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# Top 10 Cases of 2023

07 December 2023

Piers Digby & Robert Lee

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# *Guest v Guest* [2022] UKSC 27; [2023] 3 WLUK 911

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# Background

- The remedy in proprietary estoppel cases finally reaches the Supreme Court.
- Classic proprietary estoppel factual scenario – "one day, my son, all this will be yours".
- Father David promises son Andrew that on his death, Andrew would receive enough of family farm to form a viable business.
- Andrew works on farm from 1982, aged 16, to 2015, aged 49.
- But Andrew and his parents fall out, and David states he will no longer provide anything to Andrew.
- Proprietary estoppel plainly made out, but question is remedy – trial judge considered the correct approach was to first look at the claimant's expectation based upon nature of the assurance made, then check it would not be out of proportion to detriment
- Order for immediate sale of family farm, with 50% of business and 40% of proceeds to sale to Andrew (following earlier will of David)

# Decision

- Father's appeal on two main grounds:
  - a) judge had been wrong to accelerate the relief; the promise would only have taken effect on David's death but order was being made for sale now
  - b) compensation should have been limited to value of contribution made by Andrew plus lost opportunity, not share of business or farm (reliance not expectation)
- Key discussion on *Crabb v Arun District Council* [1976] Ch 179, where Scarman LJ noted that: "I would analyse the minimum equity to do justice to the plaintiff as a right either to an easement or to a licence upon terms to be agreed. I do not think it is necessary to go further than that." (minimum equity principle)
- Rejected by the majority (written by Lord Briggs) – purpose of remedy is to prevent or undo unconscionable conduct; starting point is fulfilment of promise
- Opposed by powerfully argued minority (written by Lord Leggatt) – purpose is to cure detriment – see S Gardner*, The Remedial Discretion in Proprietary Estoppel Again* (2006) 122 LQR 492, 505.
- Appeal on acceleration allowed – choice of two remedies offered

## Practical takeaways

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1. We now have a definitive test for remedy – start with enforcing the promise, then check for being "out of all proportion" with detriment. Good for claimants, bad for defendants.
2. But… practical application of test still difficult to predict and remains to be seen how cases will settle down following *Guest*.
3. Perhaps wider implications – strongly argued minority carries warnings for judicial discretion.

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# *Zedra Fiduciary Services (UK) Limited v HM Attorney General [2023] EWCA Civ 1332*

THE TIMES | News

Monday May 28 2018

Super-rich tried to clear UK's debts after war

Alexander Park Lyle, 1st baronet of Glendelvine in Perthshire, donated £10,000 in 1929 to a fund to clear the national debt. Elsie Mackay died on

## Issue

Appropriate application of funds held on charitable trust under a cy-près scheme under section 67 Charities Act 2011

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# Applicable Law

**67 Cy-près schemes**

…

(3)The matters are—

(a)the spirit of the original gift,

(b)the desirability of securing that the property is applied for charitable purposes which are close to the original purposes, and

(c)the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances.

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## Comment

- Spirit of the gift cannot be separated from the original purpose. Certain elements (encouraging altruism) cannot be stripped out.
- Creative schemes will have difficulty on "closeness" consideration
- Possibly most room for creative schemes under third consideration.

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# *Naidoo v Barton* [2023] EWHC 500 (Ch); [2023] 1 WLR 2162

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## Background

- First authority on undue influence and mutual wills
- Wife does in 2016, husband having died in 1999, survived by five sons and two daughters.
- In 1998, husband and wife each made a will. Each will provided "the two Wills are intended to be in law mutual wills", and left everything to one son (Mr David Barton)
- But wife made subsequent wills, with final will in 2015, with a different son as beneficiary (Mr Charan Naidoo)
- Mr Charan Naidoo brings claim for pronouncement of 2015 Will in solemn form and rescission of any mutual will agreement

# Decision

- Two sources of law on undue influence
- *Inter vivos* transactions, for which the leading case is *Royal Bank of Scotland plc v Etridge (No 2) [2002] 2 AC 773* – unacceptable conduct which meant that consent to the transaction ought not be fairly treated as an expression of that person's free will.
  - a) actual undue influence
  - b) presumed undue influence – where a person takes unfair advantage from relationship giving measure of influence or ascendancy over the other; presumed where there is proof of the relationship and a questionable transaction
- Testamentary dispositions – "such pressure placed on the testator as to overpower the volition without convincing the judgment"; no presumption.
- Mutual wills were former – not testamentary dispositions of themselves and dependent on the agreement for effect.

## Practical takeaways

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1. Think very, very carefully before advising mutual wills – even if wanted, now very vulnerable to challenge. Consider some other form of trust.
2. Now that *Etridge* is confirmed to be involved, make sure both testators have received independent advice explaining the nature and consequences of the transaction, and make sure you've proved for all the details.

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# *James v Scudamore [2023] EWHC 996 (Ch)*

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## Issue

Circumstances in which a probate claim will be barred by delay.

## Facts

- Will executed 1998
- Codicil executed 2002
- Deceased passed away 2010
- Will and codicil proved 2011 by Deceased's wife.
- In 2013, the Claimant son of the Deceased obtained legal advice and alleged codicil was not valid but did not issue a claim.
- Claim issued in 2020

## Held

- Deliberate failure to intervene in probate proceedings will lead to a party being bound by the result
- Explicable delay will not generally be enough to bar a claimant from taking probate proceedings
- Unjustified delay, possibly on its own or combined with waiver of rights will serve as a bar to a claim, or
- Where the delay has led to others' detrimental reliance (e.g. distribution of the estate, subsequent claim barred.

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## Comment

- Prompt action, especially where there has been legal advice.
- Death of witnesses means the presumption of due execution difficult to rebut.
- Consider how this claim may impact on how another party, even someone who would not have given evidence, may be impacted.

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# *Rea v Rea* [2023] EWHC 1901 (Ch); [2023] 7 WLUK 402

## Background

- Classic factual scenario for testamentary undue influence, but with a perhaps surprising conclusion.
- Anna Rea died in 2016; left three sons and one daughter, Rita.
- Common ground she suffered from numerous health problems and was wheelchair bound since 2016; common ground Rita was principal carer although sons' contribution disputed.
- Anna first made will in 1986, leaving her property in four equal shares to her children.
- A subsequent will was written in 2015, leaving her house (substantial part of estate) to Rita.
- Will drafted and explained by competent and experienced solicitor, witnessed in presence of GP, capacity assessment conducted. Nevertheless…

# Decision

- HHJ Hodge KC returned to key authorities from *Re Edwards* [2007] EWHC 1119 (Ch)
  - coercion is pressure that overpowers the volition without convincing the testator's judgment
  - physical and mental strength of the testator relevant
- and *Schrader v Schrader* [2013] EWHC 466 (Ch)
  - the evidence in testamentary undue influence cases is often going to be only substantial

1. Anna's frailty and vulnerability in contrast with daughter's forceful personality
2. Anna's dependence on Rita, insisting on presence even when advised otherwise
3. Timing of the will came almost immediately after reduced presence of sons
4. Significant that Rita made initial arrangements for Anna to see a solicitor
5. Terms and voice of the 2015 Will sharply different to the previous one
6. Nothing of the existence of the Will was ever disclosed to anyone else

## Practical takeaways

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1. These are unpredictable cases – various cases before *Rea v Rea* which didn't necessarily fall the same way.
2. Because of this, very important that the client understands the potential consequence of bringing along anyone who might be perceived of undue influence – explain clearly it could invalidate the Will altogether; perhaps ask if there is anyone else less connected if they need support.
3. There's especially good reason to settle, as the uncertainty can prolong litigation.

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# *Manolete Partners PLC v White [2023] EWHC 567 (Ch)*

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## Issue

Whether the Court can and should compel a judgment debtor to draw down pension benefits under an occupational pension scheme

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## Relevant Law

**Senior Courts Act 1981**

**37 Powers of High Court with respect to injunctions and receivers**

(1)The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

**Pensions Act 1995**

**91 Inalienability of occupational pension**

…

(2)Where by virtue of this section a person's entitlement, or accrued right, to a pension under an occupational pension scheme cannot, apart from subsection (5), be assigned, no order can be made by any court the effect of which would be that he would be restrained from receiving that pension.

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## Held

- HHJ Hodge KC had no doubt about the Court's ability to grant the injunctive relief under Section 37 of SCA 1981:

*"In my judgment, subject to the potential bar presented by s. 91, the court clearly has the necessary jurisdiction to grant an injunction requiring the respondent to exercise such rights as he may have under the Scheme Rules to draw down his pension pot to enable him to satisfy his judgment debt to the applicant."* at [71]

- However, section 91 also posed no bar to the relief sought by Manolete:

*"[T]he order will not have the effect of restraining the respondent from receiving that pension pot but rather the opposite: it will ensure that the payment of that pension pot is made to the respondent"* at [74]

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## Comment

- Clear that pension assets can be a valuable asset for judgment creditors seeking to enforce – in some circumstances
- The interpretation of section 91 appears to be one of form rather than substance.
- Relevance of some wrongdoing?
- Court considered it “highly important” that the principal asset had been derived entirely from funds provided by the Company.

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# *Brake v The Chedington Court Estate Ltd* [2023] UKSC 29; [2023] 1 WLR 3035

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# Background

- Clarification on standing of persons to challenge acts, omissions, or decisions of the trustee in bankruptcy's estate under s.301 of the Insolvency Act 1986
- February 2010-June 2013: Mr and Mrs Brake and PWF in partnership. Disputes ended up in arbitration, judgment and costs against the Brakes, and later the dissolution of partnership.
- Partnership property included the Farm, purchased in 2004 and introduced to Partnership in 2010. Acquired by Chedington in 2017.
- Adjacent to the Farm was the Cottage, purchased in name of Brakes and held as partnership property. In 2012, Brakes start claim for transfer of Cottage.
- Liquidators of Partnership took bids from both the Brakes as trustees of settlement fund and Chedington; Chedington succeeded.
- Arrangement made for liquidators to sell to trustee, with Chedington lending the money, and then sale to Chedington.
- In 2019, Trustee grants license to Chedington to use Cottage; locks changed by Chedington.

# Decision

- S.301 of the Insolvency Act 1986:

  (1) If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit.
- *Mahomed v Morris* [2000] 2 BCLC 536 – some interest needed to apply.
- Trial judge – no interest as trustees, and no interest as bankrupts since bankrupts only ordinarily have interest where surplus expected in the estate, following *Engel v Peri* [2002] BPIR 961
- Court of Appeal – Chedington had evicted Brakes unlawfully (per November 2019 proceedings) based on the license received by the Trustees, may not have happened if license not granted, "a legitimate and substantial interest in the relief sought sufficient to give them standing to make an application under section 303(1)"
- Supreme Court – the interest the Brakes held was an interest derived from possession, not bankruptcy status. The test was whether they had an interest in relief in their role *as bankrupts*.

## Practical takeaways

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1. Significantly reduced risk and clearer planning for trustees in bankruptcies. Nearly a two-stage process, being a) is there a surplus then b) what are the consequences, with no need to approach b) if a) is answered no.
2. Even more helpfully, some specific examples of the substantial other interest – notable one being applications for annulment.

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# *Khan v Singh-Sall & Habib Bank [2023] EWCA Civ 1119*

28 MARCH 2019

## Issue

Circumstances in which the Court will annul a bankruptcy order under section 282(1)(a) Insolvency Act 1986 and the extent of the discretion afforded to the Court

**282 Court's power to annul bankruptcy order**

(1) The court may annul a bankruptcy order if it at any time it appears to the court—

(a) that, on any grounds existing at the time the order was made, the order ought not to have been made…

## Jurisdiction

- Distinction between a lack of jurisdiction and an established practice of the Court
- However, Court still rejected the proposed "exceptional circumstances" test

*"[T]he Court has a discretion to be exercised having regard to all the circumstances; but where the Court has concluded that the bankruptcy order ought not to have been made, there must usually be something of some weight to put in the scales on the other side before that fact is outweighed and an annulment refused. I do not think it is right to say that that has to be exceptional; but it does have to be something sufficient to lead to the conclusion that annulment should be refused"* at [66].

## Comment

- Court unwilling to read a qualification into the discretion
- Clear obiter dicta indicating the limitation point will have to be revisited

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# *Invest Bank PSC v E-Husseini and others* [2023] EWCA Civ 555; [2023] 3 WLR 645

# Background

- Clarifies the extent of s.423 of the Insolvency Act 1986, transactions defrauding creditors
- Invest Bank obtains Abu Dhabi judgment against Ahmad El Husseini, patriarch of El Husseini family and business magnate, seeks enforcement against various UK assets – particularly alleging Defendants had sought to put assets out of reach
- Strictly only argued on real as opposed to fanciful prospects of success
- Defendant said no real prospect because:
  - 1) transaction in sense of s.423 does not extend to dealings with assets not owned beneficially by the debtor, following *Clarkson v Clarkson* [1994] BCC 291
  - 2) even if 'transaction' did go that far, 'person' undertaking transaction not the debtor where transaction was undertaken by company and debtor merely person through whom company acted, because of corporate veil
- Trial judge rejected 1) and accepted narrow version of 2), leading to cross-appeals.

# s.423

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(1)This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—

(a)he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;

(b)he enters into a transaction with the other in consideration of marriage [F1or the formation of a civil partnership]; or

(c)he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

(2)Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—

(a)restoring the position to what it would have been if the transaction had not been entered into, and

(b)protecting the interests of persons who are victims of the transaction.

(3)In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—

(a)of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b)of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

# Decision

- Defendant's appeal refused; 'transaction' was not restricted to dealings with assets beneficially owned by debtor
  - s.423 contains no mention of word property. It only mentions assets in s.423(a), and that is qualified by "otherwise prejudicing interest of" in s.423(b)
  - s.436 defined 'transaction' as a 'gift, agreement, or arrangement' – broad terms
  - no good policy reason to withhold such protection
  - *Clarkson v Clarkson* [1994] BCC 291 distinguished, to be restricted to insolvency cases
- Claimant's appeal allowed
- Interesting discussion of 'disattribution' heresy, see N Campbell and J Armour, Demystifying the Civil Liability of Corporate Agents [2003] CLJ 290, 292.
- Important distinction between identifying act of an agent as being an act of the company and disattributing the act from the agent so it is *only* an act of the company – the latter does not necessarily follow the former and depends on context
- Context of s.423 was to provide broad protection; not intended to be avoided by use of complex company structures

## Practical takeaways

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1. Welcome judgment emphasizing once again that the courts will try to prevent debtors using complex corporate structures to try and avoid claims. If you're attempting to enforce and you find a corporate asset switcharoo going on with the defendant as a central instrument but claiming no active decision, s.423 could help even where e.g. tracing may not
2. But do remain conscious of the requirement for intent.

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# *Denaxe Limited v Cooper [2023] EWCA Civ 752*


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*"… [T]he "immunity" which flows from an approval decision derives in principle from the nature of the review conducted by the approving court, and whether "immunity" extends to a subsequent claim depends upon the allegations made or necessarily involved in that second claim.*

*… [T]he concept of "immunity" flowing from an approval decision is most easily understood as judicial shorthand for the bar on subsequent proceedings that results from an issue estoppel … the essence of the point is that if the judge hearing the approval application determines a particular issue as a step in deciding to give his approval, that will operate as a bar to a party to the application (or one of their privies) seeking to relitigate that issue in subsequent proceedings against the trustees or office-holder" at [126]-[127]*

*"[I]dentifying as clearly as possible the issues which the court is deciding and following that through by identifying specifically the type of claims that would or would not be barred, would, in my view, be a helpful exercise."* at [165].

*"[O]ne size does not fit all. There is a wide spectrum of applications which may be made by trustees or office-holders and the nature of the approval they seek will vary … [T]he nature of any immunity which may arise is highly fact sensitive and must be considered with some care." Asplin LJ* at [171]

## Considerations

- Specifics in the sanction application
- Court may be unwilling to give extensive immunity when dealing with professional office-holders
- No "blanket" immunity

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A happy festive season to you all and remember to tune in next year for 2024’s JP programme featuring Radcliffe Chamber’s finest.