Guildhall CHAMBERS

Property & Estates Newsletter

Issue 18

In this issue

Welcome to another issue of the Guildhall Chambers Property and Estates Team Newsletter.

We hope that you managed to catch one of our Autumn seminars in Cardiff, Plymouth or Bristol, or one of our increasingly popular (and appetising) "Breakfast Bites" sessions in Bristol. We are also willing to deliver in-house events on specific requested topics. Please contact Charlie Ellis to discuss.

This edition is divided between the "Property" and "Estates" aspects of our practice. In "Property", I cast my eye over a couple of interesting recent easements cases, and also look behind the tabloid furore at the decision on adverse possession and criminal squatting in *Best v Chief Land Registrar*. Our newest team recruit Jay Jagasia considers the implications of the Supreme Court decision in *Barkas* on "as of right" (as applied to village greens, and perhaps more widely), while Oliver Mitchell considers the unsuccessful human rights arguments by an assured shorthold tenant in *McDonald v McDonald*.

"Estates" is no sleepy legal backwater. Matthew Brown looks at the decision of the Supreme Court in *Marley v Rawlings* and its implications for the rectification and construction of wills, while Tim Walsh reports on the long-awaited quantum appeal in the 'adult children' Inheritance Act case of *Ilott v Mitson*. Michael Selway adds a brief procedural and legislative update.

The team continues to expand and progress. We have welcomed Jay Jagasia as a new member since our last newsletter. Jay was formerly a solicitor at Burges Salmon and has a special interest and expertise in environmental aspects of property.

Congratulations also to all those members listed in the Chancery and Real Estate sections of Chambers and Partners and the Legal 500. Our profile and reputation as a genuinely specialist regional team continues to grow. We aim to justify that by providing an excellent service to all of our clients, while being approachable and responsive in our working practices.

As ever, if you have any queries on any aspect of Property and Estates, we will be only too happy to assist.

Ewan Paton, Editor

The Legal 500 United Kingdom Top Tier 2014

Top Ranked Chambers UK Bar 2015 Leading Set

Adverse Possession

Ill-gotten gains?

Best v Chief Land Registrar [2014] EWHC 1370 (Admin.), Ouseley J.

(also reported in Daily Mail, 8th May 2014, as "'Squatter' builder who renovated and moved into empty £400,000 three-bedroom house after elderly owner died wins right to KEEP it")

With effect from 1st September 2012, residential squatting was criminalised. Section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPOA"), in force from that date, makes it an offence to be "living in", or even to intend to live in, a "residential building" having entered it as a trespasser, knowing or where one ought to have known that one was a trespasser. There were no transitional provisions: this became an offence overnight on that date.

That part of LASPOA was rushed through, partly in response to tabloid and political pressure to the effect that the accelerated civil eviction procedure for squatters was just not enough. Now the owner can ring the police. There is no evidence that Parliament ever considered in detail, either at the draft Bill or Parliamentary stage, the effect that this would have on the civil law of adverse possession.

"In a detailed judgment covering a number of arguments, Ouseley J. held that the adverse possession principles of the 2002 Act were not affected, or intended to be affected, by section 144 LASPOA. If no objection by or on behalf of the registered proprietor was made under Schedule 6 paragraph 5 was made, Mr. B would be entitled to be registered as proprietor: *"it is as simple as that."* This was so despite Ouseley J. being of the clear view that a criminal offence had commenced when section 144 came into force."

So it was that Mr. B, an Essex builder, found himself branded a criminal. In 1997 he first became aware of an empty and vandalised house in Ilford whose owner had died. He repaired its roof in 2000, cleared the garden, made it wind and watertight and from 2001 "treated the house as his own". He spent the next several years renovating it, intending it to be his own home. He moved in to live in it in January 2012. Section 144 LASPOA came into force on 1st September 2012, and he then applied in November 2012 to be registered as the new proprietor to the property (title to which was already registered) under the provisions of the Land Registration Act 2002. He was presumably banking on neither the registered proprietor nor any personal representative objecting to his application under Schedule 6 paragraph 5 of the Act, in default of which objection he could be registered as proprietor.

The Land Registry cancelled his application. Their view was that since part of the ten year period of possession immediately preceding the application under the 2002 Act involved the commission of an offence under the new section 144 LASPOA (albeit just the last couple of months), they could not register the title, taking the view that the 2002 Act provisions were subject to an implied prohibition of registration in such circumstances. They placed reliance on the decision of HHJ Pelling QC at first instance in *R (Smith) v Land Registry* [2009] EWHC 328 (Admin) (upheld on appeal but not on all the same grounds: see [2010] EWCA Civ. 200), and in particular the argument that the adverse possession of the public highway in that case could not succeed because the possession amounted to the offence of obstruction of the highway.

Mr. B sought judicial review of this decision. He was successful, and the Registrar was ordered to proceed with the next stages of the application under Schedule 6 of the Act.

In a detailed judgment covering a number of arguments (including arguments made on behalf of the Government as an interested party), Ouseley J. held that the adverse possession principles of the 2002 Act were not affected, or intended to be affected, by section 144 LASPOA. If no objection by or on behalf of the registered proprietor was made under Schedule 6 paragraph 5 was made, Mr. B would be entitled to be registered as proprietor: *"it is as simple as that."* This was so despite Ouseley J. being of the clear view that a criminal offence had commenced when section 144 came into force.

Ouseley J. recognised that there is:

"a general and fundamental principle of public policy that a person should not be entitled to take advantage of his own criminal acts to create rights to which a Court should then give effect" (usually referred to as the *ex turpi causa* principle), but it was:

"...not an absolute rule or principle, unyielding to any circumstance. It is the starting point and not necessarily the end point. That principle of public policy may yield to competing public policy interests, the greater advancement of which are imputed to Parliament's intention in any specific statute"

In the case of the Land Registration Act 2002, there was no indication that adverse possession supported by criminal trespass was to be excluded. The public policy principles behind the 2002 Act and the Limitation Act (which included the extinguishment of stale claims and obsolete titles, and the protection of undisputed possession) supported the acquisition of title by "unlawful" (in the sense of tortious) acts of trespass, and there was no indication or reason why acts which were also criminal should prevent this.

The first instance reasoning of HHJ Pelling QC in the *Smith* case had not been expressly adopted by the Court of Appeal, who based their decision simply on the principle that the public rights over a highway could not be extinguished by adverse possession. Further, such reasoning was not consistent with the fundamental principles behind the House of Lords decision in *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519 (in which it was held that it was no bar to the acquisition of prescriptive easements over a common that it had been a criminal offence to drive vehicles over it without lawful authority). The drivers in *Bakewell* could have been prosecuted at any time during their 20 year prescriptive period, but at the end of that period the inference of an easement by lost modern grant legitimised their use. There was no real distinction of principle between that and the regularising of possession by the operation of the Limitation and Land Registration Acts.

Overall, there was no inference that section 144, limited as it was to the specific mischief of squatting by "living in..residential buildings" had been formulated with any reference to the civil law of adverse possession: its purpose was to provide a swift and additional criminal sanction of eviction, and:

"not to throw a spanner into the delicate workings of the 2002 Act, with random effects on the operation of adverse possession, all without a backward glance."

Had it been necessary to decide the point, Ouseley J. would have rejected B's alternative argument that section 144 was a violation of his human rights under Article 1 Protocol 1 and Article 8 of the ECHR, chiefly because those rights were not engaged at all in the case of a person in possession who merely had the right to apply for title. Further, had they been engaged, any interference was necessary and proportionate in furtherance of a legitimate aim.

The decision to cancel the application was quashed and the Registry were directed to proceed with Mr. B's application in accordance with Schedule 6 of the 2002 Act.

Media reaction was mixed, and mostly confused. The *Daily Mail* (citation above) was not impressed, and tracked down the deceased registered proprietor's son. He had apparently moved out of the house in the 1990s, paid Council Tax for a few years but then just "left it as it was" and claimed to know nothing of Mr. B or the case. Or as the *Mail* neutrally reported it:

"The rightful owner of a £400,000 house handed to a squatter by a High Court judge today furiously asked: 'How can this man sleep at night?'".

The Guardian (7th May 2014), taking a more upmarket and Classical angle, bizarrely reported the case as *"Roman law could secure DIY squatter ownership of property"*.

In the case of the Land Registration Act 2002, there was no indication that adverse possession supported by criminal trespass was to be excluded. The public policy principles behind the 2002 Act and the Limitation Act (which included the extinguishment of stale claims and obsolete titles, and the protection of undisputed possession) supported the acquisition of title by "unlawful" (in the sense of tortious) acts of trespass, and there was no indication or reason why acts which were also criminal should prevent this.

Such media reports appeared to ignore the points that a) permission to appeal was granted by Ouseley J., and b) Mr. B was not "handed" the property, but only permitted to proceed to the next stage of the application process. If the deceased proprietor's son or any other person takes a grant of representation of her estate, and seeks to be registered as proprietor in place of the deceased proprietor (whose name remains on the title at present) they may yet have the opportunity to object and defeat the application under Schedule 6 of the 2002 Act. So either way, Mr. B does not get to "keep" the house just yet. Watch this space (and the tabloids) for further developments....

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Easements

i) Implied easement for services

Donovan v Rana & Anor [2014] 1 P&CR 18 (CA)

A building plot was sold at auction as a *"super individual building plot situated in a pleasant residential area"*, with the transferee covenanting to build a dwelling house thereon "to the satisfaction of the Local Authority" and also to tarmac or surface the transferor's retained strip over which a right of way to the plot was granted.

When successors to the original transferee then began to build a house on the plot, they dug up the access strip and laid connections under it to all the utility services from the main highway. There had been no express grant of services easements in addition to the right of way.

The owners of the strip then sought damages for trespass, claiming that the plot owners had no right to lay services under the strip or to access it for the purpose of laying services. Perhaps not the most attractive stance, but were they right?

The judge, and the Court of Appeal said no. They held, applying the principles of *Pwllbach Colliery v Woodman* and *Stafford v Lee*, that the implication of an easement to lay and connect to main services was necessary to give effect to the common intention of the parties to the transfer, which they held was clearly the construction of a dwelling house in a suburban locality *"to the satisfaction of the Local Authority"* and therefore with mains connections in the usual way. It was argued that the test was one of necessity, not reasonableness or convenience, and that the house could still have been built with a septic tank and boreholes for water, but the Court held:

"The suggestion that a dwelling-house in such an environment might sensibly be expected by the parties to be constructed without connections to the mains utilities just a few metres away in [the highway] is, if I may say so, a somewhat optimistic submission.... the easement proposed is necessary to achieve the parties' expressly intended purpose. It is not seeking to manufacture a necessity out of what is merely reasonable or desirable. The implication of the proposed easement is, in the context of this transaction in the modern times in which it took place, relating to this building plot in this locality, entirely necessary to give effect to the inferred common intention of the parties to the Transfer."

It was further argued that the express grant only of a right of way *"for all purposes connected with the use and enjoyment of the property but not for any other purpose"*, followed by an excluding provision saying that save for the expressly granted right *"no rights of way or access ... shall be deemed to be expressly [or impliedly] granted or reserved"* prevented the implication of a right of way or access for the purpose of laying services. The Court, however, held that access for the purpose of laying services was a purpose *"connected with the use and enjoyment of the property"*, so that if (as it held) the implied easement for the laying of such services existed, the dominant owner was entitled to pass over and access the strip for the purpose of laying them.

"The suggestion that a dwelling-house in such an environment might sensibly be expected by the parties to be constructed without connections to the mains utilities just a few metres away in [the highway] is, if I may say so, a somewhat optimistic submission...."

A final argument that the common provision excluding easements which would *"restrict or interfere with the future use of the sellers retained land for building or any other purpose"* operated to prevent an easement for services under the strip was likewise rejected, despite the somewhat *"far fetched"* suggestion that the servient owners might wish to put an underground septic or oil tank under the strip.

As set out above, the decision and conclusion seem obvious, but Rimer LJ observed that he had granted permission to appeal because he had been *"impressed"* and *"troubled"* by the point concerning the exclusion of any other implied easements.

This issue is of course easily avoided by the clear express grant of easements for services in the usual way, but the case may provide a welcome backup in situations in which such an express grant was not made or cannot be traced. It will also qualify the briefly reported decision referred to in a footnote in *Gale on Easements (Penn v Wilkins)* which is often relied upon to deny the implied grant of services easements under a right of way strip. Much will still depend, however, on the particular purpose and context of the sale, as here: there is no general implication of such rights in all cases.

ii) The difficulty of (even partial) abandonment

Henry Dwyer v Westminster City [2014] EWCA Civ. 153; [2014] 2 P&CR 7 (CA)

A large area of land in North London was conveyed in 1922, with the benefit of a right of way over a passageway. From then until the 1960s the land had been used mostly for warehouse and industrial purposes. In the 1960s that use ceased and the Council acquired the land for residential development. It erected five blocks of flats, and *"it was no part of the design of this residential development that it should be served in any significant respect by the Passageway."*

Over the next 40 and more years, a market trader (D) enclosed the passageway and used it for storage. It was made inaccessible at both ends by the presence of locked gates and (at one end) iron sheeting and brickwork, and oversailed by the upper floors of other buildings, the effect of which was to *"...convert it into an entirely enclosed storage unit"*, across which *"no access....[had] been obtained for some forty years"*.

Through his actions and by application, D obtained possessory title to the passageway in 2007. In 2010 the Council decided that it would now like the passageway to be reopened to provide access to a new "area of creative workshops" on its land. D refused, claiming that the 1922 right of way had been abandoned.

"This case confirms the severity of the law on this issue, and the risks of assuming abandonment from non-use and even significant obstruction. As the facts disclose, even non-use by reason of complete enclosure amounting to possession of the servient land, sufficient to gain a possessory title, may not be enough."

The trial judge held, applying the traditionally severe law on abandonment [that it is not to be lightly inferred, that it will not generally be inferred simply from a long period of non-use, and that there must be clear evidence of a "firm intention" for the dominant owner and its successors never to use the way again: see e.g. *Benn v Hardinge* (1993) 66 P&CR 246], that there had been no abandonment of the right of way so far as the Council as freehold owner was concerned, but then held (despite it having been argued by neither party) that there had been a *"partial abandonment"* in relation to the category of *"Lessees and Tenants, Owners and occupiers for the time being of the said hereditaments"*, apparently on the basis that the original "hereditaments" no longer existed following the 1960s erection of the blocks of flats.

The Court of Appeal rejected that last conclusion as plainly wrong, since the words used were simply standard conveyancing terms, to make clear that the easement attached to each and every part of the land. Easements attach to land and do not exist and enure in gross for the benefit of particular persons, so likewise there could be no abandonment in relation to one particular set of persons or users of the way.

The Court then reaffirmed and applied the traditional law on abandonment, characterising the appeal as:

"... a straightforward case of very long non-user of the Passageway as a right of way, during a period when neither the freehold owner of the dominant land, nor anyone else using any part of that land with the freeholder's consent (whether as lessee, tenant, occupier or mere invitee) had any use for the Passageway as a right of way."

Despite D's possession and use over the years, his obstructions and structures (steel shutters, gates and courses of brickwork) had been found to be *"superficial changes which can easily be removed"*, and whose removal would cause him no significant prejudice. The injunction requiring their removal was therefore upheld.

This case confirms the severity of the law on this issue, and the risks of assuming abandonment from non-use and even significant obstruction. As the facts above disclose, even non-use by reason of complete enclosure amounting to possession of the servient land, sufficient to gain a possessory title, may not be enough. Such possessory title, if granted (as here) will be subject to the pre-existing right of way. It might have been different had D erected more permanent structures on the way, but even those might have been held to be capable of demolition. It is probably still safe to assume that only some positive act manifesting a clear intention to abandon, and/or some acquiescence or representation by the dominant owner upon which another has relied to their significant detriment, will suffice either for a finding of abandonment or estoppel against the re-assertion of the right of way.

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Assured Shorthold Tenancies and Human Rights

McDonald v McDonald and Anr [2014] EWCA Civ. 1049

Once an assured shorthold tenancy becomes periodic on the expiry of its fixed term, the possession process is intended to be straightforward. Give the correct notice under section 21(4) of the Housing Act 1988, and the court will be required to make a possession order. The ability to ask for the property back without needing to jump through hoops is, many landlords would say, the whole point of letting a property on an assured shorthold tenancy in the first place.

Of course, it isn't always as simple as it should be. Errors can inevitably creep in, and many readers will be aware that issues surrounding tenancy deposits are, in particular, a common area of difficulty. Yet the idea that human rights might present a further obstacle to recovering possession would surprise many landlords. Such points have long been arguable, given the Court's apparent status as a "public authority" for HRA 1998 purposes, but could they succeed?

For now, the answer appears to be 'no', following the very recent consideration of the question in July by the Court of Appeal in *McDonald v McDonald and anr* [2014] EWCA Civ. 1049.

The facts can be stated shortly. Of the appellant Arden LJ said this:

"She has a mental disorder which makes her particularly upset by changes in her environment. She has been evicted from social housing in the past. She cannot work."

She had been living in a house rented from her parents on a fixed term, then periodic assured shorthold tenancy. This house had been acquired by the parents precisely in order to provide her with a home, and the purchase had been funded by a mortgage. The tenancy was granted by the parents in contravention of the terms of their mortgage. They became unable to pay the mortgage instalments. Pursuant to a power under the mortgage, the mortgagee appointed receivers, who served a section 21 notice on the appellant.

At this point, the human rights argument reared its head. Was the court bound to have regard to the Article 8 ECHR right to a home, and to apply the Article 8(2) proportionality test (of whether any interference with the right was "necessary in a democratic society for the protection of the rights and freedoms of others") in possession proceedings based on a mandatory right, where the court was not required to assess reasonableness? The landlords here were private individuals. There was no hint of any involvement by a "public authority" in the section 21 notice and possession proceedings, other than the fact that the court making the order for possession was ***itself*** a public authority, and bound not to act incompatibly with the European Convention on Human Rights. Should that matter?

"... Was the court bound to have regard to the Article 8 ECHR right to a home, and to apply the Article 8(2) proportionality test (of whether any interference with the right was "necessary in a democratic society for the protection of the rights and freedoms of others") in possession proceedings based on a mandatory right, where the court was not required to assess reasonableness? The landlords here were private individuals. There was no hint of any involvement by a "public authority" in the section 21 notice and possession proceedings, other than the fact that the court making the order for possession was itself a public authority, and bound not to act incompatibly with the European Convention on Human Rights. Should that matter?"

"Arden LJ first considered some of the European human rights case law. She acknowledged that there were some cases where Article 8 appeared to be being treated as applying in the context of a private landlord, but none that seemed satisfactorily to ask and answer the question of whether it ought to apply in a case such as this. In addition, Her Ladyship identified some limited comment in authorities pointing in the other direction, and noted that none of the decisions before her were Grand Chamber decisions."

The judge at first instance thought not, and the Court of Appeal agreed. Arden LJ gave a leading judgment rejecting the need to have regard to Article 8 and proportionality in a case like this one on several grounds. Her Ladyship helpfully summarised her reasoning at paragraph 19 of her judgment:

"In my judgment, the judge was correct, and, it follows, Miss McDonald's claim that the PO should be set aside because it violates her Article 8 right must be rejected for the following reasons, which are amplified later in this judgment:

There is no "clear and constant" jurisprudence of the Strasbourg court that the proportionality test implied into Article 8(2) applies where there is a private landlord.

Even if the proportionality test had applied in this case, the court would still have made a possession order.

In any event, this court is bound by Poplar Housing and Regeneration Community Association Ltd v Donoghue [2002] QB 48 to hold that section 21 of the HA 1988 is compatible with the Convention. That precludes this court from holding that the proportionality test applies.

In the circumstances, the question of interpreting section 21 of the 1988 Act to conform to Convention rights does not arise."

Arden LJ first considered some of the European human rights case law. She acknowledged that there were some cases where Article 8 appeared to be being treated as applying in the context of a private landlord, but none that seemed satisfactorily to ask and answer the question of whether it ought to apply in a case such as this. In addition, Her Ladyship identified some limited comment in authorities pointing in the other direction, and noted that none of the decisions before her were Grand Chamber decisions. Also noting that it would be difficult to apply the test of necessity in a democratic society in a private landlord case, Arden LJ concluded (paragraph 45) that there was:

"no clear and constant line of decisions that the proportionality test applies in disputes between tenants and private landlords where the tenant relies on Article 8."

Arden LJ then considered the position on 'proportionality', even if Article 8 did apply. The result ought, she concluded, to be a possession order all the same. Referring to the established high threshold for displacing a landlord's rights in public sector cases, she noted the rights of a landlord and of third parties such as lenders standing behind the landlord. Even taking into account the medical evidence in this case, when the money owed to the lender was taken into account, a possession order would still have been made even if the proportionality test did apply (contrary to the view of the County Court judge)

In further support of her conclusion, Arden LJ held that the Court was bound by its own decision in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 to hold that section 21(4) was compatible with Article 8.

Nor was there any scope to re-interpret the very clear terms of section 21 to reach some different, human-rights friendly conclusion.

The appeal was therefore dismissed and the possession order upheld.

Speaking narrowly, the decision establishes a Court of Appeal precedent that a court does not have scope to assess proportionality before making a section 21(4) possession order at the behest of a private landlord. Slightly more widely, the observation of Arden LJ at paragraph 45 (quoted above), might be relevant in other (non-section 21(4)) private landlord cases if an Article 8 point is taken by a tenant.

Arden LJ can, in addition, be seen to lend further support to the principle that courts should give a high-degree of protection to the interests and ostensible rights of landlords, and be relatively slow to see them displaced by arguments from tenants whose entitlements to occupation have, at face value, run their course.

The principal basis of this decision may, of course, remain subject to further developments in Strasbourg, but with a strong and multi-faceted decision running in their favour, private landlords can perhaps breathe a sigh of relief.

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Village Greens and "As of Right"

R (on the application of Barkas) v North Yorkshire County Council [2014] UKSC 31

This important decision of the Supreme Court considers the meaning of the expression "as of right" in s.15(2) of the Commons Act 2006, and whether use can be deemed "as of right" when it is contemplated under the statutory provision under which a public body acquires and holds the land in question. In determining, unanimously, that such use was not "as of right", the Supreme Court was forced to revisit and overrule the earlier decision of the House of Lords in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889.

The case concerned some two hectares of playing field acquired, pursuant to powers under s.73(a) of the Housing Act 1936, as part of a larger parcel of land by the statutory predecessor of the respondent County Council, for a housing development. Most of the land was developed into housing and the playing field was laid out and maintained as "recreation grounds" pursuant to s.80(1) of the 1936 Act (with the consent of the Minister as required by such provision). The playing field had been used by local inhabitants for informal recreation for at least the last 50 years.

The provisions from the 1936 Act have been repealed and substantially re-enacted on two occasions. The current equivalent of s.80(1) of the 1936 Act is s.12(1)(b) of the Housing Act 1985 which provides that *"a local housing authority may, with the consent of the Secretary of State, provide and maintain in connection with housing accommodation provided by them under this Part…(b) recreation grounds…"*.

In October 2007, an application was made to register the playing field as a town or village green under the Commons Act 2006. As is well known, in order to achieve town or village green status, an applicant must show, *inter alia*, that *"a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years"* (s.15(2)(a) of the 2006 Act).

The application was rejected in September 2010 on the ground that although all of the other requirements of s.15(2) had been met, the use of the playing field by the local inhabitants had been "by right" and not "as of right". A judicial review of this decision was subsequently launched which failed at first instance and in the Court of Appeal. The key issue on appeal before the Supreme Court was a narrow one: where land is provided and maintained by a local authority pursuant to section 12(1) of the Housing Act 1985 or its statutory predecessors, is the use of that land by the public for recreational purposes "as of right" within the meaning of s.15(2)(a) of the Commons Act 2006?

The *Beresford* case had involved comparable statutory powers in the New Towns Act 1965 (and its successor the New Towns Act 1981). At first instance and in the Court of Appeal, although the City Council raised no argument based on the 1981 Act, they successfully argued that the land in question had been used by the public with the licence of the City Council and their predecessors, on the basis that such a licence should be implied from their providing seating and mowing the grass. It was only after argument had concluded before the House of Lords that the House asked to be addressed on the point that members of the public had a statutory right to use the land for recreation. Having heard further argument on this point, the House of Lords allowed the appeal and rejected both arguments. Importantly, it decided that the fact that the use was contemplated under the statutory provision under which the land was acquired and held did not have the effect of transforming use which would otherwise be "as of right" into use "of right" or "by right".

The Supreme Court in *Barkas* had little difficulty concluding that the recreational use of the playing field was "of right" and not "as of right" (applying the tripartite test *"nec vi, nec clam, nec precario;* not by force, nor stealth, nor the licence of the owner). As a result, the playing field did not meet the statutory criteria prescribed by s.15(2)(a) of the 2006 Act and could not be registered as a town or village green.

In determining that the inhabitants have been using the playing field lawfully or *precario*, Lord Neuberger held that:

"so long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land 'by right' and not as trespassers, so that no question of user 'as of right' arises…Where land is held for that purpose, and members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so. If that were not so, members of the public using for recreation land held by the local authority for the statutory purpose of public recreation would be trespassing on the land, which cannot be correct".

Like Lord Hoffmann in *R v Oxfordshire County Council Ex p Sunningwell Parish Council* [2000] 1 AC 335 before him, Lord Neuberger was of the view that whether user was "as of right" should be judged, objectively, by how the matter appeared to the owner of the land. In his judgment, it was:

"..plain that a reasonable local authority in the position of the Council would have regarded the presence of members of the public on the Field, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the Field was being held and maintained by the Council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors...It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights".

Lord Carnwath, giving the other substantive judgment of the Supreme Court, noted that the tripartite test, which is common to the family of prescriptive rights (easements, public rights of way, highways, adverse possession), needs to be applied differently to town or village greens where the land is held in public ownership. In such cases, merely demonstrating that the right has been exercised consistently (and without objection) for the duration of the period of prescription is not sufficient to establish the right. On this point, Lord Carnwath held that

"the same cannot necessarily be said of recreational use of land in public ownership. Where land is owned by a public authority with power to dedicate it for public recreation, and is laid out as such, there may be no reason to attribute subsequent public use to the assertion of a distinct village green right...Where the owner is a public authority, no adverse inference can sensibly be drawn from its failure to 'warn off' the users as trespassers, if it has validly and visibly committed the land for public recreation, under powers that have nothing to do with the acquisition of village green rights".

The decision is clearly difficult to square with *Beresford* and the Supreme Court was obliged to confront this earlier decision head-on. In relation to the implied licence argument, elements of Lord Scott's judgment in *Beresford* were heavily criticised as *"wrong in principle and contrary to established authority"*. Lord Neuberger identified the following two points of disagreement:

"Firstly, I do not agree with Lord Scott's view...that public use of a site, on which the owner has erected a sign permitting use as a village green, would be 'as of right'. It would amount to a temporary permissive use so long as the permission subsists, as the public use would be 'by right'. Secondly, Lord Scott's conclusion...that, when using the land for recreation, members of the public were 'certainly not trespassers' should ineluctably have led him to decide that the public's use of the land had been 'by right' and not, as he did decide, 'as of right'".

Although Lord Neuberger was satisfied that the statutory rights argument was not properly argued in *Beresford* (and, in fact, had been disclaimed by the City Council in argument) and that the judicial reasoning could be distinguished (on the basis that the land in *Beresford* had not been specifically acquired nor appropriated for any specific recreational use), he was of the view that the Supreme Court had a duty to *"grasp the nettle"* and hold that the earlier decision and reasoning should no longer be relied on. Lord Carnwath went even further and held that *Beresford* could not even be distinguished and was wrongly decided.

The decision will clearly make it more difficult to meet the statutory test that needs to be satisfied before a town or village green will be registered. Where land is held by a public body and laid out (either expressly or implicitly) for recreational use by the public, such use will, applying *Barkas*, almost certainly be characterised as use "of right". Their Lordships were keen to make it clear that the effect of their decision was not to prevent public land from ever becoming susceptible to a successful town or village green application. However, the effect of the decision is that this will only now be possible where the land is not laid out or identified in any way for public recreational use (see, for example, *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674). Even if land is only laid out for recreational use pending future development (as in *Beresford*), this will be sufficient to prevent such use from being deemed "as of right".

Although the fact that the subject land was in public ownership clearly influenced the judgments in *Barkas*, it is not immediately clear why the same principles would not apply equally to private land which is laid out or identified for public recreational use. The private landowner may be a charity or a church (or even a company or an unincorporated association) whose objects include making land available for public recreational use. In these circumstances, would resulting use by local inhabitants for a period of twenty years be sufficient to establish town or village green rights? It is difficult to understand why the legal treatment should vary simply because the land is in private ownership because such use would be with the consent or approval (express, tacit or otherwise) of the private landowner and should not reasonably be characterised as *nec precario*. While the permission subsists, such users cannot be regarded as trespassers and the use would not be perceived (objectively) by the landowner as contrary to the use which it has designated the land to be used for. Accordingly, it would not merely be understandable why the landowner would not object to such public use, but it would be positively inconsistent with its allocation decision if it did do so. If members of the public are not to be regarded as trespassers on private land, then they must, invariably, be on the land with the consent of the landowner (or *precario*). The impact of *Barkas* may, therefore, be considerably wider than that envisaged by the Supreme Court and could ultimately shape the legal treatment of town or village green applications on private land as well as public land.

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Correcting Errors in a Will: Construction, Deletion or Rectification?

In *Marley v Rawlings* [2014] UKSC 2), the Supreme Court provided important guidance as to (amongst other things) the circumstances in which a court may rectify a will under s.20(1)(a) of the Administration of Justice Act 1982 ("the 1982 Act").

The facts were straightforward. Mr. and Mrs. Rawlings, assisted by a solicitor, had made brief 'mirror wills'. Each spouse left his/her entire estate to the other, but, if the other had already died or survived the deceased spouse for less than a month, the entire estate was left to a Mr. Marley – a friend who had been treated by them as a son.

Unfortunately, by reason of an oversight on the part of their solicitor, each spouse was given the other's draft will to sign. Mr. Rawlings signed the draft will meant for his wife, and *vice versa*. Those signatures were then attested by the solicitor and his secretary.

Mrs. Rawlings died first in 2003, and her estate passed to her husband without anybody noticing the mistake. The error finally came to light when Mr. Rawlings died in 2006. At the time of his death, Mr. Rawlings and Mr. Marley held the property in which they lived as joint tenants. Accordingly that property passed to Mr. Marley by survivorship. However, there remained some £70,000 within Mr. Rawlings' estate.

In light of the mistake highlighted above, Mr. and Mrs. Rawlings' two sons challenged the validity of their father's will and claimed that they, rather than Mr. Marley, were entitled to the sums in question under the rules of intestacy.

Mr. Marley was forced to begin probate proceedings against the sons, seeking rectification of Mr. Rawlings' will and a pronouncement in favour of that will in solemn form. That claim failed in the High Court on the basis that, in Proudman J.'s judgment:

i The will did not satisfy the requirements of *s.9* of the *Wills Act 1837* (the "1837 Act"); and

ii Even if had done so, it was not open to her to rectify the will under *s.20(1)* of the 1982 Act.

We are all aware of the contents of *s.9(a),(b)* of the 1837. Section 20 of the 1982 Act provides that:

i *If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—*

a *of a clerical error; or*

b *of a failure to understand his instructions,*

it may order that the will shall be rectified so as to carry out his intentions.

ii *An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.*

As Proudman J. explained, in relation to her first ground for dismissing the claim:

'In my judgment s.9(b) of the 1837 Act provides a complete answer to the claim, namely that the testator did not intend by his signature to give effect to the will which he signed. If asked whether he did he would not have said, "yes, subject to correction of errors by substituting my wife's name for mine wherever it occurs". He would simply have responded, "no, of course not, that is my wife's will".'

If she was wrong on that first issue, Proudman J. determined that she did not even have jurisdiction under *s.20(1)* of the 1982 Act to rectify the will because there had not been a 'clerical error' within the meaning of *s.20(1)(a)*. In her view the error was not to do with the wording of the will (which was correctly expressed) but the fact that it had simply been given to the wrong person for signature.

On appeal, the Court of Appeal ([2012] EWCA Civ 61 – judgment of the court delivered by Black LJ) affirmed Proudman J.'s decision on the first ground (the court determined that it did not need to go on and consider the second ground). It expressed its doubts as to whether Mr. Rawlings' will had been signed 'by the testator', in circumstances in which the will had been drawn up for Mrs Rawlings and was said to be her last will. The court concluded, by reference to *s.9(b)* of the 1837 Act that (at [53]):

"the wording of the subsection does not seem to me to accommodate what happened here. It refers to 'the will' which must, in my view, mean the will which is in writing before the would-be testator, the one Mr. Rawlings actually signed. That is the will to which the testator must have intended to give effect and he did not so intend."

The Court of Appeal expressed its view that the present case could not be placed in the same class as a will which was the will of the testator but contained errors which could be corrected by construction, omission or rectification.

In light of the Court of Appeal's decision, Mr. Marley sought and obtained permission to appeal to appeal to the Supreme Court. The lead judgment was delivered by Lord Neuberger. This time Mr. Marley

succeeded and the decisions of the High Court and the Court of Appeal were overturned.

By the time the case reached the Supreme Court Mr. Marley was relying on three principal contentions: (1) that Mr. Rawlings' will, properly interpreted, should be read, in effect, as if it was a document signed by his wife; (2) that the extent of Mr. Rawlings' knowledge and approval of the contents of the will was such that it could be validated, albeit with deletions; and (3) that the will should be rectified so as to accord with Mr. Rawlings' intentions.

The Supreme Court declined to determine the appeal on a late argument, fully developed only on appeal, that the court was entitled to, in effect, correct the mistakes in the will as a matter of construction. Lord Neuberger nevertheless clearly favoured that as a general approach, stressing that courts should approach the interpretation of wills as they would any other document, or as Lord Neuberger himself put it:

"Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context."

Lord Neuberger stated that the process of interpreting a will can in fact be slightly broader in scope than in relation to other documents, for *s.21(2)* of the 1982 Act allows (where one or more of the requirements in *s.21(1)* is satisfied) direct evidence of the testator's intention to be adduced to assist the court. He also touched upon the (potential) overlap between the correction of mistakes by construction and by rectification, while declining to lay down any further principles on that issue.

Could the Court nevertheless rectify this will at all under section 20? First, Lord Neuberger rejected the submission that what was proposed was too extreme and wholesale to amount to mere 'rectification'. There was no principled reason to impose any restriction on the extent to which a document can be rectified. The more substantial the correction sought, the more difficult it would be to convince a court to do so. Nonetheless, the present case was described by Lord Neuberger as giving rise to a, *'classic claim for rectification'*.

Second, Lord Neuberger rejected the argument that this was not even a 'will' under section 9 of the 1837 (because of the technical lack of knowledge and approval – Mr. Rawlings had not signed 'his' will):

"It is true that the will purports in its opening words to be the will of Mrs. Rawlings, but there is no doubt that it cannot be hers, as she did not sign it; as it was Mr. Rawlings who signed it, it can only have been his will, and it is he who is claimed in these proceedings to be the testator for the purposes of s.9. Accordingly, s.9(a) appears to me to be satisfied. It is true that the will does not make sense, at least if taken at face value but that is a matter for 'a court of construction', as Lord Wilberforce explained. There can be no doubt, however, from the face of the will (as well as from the evidence) that it was Mr. Rawling's intention at the time he signed the will that it should have effect, and so it seems to me that s.9(b) was also satisfied in this case."

This seems a more realistic and practical construction of *s.9(b)*. Furthermore, it would, as Lord Neuberger found, be cutting down the operation of s.20(1) if that section could not be invoked to rectify a document which was currently formally invalid into a formally valid will.

So rectification under section 20 was possible. Should it be granted? The principal question was: did the will (as expressed) fail to carry out the testator's intentions in consequence of a 'clerical error'?

'Clerical' error had previously been construed narrowly, as meaning an error that occurred when someone (which may be the testator himself) wrote something which he did not intend to insert, or omitted something which he had intended to insert. Lord Neuberger took a wider view:

"I accept that the expression 'clerical error' can have a narrow meaning, which would be limited to mistakes involved in copying or writing out a document, and would not include a mistake of the type that occurred in this case. However...the expression can also carry a wider meaning, namely a mistake arising out of office work of a relatively routine nature, such as preparing, filing, sending, organising the execution of, a document save, possibly, to the extent that the activity involves special expertise). Those are activities which are properly to be described as 'clerical', and a mistake in connection with those activities, such as wrongly filing a document or putting the wrong document in an envelope, can properly be called 'a clerical error'."

Here, the muddling of the two draft wills was 'clerical', *'because it arose in connection with office work of a routine nature'*. For that reason the Supreme Court allowed the appeal and ordered that the will be rectified so that it contained the typed parts of the will signed by Mrs. Rawlings in place of the typed parts of the Will signed by Mr. Rawlings.

Discussion

Marley has already been applied in reported cases at first instance [see e.g. *Brooke v Purton* [2014] EWHC 547 (Ch)]. Further, the dictum encouraging a broad and contextual approach to construction, with recourse to extrinsic evidence, is likely to simplify an area otherwise dogged by centuries of artificially constructed rules of interpretation. The limits to that approach, and how it relates to the section 20 power, await further clarification. At least we now know that 'clerical error' is to be interpreted broadly.

The Law Commission recently announced (on 8th August 2014) that it will commence a general review of the law of wills in early 2015, including the present state of the law on rectification. Unfortunately consultation will not take place until 2016 (with a report to follow), so it appears as though we may yet be some way off from full statutory resolution of the current position.

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Quantifying Inheritance Act Claims

Ilott v Mitson [2014] EWHC 542 (Fam)

On 31st March 2011 the Court of Appeal handed down judgment in the case of *Ilott v Mitson* [2011] EWCA Civ 346. My article on that decision can be found on our website in our Summer 2011 Newsletter. The deceased had left an estate of £486,000 to a number of charities. The will made no provision at all for her 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 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 appeal without deciding the question of quantum. On 3rd March 2014, almost three years on, Parker J. finally dismissed that quantum appeal.

In 2011 *Ilott v Mitson* received a great deal of attention, with some commentators suggesting that it heralded an opening of the floodgates for claims by adult children. Its significance lay in the reaffirmation of earlier authority to the effect that a 'moral obligation' on the deceased to make provision for the applicant is not a prerequisite to an award in favour of an adult child. It was also an important for the Court's rejection of earlier suggestions that "necessitous circumstances" could never be enough to support an award. The subsequent reality, however, is that the decision has not resulted in a flood of reported decisions of successful claims that might otherwise have failed.

"The essence of the principal grounds of appeal was that, having found that reasonable provision had not been made, it could not be reasonable to provide a lump sum that was so small that it did not, in reality, benefit the Claimant. The sum would not provide for her housing needs and, so the argument went, any capital award over £16,000 would only serve to reduce pound for pound the benefits to which the Claimant would otherwise be entitled."

The significance of the latest appeal is that the comparatively small award of £50,000 is likely to prompt a robust stance from many defendants which, on closer analysis, may not be warranted. After all, as the Court of Appeal noted in *Espinosa v Bourke* [1999] 1 FLR 747: "*the court should not approach the question of what is appropriate maintenance with any preconceived view. All the circumstances of the applicant must be considered*".

In the quantum appeal in *Ilott* the updated valuation of the net estate was £489,000. The Claimant still had very little income and negligible assets. The family lived in a small house rented from a housing association and, whilst the family income was around £20,000 per year, all but around £5,000 of that sum comprised benefits and tax credits. The family's current standard of living was low. The Claimant had never had a holiday, much of what she had was old or second hand, she had difficulty in affording clothes for the children and was limited in the food she could buy.

It was common ground that the Claimant's relationship with her mother had irretrievably broken down many years ago, so that she had no expectation of an inheritance. This had weighed heavily in the court's approach at first instance and it was argued that the District Judge had been wrong to take into account the lack of expectancy. On appeal that argument was rejected. Expectancy, it was said, fell within the section 3(1) criteria to which the court must have regard.

The essence of the principal grounds of appeal was that, having found that reasonable provision had not been made, it could not be reasonable to provide a lump sum that was so small that it did not, in reality, benefit the Claimant. The sum would not provide for her housing needs and, so the argument went, any capital award over

£16,000 would only serve to reduce pound for pound the benefits to which the Claimant would otherwise be entitled. The reasoning of the court in rejecting this argument is short and, with respect, not particularly illuminating:

"...the court at first instance is conducting a balancing exercise between various factors. I cannot say that the judge was manifestly wrong, or even wrong, in taking the view that notwithstanding that the Claimant and her husband and family lived in straightened circumstances, the fact that they have done so for many years did not justify an award that improved their circumstances. The argument on behalf of the Claimant is in effect that because there will be no benefit to the Claimant unless her housing need is met, the award must achieve that result. That cannot be the right approach. Otherwise, the judge's determination that the lack of expectation tempered the award would be rendered meaningless".

An applicant who has made significant sacrifices (akin to the detriment that might support a proprietary estoppel claim) should have greater success. This may be particularly so if the applicant has prejudiced their own lifestyle by looking after or supporting a parent either in business (typically farming) or in that parent's infirmity.

Is this decision a cause for alarm if you are acting for an adult applicant under the Act? As the award made in the most high profile of recent decisions, there is an obvious danger that it will have an unwarranted but mesmerising effect. In truth, though, it was a harsh decision that may in part be ascribed to its history on appeal. Moreover, there are at least three good reasons why the decision should not set any new benchmark for awards. First, and generally, it has been repeatedly stated that all cases under the 1975 Act are fact specific and involve a weighing of the section 3 factors peculiar to a given case and requiring a value judgment by the court. Secondly, it was of great significance in *Ilott* that the Claimant had no expectation of an award. In cases where there is no long-standing breakdown in relations with the testator the court should accordingly view the merits of the quantum claim more favourably.

Finally, there remain a great many cases where there is a moral claim on the estate. An applicant who has made significant sacrifices (akin to the detriment that might support a proprietary estoppel claim) should have greater success. This may be particularly so if the applicant has prejudiced their own lifestyle by looking after or supporting a parent either in business (typically farming) or in that parent's infirmity. To take but one example, in *Re Watson deceased* [1999] 1 FLR 878 the Claimant had lived with the deceased, cooked and cleaned and kept house for him as well as contributing to the cost of services in the home for 11 years. The applicant (in that case a cohabitee and so subject to the "maintenance" threshold for provision applicable to children) secured a sum to buy housing and a lump sum or annuity provision and Neuberger J (as he then was) observed: *"just because the person manages to live within his or her income does not mean that income fulfils his or her needs or "requirements" let alone "reasonable requirements""*. As Parker J. observed in *Ilott*, what set that case apart from Mrs. Ilott's claim was that *"expectation, obligation and responsibility were plainly a marked feature of the [Watson] case"*.

Ultimately, therefore, whilst the quantum appeal in *Ilott v Mitson* should serve as a stark reminder of the risks inherent in pursuing claims under the 1975 Act on behalf of adult children, it should not be treated as a fatal blow to the possibility of larger or generous awards where the facts indicate necessitous circumstances and a legitimate expectation of provision underpinned by a moral claim on the estate. A moral claim is not a prerequisite to getting through what Parker J. termed the "gateway" stage of establishing an entitlement to an award but at the "evaluative" stage such matters remain important.

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The Legislative Year

There have been two areas of legislative change this year of particular relevance to Property and Estates practitioners.

County Court claims

First, there have been procedural changes affecting Property and Estates claims in the County Court, which came into force in or since April of this year and are generally prospective in effect. Some of the more notable changes are as follows:

- The county courts (plural) have been replaced with a single County Court in England and Wales, and a separate Family Court has been created. The buildings which used to be known as the 'county courts' are now known as 'hearing centres', and cases are now 'sent' rather than 'transferred' between them.
- The financial limit on the equity jurisdiction of the County Court (in the types of proceedings set out in section 23 of the County Courts Act 1984) has been increased from £30,000 to £350,000. The lower financial limit for claims (other than personal injury) in the High Court has been increased to £100,000.
- Some types of proceedings have been removed from the jurisdiction of the County Court, e.g. under the Variation of Trusts Act 1958 and other statutory provisions; others have been added to its jurisdiction, e.g. nominated circuit judges may now make freezing orders in all cases.
- CPR Part 3 has been changed to make clear that the costs management provisions do not apply to Part 8 claims unless the court so orders.

Inheritance and Trustees' Powers Act 2014

Secondly, there have been a number of changes effected by the Inheritance and Trustees' Powers Act 2014, which came into force on 1st October of this year and, again, are generally prospective in effect (in particular, the changes mentioned below apply only in relation to deaths occurring after their coming into force). These include the following:

- Section 46 of the Administration of Estates Act 1925 is amended to enhance the entitlement of a surviving spouse or civil partner on the distribution of the residuary estate of an intestate. The determination of the amount of the 'fixed net sum' and the level of the interest rate referred to in section 46 are also altered, as well as the definition of 'personal chattels' in section 55 of the 1925 Act.
- The scope of eligible applicants under section 1(1)(d) (child of the family) and section 1(1)(e) (maintained person) of the Inheritance (Provision for Family and Dependants) Act 1975 is expanded. The matters in section 3 of the 1975 Act to which the court is to have regard when exercising powers under the Act are amended for applicants under section 1(1)(a) (spouse or civil partner), 1(1)(d) and 1(1)(e).
- The time limit for applications under the 1975 Act in section 4 is amended to make clear that it does not prevent the making of an application before a grant of representation of an estate is first taken out. Section 9 of the 1975 Act is also amended to allow a court to exercise its power thereunder even where an application is made after the time limit in section 4 if the court has given permission for the application to be made.

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