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MONTHLY DIGEST

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Problems with Banks

The Daily Mail highlighted on 12 June 2020 the fact that Banks are handing out ever greater sums of money without a grant being proffered. The Chair of Solicitors for the Elderly has warned that some financial institutions are releasing as much as £125,000 thereby opening the system to abuse by people falsely claiming to be an Executor or Administrator.

Many commentators on LinkedIn have provided examples:

- Santander releasing £16,000 to the deceased's brother who just went in with the death certificate. He was neither Executor or Beneficiary. A copy of the Will was not requested.
- Halifax releasing £5,000 to an attorney after he notified them of the death and pointed out he was not the Executor and his authority had now ended.

The other major problem you are all facing are the delays to the probate process caused by the Banks. Again, many commentators to my post on LinkedIn earlier this month noted that Banks are failing to maintain reasonable response times. None of the main banks come out of this well:

- Several people complained about Barclays just not responding to correspondence despite several chasers
- HSBC is no longer writing letters but sending encrypted e-mails. The only problem is that the notification with the code is time sensitive and that code expires before the email you want to read is received!
- Nat West has developed a new online system but one firm had registered on it for several estates and then …. Nothing happened.
- Nationwide – also did not respond despite monthly chasers to a request for closing the account – 3 months and counting

Wills

Legal Services Reform

Stephen Mayson has been exploring legal services reform for some time and has now produced the final Independent Review of Legal Services Regulation. Whilst the Law Society does not think the time is right for further legal reform, one has to ask, whenever is the right time.

The current system of 10 separate regulators is simply unstainable, says Mr Mayson. He proposes that a single, sector-wide regulator should oversee all qualified and unqualified providers of legal services. This would make life a lot easier for consumers.

This then gives an opportunity for all Will-writing people to be subject to a single regulator to ensure a common, consistent and cost effective approach. The regulator must use a light touch towards regulation.

It is a detailed report of over 300 pages but worth a read.

Delusions – Clitheroe v Bond [2020] EWHC 1185

What's the issue?

This case examines the deterioration in the relationship with one daughter (Sue) following the death to cancer of another daughter (Debs) who was the lynchpin in the family. It explores the extent to which the deceased was deluded and whether any of the mistaken beliefs held were encouraged by the fraudulent calumny of the deceased's son (John), who was heavily engaged in the making of the Wills, which excluded Sue.

What does it mean for me?

Always be suspicious when a client sends instructions by one child and insists on early Will preparation without a visit. Consider compliance with the Golden Rule because of the state of health of the client who in this case suffered from affective disorder following the death of her daughter Debs.

What can I take away?

Where you allege fraudulent calumny a higher quality of direct evidence will be required to succeed.

The facts

The deceased, Jean Clitheroe, died on 11 September 2017. She had made two Wills – 21 May 2010 (2010 Will) and 3 December 2013 (2013 Will). She excluded her daughter Sue from each Will on the basis that she said she was a spendthrift. The bulk of her estate was left to her son, John.

There was a third child, Debra (Debs), who was the lynchpin of the family. Sadly, she died of cancer on 19 December 2009. She was a Deputy Head Mistress of a primary school who never married or had children. She owned her own home and had taken out various life policies yet she did not appear to make a Will (although Sue suggests John destroyed it when he saw it did not provide for him but Sue's daughter). Debs was very close to Jean, Sue and Sue's daughter, Charlotte to whom Sue thought Debs had left her estate.

As a result of a lack of Will, Debs' estate was inherited by her parents, Jean and Keith. They divorced in 1982 due to allegations made by Sue about inappropriate sexual conduct by Keith. Keith agreed to a Deed of Variation and retained just £5,000 and transferred the rest of his interest to Jean.

As a result of Debs' death, Jean took to her bed and remained bedridden until her death 8 years later. Her estate was worth £350,000 on her death. John sought to propound both his mother's Wills. Sue disputed their validity and asked the Court to find that Jean died intestate on the basis that Jean suffered from complex grief reactions to Debs' death. Jean continued to have affective disorder beyond that which manifested itself in her depression and insane delusions regarding Sue, together with a poisoning of her mind against Sue.

Sue argued that the reasons Jean gave for excluding her from her Wills were false or based on false beliefs induced by John, who knew them to be false or did not care if they were or were not. Sue claimed, therefore, that Jean lacked testamentary capacity at the time she made both Wills and, alternatively or in addition, that the 2013 Will was the result of fraudulent calumny.

The Court had to consider a range of reasons why Susan may have been excluded from Jean's Wills from wrongly accusing Keith of abusing her as a child, which caused Jean and Keith's marriage to break down, to ransacking Debra's house after her death and stealing certain items and many more. In relation to each such reason or belief the court had to consider:

1. Was it true?

2. Was there any rational basis on which Jean could have held such reason/belief; and
3. In any event, did John (or anyone else) encourage such reason/belief either knowing or not caring whether it was true or false?

More generally, the court had to consider whether Jean hated Sue and if so whether that hatred was the result of the poisoning of the mind against her by reason of an affective or other mental disorder (John had to prove it was not). Was that poisoning of the mind against Sue a result of John's fraudulent calumny (Sue had to establish that it was)?

The file of Powis solicitors around the making of the 2010 Will was illuminating. John provided a sealed envelope to the firm purporting to be Jean's instructions and saying the matter was very urgent because she had not long to live. Although irregular a draft was prepared but the senior practitioner insisted on talking to Jean on the telephone. John had insisted his mother had capacity.

The Attendance Note of the telephone conversation records that Jean was evidently very clear what she wished to do. The legal executive went through the draft Will with her and Jean confirmed that she did not want Sue to have anything apart from a diamond ring because she was a spendthrift.

The Will was engrossed that day with a set of instructions for how to execute it and John collected it. The Will was executed on 21 May 2010 before two independent witnesses. The original appears to have been returned to Powis. John was sole executor and received the residuary estate.

The instructions for the 2013 Will were given by telephone on 2 April 2013. There was a manuscript attendance note saying the John now did everything for her, so she wanted him to have everything and she no longer wanted Sue to have anything. She was encouraged to put this in writing.

The next day John brought a note from Jean to Powis's office consisting of 5 pages of handwritten notes as to why she did not want to benefit Sue.
Her Will instructions were for the diamond ring to go to one of her granddaughters; each of the granddaughters were to receive £5,000 and everything else went to John.

A draft Will was sent to Jean on 4th April 2013 with an account. On 8th April the legal executive had prepared the memorandum to go with the Will and asked to make an appointment to sign the Will. By letter almost 7 months later, dated 11 November 2013, the legal executive said the appointment fixed for 12 November had to be cancelled. The next letter on the file was confirming her attendance on 3 December at Jean's home to sign the Will – her neighbours acting as witnesses.

There was a later meeting in August 2014 where a revised Will was discussed but did not come to anything – this all seemed to be mixed up with John's divorce.

The circumstances of the preparation of the 2010 Will were criticised not least because of John's involvement in its execution and his urging for it to be completed. The solicitor's firm never saw Jean face-to-face; did not consider the Golden Rule and did not attend the execution.

Jean's medical records covering that time show that she had not eaten or drunk anything over a 3 – 7 day period; she was refusing medication, suffering from hallucinations and had on-going depression.

Similarly, with the 2013 Will, the Golden Rule was not followed; John was involved throughout and no attempt was made to take instructions from Jean in person although a lawyer did attend to supervise the execution.

In addition to medical evidence there was voluminous documents from Jean herself as she kept a diary and of course witness testimony. With regard to that, the Judge commented that he did not find John a reliable witness. He gave glib answers to questions and did not like to be corrected when what he said conflicted with other evidence such as that on the law firm's file.

John's case was run by his girlfriend Josephine Walsh. The judge found her 'argumentative, hostile and whilst clearly intelligent, reluctant to answer questions directly. She did not seem to care whether what she said was the truth or not and when pinned down in cross examination would invent such evidence as she though would assist.'

Dr Series, acting for John, gave evidence that there was no clear medical evidence that Jean lacked testamentary capacity at the time she made the 2010 and 2013 Wills due to her grief reaction. He did not accept Professor Jacoby's (acting for Sue) argument that her beliefs about Sue may have been delusional.

Professor Jacoby, for his part, concluded that Jean did show evidence of a complex grief reaction around the time of Debra's death. He said that at the

time she made both Wills Jean was suffering from a disorder of the mind, affective disorder (which encompasses the complex grief reaction and persisting depression). He said that if the beliefs about Susan were false (something which had to be determined by the court) then Jean did lack testamentary capacity on the grounds of 'insane delusions'.

The law

Fraudulent calumny

The position on fraudulent calumny was summarised by Lewison J (as he then was) in Edwards v Edwards [2007] EWHC 1119:

> " there is a separate ground for avoiding testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is "fraudulent calumny". The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the Will is liable to be set aside.
>
> The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgement if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the Will is not liable to be set aside on that ground alone."

In Nesbitt v Nicholson [2013] EWHC 4027 referring to undue influence by fraudulent calumny Proudman J said:

> "The burden of proof rests on the person alleging undue influence or fraud. Although the standard of proof is the civil standard, the balance of probabilities, and undue influence can be found by the court drawing influences from all the circumstances, the cogency and strength of the evidence required to prove fraud is heightened by the nature and seriousness of the allegation."

Testamentary capacity

The well-known test for testamentary capacity is that contained in the case of Banks v Goodfellow (1870) LR 5 QB 549. The causes of disorders of the mind are many but one example is extreme grief where in Key v Key [2010] 1 WLR 2020 the deceased reaction to the death of his wife was found to amount to an affective disorder that impaired testamentary capacity.

Testamentary capacity is a matter of understanding at the time. Lord Lewison said in Simons v Byford [2014] EWCA 280 that "capacity depends on the potential to understand. It is not to be equated with a test of memory".

Delusions

The definition of delusions in Williams on Wills 10th Edition at 4.15 is:

> "A delusion is a belief in the existence of something which no rational person could believe and, at the same time, it must be shown to be impossible to reason the patient out of the belief…..To avoid a Will, the delusion must be such as to influence the testator in making the particular disposition made."

Williams Mortimer and Sunnicks 21st edition, (WMS) says:

> "Delusion has been variously defined, but to almost every definition some objection can be raised. Perhaps the best legal test for determining whether delusion is present in a person's mind is this: "You must of necessity put to yourself this question and answer it, 'Can I understand how any man in possession of his senses could have believed such and such a thing?' And if the answer you give is, 'I cannot understand it' then it is of the necessity of the case that you should say that the man is not sane." (Boughton v Knight (1873) LR 3 PD 64).

There was debate as to which of these two approaches was preferred and the Judge concluded the WMS was to be preferred because:

1. The requirement in the test in Williams on Wills to 'show' it is impossible to reason the person out of their belief does not have the support of authority.
2. Recent authorities support the approach in WMS whether by direct reference or implication.
3. The Williams' test requires the testing of the deceased which would lead to uncertainty as to how the deceased should have been challenged, by whom and in what circumstances, all of which could be the source of further dispute.
4. It could lead to nonsensical courses of action.
5. This could lead to a reversal of the burden of proof in that the person who propounds the Will must show that the testator had capacity, was not suffering from delusions or that those delusions did not affect capacity.
6. There are also certain beliefs held by a deceased which could not be reconsidered in the light of rational facts or evidence. The emphasis

should be on how or why the belief has arisen, as opposed to endeavouring to prove a negative.

7. It would be wrong for a simple lack of challenge to defeat what clearly was a delusion.
8. The test in WMS is more flexible, it does allow for the belief to be challenged but is not prescriptive in its application.

The decision

Jean started to maintain before Debs died, and then until her death, that Sue's allegations of abuse by her father were untrue. Yet Keith wrote letters of what he had done and wanted to do to Sue and these letters formed the basis of Jean and Keith's divorce. Jean also took advice from a police friend as to whether to take the matter to the police and was advised against it as she risked losing Debs and Sue into care.

What actually happened is supported by the medical records of both Jean and Sue. John was not made aware of the facts until he was 18 and he chooses to believe they are a fabrication.

Deputy Master Linwood found that Jean's belief that Sue's allegations were untrue was irrational to the point of being delusional.

According to several witnesses, Jean was in denial about Debs imminent death. She was in excruciating pain and needed more pain relief but Jean said to Sue "If you call the Macmillan nurse, I will never forgive you and never speak to you again" because she feared it would speed up Deb's

death. Sue called for the nurse for Debs sake. It was the most difficult decision she had ever had to make.

Deputy Master Lindwood had no hesitation in finding that Jean tried to stop the administration of morphine and threatened to never speak to Sue again if she arranged it. To deliberately and repeatedly delay the provision of pain relief to one's child who is suffering excruciating pain appeared to him to be capable of no rational explanation. He accepted this marked the turning point for Sue in her relationship with her mother.

As to whether Sue was a shopaholic, there was evidence from Jean's diaries that Jean, Debs and Sue took regular shopping trips – all of them together or just two of them. It was a recreational activity. Deb's did not spend out of need but for fun as she had many hobbies and was a lifelong fan of Colchester United FC. DM Linwood found it unlikely that Debs disapproved of her sister's spending. Yes, she shopped on a very regular basis, sometimes on household items. Her expenditure on eating out was modest. She regularly went into overdraft but every now and then a substantial transfer was made to her account to put it back into credit. Jean also shopped out of more than need. She spent money on high quality clothes, Swarovski crystal and was particular about where her food shopping was done. DM Linwood therefore concluded that Jean's disapproval of Sue's spending was irrational and not based on fact. It was delusional. Debs did not disapprove of her sister as Jean maintained.

Following Debs' death, the relationship with Sue soured until by August 2010, after John got married, Jean refused to see Sue blaming her for theft

of some of Deb's belongings. There was not a shred of truth in the theft allegations and it was a delusion on Jean's part and wholly irrational.

Sue and Charlotte sent Jean cards and aimed to reconcile with her but to no avail. John became the carer and although Sue offered to help, he refused. There was plenty of evidence of Sue trying to visit Jean but being rebuffed by John. DM Linwood found that Sue was not responsible for her mother's estrangement and that Jean irrationally blamed Sue. It was a delusion.

For all the matters which were found to be delusions there was no rational basis for Jean to have held such beliefs. Her mind was poisoned against Sue by these matters. John did not displace the evidential burden on him in this regard.

John had to prove on balance that Jean had testamentary capacity when she made the 2010 and 2013 Wills. His medical evidence was not conclusive, and Professor Jacoby's opinion was preferred. At all material times Jean was suffering from an affective disorder which impaired her testamentary capacity. John failed to prove otherwise.

Did John induce or encourage Jean to exclude Sue for reasons that were false or which he knew to be false or did not care whether they were true or false? The burden of proof shifts to Sue. He was actively involved in the preparation of each Will and was the principal beneficiary; he had access to Deb's property and Jean's at all relevant times and frustrated contact between Sue and Jean. The DM felt there was insufficient direct evidence here of John encouraging his mother's beliefs about Sue so no finding of fraudulent calumny.

Tip

Always ensure you see a client rather than rely on an intermediary in the making of a Will. Where someone is clearly too unwell to come to the office is there any suggestion that their capacity needs to be verified? Of course, it does not always follow that physical impairment affects mental well-being but age and infirmity should put us on notice.

Practice points

1. The case is full of details but helpfully examines the treatment of delusions in relation to testamentary capacity.
2. Despite the plethora of hearsay evidence about John encouraging his mother's views on Sue, we are reminded that to allege fraud successfully a higher quality of direct evidence is required – this will always be tough as often the deceased and the perpetrator are the only persons present when such encouragement might have taken place.

Probate

Probate Registry Update

There continues to be dialogue between the professional bodies and HMC&TS but there is no longer a helpful approachable service for practitioners to contact easily over the phone which is regrettable.

- After much discussion Guidance in the form of 'Probate – Frequently asked questions and answers' has been settled. Hopefully, you will have received a copy from the Registry but if not it can be accessed from https://www.lawskills.co.uk/2019/wp-content/uploads/2020/06/probate-faq-for-professional-users-june-2020.pdf It is not on HMC&TS's website!
- HMC&TS stress it is imperative that legal representative details are completed on the PA1P form if you tick 'Yes' in box 1.2 – otherwise your application will be rejected.
- The Registry believe that they are managing to cope with gradual rise in applications and are now delivering within 4-6 weeks. This does not seem to be how practitioners perceive it since many of you have indicated that you are once again waiting nearer 12 weeks. The service is apparently running at 5,000 cases a week with capacity for 7,000. The increase in deaths due to coronavirus is going to put a strain on the system.
- We know that the HMC&TS prefer precedents for more difficult cases to be come from Tristram & Coote but recently staff have been rejecting applications which did not follow T & C's precedents word for word. This is surely anti-competitive and can be damaging to a firm's reputation that you choose a different precedent book. Professional bodies are challenging this stance.

Disclosure by 3rd party to litigation – Gardiner v Tabet [2020] EWHC 1471

What's the issue?

Whether it is appropriate for some people who are not a party to probate proceedings to be asked to disclose documents to the defendants to those

proceedings when the respondents claim to have handed everything to the claimant's solicitors.

What does it mean for me?

Remember to consider all relevant people who might be able to help with disclosure of relevant evidence when acting in a probate claim.

What can I take away?

The court has a discretion to order disclosure under ss 122 &123 Senior Courts Act 1981and under the special rules applying to probate claims in CPR Part 57. Probate claims are quasi-inquisitorial and this should be borne in mind when deciding whether to order disclosure or not.

The facts

Eric Tabet died on 21 July 2017. He suffered from bipolar disease and was also diagnosed with a brain tumour on 9 May 2017. He remained in hospital or hospice from 12 May until his death.

On 27 May 2017 he gave instructions for a Will to be prepared by his close friend of over 30 years Mr Jamal Hammoud, a non-party respondent to the probate proceedings between the deceased's friend Dr Mary-Ann Gardiner and his estranged siblings, Mark and Maia Tabet.

Mr Hammoud is said to have prepared the Will, read it over to the deceased and then acted as a witness with another friend, Mr Moshim Lakhim. The

Will was very short, there was no executor appointed and no attestation clause and read as follows:

> "I, Eric Tabet, of Waterloo House 155 Upper Street, Islington, London would like to confirm that in the event of my death, all of my belongings and property including Waterloo House 155 Upper Street, Islington, London N1 1RA are to go to Dr Mary-Ann Gardiner of 191 Paradise Peninsula Road, Mooresville, North Carolina, USA 28117 Tel: 00 1 704 608 4020."

The Will was apparently signed by the deceased and the two witnesses.
The deceased's siblings challenged the validity of the Will on 3 grounds:

1. The signature on the Will is not the deceased's
2. The deceased lacked capacity to make the Will
3. The deceased did not know and approve the contents of the Will

These proceedings are unusually brought against Mr Hammoud, who is not a party to the probate proceedings, for disclosure of documents which may be in his possession. He says all relevant documents were handed to Dr Gardiner's solicitors so that she could pursue taking out a grant of letters of administration with Will annexed.

The lists of documents requested were extensive in some cases going back to January 2012. The Master had to decide whether to permit all of the defendants request for disclosure.

The law

CPR 31.17 provides

"(3) The court may make an order under this rule only where—

(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and

(b) disclosure is necessary in order to dispose fairly of the claim or to save costs.

(4) An order under this rule must—

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require the respondent, when making disclosure, to specify any of those documents—

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection."

Ordering disclosure against non-parties is the exception rather than the rule – Frankson v Home Office [2003] EWCA 655 – and the jurisdiction should be exercised with caution – Re Howglen [2001] 1 All ER 376.

The following principles thus apply to this claim:

(1) The documents must be likely either to support the defendants' case or undermine the claimant's case ("relevance");

(2) The disclosure must be necessary to dispose fairly of the claim or save costs ("necessity");

(3) Even if the above two conditions are satisfied, the court has a discretion as to whether to order non-party disclosure ("discretion").

At the forefront of the siblings' submissions was the well known guidance in **Larke v Nugus (1979) 123 SJ 337 later reported in [2000] WTLR 1033**. They argued that under these rules such a request would be expected to elicit the full Will file which would include correspondence with the deceased, notes of meetings with the deceased, information about what the deceased knew and the precise circumstances of the execution of the Will.

The court has powers under ss 122 & 123 Senior Courts Act 1981 to compel the production of 'testamentary documents' and for non-parties to be examined on them. When, therefore, the court considers whether the disclosure sought is necessary to determine the claim, in the Master's judgment, this should be determined in the context of the quasi-inquisitorial nature of probate claims. However, the requirement of relevance must first be met before necessity falls to be considered.

The decision

Master Clark decided:

1. Disclosure was not relevant in relation to whether the circumstances surrounding the signing of the Will are such as to excite the court's suspicions since the defendants had not included this in their pleadings.
2. Any document which evidences whether the deceased signed the Will satisfies the relevance test; the fact that that evidence could also be

used to support an allegation of conspiracy or forgery does not alter that position.

3. Documents which the respondents might have may overlap with documents held by the claimant – this should not affect whether they should be disclosed in advance by the respondents.
4. Written communications or evidence of communications between the respondents and between each of them and the claimant between 21 May 2017 and 21 July 2017 were said to be likely to shed evidence as to his capacity, state of mind and knowledge of his testamentary intentions and therefore should be disclosed. In ordering disclosure he acknowledged that these documents may contain personal and sensitive passaged which the court can prevent publication of if not relevant to the matters to be decided.
5. The respondents accept that all hard and soft copies of the Will, draft Will and written instructions should be disclosed.
6. Drafts of and written instructions about a tenancy agreement dated 4 June 2017 were disclosable only to assist in determining the deceased ability to formulate instructions and understanding.
7. Written correspondence between the respondents and the deceased concerning his testamentary wishes in the period from 1 January 2012 to 21 July 2017. This was too long a period to be relevant. In the Master's judgement, the relevant period was 1 September 2016 to 21 July 2017.
8. Documents bearing the deceased's signature dating from 1 January 2017 – they had to be disclosed as samples which are necessary for the fair disposal of the claim.

Practice points

1. Whilst it is unusual to order disclosure of documents against a person not a party to the probate action there clearly were grounds to do so in this case and the Court has powers to enable it so order.
2. *Larke v Nugus* guidance is essential reading.

Forfeiture rule waived – Challen v Challen [2020] EWHC 1330

What's the issue?

Following the quashing of a conviction for murder and the substitution of a manslaughter conviction the question of the forfeiture rule being waived is opened up. In this high-profile case, the murderer was supported by her sons in seeking waiver under s.2(2) Forfeiture Act 1982 within 3 months of her manslaughter conviction as required under s.2(3).

What does it mean for me?

Where a person's conviction for murder is quashed on appeal, if no further charge is levied and so they are innocent, then the forfeiture rule has no application at all.

Where, as here, the murder conviction was substituted with a manslaughter conviction the rule applies but with the opportunity to seek waiver within 3 months of the conviction which is the date on which the claimant is found guilty or their plea accepted and sentenced.

What can I take away?

Coercive control is now a criminal offence and may result in the killing of a spouse as here. The fact that therefore the deceased was partly to blame for the death may well be taken into account in deciding to exercise judicial discretion to waive forfeiture.

The facts

Georgina Challen lost her father when she was six years old. She had been born late in the life of her parents and had three older brothers. This led to her being submissive and lacking in confidence.

At 15, whilst still at school, she met Richard Challen – he was 22. She became intensely attached to him and became pregnant at 17, although she had an abortion. Subsequently, they married when she was 25 and remain married for 40 years despite many ups and downs. They had two sons.

Throughout the marriage Richard was serially unfaithful to Georgina. He regularly came home late at night and he saw prostitutes. He wanted to do as he pleased. By turns his behaviour towards her was contemptuous, aggressive, belittling and violent. Any complaints about his behaviour were dismissed as mistaken.

Georgina sought medical help for domestic stress between 2006 and 2009. She drank excessively. On a number of occasions she considered getting divorced. In 2009 she even instructed a solicitor to present a divorce petition. She left home and moved into another property nearby.

By March 2010 she was considering reconciliation because she was so stressed by it all and by May 2010 the couple were having lunch on a weekly basis. Richard, however, was still manipulating the situation as he insisted on Georgina withdrawing the divorce petition and entering into a post nuptial agreement which meant she would hand over the house to him if they were to get divorced. Her solicitor advised her not to sign it.

Sadly, on 13 August 2010 Georgina signed the post nuptial agreement. She went to the house the next day with a view to start clearing it in readiness for a new beginning in Australia. Whilst she was out at the shops the telephone had been moved – she called 1471 to hear the voice of a woman. In questioning Richard about it he got angry. She then got on with making him something to eat and as he ate she struck him on the back of the head repeatedly with a hammer which she had brought with her in her bag.

The fact was she could not live without him but also realised that he had used the reconciliation to squeeze the post nuptial agreement out of her. Apparently, he then planned to divorce her.

Georgina Challen was convicted of the murder of her husband on 23 June 2011 and sentenced to life in prison, with a recommendation that she serve at least 22 years. Her sons, James and David, ran a high profile campaign to have the conviction quashed. On the 28 February 2019 the Court of Appeal quashed her conviction for murder, allowed an application in part to bring fresh evidence and remitted the matter for retrial on the indictment of murder.

On 5 April 2019, Georgina pleaded not guilty to murder but guilty to manslaughter on the basis of diminished responsibility. On 29 May 2019 after taking medical evidence the Crown accepted the pleas. On 7 June 2019 at a hearing her plea of guilty to manslaughter was formally accepted and she was sentenced to imprisonment for a term of nine years and four months which by reason of time already served meant she was immediately released.

Over a 40 year marriage the deceased had exerted coercive control over Georgina. Although that is a term recognised now and it became a criminal offence in 2015 it was not in common parlance at the time of her original conviction. She suffered several severe psychiatric illnesses.

The deceased died intestate so his sons inherited his estate which bore IHT. Georgina made an application for relief from the forfeiture rule on 6 September 2019. The question for this case was whether she had made the application in time and if so whether it should be granted.

She disclaimed her interest under the deceased's estate and had no intention of recovering the inheritance from her sons. She only wanted to give them the benefit of spouse exemption and therefore enable a repayment of IHT.

The law

Judge Matthews considered the law on 'conviction' and the use of its term in s.2(3) Forfeiture Act 1982 which says:

> "In any case where a person stands convicted of an offence of which unlawful killing is an element, the court shall not make an order under this section modifying [or excluding] the effect of the forfeiture rule in that case unless proceedings for the purpose are brought before the expiry of the period of three months beginning with his conviction [relevant period]."

There is no discretion under the Act to extend this period.

If the date on which the conviction for manslaughter was formally accepted at the hearing at which Georgina was sentenced, then she was in time with her application.

Consideration was given as to whether the date was the original conviction for murder but dismissed since that conviction was quashed. Also, could 'conviction' under s.2(3) of the Forfeiture Act 1982 be the date on which the court accepts the plea of guilty to manslaughter which in this case was on 5 April 2019. This too was rejected in favour of the date upon which the court accepts the plea and on which the claimant was sentenced.

As to whether or not the claim for relief from forfeiture should be given reference was made to s.2 (2) Forfeiture Act 1982:

> "The court shall not make an order under this section modifying the effect of the forfeiture rule in any case unless it is satisfied that, having regard to the conduct of the offender and the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case."

The leading case of **Dunbar v Plant [1998] Ch 412** was a case involving a suicide pact between a couple who were engaged. On the third attempt the man succeeded in killing himself but the woman survived. The deceased father as administrator of his son's estate brought proceedings to determine ownership of the deceased's half share of the house, various deposit accounts and two life policies. The Judge at first instance held that the woman had committed the offence of aiding and abetting the suicide of her partner and therefore the forfeiture rule applied. He was appealed on the point as to the division of the assets when modifying the rule. In the Court of Appeal Lord Philips said that the normal approach to a suicide pact is that there should be full relief from forfeiture.

However, in **Dalton v Latham [2003] EWHC 796** the claimant strangled the deceased to death. He was charged with murder but acquitted on the basis of diminished responsibility and convicted of manslaughter but sentenced to 6 years, almost the maximum term. In this case having decided that the rule applied Patten J had to consider whether to waive forfeiture and he declined. He said:

> "I have to consider whether the interests of justice require the forfeiture rule to be modified in this case. It seems to me clear that they do not. The reforms introduced by the Homocide Act 1957 were designed to preserve certain classes of offender from capital punishment for killings carried out by reason of diminished responsibility or under provocation. But the 1992 Act recognises in terms that cases of manslaughter do not qualify relief for that reason alone."

The decision

The first question is whether the forfeiture rule applies at all. If was a case of murder, then it would apply with no opportunity to seek waiver. However, the medical evidence presented to the Court demonstrated that Georgina suffered from a personality dysfunction and a dependent personality disorder. The Crown's expert said that it was an adjustment disorder. Whichever it was it resulted in her conviction for murder being quashed by reason of diminished responsibility.

It was a deliberate killing and not accidental, but manslaughter was accepted. Therefore, the potential for waiver of the forfeiture rule applies to the case.

Secondly, the Judge had to exercise judicial discretion as to whether to disapply the forfeiture rule. The exercise of discretion is not about whether there was criminal responsibility; it was whether the justice of the case requires that the forfeiture rule relating to the inheritance of property be disapplied.

This case is distinguished from say Dalton v Latham where the deceased made no contribution at all to the circumstances in which he died. Unlike this case where on the evidence the deceased contributed significantly to the circumstances in which he died.

The effect of disapplying the forfeiture rule would be that Georgina would inherit the estate rather than her sons. That would mean there was no

chargeable transfer and the estate would recover significant IHT from HMRC. Georgina having disclaimed any interest in actually recovering inheritance from her sons simply wishes them to benefit more by the repayment of tax.

Overall, the Judge was satisfied that the justice of this case required him to disapply the forfeiture rule, although he warned against assuming that any case where coercive control was involved would necessarily be decided the same way.

Practice points

1. As in most areas of law be careful to watch deadlines and dates. It might be thought unlikely to be successful in a modification of the forfeiture rule so long from date of death, but the 3 month rule from date of conviction was the significant date.
2. In cases where crimes are quashed on appeal make sure you ask yourself whether the forfeiture rule applies at all.

Barr v Exor of Colin Hearne decd [2020] UKUT 114

The facts

This case centred on the deceased's Will in which the whole residuary estate was left between 15 different people including Stephen, the deceased's son. Stephen's share of residue was 47%.

Although it was not a taxable estate, by Deed of Variation the Will was altered to gift Stephen the mobile home upon condition that he paid £30,000 to the executor to distribute amongst the other residuary beneficiaries.

The executor was a member of the firm and she assigned the pitch agreement to Stephen – the site owner objected and it ended in court.

The law

A mobile home is a chattel. The law surrounding mobile homes is complicated, but the Mobile Homes Act 1983 provides the statutory framework, although there are several regulations which apply too.

A distinction under the Act is made between the mobile home itself and the pitch agreement between the site owner and the mobile home owner.

Security of tenure is provided under the Act for the occupier but there are provisions to enable the site owner to terminate the agreement but only by court order.

The decision

The Deed of Variation was not effective, apart from for IHT. As IHT was not payable on this estate the Deed did not pass title to the mobile home to Stephen or alter the succession to the estate.

The Assignment of the pitch agreement was not in accordance with the MHA 1983 and so invalid, but it also transferred 'all rights and interests in the mobile home' to Stephen which was effective for transferring ownership of the mobile home to him.

The outcome of this decision was that Stephen ended up owning the mobile home but had no pitch agreement so could not occupy it or sell it without the site owner's say so. The site owner might let him sell the mobile home but would take a commission for this which can be no more than 10%. Equally, he might be willing to grant a fresh pitch agreement but it might have conditions attached, like the removal of sheds around the mobile home.

Practice points

- Always check the relevant law before you embark on trying to transfer title to an asset – sometimes, like this, if you don't it can come back and haunt you.

Trusts

Updating registered trusts

The new version of the Trust Registration Service went live in April 2020. Remember, the existing system relates only to trusts paying specific UK taxes. Under the updated system you can update the details of people involved in an already registered trust but you cannot close trusts yet on the system or make other changes.

Agents can only use this function if they put in place a 'digital handshake' with HMRC despite have a 64-8 registered with HMRC.

Guidance on this was updated on 19 June 2020 https://www.gov.uk/guidance/manage-your-trusts-registration-service#closing-a-trust

Challenge for breach of trust – Sofer v Swissindependent Trustees SA [2020] EWCA 699

What's the issue?

Whether the claimant had sufficient evidence to plead a case of dishonesty by a Trustee to overcome a trustee exoneration clause.

What does it mean for me?

Trustees should not simply follow the path of their predecessors and mindlessly make payments to a key beneficiary without thought to the impact this has on the trust fund. The needs of all the beneficiaries should be taken into account before making payments.

What can I take away?

Is it dishonest to make a loan rather than a gift to a beneficiary if gifts are not permitted during the lifetime of a beneficiary under the trust deed? In principle no, but if no security is taken for the loan, no action for recovery is taken and in the end the trustees write off the loans is there not an argument that the intention was to make a gift all along in breach of the terms of the trust?

The facts

Hyman Sofer was a wealthy South African bookmaker who emigrated to Australia in 1987. The claim involved the Puyol Trust, created in July 2006, drafted by an Australian law firm but governed by English law.

The Puyol Trust is one of three related trusts, the others being Gabri Trust and Xavi Trust. Each trust held units in a fourth trust, the Jordi Unit Trust. All four trusts were managed by the Trustee, a Swiss professional trust company.

Each trust was discretionary, providing primarily in the case of the Puyol Trust for Hyman's son Robert, the claimant; in the case of the Gabri Trust for his daughter Tamara and in the case of Xavi, for Tamara's issue.

By Clause M1(1) of the Pyrol Trust the Trustee was not to pay any part of the trust fund to any beneficiary for any purpose prior to the death of Hyman Sofer. By clause D3(3) of the Puyol Trust, the Trustee had power to lend any money forming the whole or any part of the assets of the trust to any person who may for the time being be a Beneficiary upon such terms as

to repayment and interest or interest free as the Trustee in their absolute discretion saw fit.

Shortly after the Puyol Trust was created, Hyman was added as a beneficiary. Between 2006 and 2016 the Trustee made 148 payments totalling over $61.5 million to Hyman at his request out of the Puyol, Gabri and Xavi trusts. The payments were recorded as loans but there was no security taken. Repayments of $3.9 million were made but this left a debt due of $58.5 million when Hyman died on 8 July 2016. Shortly after his death the Trustee released his estate from the outstanding debt.

The total net amount paid out of the Puyol Trust to Hyman was $19.2 million.

The essence of Robert's claim is that the payments made by the Trustee to Hyman were not really loans but in fact gifts, in breach of the prohibition in clause M1(1). He wishes to seek the restoration of the trust fund and the removal of the Trustee as trustee.

At first instance the Trustee sought to strike out Robert's claim or seeking summary judgement dismissing it. This was based on the fact that the Puyol trust contains a trustee exoneration clause which provided a complete answer to the claim where there was no evidence from the pleadings of any dishonest intent. The clause said that the Trustee shall not be liable for or responsible for any loss or damage:

"except where the same shall be proved to have been caused by acts done or omissions made in personal conscious and fraudulent bad faith by the Trustee charged to be so liable."

This meant that Robert must establish a dishonest breach of trust had occurred to overcome the exoneration clause.

The Judge at first instance did strike out Robert's claim but on this appeal he seeks to amend his particulars of claim which if as amended it sets out a non-strikable claim then Robert should be given permission to make the necessary amendments.

Lord Arnold said that the statement of claim is not well drafted but what matters is the substance of what it pleads – is that sufficient to disclose a case of dishonesty?

In addition, the Trustee pointed out that Deeds of Indemnity were in fact signed by Robert which set out the earlier loans and proposal to make new loans and provided the Trustee with indemnity from the beneficiaries in respect of these loans.

The Trustee was seeking to strike out the claim or obtain reverse summary judgement on one of three bases: contractual indemnity; estoppel by convention and waiver. There was no dispute that Robert needs to establish no more but no less than that he has a real prospect of successfully overcoming these defences if he is to be allowed to continue.

The law

The test for a dishonest breach of trust was set out in **Fattal v Walbrook Trustees (Jersey) Ltd. [2010] EWHC 2767**. Lewison J (as he was then) stated:

> "what is required to show dishonesty in the case of a professional trustee is:
>
> (i) A deliberate breach of trust
>
> (ii) Committed by a professional trustee:
>
> a. Who knows that the deliberate breach is contrary to the interests of the beneficiaries; or
>
> b. Who is recklessly indifferent whether the deliberate breach is contrary to their interests or not; or
>
> c. Whose belief that the deliberate breach is not contrary to the interests of the beneficiaries is so unreasonable that, by any objective standard, no reasonable professional trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries."

A deliberate breach of trust includes a breach committed with reckless indifference as to whether it was a breach or not - **Re Vickery [1931] 1 Ch 572 and Armitage v Nurse [1998] Ch 241**.

The principles of pleading dishonesty can be summarised as:

1. Fraud or dishonesty must be specifically alleged and sufficiently particularised – **Three Rivers District Council v Governor and Company of the Bank of England (No.3) [2003] 2AC1**

2. Dishonesty can be inferred from primary facts, provided those facts are themselves pleaded – Three Rivers supra
3. The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence – JSC Bank of Moscow v Kekhman [2015] EWHC 3073
4. Particulars of dishonesty must be read as a whole and in context – Walker v Stone [2001] QB 902
5. The purpose of giving particulars is to allow the defendant to know the case he has to meet – McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775
6. When giving particulars, no more than a concise statement of the facts relied on is required – McPhilemy above
7. Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged - McPhilemy.

The decision

Lord Arnold heard the arguments of Counsel for both parties. He agreed with the arguments of Robert's counsel that the Judge at first instance made a flawed judgement on three main grounds:

1. The Judge was not entitled to treat the evidence of the Trustee's witnesses as being conclusive particularly given it was hearsay and in conflict with Robert's evidence. Robert was entitled to test the

Trustee's evidence by the normal process of disclosure and cross-examination.

2. The Judge was wrong to say that it was a 'shared assumption' that the payments were loans. This was a representation by the Trustee, whose advisers drafted the Deeds of Indemnity, to Robert. If these representations were false but not to the knowledge of Robert, then it cannot have been a shared assumption.
3. The Judge failed to give any reason for his implicit conclusion that it would be unconscionable for Robert to be permitted to go back on that assumption. There would not be anything unconscionable about it if the payments were in fact gifts and not loans and the Trustee had known this, but Robert had not.

Robert's arguments on contractual indemnity, estoppel by convention and waiver have a real prospect of success and so Lord Arnold concluded that the Judge should have granted Robert permission to amend the particulars of claim. He should have dismissed the Trustee's application to strike out the claim and also have dismissed the Trustee's application for reverse summary judgement.

He was joined by Lord Justices Richards and Patten in allowing the appeal.

Practice points

1. This case is a salutary reminder that when acting as trustee you must take into account all the beneficiaries when answering a request from one for funds from the trust.
2. This means being aware of the needs of the beneficiaries in the trust and the impact of the payments on the fund.
3. A trustee must always follow the trust deed and the law and if in doubt seek clarification from the court. To simply note that gifts were not allowed so as trustee we must make loans, but then take no security or action for recovery and ultimately writing them off, smacks of the payments being gifts from the start.

Declaration of trust valid despite execution errors - Bowack v Saxton [2020] EWHC 1049

What's the issue?

A standard insurance company tick-box form for the assignment of two bonds into two trusts were incomplete. The date of the trust was left blank; the details of the bonds were not inserted and only two of the trustees had their signatures witnessed, the third just signed. Could this still be a valid trust?

What does it mean for me?

Whilst this is a case to be noted by IFAs who usually set up these kind of arrangements nevertheless no-one wants to be said to be professionally ignorant for not following through on the completion of paperwork.

What can I take away?

The Judge construed the documents as valid – which was lucky for Hargreaves Landsdowne and was no doubt a relief to the Bowacks.

The facts

Mr Bowack was a retired accountant and with his wife ttook advice from Hargreaves Lansdown Ltd. The Mr Coyle of this company suggested they each set up an AXA Isle of Man offshore bond which would be subjected to discretionary trusts for the benefit of a class of potential beneficiaries, including their daughter the defendant. Neither Mr nor Mrs Bowack were included in the class of beneficiaries.

The trustees of the trusts were Mr & Mrs Bowack and their daughter. Each bond was for the £325,000 (their NRB). Once the bonds were issued the trusts over them were purportedly created but this case seeks a declaration that each of the two trusts was properly and completely constituted or alternatively, rectification of the relevant documents so as to make them conform with the Bowacks' intentions.

At a meeting with Mr Coyle of Hargreaves Lansdowne on 29 January 2014 the Bowacks signed a hand completed standard application form headed "AXA Isle of Man Limited Evolution" attaching a cheque for £325,000 for the issue of the bond. They also completed a trust form headed "AXA Isle of Man Limited Discretionary Trust".

The bond form was fully completed but neither of the bond application forms mentions Claire, the Bowacks daughter.

The trust form was a 'tick-box' exercise not at all like a traditional trust deed. Section A was headed 'Settlor's declaration' and provides that the settlor named declares that from the Effective Date, the Trust Fund is held by the Trustees subject to the Trust Provisions set out below and is irrevocable.

The Effective Date box was accompanied by a marginal note – "Please leave blank – to be completed by AXA Isle of Man". The Bowacks left it blank but it was not completed by AXA.

Also, in relation to the Trust fund there was a marginal note saying "Please leave blank where this is a new contract – it will be completed by AXA Isle of Man". Once again, the Bowacks left the details blank and once again it was not completed and remains blank.

The sections for Settlor and Trustees were fully completed. The Beneficiaries excluded the settlor but otherwise included the settlor's descendants, current or former spouses or civil partners, siblings, and their children, will beneficiaries, intestacy beneficiaries, any descendant's current or former spouses or civil partners, and ny children of any spouse of the settlor.

Section C sets out the trust provisions and notes that the settlement is governed by the laws of England and Wales.

The document is throughout referred to as a Deed and the attestation clause supports this. In each case the trust is signed by the Bowacks and their signatures witnessed; the forms are also signed by Claire but her

signature is not witnessed. The Bowacks say that Claire's signature was not witnessed because Mr Coyle said he would deal with that. Thus, the documents are validly executed as a Deed by the Bowacks but they are not validly executed by Claire as a Deed.

Despite that lack of a witness to Claire's signature Mr Coyle submitted the forms to AXA on 30 January 2014. AXA then wrote to Hargreaves Lansdown on 13 February 2014 requiring Claire's signature to be witnessed and for ID for her to be provided. No explanation was given for why this was necessary before the trust could come into existence.

AXA had cashed the Bowacks cheques and issued the bonds. The letters confirming the bonds had been issued were sent to the Bowacks on 4 February 2014 and the policy numbers were quoted but had not been inserted into the trust deeds.

At some point the problems were uncovered and the Bowacks solicitors wrote to AXA for clarification. AXA in response said if the bonds were to be transferred into trusts they would require copies of the trust deeds and identification documents for the trustees and a tax declaration!
Two questions therefore have to be answered:
1.Whether on the facts trusts were ever constituted of the bonds which AXA issued and if so who are the trustees?

2.Whether any of the documents may be rectified by the court on the basis that they do not accurately record the intentions of those who made them?

The law

Judge Matthews referred to the leading judgement of Lord Neuberger in Marley v Rawlings [2015] AC 129 which said in interpreting contracts the court is concerned to find the intention of the party or parties and it does this by identifying the meaning of the relevant words:

(a) In the light of
   i. The natural and ordinary meaning of those words
   ii. The overall purpose of the document
   iii. Any other provisions of the document
   iv. The facts known or assumed by the parties at the time the documents were executed and
   v. Common sense

(b) But ignoring subjective evidence of any party's intentions.

A failure to express the date on which the trust is constituted is not fatal to its validity – it is sufficient that it is constituted. The Bowacks clearly intended their bonds to be subjected to a trust as soon as they were issued. If the trust was properly constituted, then on or shortly after the issue of the bond that would be the date on which it takes effect.

The other blank in the trust deeds was the failure to identify the particular trust property by inserting the bond numbers in them. The Bowacks would not know the numbers until they were allocated by AXA. Again, it is not necessarily fatal to the validity of the trusts that the numbers be inserted as

long as the relevant facts can be identified from the circumstances - Armstrong v Armstrong [2019] EWHC 2259.

There is no uncertainty of subject matter if the bond can be identified as relevant trust property which it can by virtue of the letters to the Bowacks quoting the bond numbers. There is nothing to stop a person creating an oral contract over bonds as they are not property and don't have to comply with s. 53(1)(b) Law of Property Act 1925.

There was nothing in the terms of the bond that prevented a declaration of trust over it or even that any particular formalities had to be complied with to achieve this effectively. Witness statements from officials at AXA confirmed this and the procedure they would have followed. They blamed the lack of completion of the trust forms by them on the failure of Claire to have her signature witnessed and to provide money laundering identification.

Under s.136 Law of Property Act 1925 a chose in action (such as a bond) can be assigned at law to a third party if it is absolute and in writing under the hand of the assignor, and express notice in writing is given to the debtor. Although the bonds are subject to Manx law the assignment is subject to English law. It is therefore unnecessary for the assignment of the bond to the trustees to be made in a deed. Signed writing will do. In this case both Mr and Mrs Bowack, as the applicants and owners of the bonds, signed the assignment of the bond to the trustees as a deed even if Claire merely signed.
An alternative approach is the rule in Milroy v Lord (1862) 3 De G, F & J 264 – either the owner of property must declare a trust, whereby that owner

becomes trustee, or that owner must transfer the property to another person to hold on trust for the beneficiaries.

The decision

Judge Matthews determined on the basis of the general principles of construction that the trusts of the two bonds were valid and effective trusts created at the time the bonds were issued and that there were simultaneous valid and effective assignments of the bonds to the three trustees in each case. No rectification was necessary.

He said:

> "I am not very impressed with the documentation supplied by the claimants or the way it has been handled. Indeed, the 'one size fits all', 'tick-box' nature of the forms and the unduly formalistic (and legally ignorant) approach of the professionals involved are profoundly worrying"

Practice points

1. Creating bespoke trust deeds is to be recommended.
2. Where insurance company forms are produced, always check they have been correctly and fully completed – although this may well be after the event as mostly these type of transactions are carried out by IFAs and the insurance company nevertheless we should take note.

Tax

Implementation of DAC6

- HMRC has confirmed that the UK is taking up the optional six-month deferral for the introduction of DAC6
- The government will amend the International Tax Enforcement (Disclosable Arrangements) Regulations 2020 which implement DAC6
- The new regulations may not be in force by the current deadline of 1 July but HMRC have confirmed that no action will be taken for non-reporting during the period from 1 July to the date the amended regulations come into force

IHT 400 – Submission electronically

- HMRC has explored a number of solutions to the submission of the IHT 400 electronically
- It is able to offer electronic submission of IHT 400 (and IHT 100) through Dropbox
- If you wish to use Dropbox then you must first send an email to iht.agents@hmrc.gov.uk and they will then send the details to you
- If you successfully submit your IHT account using Dropbox HMRC will not ask you to submit the same account on paper later

Progress of Finance Bill 2020

The Finance Bill was passed to the Committee Stage at the beginning of June and the committee was scheduled to report by 25 June 2020. It is therefore likely to receive Royal Assent in July.

Elderly Client

Professional CoP users – payment on account

HMC&TS is encouraging professional CoP users to use the fee account. The fee account is a free, fast and secure way for regular users to pay application fees. HMC&TS enables payment on account for those who regularly make payments to them and this includes law firms. If you have more than 12 cases annually you will be regarded as 'high volume'.

R (Maguire) v HM Senior Coroner for Blackpool & Fylde [2020] EWCA 738

What is the issue?

The engagement of Article 2 of the European Convention on Human Rights ('ECHR') in inquests relating to the death of a person who resides in a state supported setting was the subject matter of this appeal.

What does it mean for me?

An understanding of the State's duties under Article 2 of the European Convention of Human Rights ('ECHR'), Deprivation of Liberty Safeguards set out in Schedule A1 of the Mental Capacity Act 2005 ('MCA 2005'), Section 5 of the Coroners and Justice Act 2009 ('s5 CJA 2009').

What can I take away?

To engage Article 2 ECHR in inquests in respect of deaths of incapcitous persons residing in state settings requires a high standard of evidence.

The facts

This case related to Jacqueline Maguire ('Jacqueline') who died on the 22nd February 2019 in hospital at the age of 52. Jacqueline's death was caused by a perforated gastric ulcer and pneumonia. Jacqueline had Down's Syndrome and moderate learning difficulties and since 1993 Blackpool City Council had funded her residential care. Jacqueline was wheelchair bound and was subject to a standard authorisation pursuant to the Deprivation of Liberty Safeguards (MCA 2005).

A few days before Jacqueline's death, she had not been eating well and had complained of a sore throat. Jacqueline's condition worsened but the care staff took no action. On the 21st February, Jacqueline had a fit and the care staff called the GP and NHS 111. The GP concluded by telephone that Jacqueline had viral gastroenteritis and a urinary infection and issued a prescription. Jacqueline collapsed in the evening and an ambulance was called. The paramedics were not made aware that Jacqueline had Down's Syndrome. The paramedics wanted to take Jacqueline to hospital but she refused. The paramedics liaised with Jacqueline's out of hours GP and as she did not look seriously unwell, they agreed that Jacqueline should remain at the home but should be monitored. The next morning Jacqueline collapsed and was taken to hospital. She suffered a cardiac arrest and died.

During the inquest a number of issues were raised and investigated in respect of the care and treatment Jacqueline received prior to her death. This included failures on the part of the GP and carers to action appropriate care and to inform the paramedics of Jacqueline's history and conditions. In particular, it was noted that there was no care plan in place to address the

position if Jacqueline refused medical treatment or hospital admission (as she sometimes was prone to doing).

The law

Article 2 of European Convention on Human Rights (ECHR)

This article protects the right to life and is one of the most fundamental provisions in the Convention. Member states are obliged to abide by three key aspects of this convention:

- The duty to refrain from unlawful deprivation of life,
- The duty to investigate suspicious deaths; and in certain circumstances,
- A positive obligation to take steps to prevent avoidable losses of life.

Section 5 of the Coroners and Justice Act 2009 ('CJA 2009')

'(1) The purpose of an investigation under this Part into a person's death is to ascertain –(a) who the deceased was; (b) how, when and where the deceased came by his or her death; (c) the particulars (if any) required by the 1953 Act to be registered concerning the death. (2) Where necessary in order to avoid a breach of any Convention rights (within the meaning of the Human Rights Act 1998), the purpose mentioned in subsection 1(b) is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death'.

The decision

Jacqueline's family contended that the circumstances of her death dictated that there should be an inquest which satisfied the procedural obligations under Article 2 ECHR. The Coroner had initially determined that Article 2 ECHR had been engaged and conducted the Inquest on this basis. He called evidence at the Inquest between 20 and 29 June 2018 which was accepted on all sides as satisfying the procedural obligation under Article 2.

However, after the evidence had concluded the Coroner revisited his decision in light of R (Parkinson) v Kent Senior Coroner (2018) EWHC 1501 (Admin). He decided that the evidence did not suggest that Jacqueline's death might have resulted from a violation of the positive obligation to protect life imposed by article 2 ECHR otherwise known as the operational duty. Consequently, the procedural duty did not apply.

Accordingly, the jury's conclusion was limited to section 5(1) and not 5 (2) CJA 2009. Under section 5 (1) the jury decided who the deceased was, when and where she came by her death and the jury concluded that J died of natural causes. J's family sought to amplify that conclusion that J died of natural causes aggravated by 'neglect'. The Coroner ruled that the allegations against Jacqueline's carers and healthcare providers amounted to allegations of individual negligence and verified that this fell outside the State's obligations under Article 2 ECHR.

The Divisional Court

A judicial review into the Coroner's decision was unsuccessful. On the 15th May 2019 the Divisional Court determined that 'where the state has assumed some degree of responsibility for the welfare of an individual who is subject to DOLS but not imprisoned or placed in detention, the line between state responsibility (for which it should be called into account) and individual actions will sometimes be a fine one', and did not consider that the Coroner was mistaken. The Court confirmed the Coroner's decision.

An application to the Court of Appeal

An application by Jacqueline's family was made to the Court of Appeal on three grounds:

1. The Divisional Court erred in concluding that the procedural obligation under Article 2 ECHR did not apply. It was contended that Jacqueline's case was not a medical case as in the *Parkinson case,* but Jacqueline's case was similar to **Rabone v Penine NHS Care Trust [2012] UKSC 2.**
2. If *Parkinson* applied, the Divisional Court was wrong to conclude that the failure to have in place a system for admitting Jacqueline to hospital did not amount to a systematic failure.
3. The Divisional Court erred in failing to take account of the wider context of the premature deaths of persons with learning difficulties.

The Court of Appeal dismissed the appeal and concluded in response to the three grounds of appeal that:

1. The operational duty is not owed to vulnerable people in care homes which would trigger the procedural obligation under Article 2 ECHR when a death follows alleged failures. Jacqueline was looked after by carers as she was incapable of looking after herself and if she required

medical treatment, it was sought in the usual way. Jacqueline's death was linked to seeking 'ordinary medical treatment' and was not analogous to *Rabone* which concerned the death of a voluntary patient in a psychiatric hospital in which the operational duty had been held to be engaged. The Court held that in Jacqueline's case, the operational duty of the State to protect life was not engaged. Accordingly, the procedural obligation did not arise.

2. The Court rejected the contention that Jacqueline's life had knowingly been put in danger by not giving Jacqueline life-saving emergency treatment and that there was effectively a systematic failure on the part of health care professionals. The Court did not accept that the case fell within the excepted cases acknowledged in *Parkinson* and aligned to the four cumulative factors which amounted to exceptional circumstances in which Article 2 may be engaged (**Lopes de Sousa Fernandes v Portugal (2018) 66 EHRR 28**).
    (1) Acts or omissions of health care providers must go beyond mere error or medical negligence and for health care professionals in breach of their professional obligations
    (2) The dysfunction must be objectively and genuinely identifiable as systematic or structural
    (3) There must be a link between the dysfunction complained of and the harm which the patient sustained.
    (4) The dysfunction in issue must have resulted from the failure of the state to meet its obligations to provide a regulatory framework.

The Court did not accept that the criticisms of the paramedics and GP came close to satisfying the first limb of the test. Accordingly, there was no systematic dysfunction.

3. The Court held that research into the complex issues of persons with learning difficulties having reduced life expectancy was useful but did not provide additional weight to the contention that there was an operational duty owed to Jacqueline under Article 2 ECHR.

Practice points

1. This is a very relevant judgment, particularly in light of the current pandemic and the many deaths in care homes and hospitals in recent months.
2. The approach taken by the Court of Appeal suggests that there is less accountability for the State in respect of deaths of vulnerable adults who live in state residential settings and receive inadequate medical care to those deaths that occur in psychiatric or other institutional settings.

London Borough of Tower Hamlets v A & KF [2020] EWCOP 21

What is the issue?

Hilder, HHJ had to determine if A, who suffered with dementia, had the requisite mental capacity to decide whether she should remain living in a residential care home or return to her flat supported by an appropriate care package; whether or not she had capacity to decide on her care.

What does it mean for me?

An understanding of how the Court assesses a person's capacity under section 2(1) and section 3(1) to (3) of the Mental Capacity Act 2005 ('MCA 2005').

What can I take away?

The Court determines capacity on a case specific basis using the three elements to that determination namely the diagnostic test, the functional test and the causal nexus element (sections 2 and 3 MCA 2005). You do not combine the assessment for care and residence – each is considered separately.

The facts

This case relates to A, who was aged 69 and had a very long and successful career. She had no children and her former husband had died. A had many caring friends who have taken an active part in her life and were party to the proceedings. She lived in her flat for more than twenty years. In 2017 A suffered a stroke and shortly afterwards executed Lasting Powers of Attorney for Property and Finance and Health and Welfare ('LPAs'). KF is one of the Attorneys, appointed jointly and severally for property and finance and is sole Attorney for health and welfare. In 2018, A was diagnosed with Korsakoff's dementia.

In 2019 A was taken into A & E after an unwitnessed fall at home. A couple of months later she admitted herself to hospital complaining about pain in her left eye. Three contact lenses were removed from her eye. She

remained in hospital because of concerns that she would be unable to administer the necessary eye drops at home. Over the time that A remained an in-patient, she frequently tried to leave the hospital.

On the 10th July 2019, the hospital social worker ('D1') sought authority for A to be discharged from hospital to a residential placement. The matter was adjourned as the Official Solicitor had not yet been able to take up the Court's invitation to act as A's litigation friend. On the 19th August 2019, A attended the hearing herself and was able to communicate her views directly. She wanted to return home but indicated that she would be willing to reside at C Care Home for a short, pre-defined period. C Care Home had been previously chosen by KF and other friends of A, particularly for its expertise in management of Korsakoff's dementia. The Local Authority ('LA') gave a preliminary indication that it would be willing to provide a care package for support in A's home. An Order was made on an interim basis providing for A's discharge from the hospital to C Care Home with directions for a further attended hearing.

A settled into C Care Home better than had been anticipated and she did not want to attend the next hearing. Directions were made by consent. Permission was granted for the joint instruction of an expert psychiatrist to report as to A's capacity to make decisions about where she lives, how she is cared for, the management of her property, and the revocation/execution of the LPA. A safeguarding incident had been raised about A's relationship with another resident of C Care Home. A further interim Order was made for A to remain at C Care Home whilst further information was gathered including expert's reports as to A's capacity.

A's hearing was listed for 30th January 2020. She did not attend the hearing and was described as having a 'sense of frustration at her confinement in C Care Home and the apparent lack of sufficient opportunities for her to leave the home'.

The matter was listed for final hearing. There was no dispute between the parties that A required care to ensure that she ate, took her medication avoided alcohol and had some structured social activity.

The Court had to determine two issues:

(a) whether A presently has capacity to decide for herself where she lives (it being agreed that she lacks capacity to decide how she is cared for); and

(b) if she lacks capacity to decide where she lives, is a trial period of returning to live at home with a care package in her best interests?

The Local Authority and Official Solicitor acting on behalf of A disputed whether the issue of A's capacity to make decisions about her residence and care could be properly separated with the LA contending that both decisions were interlinked and could not be separated. They contended that 'an understanding of the kind of care required is fundamental to any decision on residence', relying on the Court of Appeal case of B v A Local Authority [2019} EWCA Civ 913. The LA argued that as A could not recall and 'does not accept her historical difficulties, and therefore cannot use and weigh that information in making decisions about the care or, as a consequence, the place in which she needs to live in order to receive such care'.

The Official Solicitor contended that when assessing care and residence separately, it did not mean that they had been separated into 'silos'. The Official Solicitor stated that what was required was 'an individualised assessment that a best interests' decision will be made in respect of an appropriate care package and in these circumstances, A is able to understand, retain, use and weigh the relevant information in coming to a decision on residence'.

The law

Mental Capacity Act 2005 (Section 1)

1(1) The Court had to consider the principles set out in section 1 of the MCA 2005. These are:

(2)A person is assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as being unable to make a decision unless all practical steps to help him do so have been taken without success.

(4) A person is not to be treated as being unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made under this Act for and on behalf of a person who lacks capacity, must be done or made in his best interests.

(6) Before the Act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

The single test for capacity is set out in s2(1) below

Section 2 (1) to (8) People who lack capacity

(1)For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for

himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind and brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary

(3) A lack of capacity cannot be established merely by reference to—

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity…..

Functional test for capacity is set out in section 3 below

Section 3(1) to 3(3)

(1) provides that a person is unable to make a decision in relation to some matter if he or she is unable to make a decision in relation to some matter if he or she is unable to understand, retain or use or weigh the information relevant to their decision, or is unable to communicate that decision.

(2) The relevant information is required to be presented to the person in a way that is appropriate to his or her circumstances and

(3) The fact that a person may only be able to retain the information for a short time does not prevent a finding of capacity.

(4) What is relevant information will depend on the particular decision to be made, but includes the reasonably foreseeable consequences of the decision or failure to make a decision.

Summary – 3 elements to be considered in determining the question of capacity

(a) The 'diagnostic test' -is there an impairment or disturbance in the functioning or the mind or brain?

(b) The 'functional test' – is the person unable to understand, retain or use or weigh relevant information, or to communicate their decision?

(c) The 'causal nexus' – is the inability because of the identified impairment or disturbance?

Section 4 (1) to (11) Best Interests

(1) In determining for the purposes of the Act what is in a person's best interests, the person making the determination must not make it merely on the basis of-

(a) The person's age and appearance, or

(b) A condition of his, or an aspect of his behaviour which might lead others to make unjustified assumptions about what might be in his best interests

(2) The person making the determination must consider all relevant circumstances and, in particular, take the following steps

(3) He must consider-

(a) Whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) It appears likely that he will, when that is likely to be…

The decision

Hilder, HHJ rejected the Local Authority's approach and ruled that in cases which come to the 'Court of Protection for determination, decisions about where a person lives and decisions about what care a person usually receives, are usually considered as individual domains of capacity'. Such 'an approach is clearly in keeping with the Act's 'issue-specific' approach to decision making'.

Hilder, HHJ found that 'there is ample authority for considering residence and care as individual domains of capacity'. She accepted that there was an

overlap between the two, but resisted the idea that lacking capacity in one domain (care) means that one also lacks capacity in another (residence). This amounted to conflating the two domains. 'It is not necessary to make a capacitous decision about care in order to make a capacitous decision about residence.'

The judge ruled that on the evidence before her that she found that A had capacity to decide upon residence even though she lacked the capacity to decide on care arrangements.

Practice point

This is a useful reminder that the MCA is structured so that an approach to the assessment of capacity is taken as decision specific.