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Kireeva v Bedzhamov

[2024] UKSC 39; [2024] 3 W.L.R. 1010

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Facts

The Respondent was a Russian citizen residing in England since 2017.

In 2018 the Respondent was made bankrupt by a Russian Court.

In 2021 the trustee in bankruptcy applied to the High Court in England for recognition of her position and for assistance in realising real property owned by the Respondent in London.

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High Court

- No assistance could be given regarding the Property.

Court of Appeal

- Majority dismissed the appeal – there was no provision which allowed for a foreign bankruptcy order to have effect on immovable property located in England.
- Arnold LJ dissented stating that there was a discretionary power under common law.

Supreme Court

- At common law no recognition will be given to any provision of foreign law or any order of a foreign court which purports to affect rights or interests in land located in England.

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Paragraph [110]

'It may be said, with some justification, that the application of the immovables rule in the case of a foreign bankruptcy produces a surprising result in leaving the bankrupt's immovable property in this country to be enjoyed by the bankrupt […] when in a bankruptcy under the laws of both this country and the foreign state (in this case, Russia), immovable property would form part of the bankrupt's estate'

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Points of interest

- Navigating cross-border insolvency
- The immovables rule continues to be good law
- Does s.426 Insolvency Act 1986 or Cross Border Insolvency Regulations 2006 assist?
- Separation between legislature and judicial functions in the UK.

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Hirachand v Hirachand

[2024] UKSC 53; [2024] 12 WLUK 300

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Background

Inheritance (Provision for Family and Dependants) Act 1975:

s. 1(a): …that person may apply to the court… on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant.

s. 3: …if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters… the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future…

But…

The Courts and Legal Services Act 1990:

s.58A(6): A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee.

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Court of Appeal

- "maintenance" should not be interpreted too prescriptively
- the payment of debts could form a legitimate part of a maintenance award (*in re Dennis, dec'd* [1981] 2 All ER 140, 145-146

Supreme Court

- first principles: costs only recoverable as costs, even though in many sorts of claims they could equally fit under damages or compensation (e.g. legal costs are foreseeable consequence of breach of contract)
- clear Parliamentary background in wanting to prevent success fees imposing an excessive burden on justice
- no history of provision for unrecoverable part of base fee
- complicated and frustrated the working of Part 36 offers

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Practical Consequences

- Real barrier to a lot of claimants; the entire point of these claims is that reasonable financial provision was not made
- If issue is Parliamentary intent, possibly an issue for Parliamentary review – from a policy perspective, often better worthy claims are supported to succeed
- Advice on merits now requires additionally careful scrutiny of position after costs

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Leonard v Leonard

[2024] EWHC 321 (Ch); [2024] 2 WLUK 377

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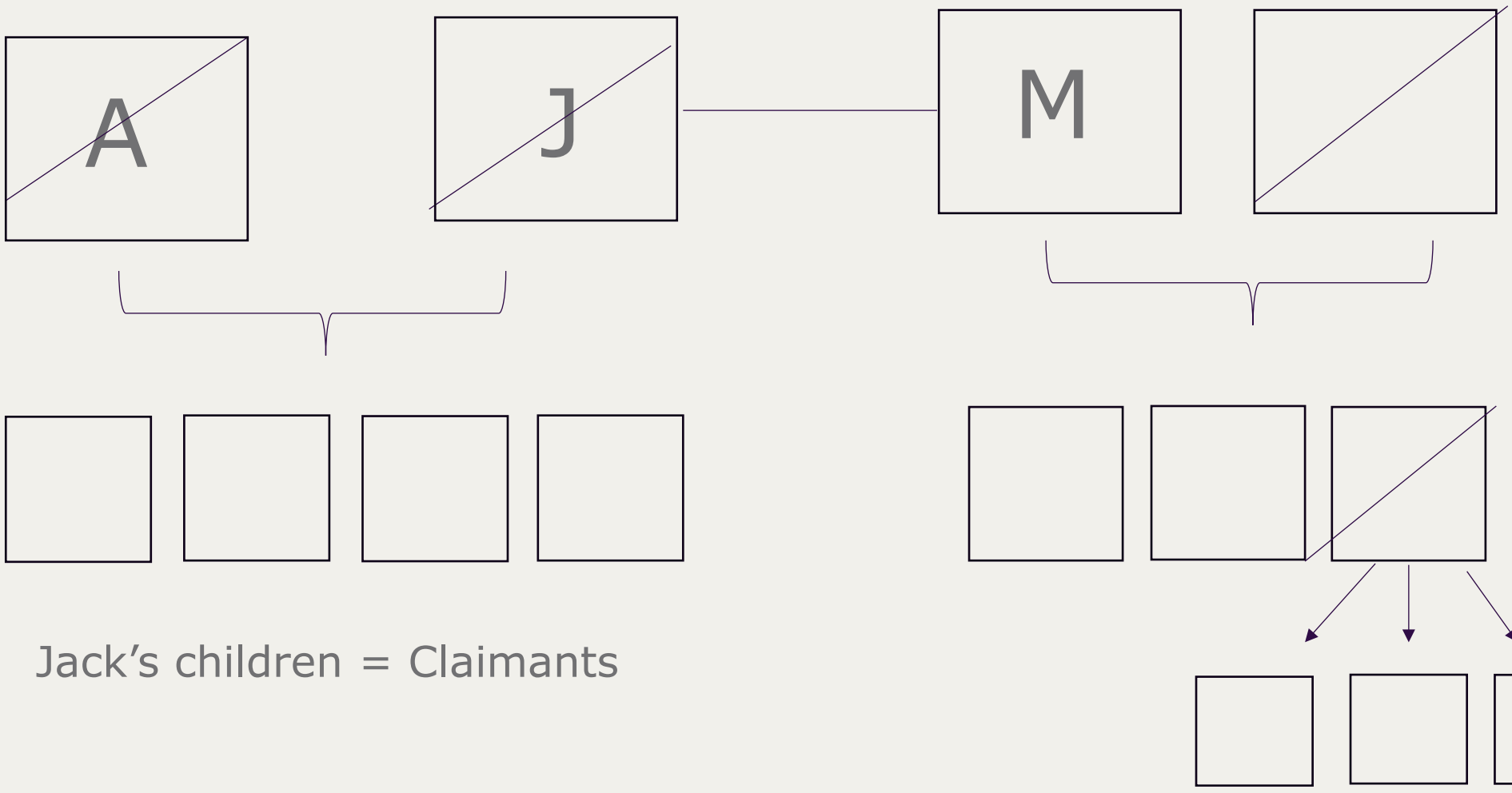
Family tree



Jack’s children = Claimants

Margaret’s Family

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Banks v Goodfellow (1870) LR 5 QB 549 at [565]

(i) shall understand the nature of the act and its effects,

(ii) shall understand the extent of the property of which he is disposing;

(iii) shall be able to comprehend and appreciate the claims to which he ought to give effect;

(iv) and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made".

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Costs

[2024] EWHC 979 (Ch); [2024] Costs L.R. 723

1. Issue based costs

2. Common law probate exceptions

'whether the circumstances, including the knowledge and means of knowledge of the opposing party, led reasonably to an investigation of the matter. If so, the court may make no order as to costs…" (paragraph [13]).

3. Third party costs orders

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Nilsson v Cynberg

[2024] EWHC 2164 (Ch); [2024] 3 W.L.R. 969

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Background

- Another case of cohabiting couples and the usual problem of changes in understanding about effective ownership of property.
- Starting position remains that in *Goodman v Gallant* [1986] Fam 106 – where there is an express declaration of trust over the property by all those beneficially entitled to it, this determines the true nature of the equitable division of the property, overriding any prior common intention constructive trust or equity.
- But… "unless varied by subsequent agreement or affected by proprietary estoppel", *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432.
- What are the requirements of any subsequent agreement? Conventional view was informed by remarks in *Pankhania v Chandegra* [2013] 1 P & CR 16 at [28] – "reliance on Stack v Dowden and Jones v Kernott for inferring or imputing a different trust in this and other similar cases which have recently been before this court is misplaced where there is an express declaration of trust of the beneficial title and no valid legal grounds for going behind it"

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Specific facts

- Husband and wife acquired property in 2001, deed of transfer recording them as joint tenants
- Split (somewhat) amicably in 2009, understanding that the wife is to receive the property. She takes on the financial burden – mortgage, repairs – but no formal transfer is ever effected and divorce proceedings won't be finalised for another decade.
- In 2018, husband becomes bankrupt. Trustees in bankruptcy decide to go after his share of the property.
- Wife claims express declaration varied by subsequent common intention constructive trust and/or proprietary estoppel. Husband not a party per se, but supports her claim.

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Decision

- *Stack v Dowden* clear that express declaration of trust could be modified by subsequent agreement. *Pankhania* did not overrule that, and was being read excessively narrowly – properly understood, *Pankhania* was applying to a situation where it was alleged common intention constructive trust had arisen at the same time.
- No prior judgments had explicitly stated subsequent variations needed to comply with formal statutory provisions.
- By contrast, it was established that proprietary estoppels could apply, and these did not need to be written – would be inconsistent if only one form of equity was subject to this restriction.

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Practical Consequences

- Not necessarily a free-for-all – unusual factual situation where couple agreed, so perhaps less relevant to conflicting cohabitee claims than might be thought.
- Real danger is to trustees-in-bankruptcy. Danger of how to verify whether a common intention constructive trust actually did arise – no direct exposure to it.
- Hallmark here was significant financial contribution by wife, including shouldering all mortgage and repairs. Do the financial homework carefully!

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Sian Participation Corp v Halimeda International Ltd

[2024] UKPC 16; [2024] 3 W.L.R. 937

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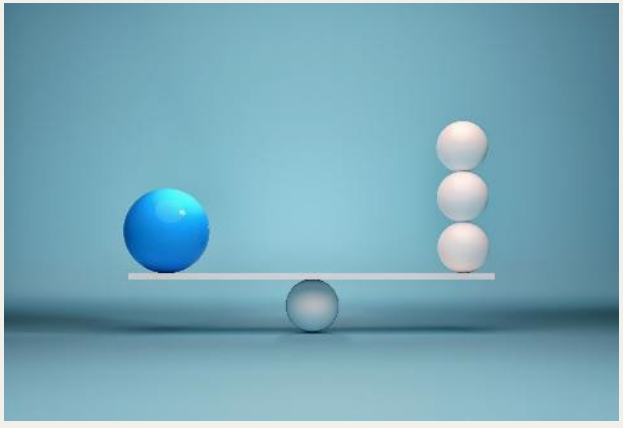
Wind-up or arbitrate?

Privy Council decided winding-up proceedings should only be dismissed or stayed so that arbitration can take place if the debt is genuinely disputed on substantial grounds.

This departed from the English law authority of *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575 (Ch)



Balance between allowing parties to arbitrate when that is what has been agreed versus the public benefit of company's entering insolvency processes without undue delay.

What will other jurisdictions do?

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Re a Company (BHM-000012)

[2024] EWCA Civ 1436; [2024] 11 WLUK 430

Background

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Company/Birmingham

3 January 2024 – application for injunction restraining presentation

5 January 2024 – application accepted for filing

15 January 2024 – application served on parties

17 January 2024 – order that the petition not be issued

18 January 2024 – order dismissing application

Petitioner/Manchester

13 December 2023 – statutory demand presented

12 January 2024 – winding up petition submitted on CE-file

14 January 2024 – notified petition had been filed, deposit needed

15 January 2024 – cheque sent

17 January 2024 – application received, company told too late

18 January 2024 – court issues petition

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Decision

- Important because of various dependent on date of presentation, e.g. s.126 of Insolvency Act 1986 (stay of proceedings), s.127 (avoidance of property dispositions), s. 128 (prevention of attachments)
- Historical dive – the old Insolvency Rules 1986: "No petition shall be filed unless there is produced on presentation of the petition a receipt for the deposit payable on presentation."
- Current Insolvency (England and Wales) Rules 2016:

  7.7. Petition: presentation and filing
  (1) The petition must be filed with the court.
  (2) A petition may not be filed unless -
  (a) a receipt for the deposit payable to the official receiver
  is produced on presentation of the petition…"

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Decision

- Insolvency Proceedings [2020] BCC 698, [2020] BPIR 1211:

9.3 Payment of the fee and deposit

9.3.1 Unless the petition is one in respect of which rule 7.7(2)(b) of the [2016 Rules] applies, a winding up petition will not be treated as having been presented until the Court fee and official receiver's deposit have been paid.

- "filing" is an act of the court; strictly petitioners deliver up for filing.
- filing happens and presentation occurs when payment is made (or cheque received), otherwise unhappy situation where petitioner could deliver up documents, not pay OR, and sit on petition

Practicals

- Pay quickly! Over the telephone increasingly preferable.

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Rea v Rea

[2024] EWCA Civ 169; [2024] 2 WLUK 362

Facts

- Anna (the Deceased) made a will in 1986 leaving the estate her four children, a daughter Rita (the Claimant) and three sons (the Defendants) in equal shares.

- Anna made a new will in December 2015. The will gave her home (the sole asset of value) to Rita and the residue to be shared equally between the four children.

- The will expressly stated that her sons had not helped with her care and that if they challenged the will the executor (Rita) was to resist such claims.

- Her sons were not told about the will during Anna's lifetime.

- After a retrial the High Court decided that the Will was invalid by reason of undue influence. Rita appealed.

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Points of interest

- Undue influence is a high bar. Most cases the starting point is that undue influence is "inherently improbable" (paragraph [27]).

- The Court of Appeal rejected common arguments

  - Frailty
  - "People with forceful personalities do not routinely, let alone invariably, exercise undue influence" (paragraph [46])
  - Dependency
  - Secrecy surrounding the will
  - Arranging the meeting
  - Persuasion

- Evidence from the solicitor and Anna's doctor

- Litigation risk

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Wright v Chappell

[2024] EWHC 2166 (Ch); [2024] B.C.C. 1343

Background

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- Defendants were directors of four companies in the BHS Group in the 2 years prior to entering liquidation.
- Previous successful trial against them for misfeasance and wrongful trading, concluding in 2023, but… issue of quantum for "*Sequana* duty" adjourned for further consideration
- Flashback time: in *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, Supreme Court had considered the nature of the duty owed by directors to creditors. On the facts of *Sequana*, there had been no *Sequana* duty, so issue of quantum never considered.
- Liquidators contended:
  - 'but-for' test applied when assessing compensation without need for foresight/remoteness
  - *prima facie* loss is loss in net assets available on insolvency
  - liability is joint and several
- Directors contended:
  - any individual quantum of compensation needed to be attributable to a specific breach
  - Court had the discretion to apportion liability rather than opt for joint and several

Decision

- Back to first principles: the point of equitable compensation is to make good the loss to the underlying fund (*Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWCA Civ 2291).
- The term "compensation" can be misleading; the remedy is fundamentally restitutionary or restorative – it aims to put back into the fund what was taken out, not to restore the fund to where it would have been but for the breach.
- This applied to directors of companies in respect of company assts just as much as trustees in respect of the trust fund.
- Middle ground approach – not sufficient to simply say "there has been a breach of duty, and a consequent depreciation in value of assets, ergo value of assets should be restored". Need to show effective cause (although not necessarily sole cause); however, no need to link compensation to specific and particular breach by given director.
- Unlikely court had discretion – would lead to differential remedies between s.212 Insolvency Act 1986 applications and Part 7 claims.
- The restrictions of s.214 of the Insolvency Act 1986 (wrongful trading), which required that the "person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation" did not also restrict misfeasance claims.

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Practical Consequences

- Great news for liquidators. Scope of recovery can be very significant indeed – consider difference between what is recoverable from an individual act of wrongful trading, and the loss that results from all the other acts that occurred because the company kept going when it otherwise shouldn't.
- Notwithstanding comments on s.212 and s.214 both having relevance, does make s.212 far more attractive – faster Insolvency Act application process, but without the high bar of knowledge. Best of both worlds.
- Conversely, very real reason for directors to beware! Negligent breach of trust in particular.

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Manolete Partners Plc v White

[2024] EWCA Civ 1418; [2024] 11 WLUK 275

Facts

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Manolete obtained a judgment against Mr White for breach of director's duties which remained unpaid.

Mr White had an occupational pension which was not in payment.

Manolete applied to the High Court for an injunction to force the Defendant to draw down his pension to satisfy some of the judgment debt.

The High Court ordered Mr White to draw down his occupational pension scheme benefits. Mr White appealed.

The Court of Appeal found that Mr White could not be ordered to draw down his occupational pension to make it available to Manolete for enforcement purposes.

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Section 91(2) Pensions Act 1995

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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Points of interest

- Enforced the protections that occupational pensions can have against creditors.
- Not just and convenient to construct an order for the purpose of circumventing a statutory prohibition (paragraphs [109]-[110]).
- The position would be different if fraud was at play - section 91(5) Pensions Act 1995.
- When a pension is being drawn – consider income payment order, attachment of earnings order, excessive contributions – section 91(4) Pensions Act 1995.

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Rahman v Hassan

[[2024] EWHC 1290 (Ch); [2024] 5 WLUK 492

Background

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- Claimant a relative of the deceased, increasingly close friend as deceased fell into ill health. Deceased intended to execute a will to make claimant his beneficiary, but died before completion. Whilst contemplating his death, called claimant to his bedside and made various arrangements – passwords, land certificate.
- The donor must take a sufficient step to implement the gift by delivering the donee the thing itself, or some means of accessing or controlling the thing – what was called in Hawkins v Blewitt (1798) 2 Esp 663 in quite a nice turn of phrase as "parting with dominion" of the thing given.
- Easy to understand for chattels – what about more complex bundles of rights? *Sen v Headley* [1991] Ch 425 answers this with the *indicia* of title.
- Outstanding question about whether this can apply to registered land. No obvious *indicia*.

Decision

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- Digital accounts – password and security credentials equivalent to key.
- Here, land certificates held. Sufficient *indicium* of title.

  "It is not necessary for me to decide what would have happened to the gift of the house if Mr Al Mahmood had not had the land certificate. But I may say that, as at present advised, I would have held that the handing over of an office copy entry of the register with the relevant donative intent would have sufficed. As I have already said, the purpose of the handing over of an object is to demonstrate the intention to make the gift (see Woodard). The fact that there is a particular statutory means of transferring the legal estate in the land is neither here nor there."
- Is this correct? Watch out for the appeal! Balance of respecting rights of dying individuals in difficult circumstances versus having sufficient safeguards. But is this the right safeguard?