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Call for evidence on SMI payments

A call for evidence into how Support for Mortgage Interest (SMI) might operate for claimants in the future has been published by welfare reform minister, Lord Freud.

SMI – which costs the government £400m a year – was introduced to help people struggling to make their mortgage payments. Without it, a claimant who could not keep up with mortgage payments would either have to sell their home or have it repossessed.

However, the government says SMI was intended to provide help to those people who are having short-term problems with their mortgage payments and is not meant to be a long-term solution to home ownership.

It wants views on: whether it is right for future new claimants of SMI to receive support indefinitely without the taxpayer having an opportunity to recoup some of those costs to help others in need; and if, after a fixed period of time, new claimants who want to continue receiving support should do so in exchange for a charge being levied on the property which would be paid back to the taxpayer upon its sale.

His Lordship said: "The current system of SMI payments does not encourage people to get on top of their own finances. It is also not sustainable. Even with today's low interest rates it costs the government £400m a year.

"We are committed to supporting homeowners to stay in their own homes when times are hard. But in the future this type of support must be fair and affordable."

Ruling on negligence and deficient lending practices

A recent High Court judgment sets out guidelines for the assessment of contributory negligence in cases where poor lending practices have contributed to losses on the resale of repossessed property.

John de Waal, barrister at Hardwicke, said *Paratus AMC Ltd v Countrywide Surveyors Ltd* is an important decision for subprime mortgage lenders and the professional indemnity insurers (PII) of surveyors and solicitors.

It deals, he said, with the consequence of securitisation on claims for negligence and the assessment of contributory negligence when loans at this end of the market go bad.

"The idea that a type of lending, eg, 90% loan to value (LTV), was negligent was rejected. This is a significant blow for professional indemnity insurers. However the judge was critical of certain lending practices; eg, failing to check the borrower's income."

The case arose after Paratus lent £166,500 to David Stockton as a buy-to-let mortgage on a flat for sale at £185,000. The loan was self-certified. The flat was valued at £185,000 by the defendant. Stockton defaulted, after which the property was repossessed and sold for £118,103.

De Waal said: "The claimant sued Countrywide for negligence, but lost – just – on the basis that the flat was in fact worth £175,000 at the time and this was within a reasonable margin of error."

There are two key findings in the case, he said: that lending at 90% LTV on a self-certified basis is not in itself negligent, but that the claimant's failures to investigate Stockton's income/debts were sufficiently negligent to justify a finding of 60% contributory negligence had the claim succeeded.

De Waal said there has been something of a "shadow war" between lenders and PII insurers of late, with anecdotal evidence suggesting that most claims settle at fairly low levels. "This important out-in-the-open skirmish will give helpful guidance to both sides as to how courts will decide cases that come to trial."

New guidance on social housing penalises unemployed

New guidance on how social housing is allocated by local councils and housing associations has been put out for consultation by the government.

Housing minister, Grant Shapps, said the new allocations guidance will release councils and housing associations from "the shackles of the current tick-box approach for allocating social homes".

The new freedoms, he said – which will allow councils to set the lengths of new tenancies – will ensure councils and housing associations can reward achievement, encourage housing mobility and tackle the tenants who are able to work but do not take up opportunities for jobs.

Several councils, including Westminster, Manchester and Southend, plan to give priority to people in work, while Wandsworth council is proposing a pilot scheme – *Housing into work* – where unemployed applicants of working age, who are physically capable of work, will be granted two-year tenancies as long as they make every effort to find work or enroll on a training course.

Shapps said: "For years the system for social housing has been associated with injustice – where rewards are reaped for those who know how to play the system the best. Despite this terrible image, a lazy consensus in social housing has ensured that, for an entire generation, no one has bothered to do anything about it."

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Shifting the burden

A recent High Court decision clarifies a number of issues surrounding the service of contractual notices, as ***Ellodie Gibbons*** *reports*

In *Calladine-Smith v Saveorder Ltd* [2011] EWHC 2501 (Ch), the High Court considered the service of notices under the Leasehold Reform, Housing and Urban Development Act 1993 (LRHUDA 1993). In various places, LRHUDA 1993 requires that notices are "given", yet fails to define "given". Further, LRHUDA 1993 contains no deeming provision unlike, for instance, the Civil Procedure Rules, which do not apply to a notice served under LRHUDA 1993. For example, there is no provision that if a notice is posted on a particular day it is deemed to have been given two days later. The Act does provide, however, by virtue of s 99(1)(b), that a notice may be sent by post. Consequently, the Interpretation Act 1978 (IA 1978), s 7 applies, which provides that service of a document is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Lack of detail

The lack of more detailed provisions as to service in LRHUDA 1993 can cause significant problems. For example, if a counter-notice is not received, the nominee purchaser, in a claim to collectively enfranchise, and the tenant, in a new lease claim, can apply to the court for an order determining the terms on which he is to acquire the freehold or the new lease, as the case may be (see LRHUDA 1993, ss 25 and 49). While ss 25 and 49 suggest that the court has a discretion in the matter, it is now clear that it does not. So long as the court is satisfied that on the relevant date the right to acquire the freehold or a new lease existed, the court must make an order on the terms proposed by the tenants (*Willingale v Globalgrange Ltd* [2000] 2 EGLR 55). In other words, the tenants acquire the freehold or a new lease by default. How to serve a notice is therefore a vexed question for practitioners and it is surprising that there has previously been little authority on the point.

Lower court decision

In *Calladine-Smith v Saveorder Ltd*, Mr Calladine-Smith was the qualifying tenant of a flat for the purposes of LRHUDA 1993, who had served a notice on the defendant, his landlord, of his claim to acquire a new lease. Contending that the defendant had not served a counter-notice in reply, Mr Calladine-Smith applied for an order determining the terms on which he was to acquire a new lease pursuant to s 49. The defendant disputed his entitlement to an order on the basis that it had given a counter-notice.

The judge at first instance found that the defendant's solicitors, on behalf of the defendant, had properly addressed, pre-paid and posted a letter containing a counter-notice to Mr Calladine-Smith. However, she also found that Mr Calladine-Smith had not received that letter. Applying s 7, the judge found that it was not sufficient for Mr Calladine-Smith to prove non-receipt, but that he also needed to prove that the letter had not been properly addressed, pre-paid and posted. As he could not so prove, the judge found that the counter-notice had been served.

Appeal

On appeal by Mr Calladine-Smith, Morgan J considered two points arising out of the words "unless the contrary is proved" in s 7:

(1) whether the "contrary" is the contrary of the allegation that the letter was properly addressed, pre-paid and posted and no other matter (as the defendant contended) or whether the "contrary" is the contrary of the deeming provision that the letter in question was delivered in the ordinary course of post; and
(2) whether the reference to the contrary being "proved" required no more than evidence which supported a finding on the balance of probabilities that the letter was not delivered or whether there was a burden on the addressee of the letter to lead positive evidence as to what happened to the letter and/or a burden on the addressee to show that the sender of the letter was aware that the letter had not been delivered.

The judge had no difficulty in rejecting the defendant's contention as to (1) and held that the "contrary" is the contrary of the deeming provision that the letter in question was delivered in the ordinary course of post. As to (2), the judge held that s 7 required a court to make findings of fact on the balance of probabilities on all the evidence before it. As the judge at first instance had found that the counter-notice had not been received by Mr Calladine-Smith, the contrary of the deeming provision was indeed proved and, therefore, the counter-notice had not been served on him.

Clarification

The case clarifies a number of issues surrounding the service of notices under LRHUDA 1993 and, to a certain extent, contractual notices in general.

First, it clarifies what is meant by "given". While many practitioners work on the basis that "given" involves receipt, there is no authority to this effect. It is, however, implicit in Morgan J's judgment that "given" must be taken to involve receipt and therefore differs from terms such as sending, serving and dispatching.

Second, *Calladine-Smith* puts paid to the notion that s 7 fills the gap left by the draftsmen of LRHUDA 1993 and inserts a deeming provision upon which reliance can be placed in all circumstances. Indeed, the solicitor for the defendant gave evidence that she used the ordinary post to serve notices rather than recorded or registered delivery on the basis that using the latter method would mean the notice could be returned, but using the former reliance could simply be placed on IA 1978. This is to ignore the caveat in s 7. As was demonstrated in *Calladine-Smith*, it may not be difficult to prove the contrary. Consequently, while the ability to rely on s 7 is superficially attractive, it may prove to be of no benefit at all.

Third, and this applies to the service of notices under other Acts to which s 7 applies, it is now clear that when applying s 7 the contrary need only be

proved on a balance of probabilities. In *Lex Service plc v Johns* [1990] 1 EGLR 92 there are comments to the effect that for the purpose of s 7 the addressee of the letter, if he is to avoid a finding that he has been served, must do more than simply deny the fact of service; he must adduce positive evidence, for example, that the document had been returned to sender, not signed for or received by someone other than the addressee. Keen to limit the application of *Lex Service*, which has been the subject of much judicial criticism, Morgan J found that it was a decision on the combined operation of the Landlord and Tenant Act 1927, s 7 and s 23 and therefore not binding when considering the operation of s 7 alone.

Calladine-Smith may cause renewed anxiety for those seeking to serve notices under LRHUDA 1993 or indeed any other statute to which s 7 applies. If the recipient can prove non-receipt by a mere denial, can the sender ever be certain of being able to prove service?

The decision in *Calladine-Smith*, however, is not as concerning as it may appear. Morgan J's decision was based upon the findings of fact made by the judge at first instance and, in particular, the finding that Mr Calladine-Smith had not received the notice. In turn the judge had been compelled to reach this finding as Mr Calladine-Smith's evidence on the point was not challenged and it was accepted on behalf of defendant that the notice had not been received.

Effect of s 7

The effect of s 7 is to shift the burden of proof, so that once the sender of a document has proved that he has properly addressed, pre-paid and posted a letter containing the document, the burden shifts to the recipient to prove non-receipt. Where the evidence is evenly balanced, the burden will not be discharged and service will be proved. So, for example, where a document is found to have been posted, but the recipient denies receipt and the document is just as likely to have been eaten by the recipient's dog once pushed through the letterbox as it is to have been lost in the post, a mere denial of receipt by the recipient is unlikely to be sufficient to avoid a finding that he has been served.

That said, the prudent course to adopt when serving a notice must be to use a method of service which produces evidence of receipt, for example, registered or recorded delivery or service by hand, or to obtain an acknowledgment of receipt. In *Calladine-Smith* the defendant's solicitor had served the counter-notice under cover of a letter asking Mr Calladine-Smith to confirm receipt. However, and despite having contact details, she did nothing when receipt was not confirmed.

Sometimes picking up the phone provides a very simple solution to what may appear a tricky legal problem.

Ellodie Gibbons,
Barrister, Tanfield Chambers

A pyrrhic victory?

Kerry Bretherton *assesses the impact of a recent Supreme Court ruling on 90-year leases*

On 9 November 2011 the Supreme Court handed down judgment in *Berrisford v Mexfield Housing Co-operative Ltd* [2011] UKSC 52; [2011] 3 WLR 1091. The Supreme Court held that Ruza Berrisford was not a periodic tenant but rather that she held what would have been a tenancy for life, before 1925, and so that was converted into a 90-year term by the Law of Property Act 1925 (LPA 1925), s 149(6). Accordingly, a notice to quit was not sufficient to determine Miss Berrisford's right to occupy the premises and possession could only be obtained if Mexfield was entitled to forfeit the lease.

Many of those involved in social housing are interested in the ramifications of the decision. While the position is now clear in relation to the occupants of fully mutual housing associations who occupy under similar agreements, it remains to be seen whether the decision extends further. To consider this issue it is necessary to consider the particular of facts of the case.

Miss Berrisford had been a home owner who fell into mortgage arrears. She was assisted by a mortgage rescue scheme and entered into an agreement which limited the landlord's right to recover possession. The relevant provision specified: "6 This agreement may be brought to an end by the exercise of the right of re-entry specified in this clause but *ONLY* in the following circumstances." These included arrears of rent in excess of 21 days, breach of term or Miss Berrisford ceasing to be a member. Tenants of fully mutual housing co-operatives were expressly excluded from the security of tenure conferred by the Housing Acts 1985 and 1988.

Rejection

The Supreme Court rejected the contention that the construction of the agreement was such that the intention of the parties was to create a periodic tenancy. Lord Neuberger found that the intention of the parties was that the agreement would only be determined in the way specified in cl 6 of the agreement. He considered that the construction of the agreement was not such that there was a right to determine the agreement by notice to quit both because of the natural meaning of the words of the agreement and because there was little point in having a right to forfeit pursuant to cl 6 if the agreement could be determined by notice to quit. The Supreme Court considered that the lease was what would have been a lease for life, prior to LPA 1925 and so took effect as a 90-year lease.

What must be noted is that the issue was essentially one of construction of the particular leases granted by Mexfield, albeit those leases may well be mirrored by those granted by other fully mutual housing co-operatives. While it is difficult to envisage a fully mutual housing co-operative which could argue that it had not granted 90-year leases to its occupants (unless the terms of the occupancy agreements were very different from the Mexfield agreement) it is difficult to envisage a wider application.

Falling outside

The most common types of tenancy which fall outside the provisions of the Housing Acts 1985 and 1988 are tenancies provided by local authorities in accordance with obligations under the homeless legislation. Many such tenancies provide that possession will be sought if there is a breach of the terms of such agreement or if the statutory duty ends. Those agreements are not similar to the Mexfield agreement. Few (if any) such agreements contain a provision as emphatic as the "*ONLY*" in the Mexfield agreement, but more importantly any suggestion that such tenancies

would be construed as a tenancy for life if granted prior to 1925 can only be regarded as absurd.

The intention of Parliament in excluding such tenancies from statutory protection is because they are intended to be precarious; it is difficult to envisage a more striking contrast than with the findings of the Supreme Court about the intention of the parties in *Mexfield*. This statutory context is critical in demonstrating a positive intention not to create anything beyond a periodic tenancy. There are few other tenancies which are not either assured (including shorthold) or secure and so it appears the rights of occupancy pursuant to a 90-year lease will be limited.

Benefits

It has been suggested that there may be difficulties for occupants of fully mutual housing co-operatives in securing housing benefit. Historically, housing benefit was payable because tenants of fully mutual housing co-operatives were considered to be periodic tenants.

However, the Housing Benefit Regulations 2006 restrict payments to certain types of occupancy. Long tenancies are expressly excluded by reg 12(2)(a). The Department for Work and Pensions website advises that in cases where a tenancy was granted for a period in excess of 21 years housing benefit is not payable although pensions credit, income support and job seeker's allowance may assist.

The extent to which other benefits are payable at a level equivalent to housing benefit has yet to be determined and it is certainly to be hoped that a sensible method of providing for payment can be ascertained.

However, if there is any difficult in achieving a level of payment similar to housing benefit levels, *Mexfield* could prove something of a pyrrhic victory for tenants of fully mutual housing co-operatives as an inability to pay will be of great relevance to any application for relief from forfeiture.

Kerry Bretherton
Barrister,
Hardwicke

No repudiation

Non-compliance with a contract based on a mistaken belief as to the terms of a court order was not repudiation. However, the contract payments still had to be made. The court order had not removed the obligation. It could not vary the contract.

Repudiation of a contract occurs where one party to it communicates to the other (through words or conduct) that it no longer intends to be bound by it, usually by committing a major breach of a significant obligation in the contract. The innocent party can then decide whether to:

- seek to enforce performance of the contract and remedy of the breach; or
- accept repudiation and treat the contract as at an end (if the parties can be restored to their former position) in which case he can sue for damages caused by the repudiation.

To be repudiatory, the breach must go to the root of the contract. Its effect must be to:

- deprive the innocent party of substantially the whole benefit that it was intended, as expressed in the contract, that it should obtain; or
- render it incapable of performing its own obligations.

In *Quest Advisors v McFeely* [2011] All ER (D) 83 (Dec), a dispute arose in relation to an agreement between Quest and Mr McFeely for the sale to him of a site and subsequent lease-backs to it of the commercial space in the completed development. The agreement provided for Quest to make a contribution to building costs (a sum per square metre) by way of three staged payments to McFeely (the last being due on practical completion). The grant of the leases was subject to the payments having been made.

The High Court rejected a claim by McFeely that an assignment by Quest to another company of its rights and obligations amounted to a repudiation of the contract. The assignment was not effective, but nor did it amount to a repudiation. The order (original order) made confirmed that McFeely must grant the leases to Quest provided that it had paid the building costs contribution on or before practical completion.

A dispute then arose in relation to the staged payments. Quest argued that the original order had superseded the contract and its only obligation was to pay whatever was due as a building costs contribution on or before practical completion. The High Court held that the order did not remove Quest's obligation to make the three staged payments. However, the failure to make at least the first one was not a repudiation of the contract. Quest's stance was based on its construction of the judge's order and, even though it was wrong, it did not amount to a repudiation. The principle in *Woodar Investment Development v Wimpey Construction (UK)* [1980] 1 All ER 571 applied: a failure or refusal to implement the terms of a contract, based only on a mistaken belief as to its terms will not, without more, constitute a repudiation.

The Court of Appeal upheld the High Court's decision in the main.

Staged payments

The judge had been correct to hold that the original order did not remove Quest's obligation to make the staged payments. The purpose of the declaration in the original order was to confirm the obligation to grant the leases. The only claim before the court was by Quest for the performance of the contract. There was no counter-claim for the staged payments. In any event, the court had no power, on an application for specific performance, to dispense with or relieve Quest from its own obligations under the contract. The order could not alter the terms of the contract.

Repudiation

The High Court had also been correct to reject the repudiation argument. The reasoning had been based on the principle endorsed in *Woodar* and the judge clearly accepted that Quest's refusal to make the staged payments was based on a genuine, albeit mistaken, belief about the effect of the original order. McFeely's argument could only succeed if it could be shown that Quest was intent on refusing to perform its obligations regardless of

whether the original order had relieved it of having to do so. The evidence pointed to the opposite conclusion.

The High Court's reasoning was also based on the premise that once the court has made an order for specific performance, the ability of the party with the benefit of the order to exercise his contractual rights under the contract is circumscribed by the order. The contract remains in effect and is not merged in the judgment, but the applicant has placed the supervision of its performance into the hands of the court. Its rescission or cancellation can only be achieved by an order of the court.

Interim payment

The Court of Appeal held that the High Court had been wrong to order Quest to pay a sum on account of the first two staged payments. The judge had ordered the payment to be made on account (with any final payment being adjusted on completion) as it was not possible to determine the amount of the payments without a further hearing to decide issues such as the measurement of the commercial space as built. This was not an order for specific performance of the staged payments clause, but an order for an interim payment under CPR 25.7. However, the only possible conditions for making such an order were not satisfied:

- that Quest had admitted liability (it had not); or
- that if the claim went to trial, McFeely would obtain judgment for a substantial sum of money.

The problem with the second condition was that McFeely had not counter-claimed for the amount of the staged payments. At the time the order for payment was made there was no comprehensive evidence about the condition of the property (there was now a substantial dispute about the way the commercial space had been constructed and the alleged effect on rental value).

The judge had been wrong to deal with the matter on a summary basis, without notice to either party and in the absence of any application by McFeely. He should have left it to McFeely to make an application for interim payment. This would have had to be supported by evidence about the state of the works and could not have taken place before McFeely had complied with the judge's order to give Quest access to inspect and measure. The current dispute on the state of the works would then have arisen and it was "inconceivable" that the order for payment would have been made. The Court of Appeal varied the order to provide for payment of the lesser sum which Quest conceded was likely to be payable less an amount in respect of costs.

The Court of Appeal confirmed that while failure to make the payment as originally ordered (and once a stay had been refused) was a clear breach of the court's order, it did not amount to a repudiation of the contract. McFeely would have had to establish that the order was for the performance of the payment clause in the contract, which it was not. It was, at most, an order for an interim payment on account of what McFeely might recover as part of a final judgment. In any event, the successful appeal against the making of the order for payment probably meant there was no repudiation.

Joanna Bhatia

Judges rule

Questions of construction on which a rectification claim depended and an estoppel claim turning on the same facts fell to be determined by the court, despite a widely drawn disputes clause confirming that any dispute would be referred to an expert

In *Persimmon Homes v Woodford Land* [2011] All ER (D) 07 (Dec), the High Court had to decide which issues arising from an agreement for the grant of put and call options, relating to a development site, fell to be determined by an expert and which (if any) by the court.

The disputes clause provided at cl 18.1 that "any dispute" arising between the parties would first be referred to a director from each of the respective parent companies for resolution. If they could not resolve it, sub-cl 18.1 confirmed cl 18.2 would apply. Clause 18.2 confirmed that any disagreement between the parties to be resolved "under this sub-clause" should be referred to an expert. Various other clauses in the agreement provided for any disputes on the matter which were the subject of the clause to be determined under cl 18.

Scope of dispute resolution procedure

The High Court held that the scope of the dispute resolution procedure was not confined to cases where it was specifically incorporated by reference to it in other clauses in the agreement. That placed an unwarranted limit on the words "any dispute" in cl 18.1. The words "under this subclause" in cl 18.2 did not change this. They were simply a reference back to cl 18.1. All the other clauses in the agreement referred to cl 18 as a whole. The scope of cl 18.2 was narrower than cl 18.1, but only because cl 18.2 excluded disputes which had already been resolved under cl 18.1. That apart, the full generality of cl 18.1 carried forward into cl 18.2.

However, both parties agreed that a claim for rectification fell outside the scope of cl 18. The court confirmed that this was because rectification was a discretionary remedy, with retrospective effect, that only the court could grant. This exception was significant. It showed that the words "any dispute" in cl 18.1 could not be read literally. The question was where to draw the boundaries of the exception.

There was no presumption that the exception would be construed as narrowly as possible. The court should ask itself what the parties, as reasonable businessmen, should be taken to have intended.

It was also true that, in contrast to an arbitration clause, when a dispute resolution clause in a commercial contract requires disagreements to be resolved by an expert, there is no presumption that the parties intended all the disputes to be determined that way. However, here the apparently unqualified width of the disputes clause may be thought to provide a stronger indication in favour of expert determination than some cases.

Intention of the parties

Adopting this approach, and given the existence of the rectification claim, which was properly pleaded and had a reasonable prospect of success, the parties must be taken to have intended

that that court should also be free to decide any questions of construction of the agreement on which the claim depended and any estoppel claim turning on a detailed investigation of essentially the same facts.

The parties would have wished to avoid, as far as possible, conflicting decisions by the expert and the court on such questions of construction. The court was also influenced by:

- the procedural unsuitability of the estoppel claim for determination by an expert;
- the fact that if the court were to hear a rectification claim before any associated questions of construction had been referred to an expert, the decision of the court would be binding on the parties and *res judicata* (already judged) and reference to an expert would be impossible. However, the agreement did not require associated questions of construction to be referred to an expert before a rectification claim could proceed and, if it did, this could lead to inconsistent determinations by the expert and the court.

Question of construction

It was true that this finding meant that a question of construction may or may not fall within the mandate of the expert depending on whether it was associated with a rectification claim. Also the risk of conflicting decisions could not be completely eliminated as a question of construction could be referred to an expert and the losing party may then decide to seek rectification. The court would still have to consider the question of construction for itself (as had happened) – and if the court was correct on that point – in relation to another rectification claim in relation to the agreement which is the subject of appeal to the Court of Appeal (*Barclays Bank v Nylon Capital* [2011] All ER (D) 214 (Jul)). However, if a losing party decides to postpone a rectification claim until the question of construction has been decided by an expert he "has only himself to blame". By contrast, if the court found the other way, the question of construction would have to be referred to an expert, even though it was raised at the same time as the rectification claim and even though the risk of conflicting decisions would then be unavoidable.

Joanna Bhatia

Insufficient trigger

The limited relationship of trust and confidence between a separated couple did not trigger a presumption of undue influence.

Undue influence arises where a transaction is to the manifest disadvantage of the person subjected to the dominating influence. It is the abuse of a relationship of trust and confidence or the exploitation of a vulnerable person. In narrowly defined relationships (eg solicitor and client), undue influence is presumed. In other cases, the burden lies on the claimant to establish it by showing there is a relationship of trust and confidence and a transaction calling for an explanation. If the defendant cannot counter the *prima facie* case, there is a rebuttable presumption of undue influence. The force of the presumption depends on the degree of trust and confidence or vulnerability in the relevant relationship and the extent of the disadvantage to the claimant (see *Royal Bank of Scotland v Etridge* (No 2) [2001] 4 All ER 449).

In *Liddle v Cree* [2011] All ER (D) 122 (Dec), the High Court dismissed Mr Liddle's claim to set aside the partition of a farm on the ground that it was procured by the undue influence of Mrs Cree.

Nature of relationship

There was not the type of confidential relationship between Mr Liddle and Mrs Cree necessary for a presumption of undue influence in relation to a transaction calling for an explanation. There was a limited relationship of trust and confidence between them. The partition was an unwise transaction for Mr Liddle in terms of securing for him continued long-term residence at the farm during his retirement. However, he discussed and agreed it with Mrs Cree at arms' length at a time when, although he continued to trust her integrity and business judgment, he was no longer looking to her (if he ever had done) for advice and guidance as to his best interests when negotiating the consequences of their separation.

Transaction

Even if there had been the required confidential relationship, the transaction was not one calling for an explanation. The terms of the partition did not trigger the evidential presumption of undue influence. It was a means of dividing the farm which had been acquired and improved mainly at Mrs Cree's expense. It may have been unwise from Mr Liddle's perspective, but the law does not generally protect people with capacity from making unwise or foolish bargains. The transaction was not unfair. Mr Liddle received a greater share of the farm, in terms of value, than his contribution to it and his severed part was readily realisable.

Rebuttal of presumption

Even if the presumption of undue influence had been triggered, there was sufficient evidence to rebut it. Mr Liddle had not agreed to take his part of the farm because Mrs Cree had abused a relationship of trust between them. He unwisely thought it would serve his purposes. The worst that could be said about Mrs Cree's conduct was that she did not advise him against it or insist that he take independent advice. However, she was under no duty to him to do so.

Deterioration in health

The partition was completed in March 2010, but was not registered until August 2010. By that time the decline in Mr Liddle's health had reached a stage where it had become a thoroughly imprudent transaction from his perspective. It was by then a transaction calling for an explanation. However, Mrs Cree was entitled to assume at the end of March 2010 that the transaction was concluded as between them. She was not then under any conscientious obligation to assist Mr Liddle to reconsider or withdraw from it. She committed no abuse of their diminished relationship by continuing to supervise the progress towards registration from late May until August 2010 (the period when the serious deterioration in Mr Liddle's ability to look after himself took place). There was nothing about his apparent or actual mental health in March which required her to encourage him to think again. By mid-2010, Mr Liddle and Mrs Cree had been living substantially apart for well over a year. It was difficult to conclude that an

obligation to have regard to Mr Liddle's best interests arose for the first time at that stage, in relation to a transaction which they had already informally agreed after separating.

In any event, the transaction was not unfair financially. The difference in the value of the two parts of the farm reflected Mrs Cree's much larger contribution to the purchase and improvement of the farm and their business and personal expenditure in the previous decade. There was also no reason why Mr Liddle could not have sold his part of the farm and obtained a sufficient sum to find himself reasonable accommodation.

Unconscionable bargain?

There appeared to be no authority dealing with an increase in vulnerability between the time when an otherwise unobjectionable transaction was informally agreed and when it was completed. Mr Liddle argued that:

- by March, or certainly August, the partition had become a harsh and oppressive bargain;
- it was completed when he was suffering from a serious bargaining weakness;
- even if it had been informally agreed in unobjectionable circumstances, Mrs Cree took unconscionable advantage of him in proceeding with it despite his declining health.

Even assuming that there was a general equitable principle that the court will interfere with the freedom of contract in the case of a harsh and unconscionable bargain, the requirements were not satisfied. The terms of the partition were not harsh or oppressive. It may have been an unrealistic means of providing Mr Liddle with accommodation at the farm, but he obtained unencumbered property of sufficient value to buy accommodation. He obtained the part of lesser value due to Mrs Cree's larger contribution. In addition, Mrs Cree's conduct during 2010 in pursuing the transaction to completion could not be described as taking unfair or unconscionable advantage of Mr Liddle. She had not received any inkling from him that he was having second thoughts.

The High Court commented that the cost of the proceedings was likely to substantially exceed the difference in value between Mr Liddle's and Mrs Cree's parts of the property. It was a dispute which the court had limited power to resolve as the parties were not married and was one which "cried out for mediation".

Joanna Bhatia

Case digests

Havering London Borough Council v Chambers
[2012] All ER (D) 11 (Jan); [2011] EWCA Civ 1576
20 December 2011

Limitation of action – Land – Adverse possession – Acts amounting to possession – Claimant local authority being registered owner of land – Authority seeking possession of land – Defendant making counterclaim for adverse possession – Judge dismissing counterclaim – Whether judge erring – Land Registration Act 2002

The claimant local authority was the registered owner of land in Essex (the land) comprising of three areas marked A, B and C on the plan. The authority commenced proceedings in the county court against the defendant for possession of the land and for injunctions. In his counterclaim, the defendant asserted that as he had been in adverse possession for more than 12 years before the commencement of the Land Registration Act 2002, Pt 9, he was entitled to a declaration that he was the owner of the land pursuant to Sch 12, para 18(3) to the Act. The judge ordered that the defendant deliver up possession of the land to the authority, having decided that the defendant's use of the land had been intermittent and not continuous and that there had been no continuous adverse use being made of the disputed land until about 2002. He also referred to the authority's intended use of the land. The judge concluded that the defendant had not established factual possession, nor had he shown the necessary intention to possess the land for the requisite 12-year period. He found there was evidence that the authority had impliedly given the defendant permission for his use of the land. Accordingly, the defendant's counterclaim was dismissed. The defendant appealed.

The defendant submitted that the judge's rejection of his defence and counterclaim was fundamentally flawed both in relation to the judge's findings of fact and in the judge's formulation and application of the law. Consideration was given to *JA Pye (Oxford) Ltd v Graham* [2002] 3 All ER 865 (Pye).

The appeal would be allowed in part.

In determining adverse possession, the question was whether the squatter had disposed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner. There were two elements necessary for legal possession: a sufficient degree of physical custody and control (factual possession), and an intention to exercise such custody and control on one's own behalf and for one's benefit (intention to possess). The suggestion that the sufficiency of the possession could depend on the intention not of the squatter but of the true owner was heretical and wrong. In this case, there had been no proper basis for challenging on appeal the judge's decision in so far as it related to area C. Not only was there material on which the judge was entitled to come to the conclusion that the defendant had failed to established possession of area C, that was the only conclusion to which he could properly have come. However, the court could not rule out the possibility that other judges might properly reach a different view from that of the judge in respect of areas A and B. It would not be right for the court to dismiss the appeal in respect of those areas, bearing in mind the judge's apparent application, without further explanation and elaboration, of an "intermittent and not continuous" user test rather than the test in *Pye*. The authority's intended use of the disputed land had been irrelevant. In considering whether the defendant had established that he had factual possession of the land the judge had made a number of errors of law. The combination of those errors, the lack of findings of fact on important matters, and the sketchiness of the reasoning underpinning his factual conclusions meant that as regards areas A and B, his conclusions could not stand. Although there was material on which he could have found for the authority on that question, the court could not be confident that he would have done so had he applied the law correctly.

The dispute over areas A and B would be remitted for a rehearing.

Legislation update

Housing (Scotland) Act 2010 (Consequential Amendment) Order 2011	**Enactment citation** SSI 2011/445 **Commencement date** 23 February 2012 **Legislation affected** Housing (Scotland) Act 2001 amended **Enabling power** Housing (Scotland) Act 2010, ss 163(1)(b), (2)	Amends the power to make Orders and Regulations in the Housing (Scotland) Act 2001. The amendment is consequential to the amendment made to the Act by the Housing Act 2010, s 153(b) and clarifies the parliamentary procedure for making an Order under the Housing Act 2001, s 16(5A)(c).
Non-Domestic Rating Contributions (England) (Amendment) Regulations 2011	**Enactment citation** SI 2011/2993 **Commencement date** 31 December 2011 **Legislation affected** SI 1992/3082 amended **Enabling power** Local Government Finance Act 1988, ss 143(1), (2), Sch 8, paras 4, 6	Amend the Non-Domestic Rating (Contributions) (England) Regulations 1992, SI 1992/3082, so that the amount local authorities in England must pay into the national non-domestic rating pool reflects relevant financial and economic factors
Incidental Flooding and Coastal Erosion (Wales) Order 2011	**Enactment citation** SI 2011/2829 **Commencement date** 1 December 2011 **Enabling power** Flood and Water Management Act 2010, ss 38(8), 39(12)	Applies the relevant provisions of the Water Resources Act 1991 relating to compulsory purchase, powers of entry, and compensation to the exercise of the powers under ss 38 and 39. It also modifies the application of those provisions for the purposes of s 38 so that: (a) the Environment Agency may not exercise the powers of compulsory purchase except for the purpose of enabling the UK to comply with its obligations under certain named EU Directives; and (b) the Environment Agency and local authorities must give seven days' notice before exercising the powers of entry in relation to agricultural land (except in an emergency).
RTM Companies (Model Articles) (Wales) Regulations 2011	**Enactment citation** SI 2011/2680 **Commencement date** 30 November 2011 **Legislation affected** SI 2004/675 revoked **Enabling power** Commonhold and Leasehold Reform Act 2002, ss 74(2), (4), (6), 178(1)	Prescribe, by reference to the schedules to these regulations, the form and content of the articles of association of RTM companies. Schedule 1 contains model articles in English and Sch 2 contains model articles in Welsh. These regulations include provision, authorised by s 74(4) of the Commonhold and Leasehold Reform Act 2002, to the effect that the model articles have effect for an RTM company whether or not they are adopted. Also revoke the RTM Companies (Memorandum and Articles of Association) (Wales) Regulations 2004.