Guildhall CHAMBERS

Newsletter

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IN THIS ISSUE

EDITORIAL

Over the course of the last year there have been a number of important developments. To some extent changes in the wider economy inevitably dictate the sort of work and issues that we have to tackle. Issues surrounding solicitors' undertakings, bankruptcy or enforcement crop up far more often for example. At the same time, the last year has also seen ongoing developments in certain "hot topic" areas like proprietary estoppel and constructive trusts that merit attention.

With this in mind, we have sought to provide a comprehensive newsletter covering a variety of eclectic issues. The Court of Appeal have just delivered judgment in *Kernott v Jones* and I offer a few reflections on what this means in joint ownership constructive trust claims. A year on from the House of Lords' decision in *Thorner v Major* I also offer some reflections on that case whilst Ewan Paton explains the Court of Appeal's recent decision in *Cook v Thomas* (yet another proprietary estoppel claim based on alleged promises of testamentary provision).

Ross Fentem analyses the controversial decision in *Redstone Mortgages Plc v Welch* and reflects on whether that case will withstand scrutiny as contests between mortgagees and occupiers in sale and leaseback transactions become more commonplace. In addition, we have three companion pieces on enforcement. Michael Selway reports on the Court of Appeal decision in *Nationwide Building Society v Wright*, an important decision on the interplay between charging orders and bankruptcy, whilst Holly Doyle (our latest recruit to the team) considers the question of enforcement against the owners and occupiers of houseboats. Finally, Ewan Paton offers his thoughts on similar issues in relation to that most prized of assets, the great British beach hut.

The harsh decision on solicitors' undertakings in *Clark v Lucas Solicitors LLP* is reviewed by Matthew Wales whilst William Batstone has provided two pieces on developments in the agricultural sector. Namely, the effective reversal of Lewison J's decision in *Mason v Boscawen* and an important clarification on the rules of succession to tenancies protected by the Agricultural Holdings Act 1986.

Finally, Malcolm Warner provides a timely review on the law of "delusions" in the context of testamentary capacity (an area of unusually fast-paced development in recent years).

Tim Walsh, Editor

Constructive trusts

Kernott v Jones [2010] EWCA Civ 578

As we have observed in previous editions of our newsletters, the House of Lords' decision in *Stack v Dowden* [2007] 1 AC 432 has had a significance well beyond the narrow issues determined in that case. It has been considered in a number of subsequent High Court and Court of Appeal decisions and now, most recently, in *Kernott v Jones* [2010] EWCA Civ 578.

Stated shortly, the facts were as follows. In 1984 Ms. Jones and Mr. Kernott formed a relationship and thereafter purchased a property, known as 39 Badger Hall Avenue, in joint names. Crucially, as in *Stack v Dowden*, there was no express declaration of trust. The property was occupied by the couple from May 1984 until October 1993 when their relationship ended. At trial it was common ground that the parties' contributions until 1993 would have inevitably resulted in a declaration (had the issue been determined then) that they held the beneficial interest in that property in equal shares. In 1993 Mr. Kernott left Badger Hall Avenue and ceased to contribute to the mortgage or other outgoings. The issue at trial was whether the parties' respective beneficial interests had been changed by the fifteen year period in which Mr. Kernott had abdicated all responsibility for the outgoings on the property. The judge at first instance found the beneficial shares had been altered and that Ms. Jones was now entitled to 90% of the value of the property on the basis that this was "fair and just". That was upheld by Mr. Nicholas Strauss QC sitting as a deputy judge of the High Court who invoked the notion of the "ambulatory constructive trust" approved of in *Stack v Dowden*. Broadly, that involves the idea that the parties' beneficial interests may fluctuate over time depending on the circumstances.

The issue

Wall LJ summarised the issue before the Court of Appeal in the following terms: *"Where (1) an unmarried couple has acquired residential accommodation in joint names, which by common agreement was held by them beneficially in equal shares as at the date of their separation, and (2) one party…thereafter (a) continues to live in the property; and (b) assumes sole responsibility for its continuing acquisition and maintenance – i.e. not only supports herself and the parties' children but pays the mortgage and all the outgoings (including repairs and improvements) – can the court properly infer an agreement post separation that the parties' beneficial interests in the property alter or (to use the phrase coined by Lord Hoffman in Stack v Dowden) become "ambulatory", thereby enabling the court – as here – to declare that, as at the date of the hearing before the court, the beneficial interests in the property are held other than equally?"*

By a majority (Jacob LJ dissenting), the Court of Appeal rejected the "ambulatory constructive trust analysis" (at least on the facts).

Analysis

The starting point where domestic property is held in joint names is that there is a strong presumption that the parties hold the property as both legal and beneficial joint tenants unless there is an express declaration of trust (see *Stack v Dowden*). Any severance of that joint tenancy accordingly means that they hold the property in half shares (see *Goodman v Gallant* [1986] Fam 106). It followed that had the joint tenancy been severed when the parties' relationship ended in 1993, that would have been the outcome. The Court of Appeal in *Wilcox v Tait* warned against confusing the enquiry as to the extent of the parties' beneficial interests in the property with the exercise of equitable accounting. Moreover, that case suggested that equitable accounting will often be appropriate from the date when the parties' relationship came to an end. The danger in a liberal application of the ambulatory trust analysis (as advocated in the courts below) was that there would be a significant blurring of the analytical boundaries. It is noteworthy that the judgment of Mr. Nicholas Strauss did not make any reference to equitable accounting at all.

Having analysed the sometimes conflicting opinions in *Stack v Dowden,* Wall LJ stated that the question ultimately distilled down to whether there was *"sufficient in this case to warrant the inference that following their separation… there was a shift in the parties' intentions."* The argument ran that Ms. Jones had continued to acquire the property through her contribution to the mortgage whilst Mr. Kernott had ceased to contribute. In those circumstances it was contended that the beneficial interest in the property became "ambulatory" so that when the judge was called upon to determine the shares they had shifted from 50/50 in 1993 to 90/10 in 2008. At paragraph 57 it was stated that:

"The critical question is whether or not I can properly infer from the parties' conduct since separation a joint intention that, over time, the 50-50 split would be varied so that the property is currently held 90% by the respondent and 10% by the appellant. Presumably, if the beneficial interests are "ambulatory" and the ambulation continues in the same direction, the appellant's interest in the property will at some point be extinguished."

Crucially, the court was unable to *infer* a joint intention to vary the interests. The conveyance into joint names created joint beneficial interests. There had to be something to displace those interests and *"the passage of time is insufficient to do so, even if, in the meantime, the appellant has acquired alternative accommodation, and the respondent has paid all the outgoings".* Despite Mr. Kernott's complete abdication of all responsibility for the property and its mortgage there was, it was said, nothing in the facts which served to displace the presumption of equality. As Rimer LJ added at paragraph 83: *"the problem with the judge's decision is that there was no evidence (or none that he identified) from which he could draw an inference of an intention by the parties to agree that their beneficial shares should be other than equal, let alone any intention as to what such shares might be."*

In the first appeal the Judge had felt able to surmount any evidential obstacle because of Baroness Hale's indication in *Stack* that an intention to vary interests might be imputed. As Lord Neuberger had explained (dissenting from any such suggestion and stating the largely orthodox view that intention should not be imputed), an inferred intention is one which is objectively deduced to be the subjective intention of the parties, in the light of their actions and statements. An imputed intention, however, is one

which is attributed to the parties, even though no such actual intention can be deduced from their actions and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend. In somewhat scathing terms, Rimer LJ has re-asserted the orthodox view. At paragraph 77 he states that *"As for Baroness Hale's statement that the court must or can look for the parties' imputed intention, I do not, with greatest respect, understand what she meant."* In fact, as he goes on to explain, the terms of much of Baroness Hale's opinion were wholly inconsistent with the idea that the court could impute an intention that was not there.

In the final analysis, the majority's decision in *Kernott v Jones* should bring a welcome measure of clarity. The case was largely decided on the basis of the presumption of equality in joint ownership cases but once the purpose of the trust comes to end with the demise of the relationship that, arguably, should be when any interest crystalises in any event. Attempts to infer an intention to vary beneficial ownership after that point are artificial and should be difficult to make out. Parties are unlikely to intend to give away or cede anything at that time. One may speculate whether the decision in *Kernott v Jones* would have been different (and the presumption of equality more readily displaced) had it not been conceded that beneficial ownership was equal when the relationship broke down. *Kernott v Jones* certainly now sits comfortably alongside cases like *Wilcox v Tait* and should not be operative of injustice because the machinery of equitable accounting (whether at common law or under the Trusts of Land and Appointment of Trustees Act 1996) should serve to adjust what each party recovers to ensure fairness.

Tim Walsh

THE CONTEST BETWEEN MORTGAGEES AND OCCUPIERS IN SALE AND LEASEBACK TRANSACTIONS:

A Note on *Redstone Mortgages plc v Welch*

The last recession gave rise to a wealth of activity in the mortgage repossession sphere, culminating judicially in the important series of decisions concerning the effect of undue influence on a lender's right to possession. Sale and leaseback may turn out to be the "undue influence" of the current recession, as in a string of first instance cases across the country courts are being asked to rule on the competing interests of lenders and occupiers in circumstances in which the occupier has sold a property under an equity release scheme on the proviso that they will remain entitled to live there, often for the rest of their lives.

Amidst growing disquiet about the scope for fraud, the Financial Services Authority intervened as from 1st July 2009. Since that date, it has been regulating the sale and leaseback sector on what it describes as "an interim basis", with its full regulatory regime due to come into force on 30th June 2010. This regime, however, will be of no relevance to sale and leaseback arrangements entered into before July 2009. This article will examine the the first reported decision on sale and leaseback, *Redstone Mortgages plc v Welch* [2009] 36 EG 98, and offer some practical assistance to those advising mortgagees facing similar situations.

Redstone v Welch

Although emanating from the Birmingham County Court, the decision of His Honour Judge Worster in *Welch* is important. It struck a powerful blow for the interests of occupiers and is now in part binding on the lower courts: in *Delaney v Chen and Du* [2010] EWHC 6 (Ch), a case involving an allegation of a sale and leaseback transaction at an undervalue, His Honour Judge Purle QC (sitting as a Judge of the High Court) expressly approved a key element of Judge Worster's reasoning and conclusions.

The facts of *Welch* were far from uncommon. As part of a commercial strategy, Miss Welch and her business partner approached Mr and Mrs Jackson, who owned a property in the West Midlands but who were in arrears on their mortgage. She offered to buy the property, pay off the existing charges and grant what was found to be an assured tenancy ("AT") to Mr and Mrs Jackson to enable them to stay in their home. Apparently unknown to the vendors, Miss Welch was to obtain a secured loan in the sum of £100,000, but she agreed only to pay the vendors sufficient to redeem the prior charges, about £65,000. She represented that, so long as they maintained the rental payments, they could occupy the property for as long as they wished, that their daughter would have a right to succeed to the AT, and that they would have an option to repurchase the property at a discount of 10% on the market value at the time of exercise.

Miss Welch's partner offered to pay for a firm of solicitors for the Jacksons, who knew the true nature of the transaction, although not a single one of the conveyancing documents referred to it. On the contrary, the contract for sale – which was signed by Mr and Mrs Jackson – provided at Special Condition 5 that vacant possession was to be given up on completion, although this was not pointed out by the solicitor. There was no evidence that the Jacksons had signed a now-common "overriding interests questionnaire". From the point of view of Redstone, this was a quite normal residential sale: Mr and Mrs Jackson duly signed the TR1 form to transfer the registered title, the mortgage sums were drawn down, and a charge was registered in Redstone's name. Prior to completion, a 12-month tenancy agreement was signed by Mr and Mrs Jackson as tenants, but appears not to have included a start date.

Needless to say, Miss Welch soon fell into arrears, and when Redstone took possession proceedings it was met with a defence that the Jacksons had an interest, either by virtue of the AT or under a proprietary estoppel, which overrode Redstone's registered charge. The Judge found that the Jacksons established various rights of occupation (under the AT and by way of estoppel) as against Miss Welch. The real question was whether the Jacksons had an interest in the property which bound Redstone, the mortgagee. Judge Worster found resoundingly in the Jacksons' favour.

"On what was described as the "priority" issue, the Judge held that the agreement to grant the AT was an indissoluble part of the Jacksons' agreement to sell, and Miss Welch's agreement to buy, the property: that was the "substance and reality of the transaction".

Firstly, on what was described as the "priority" issue, the Judge held that the agreement to grant the AT was an indissoluble part of the Jacksons' agreement to sell, and Miss Welch's agreement to buy, the property: that was the *"substance and reality of the transaction"*. Neither party intended that Miss Welch should obtain any more than a title encumbered by the seller's rights of occupation. The result of this conclusion was that all that Miss Welch could acquire, and all that she could charge, was a title so encumbered. It was this part of the reasoning that was expressly approved by Judge Purle in *Delaney*. The rights arose prior to registration of the sale, let alone the charge, and were protected by the Jacksons' actual occupation of the property. At paragraph 55, Judge Worster noted that *"it was an occupation that would have been obvious on a reasonably careful inspection of the land at the time of the disposition, that no or no sufficient inquiry was made by [the mortgagee], and that there was no failure on the part of the Jacksons to disclose their right when they might reasonably have been expected to do so."* In other words, the proviso contained in paragraph 2 of Schedule 3 to the Land Registration Act 2002 ("the LRA 2002") was not made out.

The second reason for the decision was described as the "registration gap" point. At paragraph 69, the Judge accepted the argument of Counsel for

the Jacksons that, after the registrable transfer but prior to completion by registration, Miss Welch had the power to grant a leasehold estate out of land because she was then entitled to be registered (see ss. 23 and 24 of the LRA 2002). Given that the AT could take effect at law without registration while the mortgage could not, the Judge held that the AT was a legal interest which took priority over the mortgage: i.e. until registration, Redstone's charge was equitable and so ceded precedence to a legal interest.

Analysis

Welch contains a number of analytical difficulties. The "registration gap" which was so important to the second basis for the decision was the space of time between the transfer and its registration. The transfer and the execution of the mortgage took place on the same day, and following *Abbey National Building Society v Cann* [1991] AC 56, they must be taken to have been simultaneous. Thus, if (contrary to the facts) the AT was granted during the "registration gap", then on registration of the mortgage, ss. 28 and 29 of the LRA 2002 would kick in to provide that the mortgage took priority over the AT on the basis that (i) the AT was not granted before the disposition giving rise to the charge, and (ii) the charge was "first in time". Judge Worster appears to have come to the conclusion that an AT was granted shortly before the transfer. But prior to the transfer, Miss Welch had no interest in the property out of which to grant a lease, and it is trite that the Jacksons could not have granted themselves an AT. At best, the purported AT would have taken effect as a specifically enforceable agreement in equity to grant an AT: in other words, the Jacksons had an equitable interest coupled with actual occupation. There is no need for the "registration gap" to explain this, because it works as a traditional overriding interest. On analysis, the "registration gap" reasoning does not hold up.

The "priority" ruling is more troubling. Its problems are compounded by an apparent failure to distinguish (i) the argument on the "indissoluble link" between the sale and the occupation agreement and (ii) the doctrine of overriding interests. If, as was made out on the facts, the Jacksons had an equitable interest fortified by actual occupation and the mortgagee did not make adequate inquiries, then their rights would override the charge regardless of whether they transferred to Miss Welch an unencumbered freehold estate or an estate bound by their rights of occupation. Judge Worster's reasoning appears to deprive the doctrine of overriding interests of any real purpose in the common sale and leaseback transaction. The doctrine asks whether the mortgagee's estate is subject to unregistered interests; it cannot be relevant if the mortgagee has charged no more than an encumbered estate already subject to the otherwise (potentially) overriding rights. In that circumstance, there is no other interest to override the charge than the interest which is the prior encumbrance: the analysis becomes circular.

Neither does the "priority" ruling sit at all easily with the House of Lords' decision in *Cann* (above) or with the lesser-known decision of the Court of Appeal in *Lloyd's Permanent Building Society v Fanimi Lawtel* 21/4/97 (unreported elsewhere). In *Fanimi*, a short tenancy had been granted by the mortgagor about a month before registration of the transfer and charge, but long after the purchase had taken place and the mortgage offer had been accepted. The tenancy did not however have priority over the charge, notwithstanding that the tenancy was not registrable. At the date of granting the tenancy, the mortgagor's interest was equitable only: he was not the registered proprietor of the property. Any tenancy that he granted was granted out of his equity of redemption only. The mortgagor's interest was from inception subject to the interest of the mortgagee providing him with the purchase money. In *Welch*, the purchaser needed the mortgage loan to complete the transaction, including the leaseback. The Jacksons transferred – and intended to transfer – the legal freehold estate. The legal estate is what Miss Welch obtained, although her estate was subject in equity to the agreement, and the legal estate is what the mortgagee intended should be charged. Logically, there could be no transfer, at law, of an estate subject to a prior equity, and from its inception, Miss Welch's interest would have been subject to the interest of the mortgagee.

Practicalities

Whatever the doctrinal problems of ***Welch***, it is going to substantially affect lenders' claims. Advisors must be sure to scrutinise the conveyancing files to work out what information was being provided by the sellers about possession being given up on completion. It should be noted that, if the decision of Geoffrey Vos QC in *Bank of Scotland v Hussain* [2008] EWHC 1669 (Ch) on the inquiries of persons in actual occupation under the Land Registration Act 1925 ("LRA 1925") applies to the new regime, it will not be enough merely to have asked whether the seller intends to give up vacant possession: it will be necessary also for the lender to have asked whether the seller will assert any rights in the property, and if so what rights, after completion.

Secondly, the precise chronology must in every case be worked out exactly. It may have taken only a very small shift in the order of events for the decision in *Welch* to have gone another way.

Thirdly, Mr and Mrs Jackson's evidence was that they had no idea that Miss Welch intended to fund the purchase with a mortgage. In *Cann*, Lord Oliver approved the reasoning of Dillon LJ in the Court of Appeal as to the knowledge of the non-borrowing occupier (who claimed rights connected with her actual occupation) that her son would have to fund the purchase with a mortgage. As Lord Oliver put it: *"She is not, therefore, in a position to complain, as against the lender, that too much was raised, and even if … she had been able to establish an interest in the property which would otherwise prevail against the society, the circumstances to which I have alluded would preclude her from relying upon it as prevailing over the society's interest…"*.

In *Thompson v Foy* [2009] EWHC 1976 (Ch), Lewison J held that the principle operates in a manner akin to an estoppel: the owner has given the buyer the opportunity to represent himself as the beneficial owner following exchange of contracts, and any limitations on the generality of the powers conferred by the owner on the buyer must be brought to the knowledge of the mortgagee.

Conclusion

We have not heard the last of this. *Welch* is not without its own internal problems, and the sheer scale of sale and leaseback transactions over the last decade means that a huge volume of similar cases are reaching the courts. It should not be assumed that they will all go the same way as *Welch*.

Ross Fentem

Proprietary estoppel

***Thorner v Major* [2009] 1 WLR 776**

What might loosely be called "disappointed beneficiary cases" come in a variety of forms. Human nature being what it is, promises of testamentary provision are often made or intimated but the would-be testator, whether by design or inadvertence, then fails to come good on his assurances. Clients who believed that they were to inherit under a will often make enormous sacrifices for loved ones in the belief that steps have been, or will be, taken to provide for them and they are left distressed when this is not the case.

Of course, the absence of a will is by no means fatal. Your client may be able to lay claim to the property of the estate (and in particular the real property of the deceased) by bringing a claim in constructive trust (the leading recent case being *Stack v Dowden* [2007] 2 AC 432). Alternatively, a claim under the Inheritance (Provision for Family and Dependants) Act 1975 may be viable despite the inherent limitations of that Act. If your client is particularly lucky, the facts may even sustain a claim in contract which defeats the effects of an inconsistent will or intestacy (as in the classic case of *Parker v Clark* [1960] 1 WLR 286). If the facts fit you may also be able to deploy arguments based on secret trusts. Further, following the Court of Appeal decision in *Gillett v Holt* [2001] Ch 210 it has arguably been far easier than might have been anticipated to bring a claim based in proprietary estoppel. Moreover, following *Re Basham* [1986] 1 WLR 1498 (and despite some conflicting authority) it has been widely accepted that proprietary estoppel claims need not necessarily involve claims to land but can, at the very least, extent to a residuary estate.

The most recent pronouncement from the House of Lords on claims of this type came a year ago in *Thorner v Majors*. The dust has now settled and no further Court of Appeal decisions have fully considered the ramifications of that case (although elsewhere in this newsletter Ewan Paton has given some consideration to the Court of Appeal's observations on Lord Scott's opinion that claims by disappointed beneficiaries are better framed in constructive trust than estoppel (an opinion which only Lord Scott expressed and which arguably sits uneasily with most authority)).

The facts

The facts of *Thorner v Major* were the stuff of exam questions. David Thorner was a Somerset farmer who, for nearly 30 years, did substantial work without pay on the farm of his father's cousin, Peter Thorner (hereafter "the deceased"). From 1990 until his death in 2005 the deceased had encouraged David to believe that he would inherit the farm and David acted in reliance upon this assurance. In the event, however, the deceased left no will and David was compelled to bring a claim to the farm based upon proprietary estoppel.

Over the years the farm had varied in size as the deceased had bought and sold different parcels to farm or for development. During that time he made various oblique remarks which led David to eventually expect that he would inherit the farm. On one occasion in 1990 he had given David an insurance bonus notice relating to two policies on his life and said "That's for my death duties". The deceased had, in fact, at one point made a will leaving most of his estate to David but he later destroyed that will and ultimately died intestate.

The issues

On appeal there were essentially two issues. The first and main issue concerned the character or quality of the assurance necessary to make good the claim. The Court of Appeal had rejected the claim on the basis that there had been no clear and unequivocal representation by the deceased upon which he had intended David to rely. The second argument raised in opposition to the claim was that, given the deceased's buying and selling of land over the years, the property which had been the subject of the alleged estoppel lacked sufficient certainty. Both issues were resolved by the House of Lords in favour of the claimant.

Issue 1: Is there a necessity for a clear and unequivocal representation?

A proprietary estoppel claimant must prove three things (i) a representation or assurance made to the claimant; (ii) reliance on it by the claimant; and (iii) detriment to the claimant in consequence of his (reasonable) reliance. *Thorner* is significant in clarifying the law on the first of these three limbs.

There was, before *Thorner* some conflicting authority as to whether the representation must be "clear and unequivocal". Lord Walker (at para. 56 of his opinion) stated that he would prefer to say *"that to establish a proprietary estoppel the relevant assurance must be clear enough"*. Everything is hugely dependent on context. Hoffman LJ's formula in *Walton v Walton* (unreported) 14 April 1994 was approved. It was in the following terms: *"The promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made."*

Lord Neuberger approached the issue in slightly different terms. He expressly stated that there must be some sort of an assurance which is "clear and unequivocal" before it can be relied upon but that that proposition is subject to three qualifications. First, the words or actions must be assessed in their context (it is for this reason that proprietary estoppel can be established based on silence and inaction). Secondly, one should not be "unrealistically rigorous" when applying the "clear and unambiguous" test. The court should not search for ambiguity and uncertainty, but should assess the question of clarity and certainty *"practically and sensibly, as well as contextually"*. Normally, it is sufficient for the person invoking the estoppel to establish that he reasonably understood the statement or action to be an assurance on which he could rely. Thirdly, there may be cases where the statement relied on to found an estoppel could amount to an assurance which could reasonably be understood as having more than one possible meaning.

In this case context was everything. It concerned two taciturn and undemonstrative men who communicated obliquely but understood each other well. On the facts the deceased's assurances, objectively assessed, were intended to be taken seriously and relied upon by David. That was enough to make good the claim once detrimental reliance was established.

Issue 2: The identity of the property

In Lord Walker's view, it was a necessary element of proprietary estoppel that the assurances given to the claimant should relate to identified property (usually, but not invariably, land). As Lord Neuberger observed, however, *"It would be a regrettable and substantial emasculation of the beneficial principle of proprietary estoppel if it were artificially fettered so as to require the precise extent of the property the subject of the alleged estoppel to be strictly defined in every case"*. On the facts of ***Thorner*** the parties tacitly understood that the property which was the subject matter of the assurances would fluctuate over time and that the claimant was to inherit the farm as it existed at the date of death. In the circumstances there was, therefore, sufficient certainty about the subject matter of the assurances to found a proprietary estoppel and the claim was made out.

Unanswered questions

Thorner v Major has helped to clarify the requirements of a proprietary estoppel claim. Regrettably, however, it remains an area bedevilled by uncertainty in its application.

The Court of Appeal in *Gillett v Holt* and *Ottey v Grundy* [2003] EWCA Civ 1176 had effectively stated that it is the fact of detrimental reliance which will make an assurance irrevocable. As *Jennings v Rice* [2003] 1 P & CR 100 made plain, however, the fact that an assurance has been relied upon does not necessarily mean that a claimant's expectation should be fulfilled (particularly if there is a gross disparity between detriment and expectation). There is, however, a difference between an indication of present testamentary intention (i.e. *"a mere statement of present (revocable) intention"*) and an assurance or promise of future entitlement. In respect of promises in the latter category, in *Gillett v Holt* Robert Walker LJ (as he then was) had stated *"it is the other party's detrimental reliance on the promise which makes it irrevocable"*. At paragraph 89 of *Thorner*, however, Lord Neuberger considered the position if the assurances had been potentially "revocable" and suggested that once there had been detrimental reliance for a substantial period the deceased might have gone back on it either subject to paying appropriate compensation or if the deceased's change of mind was due to a "change of circumstances". Lord Scott appeared to be of the view that such a change of circumstances may have arisen if the deceased had needed to sell the property to fund residential care. Precisely when an assurance is rendered irrevocable or when a change of circumstances will entitle the promisor to dissipate the subject-matter of the estoppel will inevitably be the subject of still further litigation.

Tim Walsh

Estoppel, constructive trusts and testamentary promises

Cook v Thomas [2010] EWCA Civ.227[1]

In this case, the son-in-law and daughter (Mr. and Mrs. Thomas) of a 92 year old widow (Mrs. Cook) unsuccessfully claimed that they were wholly beneficially entitled to her Herefordshire farmhouse and land. They had occupied, rent free, a mobile home sited on the farm land from 1996 to 2001, and resumed some small-scale sheep farming on the land, with the agreement of Mrs. Cook. In 2001 the roof of the mobile home blew off in a storm, and Mrs. Cook invited them to stay in a wing of the farmhouse, also rent free, and permitted them to complete some work necessary to make their rooms habitable. Shortly after that, following an argument over a damaged Land Rover, the parties fell out, were estranged and barely spoke again. They continued to live in separate wings of the same farmhouse for the next eight years, with the elderly Mrs. Cook living primarily in one room and washing herself in the kitchen sink. Press reports of the case made (somewhat spurious) comparisons with Stella Gibbons's 1932 classic *Cold Comfort Farm*.

The Thomases claimed to be entitled to the whole farm on the basis of an alleged series of promises as to such entitlement, taken individually and cumulatively, upon which it was alleged they had relied to their detriment by carrying out substantial works on the farm. Mr. Recorder Eyre dismissed their claim, and the Court of Appeal upheld his decision. The Court of Appeal did not disturb the findings of fact that no assurance of any long term entitlement or rights was given either when they initially moved into the mobile home onto the land and commenced farming, or when they moved into the farmhouse after the storm. Such works as were done on the land and to the farmhouse after those events were first for the benefit of and incidental to their farming activities, and then to make their living quarters habitable. The Recorder did find that Mrs. Cook made a remark in 2000, while works funded by her were being carried out to the house, that "all of this will be yours when I'm gone", but held that a) this was a mere statement of her then present testamentary intentions, not intended to be an irrevocable assurance, applying the distinction made by Robert Walker LJ in *Gillett v Holt* [2001] Ch. 210 at p228C; and b) no specific works were in fact carried out in reliance on that assurance after it was made. The Court of Appeal upheld both of those findings, and the possession order made in Mrs. Cook's favour.

To the slight irritation of counsel for the Respondent, neither the trial judge nor the Court of Appeal found it necessary to deal with the further argument that, in any event, the benefits received by the Thomases (including nearly fourteen years of rent free occupation and farming) outweighed the labour and materials value of any work they had done by a ratio in excess of twelve to one, resulting in any possible estoppel equity being 'spent' several times over on the principle of e.g. *Sledmore v Dalby* (1996) 72 P&CR 196

In addition to a familiar reminder given by the Court of the difficulties of appealing against careful findings of fact, the case is of legal interest for Timothy Lloyd LJ's observation that "testamentary promise" cases of this type, also exemplified by *Gillett v Holt* and *Thorner v Majors* (see elsewhere in this issue) are usually best analysed by the doctrine of proprietary estoppel, and that Lord Scott's attempt in *Thorner* to invoke the constructive trust as the relevant tool of analysis was a single opinion in which no other Lords concurred: see paragraph 105.

Despite boldly telling press reporters "It's not over yet" and seeking permission to appeal to the Supreme Court, the Thomases have now vacated the property. Mrs. Cook's most recent will, in evidence before the Court, leaves them nothing, and devises the whole of her farm to a wildlife trust.

Ewan Paton

Ewan Paton who appeared as counsel for Mrs. Cook at trial and on appeal.

[1] also reported in the Daily Mail, 18th March 2010 as "Cold Comfort eviction: 92 year old wins right to kick her daughter out of house after not speaking for eight years"!

Charging orders and bankruptcy

Nationwide Building Society v Wright [2009] EWCA Civ 811; [2009] 40 EG 132

In *Nationwide Building Society v Wright*, the Court of Appeal considered section 3(5) of the Charging Orders Act 1979 – *"3(5) The court by which a charging order was made may at any time, on the application of the debtor or of any person interested in any property to which the order relates, make an order discharging or varying the charging order."* – and gave judgment on the issue of whether, and in what circumstances, the court should exercise its power under that section in a case where the debtor has been adjudged bankrupt but the charging order has been made before the commencement of the bankruptcy.

The basic facts of *Nationwide Building Society v Wright* were as follows. Nationwide obtained a judgment against Mr Wright, and then applied for a charging order to secure that judgment against Mr Wright's share in his and his wife's property. The court made an interim charging order on 5 May 2006, and made that order final on 26 June 2006. On 17 May 2006, a third party had presented a bankruptcy petition against Mr Wright, but it was accepted that neither Nationwide nor the court knew the bankruptcy petition was pending at the time the interim charging order was made final. On 12 July 2006, Mr Wright was adjudged bankrupt, and his share in his and his wife's property vested in his trustee in bankruptcy, subject to Nationwide's charging order.

Mr Wright's trustee in bankruptcy applied under section 3(5) of the 1979 Act to discharge the charging order. On the hearing of the application, a Deputy District Judge held that, since the court making the final charging order had not known of the pending bankruptcy petition, the final charging order had been properly made, but nevertheless decided that as a matter of discretion he should discharge the charging order. Nationwide appealed to a County Court Judge, who dismissed the appeal. Nationwide then appealed to the Court of Appeal, relying on section 346 of the Insolvency Act 1986 in submitting that the pending bankruptcy petition and the subsequent bankruptcy order were not of themselves sufficient circumstances to discharge the charging order.

"… the principle underlying section 346 of the 1986 Act is that, absent special circumstances, a creditor who acquires property from a debtor – in good faith and without notice of the presentation of a bankruptcy petition – before the making of a bankruptcy order, is entitled to retain that property against the trustee in bankruptcy."

The effect of section 346 of the 1986 Act is that the creditor of a person adjudged bankrupt is not entitled, as against the trustee in bankruptcy, to retain the benefit of a charging order against the bankrupt's property, unless the final charging order was made before the bankruptcy order. It should also be remembered that an interim charging order will not be made final where a bankruptcy petition is known to be pending: *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1982] 1 WLR 301 (CA) and [1983] AC 192 (HL). In *Nationwide Building Society v Wright*, the final charging order ***was*** made before the bankruptcy order, when the bankruptcy petition was ***not*** known to be pending; and the issue raised in the appeal was whether, in such circumstances, the court should exercise its power under section 3(5) of the 1979 Act to discharge the charging order.

Sir John Chadwick gave the judgment of the Court, and held that the principle underlying section 346 of the 1986 Act is that, absent special circumstances, a creditor who acquires property from a debtor – in good faith and without notice of the presentation of a bankruptcy petition – before the making of a bankruptcy order, is entitled to retain that property against the trustee in bankruptcy. Sir John Chadwick said, at paragraph 18 of his judgment, that:

"That principle, as it seems to me, underlies both the restriction in section 346(1) of the 1986 Act and the limitation to that restriction. A creditor who has issued execution against the land of a person who is adjudged bankrupt is not entitled, as against the trustee in bankruptcy, to retain the benefit of that execution unless the execution was completed [i.e. unless the final charging order was made] before the commencement of the bankruptcy; that is to say, unless the execution was completed before the bankruptcy order was made. That is not to say that a creditor who has completed execution before the commencement of the bankruptcy will, in all circumstances, be entitled to retain the benefit of that execution. In the absence of an express limitation to that effect, the legislature is not to be taken to have intended to impose a restriction on the general power to discharge or vary a charging order conferred by section 3(5) of the 1979 Act. But it is, in my view, clear that the legislature did intend that a creditor who had completed execution before the bankruptcy order was made was not to be deprived of his security by reason of the bankruptcy order alone. Some additional feature was needed before it could be appropriate to exercise the general power under section 3(5) of the 1979 Act."

And Sir John Chadwick concluded, at paragraph 29 of his judgment, that:

"As I have said, I am satisfied that the legislative intention which underlies section 346(1) of the 1986 Act is that a judgment creditor who has obtained a final charging order before the making of a bankruptcy order is not to be deprived of the benefit of his security by reason of the bankruptcy alone… There is nothing in the facts of the present case which justifies a departure from that principle. I think the courts below were wrong to discharge the charging orders which had been made in this case."

As a result, Nationwide's appeal was allowed, and the Deputy District Judge's order discharging the final charging order was set aside. *Nationwide Building Society v Wright* therefore holds that in a case where a final charging order is made before a bankruptcy order and when a bankruptcy petition is not known to be pending, the court should not, in the absence of special circumstances, exercise its power under section 3(5) of the Charging Orders Act 1979 to discharge the charging order.

Michael Selway

Houseboats: a liquid asset?

It is thought that over 15,000 people live on narrow boats and Dutch barges on Britain's inland waterways. This gives rise to a knotty problem in terms of the enforcement of judgments against such individuals.

In the usual case, where a person's home is annexed to the land upon which it rests, it is a simple matter to apply for a charging order under section 1 of the Charging orders Act 1979 to enforce a judgment. But this is inapposite in the case of a houseboat - it has been relatively clear since the House of Lord's decision in *Chelsea Yacht & Boat Co Ltd v Pope* [2000] 1 WLR 1941 that a barge/houseboat is technically a chattel and not an item of real property: *"A boat, albeit one used as a home, is not of the same genus as real property"* per Tuckey LJ at paragraph 26.

However, the usual method of enforcement against chattels (the writ of fieri facias which commends an enforcement officer to seize in execution the goods, chattels and other property of the judgment debtor authorised by law) seems hardly less inappropriate where the houseboat is the main residence of the judgment debtor.

Goods specifically exempt from such seizure by statute include such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the debtor and their family (Courts Act 2003 schedule 7 paragraph 9(3)). If the houseboat is the judgment debtor's main residence, then it is at least arguable that in itself it is a chattel which is necessary for satisfying the basic domestic needs of the debtor (especially where it has built in furniture and equipment i.e. bunks, kitchen and lavatory facilities etc which cannot be removed).

In addition, under the Human Rights Act 1998 it is of course unlawful for a Court to act in a way which is incompatible with a right under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950). The two most relevant Convention rights in this context will be article 8 (right to respect for private and family life, home and correspondence) and Protocol 1, article 1 (right to peaceful enjoyment of one's possessions). The issue by the High Court of a writ under which the debtor's residence may be seized, essentially depriving him of his home without the protection of having to get the specific permission of the Court (as would be the case in possession proceedings), could therefore be open to challenge by a debtor as being incompatible with his convention rights.

I am not aware of any reported cases dealing with this issue and I consider that in the circumstances it is advisable to make an application to the Court for a declaration that the houseboat might be seized prior to executing the writ.

Even if such a houseboat can be seized, the commercial value of a second hand boat is questionable, especially when divorced from the mooring rights of the Judgment debtor (NB: the mooring rights themselves could be a very marketable asset if transferrable, although not if they consist of a licence terminable at will). There are no published price guides for secondhand boats, but adverts in the waterways press give a good indication of current prices which will vary according to the age and size of the boat, the hull-builder's reputation and quality of interior and exterior fittings. There may be a considerable outlay in putting the boat into a saleable condition, in addition to the storage and insurance costs. A Boat Safety Examination is required for the issue of a Boat Safety Scheme Certificate (the boating version of the MOT, which must be undertaken every four years). All boats wishing to be licensed for navigation on British Waterways and most Environment Agency waters must have a valid certificate. Then there are the marketing costs: according to the British Waterway's website, the cost of a full survey of the average boat is £400- £600 and broker's commissions are typically around 10% of the sale price.

In these circumstances, it may be that the best and most practical solution is to take to the insolvency route and issue a statutory demand against such debtors, in the hope that such a course of action will provide the necessary impetus needed for them to take out a chattel mortgage to raise funds to meet the judgment debt.

Holly Doyle

Beach huts: a real asset?

As summer approaches, some of our readers (or their clients) may be lucky enough to be heading for the coast, to enjoy the peculiarly English pleasure of a privately owned beach hut. From Dorset to Norfolk, via the south coast, these have become highly desirable items, with owners as varied as Keith Richards, Tracey Emin and even HM the Queen (although her Sandringham hut burned down in 2003). They are the surviving descendants of the Victorian 'bathing machines'. As social mores changed, the bathing machines lost their wheels and colonies of permanent huts emerged amongst the dunes or shingles, particularly on the south coast and in East Anglia. At the height of the property boom, some were said to have changed hands for over £100,000 (although Keith Richards bought his in West Wittering for a measly £60,000 in 2006) – not bad for a 14' x 7' (or smaller) wooden shed with no services and stringent user restrictions.

The prices of such huts, and the terms on which they are occupied, vary across the country. It has however occurred to this writer, from such examples as I have seen, that beach huts represent something of a legal oddity, often with limited protection and security, and with their value resting on shared social convention rather than any strict legal analysis of their legal nature and transmissibility.

A typical situation is where the local Council owns and maintains a stretch of seaside land, and allows 'owners' to occupy designated plots with their huts, under an annual licence for a fee. The legal nature of the arrangement is generally that the hut is a mere chattel, stationed on the land by virtue of a genuine contractual licence, the owner taking care to reserve the right to move the hut owner to a different plot at any time so as to get around *Street v Mountford* and avoid any arguments about tenancies. Very often, particularly in the smarter resorts, the licence agreement will contain a raft of rules, restrictions and covenants, running from the colour and size of the hut to the playing of radios. Typically, breach of any of these will entitle the council to terminate the licence forthwith, but most of the agreements I have seen provide in any event that the licence is terminable on notice at any time, subject only to a pro rata refund of that year's licence fee. Hut owners generally have no contractual right to a new licence each year. Nor is there any question of statutory protection applying to such huts: they are not within the Mobile Homes Act 1983, still less the Landlord and Tenant Act 1985 or Housing Act 1988. Further, it is quite common for Councils or other owners to require their consent to any transfer of a hut, including transfer of the benefit of the residue of that year's licence agreement, and to charge a healthy premium for granting such consent (which they may then use to defray their costs of keeping the area tidy, or else just add to their coffers). The discretion to grant or withhold consent is usually expressed to be as absolute and unreviewable as the discretion to renew a licence. Such a system of transfers and consent seems to rest on the social convention that if the money is paid, consent will generally be given. It goes without saying that such a practice is outside the prohibition on 'fines' for licences to assign under section 144 Law of Property Act 1925 (since these are not "leases"), and likewise the provisions of the Landlord and Tenant Act 1988 on refusal of consent for assignment.

The oddity lies in the hut itself being considered as an "asset" which can be sold for a large sum of money, when in strict legal theory it is nothing more than some wood and nails worth a few hundred pounds or so as a chattel, with the benefit of an insecure and unprotected licence liable to termination or non-renewal at any time. The assumed value rests on the shared social and political assumption that the Council or other owner will not in fact terminate, refuse to renew or refuse to consent to assignment of the licence, even though it could if it so chose. If it did, it would presumably face a rebellion of beach umbrella-wielding 'owners', adverse media attention or even Keith Richards playing a protest concert.

While the point has apparently yet to be tested in a case in the higher courts, there is considerable interest in how such an 'asset' falls to be dealt with in the hands of creditors or a trustee in bankruptcy. On the face of it, all such creditors or trustees have to enforce upon is the chattel itself, even if "the beach hut" is said to have been bought for £100,000. They could not, in the examples I have seen, insist on an assignment of an existing licence to them without the Council's consent, or even (on the wording of many licences I have seen, expressed to be personal to the licensee) claim a charge on the benefit of the agreement. Even if they could, that licence might expire at the end of the year and not be renewed, leaving them with just the wood and nails.

As the property market recovers, beach huts will doubtless continue to grow in popularity and desirability. If you have any queries, interesting cases, or beach huts for sale, please let me know!

Ewan Paton

Solicitors' undertakings

Clark v Lucas Solicitors LLP [2009] EWHC 1952 (Ch)

This case provides a stark reminder that the Court will summarily enforce a solicitor's undertaking, albeit in circumstances where the undertaking is given out of Court, there is no question of impropriety by the solicitor concerned, and the cost of performance of the undertaking to the solicitor exceeds the damage to the claimant.

Solicitors' undertakings are a useful and valuable tool in completing property transactions, and indeed they are commonly given by solicitors thereby allowing their clients to utilise the payment of the sale price to redeem the secured indebtedness. The facts of *Clark v Lucas LLP* demonstrate that a solicitor's undertaking given without careful thought can be disastrous for the firm concerned.

The facts of *Clark v Lucas* are relatively simple. The solicitors concerned acted for a developer who was in the course of constructing several residential units. The site was subject to a mortgage in favour of a bank, and a second charge in favour of a private investor "K". In the course of the sale of one of the units to the claimants, the solicitors gave an undertaking to discharge both the bank's and K's charge over the unit before completion.

On completion the entire balance of the purchase price was paid to the bank, and in due course the bank provided the relevant notice of discharge DS3. It was expected that the developer would utilise its facility with the bank to pay K 20% of the sale price as required by the agreement between K and the developer.

However, notwithstanding the sale the bank called in the balance of its outstanding indebtedness and the developer went into administration. K was not paid.

K refused to provide the claimants with a notice of discharge DS3 in respect of the unit. His agreement with the developer did not require him to release his charge upon the sale of the unit, and furthermore the terms of his agreement now required repayment in full as the developer had entered administration. The sum due to K under his charge was approximately £1m, as opposed to the sale price of the unit which was approximately £500k.

The solicitors sought to resist performance of their undertaking on the basis that it was impossible to perform (in the sense that the solicitors could not pay). The Court reviewed the authorities concerning impossibility, notably *Udall v Capri Lighting Ltd* [1988] 1 QB 907 and *Wroth v Tyler* [1964] 1 Ch 30, pointing out that impossibility in this sense meant circumstances which were not capable of being performed (for instance extracting a personal guarantee from a deceased person or obtaining a charge over a property which had previously been transferred to a third party). The Court pointed out that it was possible for the undertaking to be performed by the solicitors providing a cheque to K in the requisite sum.

The Court reviewed *Angel Solicitors v Jenkins O'Dowd & Barth* [2009] 1 WLR 1220 which is authority that the Court will consider limiting compensation to that which could have been contemplated at the time that the undertaking was given i.e. the sum that K might reasonably have insisted upon at the time of the transaction to release his charge over the unit in question. However, on the facts of the case the Court held that it should have been within the solicitor's contemplation that payment of the entire sum due under K's charge might be necessary in order to perform the undertaking.

Furthermore, the Court had little sympathy with the solicitor's submission that an order for performance of the undertaking was disproportionate and therefore punitive rather than compensatory. Performance would involve payment of £1m to K, whereas the unit was sold for, and was worth, only half of that sum. The Court referred to the Solicitors' Code of Conduct:

"An undertaking is binding even if it is to do something outside your control. For example, if you undertake to make a payment out of the proceeds of sale of an asset, unless you clearly state to the contrary you will be expected to make the payment even if the fund (gross or net) is insufficient…"

Finally, the Court also had little truck with the argument that in circumstances where K was a second chargee behind the bank and K's security was therefore of limited value, payment in full to K amounted to unjust enrichment.

The Court granted the application, leaving the solicitors to find £1m and with little recourse against their impecunious client.

Matthew Wales

Agricultural rent freeze averted

The decision of Mr Justice Lewison in *Mason v Boscawen* [2009] 1 WLR 2139, reported in the last edition of the newsletter, caused alarm amongst landlords at the prospect of a possibly prolonged agricultural rent freeze. The decision, in a Case D notice to quit arbitration, that VAT on rent was itself rent had the consequence that, on a holding where the landlord had opted to tax, whenever the rate of VAT changed, as it did on 1 December 2008 and on 1 January 2010 and may do so again shortly, the 3 year rent review clock would be re-set. But the Government acted quickly. Section 79(1) of the Finance Act 2009, which received Royal Assent on 21 July 2009, amends paragraph 4(2) of Schedule 2 to the Agricultural Holdings Act 1986 to add further changes in rent that are to be disregarded for the purposes of the three year review cycle in a new sub-paragraph (d) i.e. an increase or reduction of rent arising from (i) the exercise of an option to tax under Schedule 10 to the VAT Act 1994, (ii) the revocation of such an option, or (iii) a change in the rate of VAT applicable to grants of interests in or rights over land in respect of which such an option has effect. Section 79(2) provides that the changes are retrospective so an outstanding demand for arbitration, that was in a state of limbo following the decision in *Mason v Boscawen*, became effective to refer the rent to arbitration, if it would have been effective before the decision.

William Batstone

Succession rules clarified

Kemp v Fisher [2009] EWHC 3657 (Ch)

His Honour Judge Raynor QC, sitting as a High Court Judge, resolved a long outstanding question related to succession to tenancies protected by the Agricultural Holdings Act 1986 in *Kemp v Fisher* [2009] EWHC 3657 (Ch). Mr Kemp's current tenancy of Lodge Farm on the Kilverstone Estate in Norfolk was granted on 25 February 1998 by an agreement made between the Trustees of the Estate, Mr Kemp and his father as outgoing tenant. Mr Kemp's father had been granted a new tenancy by the Trustees by an agreement made on 16 October 1973 and the initial tenancy in favour of a member of his family was granted in 1947. The question for decision was whether the tenancy granted by agreement on 16 October 1973, before succession was first introduced by the Agriculture (Miscellaneous Provisions) Act 1976 on 14 November 1976, was deemed by section 37(2) of the 1986 Act to be one of the maximum of two statutory successions permitted by the Act. HHJ Raynor QC decided that it was not and thereby ended years of uncertainty created by obiter remarks of Jowitt J in *The Trustees of Saunders v Ralph* (1993) 66 P&CR 335 to the effect that the statutory scheme could apply retrospectively so that any pre-1976 successions counted against the maximum of two. HHJ Raynor QC disagreed. The 1986 Act being a consolidating measure, it was permissible to go back to the 1976 Act to resolve ambiguity. Section 18(1) of that Act expressly referred to events after the passing of the Act and this construction accorded with the presumption against retrospective legislation. Moreover if the statute was construed as applying to pre-1976 grants its effect would be capricious by excluding many families from the scheme, where voluntary successions had taken place years before the statutory right of succession had been conceived, in favour of families of first generation tenants. Accordingly Mr Kemp was entitled to a declaration to the effect that only one succession had been used up and his son would be entitled to apply to succeed him in due course.

William Batstone

Delusions in a nutshell

For years uncounted a neglected backwater when assessing testamentary capacity, we have had three recent cases[1] which suggest that challenges on the basis that the Deceased was deluded are on the rise. Practitioners therefore need to know what to look for when interviewing those preparing to make a will and when and how a challenge to the will can be advanced.

What is a Delusion? There is a lengthy World Health Organization definition but in essence it is a false belief than cannot be dispelled by rational explanation. They tend to be long term and stable, frequently first manifesting themselves in early life but in fact can arise later in life – and must necessarily do so in relation to one's children. It is useful to contrast a confused state with a delusional one. A patient may easily become confused in hospital as to why they are there or as to what is wrong with them but this may pass as their health improves and they are discharged. Essentially it is short term and may be associated with physical illness, medication and so on. In contrast with a delusion the "patient" may have no difficulty whatever in conducting a seemingly normal life and yet may at the same time and over a long period believe their spouse is having affairs or they are occasionally visited by deceased relatives and suchlike.

Operative Delusions

Even though the testator suffers from delusions they may not be operative in the sense of adversely affecting the ability to make a will. In *Banks v Goodfellow*[2] the testator thought (i) he was pursued by spirits and (ii) a man long dead was molesting him; yet neither was operative as to will disposition which slighted his niece.

Visibility

A major problem with delusions is that a sufferer may "present" as perfectly normal. They may be rational of speech as well as normal in appearance and yet a mention of yoghurt or a particular child may set them off. Branislav Kostic in *Kostic v Chaplin & Ors* may have appeared perfectly rational in conversation on everyday topics and run a successful business concern but if (as his solicitor did) one became aware of some of his observations on his son or international conspiracies[3] most people would have immediately suspected some serious mental disturbance.

Correspondingly, conducting a Clifton test or mini mental test may not detect a delusion nor may a solicitor or even a psychologist unless primed as to what to look for. That said an "inofficious" will[4] (i.e. one that disregards the claims of those of near relation or normal natural affection) must sound warning bells

The Golden Rule

If in doubt about capacity a solicitor should always have the client assessed by their GP, however this does not guarantee the court will accept there was capacity[5]. In *Ritchie v Joslin & Ors* neither solicitor nor GP had any doubts about capacity, they knew the old lady and family well and, in essential detail, all the alleged delusions, and yet she was found to be deluded and the will set aside.

Other Evidence

Attesting witnesses are usually most important witnesses at time of challenge[6] but if not familiar with the testator (as in *Kostic*) may be of little value in a delusions case.

In *Blackman v Man*[7] the Court warned against placing too much reliance on experts who were basing their views not on having met the testator but instead on inferences from factual evidence in medical notes or witness statements. However in reality it may prove crucial as in *Kostic* and *Ritchie*.

Onus of proof as an issue is probably dead in the water after *Sharpe v Adams*[8] which included the observation that: *"Cases are only decided on the burden of proof if, exceptionally, the court is unable to reach an evaluative decision on the evidence taken as a whole."* Which one can translate to *"only wimps resort to the burden of proof"*. One cannot see many judges wishing to be tarred by that brush.

Proof of capacity: It is not necessary to prove the testator actually understood matters at the time of execution of the will, but rather that they had the *capacity* to understand them at the time[9] – which is a subtle but important distinction.

A Quantitative Test?

On a general plane the level of capacity to make any gift is relative to the importance of what is being given away – *Re Beaney*[10]. Since one does not need perfect capacity to make a will can one also make a will when not perfectly free of delusions? From *Banks v Goodfellow*[11] there are two points

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1 *Sharpe v Adams* [2006] WTLR 1059; *Kostic v Chaplin & Ors* [2007] EWHC 2298 & *Ritchie v Joslin & Ors* [2009] EWHC 709

2 (1870) LR 5 QB 549

3 See paragraph 45 of the Judgement

4 From *Banks v Goodfellow* ibid

5 *Sharpe v Adams*

6 Williams on Wills 9th Ed. Paragraph [4.20]

7 [2008] WTLR 389,408E

8 At page 1081H (paragraph [74]

9 *Hoff v Atherton*[2005] WTLR 99, 109D

10 [1978] 1 WLR 770

11 Page 565

12 But perhaps many people suffer mild delusions – since the chances of winning the lottery may be akin to being run down by a bus, yet people prefer to play rather than buy high visibility coats.

made (i) the testator can be deluded provided the delusion does not affect the particular disposition, and (ii) if the delusion is *"calculated to exercise any influence"* then capacity is lost. Again the second test is not whether it did influence but whether it might have *any* influence. This suggests that no delusional effects whatsoever are permitted[12].

Is Irrationality the Test? Is the irrational exclusion from a will of the natural objects of the testator's bounty evidence of a delusion? This would set the evidential bar very low and might be thought to be the result from *Couwenbergh v Valkova*[13]. In fact although the testatrix did suffer from a false and irrational belief such that the objects of her bounty were beyond her capacity to review them, the Judge did not describe this as a delusion and it was not assessed as a condition from which she could not be released by rational argument. So akin to confusion it might remove capacity but equally it might be a short term affliction or poisoning of the mind.

The Borderline Case

The borderline case presents particular difficulty in advising, especially as to costs (as below). Realistically *Kostic* appears a fairly obvious case from a brief perusal of the Judgement and the writer's description of the decision by the CPA to fight the case as a punt[14] might be agreed with by many – and hence the costs award. *Ritchie* is a much better guide to borderline decisions and the difficulties faced by the charity or other party seeking to uphold the will. In that case – and this clearly impressed the Judge when it came to costs[15] - the charity who was otherwise to benefit from most of the estate had had no contact with the testatrix during her lifetime (and hence had no knowledge of its own about her), had both her experienced solicitor and GP saying she had capacity, the will was made 8 years before her death and there was no independent (i.e. non family) evidence she did not have capacity.

In addition the delusions relied on were that (i) her children never came near her; and (ii) her children did not need her money. These raised a complex picture that was shifting even during the trial. For instance was (i) largely a figure of speech meaning that they might visit but not as frequently as she liked? It was a comment she had made to both the solicitor and the GP who had a good idea of the true position and they took it into account when making their assessment of her. As to (ii) in large measure this was in fact an accurate assessment of the position.

Contesting Claims

As to evidential sources we have:

i The solicitor – usually a reliable voter in the capacity lobby

ii The GP

iii Attesting witnesses

iv Friends, relatives, local religious leaders (often overlooked nowadays), carers etc

v Health records

vi Experts

The main issues to address are usually:

vii Size of estate

viii Costs risks

ix Evidence

x Merits

xi Power of trustees to compromise[16]

xii Offers of settlement (inc. Part 36 and tactical offers)

Trustees also have to consider a Beddoes Application in appropriate circumstances. A possibly very useful course is to release the discretion of the trustees as to whether to seek to uphold the will to the Court[17].

Costs

It is notorious that the allure of "costs from the estate" has lead many litigants into probate litigation with false hopes as to costs awards – which have been rudely dashed. Contrary to common perception (even in the profession) the usual rule of costs following the event is only disapplied in probate cases where[18]:

i the origin of the action is the fault of the testator – then costs should come out of the estate; or

ii if the circumstances warrant an investigation of the capacity of the testator or similar – then there should be no order as to costs.

The costs decisions in *Kostic*[19] and *Ritchie*[20] illustrate:

a That a part 36 Offer may appear a valuable weapon in a delusions case but because they are "all or nothing" cases and also because the starting point for a probate case is not the same as in ordinary litigation (costs may not follow the event anyway) they are more easily ignored by the Court as relevant to its costs decision.

b The "commercial decision" basis of approaching costs in Kostic must probably be confined to cases as extreme as that one.

Another tack for a party concerned about costs risks is simply to give notice to cross examine[21] in which circumstance the usual order is no order as to costs. However:

i It does not apply to those alleging fraud or undue influence or where the party concerned had no reasonable grounds for opposing the will.

ii The party cannot (or should not) raise a positive case, and so should not be permitted to call their own medical expert.

Conclusion

This is now a topic which will have to be at the forefront of the thoughts of practitioners, especially where the testator proposes to dispose (or has disposed) of his estate outside the natural objects of their bounty – the question "why" looms large.

Malcolm Warner

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[13] [2008] EWHC 2451

[14] *Ritchie* (costs) [[2009] WTLR 885 paragraph 11

[15] Ibid paragraph 38

[16] Section 15 of the Trustee Act 1925

[17] *In Re Earl of Strafford* [1980] Ch 28

[18] See the review in *Kostic* at [2008] WTLR 655, 657D-663H

[19] [2008] WTLR 655

[20] See footnote 14 above.

[21] Tristram & Coote's Probate Practice 30th Ed. Paragraph 40.17

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