December 2009

Annual Newsletter

Lucy Theis QC

Welcome to Field Court Chambers 2009 Annual Newsletter.

It has been a busy year and it gives me great pleasure to introduce several new members who have joined Chambers. Established practitioners John Church and Paula Diaz joined us from 2 Gray's Inn Square; Matthew Stott made the slightly longer journey from Broadway House Chambers in Bradford; Rhys Haden returned from a six-month spell as Judicial Assistant to the President of the Queen's Bench Division, Sir Anthony May and Steven Fuller joined Chambers as tenant after completion of his pupillage. Steven is currently judicial assistant to the Court of Appeal (Civil Division), allocated to Lord Justice Pill, and will return to Chambers in April 2010.

I am also delighted to report this year that Joshua Swirsky was appointed a Recorder and Max Thorowgood was appointed Deputy Adjudicator to HM Land Registry.

We have had great responses to our CPD programme of seminars which we took to the offices of our solicitors and Local Authorities. If you are interested in having one of our members to talk about a particular area of law, please contact our Senior Clerk, Ian Boardman.

I am now reaching the end of my term as Chairman of the Family Law Association (FLBA). I have been heavily involved in preparing responses to consultations over family fee reforms, and I have worked very closely with all the family solicitor groups. We welcome the general recognition in the announcement made on 21st October 2009 that the original proposals have been "substantially revised" but I remain concerned about whether the complexity of cases is sufficiently recognised, as if it is not this will have an adverse impact on effective access to justice to the most vulnerable families in society.

I have recently been elected to the Bar Council and plan to continue highlighting the public interest in ensuring there is effective access to justice for all, irrespective of means.

On behalf of everyone in Chambers, I wish you all a very merry Christmas and a happy and prosperous New Year.

Lucy Theis QC
Head of Chambers

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DIARY

Bon voyage!

The Large Pension Room at Gray's Inn hosted a retirement party for **Michael Clark** on 4th February. A huge gathering enjoyed a heartfelt speech of thanks from **Lucy Theis QC** to Michael for providing Chambers with many years of dedicated service.

Quiz nights

Bung Hole Cellars on High Holborn witnessed two fun quiz nights on 23rd April and 12th November. Eight teams delved into excellent wine before tackling questions such as: "What is the capital of South Australia?" and "What R&B band was Robert Bell a member of?" On the first night, victory went to "*Brainless of Brent*" (**Burrows**) following a tie-break with "*Blaser Glory*" (aka **Blaser Mills**). They were followed closely by "*Mullies Marvels*" (**Moss Beachley Mullem & Coleman**). The second night saw **Hammersmith and Fulham** as winners closely followed by **Blaser Mills**. The star of the show that night was **Lesley Tapson**.

Charity highlights

The sun shone over London on the 12th July as 20,000 runners headed for Hyde Park Corner for the start of the "Asics London 10km" joined by a plucky team from Chambers, plus special guests. **Ian Boardman's** knee-defying time of 45min 25sec is there to be beaten next year. The team raised £1,000 the children's charity **Reunite**. Chambers hosted a well attended Christmas Choral Evening with festive music in the Large Pension Room on 9th December. Donations went to **Great Ormond Street** and **Solace Women's Aid**.

Bowled over

This summer's Ashes ended in glorious victory for England but alas, the second most coveted prize in cricket, the Golden Box, left the Clerks' room after the annual fixture with **TLT** on 17th June resulted in a narrow defeat for Chambers. One week later, an experienced team from **BP Collins** played some excellent cricket to inflict our second defeat of the season. Amends were made against **Hodders** in July with special mention going to **Ruth Cabeza** for bowling an excellent final over in a tense finish. **Payne Hicks Beach** provided opposition for the final match of the season and runs flowed freely in both innings. A nail-biter was on the cards but fading light and an approaching thunderstorm forced the captains to call an honourable draw and head for the bar.

For further information on the topics covered by the newsletter please contact Sabina Smith:
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Sharp shooters

Chambers' Netball team had its first tip-off on 5th November. Quick hands, nimble feet and dead-eye shooting by **Oliver Fisher** star **Fiona Mellon** made for a great match with Oliver Fisher winning 11:6. A re-match is arranged.

Finally...the footie

A well played match against **BP Collins** on 24th November resulted in a 10:8 win for Chambers. The two teams pose for a group photo below.

From Left to Right: Andrew Clisold, Simon Deans, Alex Zachary, Craig Williams, Tim Constable, Alex Jones, Steve Perry, Chris Stirling, Michael Joy, Jonathan Pennington Legh, Max Thorowgood, Rhys Hadden, Ian Boardman, Lawrence Cannell.

CASE REPORTS

Prospective adopters who live abroad

Re: A (A Child) [2009] EWCA Civ 41

Ruth Cabeza

This case considered how the law can facilitate a child's adoption by likely adopters who live outside this jurisdiction. English law does not permit the casual movement of children out of this country for the purpose of adoption overseas. Section 84 of the Adoption and Children Act 2002(ACA 2002) does, however, facilitate the lawful removal of children from the UK for the purpose of adoption overseas and provides for the making of an order granting parental responsibility to prospective adoptive parents and extinguishing it in every other person. An application for a convention adoption can be made in this country by a person habitually resident in a country that has adopted the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption and it is suggested that the principals set out in relation to s.84 applications apply equally to the interpretation of s.42 ACA 2002 as amended by regulations for the purpose of convention adoptions.

The background

A care order was made in relation to child A in January 2007. The authority's plan was adoption. The only family members considered viable adopters were a paternal uncle and aunt, Mr and Mrs N, who lived in the USA.

The authority put forward a plan which involved, at a preliminary stage, the child travelling to the USA and living with Mr and Mrs N for the purposes of an investigation and assessment of their suitability as potential adopters.

Section 85 of the Adoption and Children Act 2002 (ACA 2002) makes it an offence to remove a child from the UK 'for the purpose of adoption' unless the prospective adopters have been granted parental responsibility under s. 84. However, paragraph 19 of Schedule 2 of the Children Act 1989 (CA 1989) enables local authorities to apply to the Court for permission to arrange for a child in their care to live outside England and Wales (and so to avoid the sanction imposed by s. 85 ACA 2002) but not if the local authority is placing a child abroad for adoption with prospective adopters (paragraph 19(9)).

A subsequent step in the plan was for Mr and Mrs N to apply for parental responsibility under s. 84(4) ACA 2002, which requires that the child's home be with the applicants at all times during the preceding 10 weeks and, under s. 42, that the Court be satisfied that the local authority had had sufficient opportunities to see the child in the home environment over that 10 week period. Mr and Mrs N were able to make a short visit to the UK but could not remain here for the 10 weeks before the planned application and so it was proposed that some of the 10 week period be spent in the USA.

The authority sought an order approving the removal of the child to the US under paragraph 19 of Schedule 2 to CA 1989 and a declaration that there was no bar to it taking account of the period the child would spend in the USA for the purpose of s. 84(4) of ACA 2002.

At the hearing before Charles J, now reported as *Haringey London Borough Council v MA, JN, IA* at [2008] 2 FLR 1857, the Department for Children, Schools and Families, an intervener, argued that permission for a child to live abroad could not be given because the placement would contravene s. 85 ACA 2002 and that approval could not be given under paragraph 19 of Schedule 2 CA 1989 because the authority would be placing the child for adoption with prospective adopters.

The Department also argued that no part of the 10 week period referred to in s 84(4) could be spent abroad.

Charles J found that permission could be lawfully be given under paragraph 19 and that the 'home' for the purposes of ss 84(4) and 42(7) (a) did not have to be in the UK. However, because of conflicting High Court authority in the form of *Plymouth CC v CR and others* reported, 13 June 2006 considered and *ECC v M and others* [2008] EWHC 332 he felt unable to make the requested order and, instead, gave leave to appeal.

Court of Appeal held:

The judgments of the Court of Appeal were a resounding vindication for the local authority, as they endorsed the analysis of the law at first instance, and go so far as to state that even without the exonerating effect of Sch 2, para 19(6) it was

unlikely that the local authority plan fell foul of s 85.

- *Permission could lawfully be given under paragraph 19 of Schedule 2 to Children Act 1989 for an authority to arrange for a child to live outside the UK for the purposes of an investigation and assessment of whether adoption abroad by the persons with whom the child was to live would be the most appropriate welfare solution throughout his or her childhood.*
- *The 'home' for the purposes of s.84(4) and s. 42(7)(a) did not have to be in the UK.*

The judgment means that adoption of children by family members who live abroad is possible, but it remains difficult. Each case must be considered on its merits. The fact that the Court accepted that 10 weeks referred to in s.84(4) did not have to be spent in the jurisdiction of the Court was only part of the overall successful outcome for this little girl. The other reasons lay in the careful and practical planning which the London Borough of Haringey invested in her future.

A was lucky. Her relatives could visit the UK for a short period. For some children it is not possible for relatives to visit the UK. For them, this case will not provide relief. Their situation can only be assisted by the introduction of regulations under s. 86 ACA 2002. DFCS confirmed at the appeal hearing that it is consulting in relation to the possibility of making regulations under this provision.

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Guarantors' guarantees

Mentmore International Ltd and others v Abbey Healthcare (Festival) Ltd and another [2009] All ER (D) 175 (Aug)

Hashim Reza

The key issue for the court to determine in this case, in which Hashim Reza represented the claimants, was whether the first defendant had realistic prospects of defending the claimants' complaint that it had failed to use its best endeavours to procure a release of guarantors' personal guarantees.

The background

The first claimant was the seller, under a sale and purchase agreement, of the entire issued share capital in six companies. The first defendant was the buyer under the contract. The second defendant was the first defendant's sole director. The second to fourth claimants all claimed to be entitled to the benefit of obligations undertaken by the first defendant in the sale and purchase agreement in respect of certain bank guarantees which they had given in respect of the companies, and they sought the specific performance of those obligations. Pursuant to the sale and purchase agreement, cl 5.4 provided, *inter alia*, that the first defendant should undertake to procure the release of the guarantors from guarantees made on behalf of the companies and, pending such a release, undertake to indemnify the guarantors for any amounts paid by them. The claimants then issued proceedings for summary judgment on certain aspects of its claim.

Held

A party with an obligation to use best endeavours had to take all the steps in its power which were capable of producing the desired result which a prudent determined and reasonable person, acting in his own interests and desiring to achieve that result would take (see [25] of the judgment).

On the evidence, the first defendant had no realistic chance of defending against the claimants' contentions that it had failed to use its best endeavours to secure the release of the guarantors.

IBM United Kingdom Ltd v Rockware Glass Ltd [1980] FSR 335 considered.

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Was the wrong beast shot?

Thorner v Majors [2009] UKHL 18***; Cobbe v Yeoman's Row Management Ltd*** [2008] UKHL 55

Max Thorowgood

In the last two years the House of Lords has added fresh fuel to the fires which burn perpetually beneath the vexed questions of the nature of the common intention constructive trust and its relationship to proprietary estoppel.

In *Stack v Dowden* [2007] UKHL 17, Baroness Hale and Lord Walker's apparent willingness to impute intentions to the parties to an alleged trust suggested a potentially significant widening of the already diffuse doctrines which constitute the common intention constructive trust in the 'domestic consumer' context.

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That impression was reinforced by the Privy Council's decision in *Abbott v Abbott* [2007] UKPC 53 in which Baroness Hale applied the 'holistic' approach to determining both the existence of a beneficial interest in property and its extent, although the Court of Appeal in *Laskar v Laskar* [2008] EWCA Civ 347 restricted the scope of the domestic consumer context to purchases of property, "as a home".

Having thus extended the common intention constructive trust, in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, the House appeared dramatically to reduce the scope of the doctrine of proprietary estoppel in a commercial context.

Mr Cobbe was an experienced property developer who reached an oral agreement to purchase land for £12m for development if planning permission was granted. Acting in the belief, actively encouraged by the landowner, that the agreement would be honoured despite both parties being aware that it was binding in honour only, Mr Cobbe expended significant effort, skill and money in obtaining planning permission only for the landowner to withdraw and seek preferable terms once planning permission was obtained

Mr Cobbe succeeded at first instance and before the Court of Appeal on the basis that the landowner's unconscionable behaviour gave rise to a proprietary estoppel and/or a constructive trust which prevented it from resiling from the bargain.

In his leading judgment, with which Lords Hoffman, Brown and Mance agreed, Lord Scott stated the following important points of principle:

1 Proprietary estoppel is a sub-species of promissory estoppel which becomes proprietary if an estoppel is invoked in support of a proprietary claim.

2 A claim of proprietary estoppel cannot be founded on unconscionable behaviour alone. A proprietary claim and an answer to that claim based upon some fact or facts which the defendant is to be debarred from asserting are required.

3 The proprietary claim must be to "a certain interest in land".

4 In his *obiter* view, no proprietary estoppel could displace the clear requirements of s. 2(1) Law of Property (Miscellaneous Provisions) Act 1989 that an agreement for the disposition of an interest in land be in writing.

Mr Cobbe did not assert that the agreement was enforceable, therefore, the landowner could not be estopped from denying those facts. Further, his interest was merely an expectation that a binding agreement for the sale of the land, including all the relevant terms, would be concluded following the grant of permission; not a certain interest in land so Mr Cobbe's claim to a declaration as to the extent of his interest in the property on the basis of either proprietary estoppel or constructive trust failed.

Lord Walker also allowed the appeal and dismissed Mr Cobbe's claims but on a narrower basis that in commercial circumstances where both parties understood that their agreement was not binding the landowner's conduct, although unattractive, could not be castigated as unconscionable.

Since it was handed down commentators, including the first instance judge Sir Terence Etherton in a recent lecture to the Chancery Bar Association, have been prophesying that the decision in *Cobbe* either spelt an end to the doctrine of proprietary estoppel as we know it, or that it would be 'confined to its own particular facts.' Lord Justice Etherton, further suggested that in choosing to restrict the more precisely defined and flexible doctrine of proprietary estoppel rather than the will'o-the-wisp which is the common intention constructive trust, the House of Lords, "shot the wrong beast".

The judgments of Lords Walker and Neuberger in the House of Lords' most recent contribution to the debate, *Thorner v Majors* [2009] UKHL 18 handed down on 25th March 2009, suggest that fears of proprietary estoppel's demise have been exaggerated. Indeed, Lord Walker, in giving the leading judgment, was at pains to emphasise both that neither party to the appeal had suggested that the doctrine of proprietary estoppel had been, "severely curtailed or even virtually extinguished".

In *Thorner* the Claimant had worked for a number of years on the deceased's farm without pay in reliance upon a small number of oblique

assurances that "the farm" would be his despite other opportunities being available to him which he did not take up.

The trial judge held that both the deceased and the Claimant were of naturally taciturn dispositions and that, viewed in context, the assurances were sufficiently unequivocal to entitle the Claimant reasonably to rely upon them.

The Court of Appeal allowed the Defendants' appeal on the basis that the trial judge had failed to consider whether the assurances had been made with the intention of persuading the Claimant to alter his position, rather than merely as statements of present intention.

In the House of Lords the Defendants sought to uphold the Court of Appeal's decision both in relation to the sufficiency of the assurances and on the ground that *Cobbe* had strengthened or re-emphasised the requirement that the proprietary interest claimed be certain and that that could not be demonstrated because the extent of the farm had fluctuated considerably over the period.

The House of Lords allowed the appeal.

As to the certainty of the interest claimed, Lord Walker said that the relation of the estoppel to a specific interest in the Defendants' land was the distinctive feature of proprietary estoppel but noted that Lord Kingsdown in *Ramsden v Dyson* (1866) LR 1 HL129 accepted that an equity could arise and be satisfied despite a degree of uncertainty as to the interest claimed. There was no real uncertainty as to the identity of "the Farm".

The decision is also interesting for its endorsement of the judgment of Hoffman LJ in *Walton v Walton* (14th April 1994 Unreported) to the effect that, unlike a contract, the inevitable uncertainties and unspoken qualifications of oral, non-contractual, assurances need to be considered retrospectively from the point at which the promise falls to be performed. At that point the question is: whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept.

In his *'obiter'* remarks to the London Common Law and Commercial Bar Association in July entitled, 'The Stuffing of Minerva's Owl,' Lord Neuberger said about the section 2 point:

> *"… it is only fair to acknowledge that Lord Scott's approach was consistent with a number of previous Court of Appeal decisions, including ones to which Lord Walker and I were parties – Yaxley v Gotts [2000] Ch 162 and Kinane v Mackie-Conteh [2005] EWCA Civ 45. However, in agreement with the Court of Appeal and Etherton J in Cobbe v YRML, I suggest that section 2 has nothing to do with the matter. In cases such as those in Crabb v Arun and Thorner v Majors, the estoppel rests on the finding that it would be inequitable for the defendant to insist on his strict legal rights. So the fact that, if there was a contract, it would be void is irrelevant: indeed the very reason for mounting the proprietary estoppel claim is that there is no enforceable contract. I accept of course that it is not open to a claimant to take the unvarnished point that it is inequitable for a defendant to rely on the argument that an apparent contract is void for not complying with the requirements of section 2. But where there is the superadded fact that the claimant, with the conscious encouragement of the defendant, has acted in the belief that there is a valid contract, I suggest that section 2 offers no bar to a claim based in equity."*

Conclusion

1. The commercial and domestic consumer contexts are to be sharply distinguished in relation to both common interest constructive trusts and proprietary estoppels.
2. The *Gillett v Holt* [2001] Ch 210 and *Pallant v Morgan* [1953] Ch 43 equities are founded in the doctrines of proprietary estoppel and now have the imprimatur of the House of Lords.
3. The courts are unlikely to hold that a proprietary estoppel could be prayed in aid to defeat s. 2(1) Law of Property (Miscellaneous Provisions) Act 1989.
4. The quality of the assurance said to found a proprietary estoppel is highly sensitive to the context in which it is given. Its enforceability will be assessed when it falls to be performed and depend upon all the events which have happened the issue being whether it would be conscionable for the promisor to resile.

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