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Annual Festive Case Law Update

Part 1

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7th December 2022

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Civil Fraud & Credit Hire

Roderick Abbott

Civil Fraud – similar fact evidence

- Ruta Kerseviciene v (1) Mide Quadri (2) Royal Sun Alliance Limited [2022] EWHC 2951 (KB) (Freedman J).
- Four conjoined appeals from HHJ Backhouse at Central London CC.
- Claimant's application to debar Ds from relying on a statement from Ds' solicitor, which summarised data relating to 372 other claims brought by Cs' solicitor (Ersan & Co) and/or involving the same medical expert.
- Basis of Cs' application was that the statement was inadmissible because it was:

  (1) impermissible expert evidence, adduced in breach of Part 35;

  (2) unreliable, by reason of skewed selection of data.

- The evidence showed the following.
- 95% of claims represented by Ersan including an allegation of psychological injury.
- 67% of claimants were recommended for a further psychological examination.
- In 100% of the reports provided by Dr Yahli, he diagnosed a recognised psychiatric condition.
- 67% of Dr Yahli's reports provided for a recovery period of two years of longer.
- Ds suggested that these statistics showed striking and unsually high levels of referral for psychological examination, and diagnosis of a condition upon that referral.
- HHJ Backhouse dismissed Cs' application.
- Held that the evidence was similar fact evidence rather than expert evidence.
- Whilst might not be probative in itself, capable of proving fundamental dishonesty and therefore contrary to the overriding objective to shut it out.
- Cs could challenge the evidence if they wished (e.g. by calling expert evidence and/or making submissions as to its unreliability or lack of weight).

- Court of Appeal (at paragraph 13 of the judgment) set out the relevant principles relating to the admissibility of similar fact evidence from the House of Lords decision in O'Brien v Chief Constable of South Wales Police [2005] 2 AC 534.
- Court of Appeal (albeit with more reservations than HHJ Backhouse) ultimately upholds her decision that the evidence should be deemed admissible, and any decisions as to its weight or reliability be dealt with by the trial judge: see paragraphs 29 to 35 of the judgment.

Credit Hire

- Illegality defence – Agbalaya v London Ambulance Service (County Court at Central London, 17 February 2022, HHJ Letham, unreported).
- Part 8 and the Protocol for Low Value Personal Injury Claims in Road Traffic Accidents – Islington LBC v Bouros [2022] EWCA Civ 1242.
- Defamation (!) – Direct Accident Management Ltd v Newsquest Specialist Media Ltd [2022] EWHC 2572 (KB).

Illegality Defence - Agbalaya

- HHJ Lethem at Central London CC
- C claims hire charges following an RTA.
- C's original vehicle did not have an MOT and would have failed its MOT if presented.
- C also would not have been financially able to get vehicle in fit state to pass its MOT.
- Therefore, but for the accident, she would not have had a vehicle which she could lawfully use on the public road.
- Court reviewed recent Supreme Court authority on the application of the illegality doctrine: Patel v Mirza [2016] UKSC 42 and Stoffel v Grondona [2020] UKSC 42.
- Seriousness of transgression not the key to the analysis (although failure to obtain an MOT could not be said to be trivial given its purpose in protecting the public).
- Although only a County Court judgment, a carefully reasoned decision following a full review of the relevant authorities, so highly persuasive at County Court level.
- Cf. Jack v Boryz (Newcastle Upon Tyne CC, HHJ Freedland, 19 December 2019).

Part 8/Low Value Protocol - Bouros

- Conjoined appeals in which insurers had challenged credit hire claims as part of the Protocol/CPR PD 8B procedure on the basis of inadequate evidence.
- Court of Appeal held that in both instances there was sufficient evidence before the district judge to allow the credit hire claims.
- Emphasised that the PD 8B procedure was designed to minimize costs where the sums involved were small, and delivered fairly rough justice.
- If a party or the court considered that the case was not suitable to continue under Stage 3 then it could be transferred to Part 7, and this power was not confined to “rare and exceptional cases” (as the notes in the White Book suggested).

Defamation – DAMS v Newsquest

- Preliminary ruling on the meaning of two articles published on D's website, the "Insurance Times", with the headlines "Credit hire sharks circle as market reacts to excessive costs" and "Rogue agent aggravates industry with trumped-up credit hire costs".
- First article refers to a specific case where DAMS was the CHO and Aviva successfully defended a claim for credit hire of £400,000.
- Second article examines the relationship between DAMS and Bond Turner solicitors.
- Both articles deemed to be defamatory, and their precise meanings defined for the purposes of the rest of the action.
- Not clear whether will get as far as trial, but could be very interesting if it does!

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Professional Negligence

Francesca O’Neill

Ho ho ho…

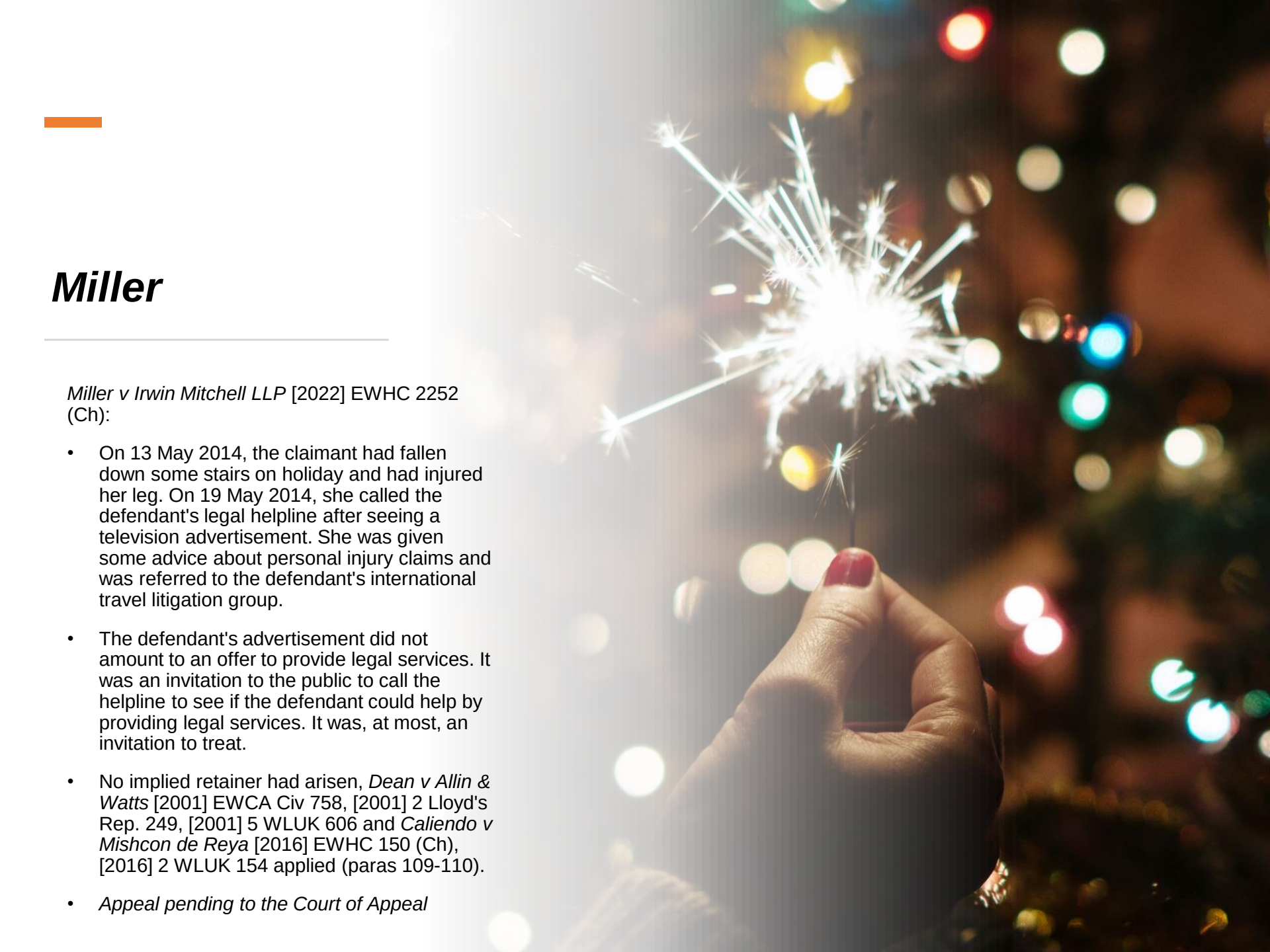
Professional negligence has always been a very jolly practice area!

- *Miller v Irwin Mitchell*
- *McDonnell v Dass Legal Solutions*
- *Aurium Real Estate v Mishcon de Reya*

Miller

Miller v Irwin Mitchell LLP [2022] EWHC 2252 (Ch):

- On 13 May 2014, the claimant had fallen down some stairs on holiday and had injured her leg. On 19 May 2014, she called the defendant's legal helpline after seeing a television advertisement. She was given some advice about personal injury claims and was referred to the defendant's international travel litigation group.
- The defendant's advertisement did not amount to an offer to provide legal services. It was an invitation to the public to call the helpline to see if the defendant could help by providing legal services. It was, at most, an invitation to treat.
- No implied retainer had arisen, *Dean v Allin & Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep. 249, [2001] 5 WLUK 606 and *Caliendo v Mishcon de Reya* [2016] EWHC 150 (Ch), [2016] 2 WLUK 154 applied (paras 109-110).
- *Appeal pending to the Court of Appeal*



McDonnell v Dass LegalSolutions [2022] Costs LR 855:

- Claimant sought to argue that there was an implied retainer between himself and a firm of solicitors, based on a conversation lasting a few minutes.
- In keeping with both prior authority on the point and recent trends, the court took a stringent view towards the tests that any claimant would have to satisfy in order to show that a retainer had come into existence:
    - Where there is no express retainer, an implied retainer would only be if the test for implication was met. *That test is one of necessity.*
    - A retainer would not be implied just because it was convenient to one of the parties.
    - The fact that there was no express retainer was powerful evidence in support of the argument that there was no implied retainer either.

Aurium Real Estate v Mishcon de Reya [2022] EWHC 1253 (Ch)

- The firm had not been instructed under a general retainer to provide all legal advice necessary to successfully conclude the project, but was engaged to advise on a matter-by-matter basis by an engagement letter.
- The absence of a general retainer made it necessary to identify the precise contractual basis under which the firm had provided the advice.
- Read fairly and objectively, and having regard to the circumstances in which the letter was agreed, the agreement envisaged a continuum of drafting and negotiation between the law firm and tenants with a view to documenting an agreed surrender (of a tenancy).

- The company contended that the scope of the letter had been expanded by subsequent instructions.
- Variation? The focus was on the parties' intention, determined objectively, and on whether the suggested variation went "*to the very root of the contract*", *British & Beningtons Ltd v North West Cachar Tea Co Ltd* [1923] A.C. 48, [1922] 11 WLUK 10 applied.
- No duty of care. Judgment worth reading for paragraphs 33, 69, 98, 106 as a discussion of the scope of duty of care applying the recent guidance in *MBS.*

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Disciplinary Law

Cyrus Katrak

Reflection, Insight and remediation

- Fitness to practise investigations and sanctions exist to protect the public and maintain public confidence. It does not exist to punish healthcare professionals, and equally not to act as a complaints resolution service.
- Things go wrong - impairment can include clinical errors or misconduct. It can also include, amongst other things, adverse health and/or language proficiency.
- Reflection, insight and remediation could be applied to any of these.
- Reflection involves serious thought or consideration of the circumstances that lead to a things going wrong.
- Insight is learning from this reflection to gain an accurate and deep understanding of steps necessary to ensure mistakes are not repeated and address the consequences

Reflection I

- Reflection helps the professional gain insight into the circumstances that led to things going wrong and from this to demonstrate remediation
- Reflective practice should be part and parcel of everyday life for healthcare professionals and not just when the GMC come calling
- In 2019 the UK's healthcare regulators issued a joint statement on "reflective practice", stating:
  - "Reflection is the thought process where individuals consider their experiences to gain insights about their whole practice. Reflection supports individuals to continually improve the way they work or the quality of care they give to people. It is a familiar, continuous and routine part of the work of health and care professionals."

Reflection II

- Good reflection includes
  - Professionals who proactively and willingly engage in the practice – making it less of a tick box exercise.
  - A systematic and structured approach that aims to draw out learning outcomes has a greater impact
  - Both positive and negative experiences. Any experience, including a conversation with a colleague, a significant clinical or professional event, or a period of time can generate meaningful reflections, insights and learning.
- https://www.gmc-uk.org/- /media/education/downloads/guidance/the-reflectivepractioner-guidance.pdf
  - Group reflection activities should be encouraged by employers and training providers as they provide mechanisms to identify complex issues and effect change across systems. Time should be made available, both for self-reflection, and to reflect in groups.

Insight

- The level of insight demonstrated by a health and care professional plays a very important role in the outcome of a fitness to practise investigation.
- Regulators consider insight as a mitigation factor when considering fitness to practise. Conversely, persistent lack of insight into the seriousness of actions or the consequences can be aggravating factor more likely to lead to adverse findings and increased likelihood of sanctions.

Demonstrating Insight

- Evidence that the professional has considered the concern, understood what went wrong and accepted they should have acted differently by for example demonstrating that they fully understand the impact or potential impact of their performance or conduct.
- Insight can also be demonstrated through training and training courses.
- Case examiners can consider, in their assessment of a health and care professional's fitness to practise, if they submit evidence, amongst other things, of insight.

Remediation

- Remediation is the proactive rectifying / correcting the behaviour that has generated fitness to practise concerns and addresses concerns about their conduct, behaviour or health.
- Paragraph 31 of the GMC MPTS Sanctions Guidance states:
  - “Remediation is where a doctor addresses concerns about their knowledge, skills, conduct or behaviour. Remediation can take a number of forms, including coaching, mentoring, training, and rehabilitation (this list is not exhaustive), and, where fully successful, will make impairment unlikely.”
- Some concerns are deemed so serious that they are, either, very difficult to remediate or are irremediable such as:
  - Criminal convictions
  - Cases involving dishonesty
  - Sexual misconduct and/or impropriety
  - Drug or alcohol use

Remediation

- In Blakeley v The General Medical Council [2019] EWHC 905 (Admin) it was held that a doctor does not necessarily have to accept the past wrongdoing to still be fit to practise at the date of a review. The focus will need to be on whether the doctor is at risk of repetition and whether they understand the gravity of the findings and the impact on public perception.
- Even where the doctor considers that the treatment given to a patient was appropriate, evidence of having reflected on the issues raised in a complaint can be helpful - it does not imply wrongdoing and is viewed positively.

Remediation in difficult cases

- Williams v The General Dental Council (Rev1) [2022] EWHC 1380 (Admin) – Allegations relating to dishonesty. Remediation found to be of a higher quality, which made a difference to the analysis of the appeal court, as follows (paras 145-146):

"145. What did the Appellant do to remediate her errors? After the investigation started, the Appellant engaged in a wide and long list of effective training on the issues relevant to her admitted and later proven misconduct in a mature and insightful way. **The road to redemption starts which insight and understanding and travels through remorse and learning to improvement.**

146. The Appellant's reflective statement on her errors is insightful in my judgment."

Examples of remediation

- A Dr who has been dishonest might go on a probity and ethics course then write a reflective account of what led to their dishonesty and what they have learned.
- A Dr found to have acted sub-optimally might be supervised for a while during clinical procedures, and be signed off as competent, also going on courses that evidence updating.
- A Dr who has behaved badly at work / in their private life might see a behavioural psychologist to understand their triggers and overcome their misunderstandings and impulsivity through CBT or other therapies.
- A Dr who has an alcohol or drug dependency might seek help from AA, and see a drugs and alcohol specialist to become abstinent.
- A Dr who has beaten their spouse will need to demonstrate that they understand about the impact on the victims as well as the impact in wider society of domestic violence of undermining confidence in the doctor and the medical profession.
- A Dr who has inappropriately touched a colleague or patient / had inappropriate emotional or sexual relationship will need to demonstrate understanding of boundaries, how they crossed the line, and impact of their conduct on others.
- A Dr who has run a business in a manner that causes harm / risk of harm, or which has acted in breach of regs, might need to make structural / personnel changes, including staff and self training, to ensure that there is no risk of repetition.
- A Dr who has acted out of character due to burn-out, fatigue or mental ill-health would need to work at resilience, and ensure that they had a stay well plan, and an understanding of the warning signs of getting into difficulties.

Remediation

- An apology to those who have been harmed will also be seen as a remediative step.
- Doctors will need to be able to demonstrate that the risk of repetition of the same conduct is negligible, if not nil.
    - Mere verbal or written assurance will be unlikely to be enough. Respectable and detailed work on remediation therefore needs to be evidenced in a variety of ways, such that it would be reassuring to others who scrutinise such evidence.
- A doctor should devise personal development plan, with the assistance of suitably qualified and competent clinicians or other professionals. This will provide evidence to the journey the doctor has been on, what they have achieved on their journey, and whether the shortcomings will be remediable in the future
- The GMC provides a rudimentary template for creating PDPs, and it is a good starting point

Failure to remediate

- A GMC analysis of cases in 2021 heard at MPTS panels relating to conduct and performance. Of 60 cases in which the doctor apologised or had remediated since the events, 5% were erased from the register. In contrast, where the panel considered that the doctor had not demonstrated insight, 59% were erased. Remediation activity appeared to be an effective way to demonstrate insight.
- Where no active steps or lip service to the concerns, Dr risk being suspended / heavily restricted / erased from the medical register.
- A lack of quality evidence of remediation can also lead to the same outcomes.
- Where a doctor has tried to remediate but has been unsuccessful, the same risks apply.
- Where a doctor has not been able to show evidence that they are on a journey to overcome their shortcomings, they will be at risk of such sanctions

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Contentious Probate

Maurice Rifat

Brief annual round-up in Contentious Probate

Seasons Greetings from all of us at Deka Chambers

On behalf of the Commercial Chancery and Property Group this is a brief round-up of some highlights of the past 12-months on the very festive subject of

…….Contentious Probate

Testamentary Capacity

When someone executes their will they must understand what they are doing.

They must understand and appreciate the claims to which they ought to give effect;

No disorder of the mind must poison their affections, pervert their sense of right or prevent the exercise of their natural faculties. No insane delusion must influence their will in disposing of their property. (See *Banks v Goodfellow (1870) LR 5 QB 549, Cockburn CJ at page 565*.)

The Test for Testamentary Capacity

Clitheroe v Bond (2022) EWHC 2203 (Ch)

The Court upheld a Deputy Master's refusal to admit two wills to probate due to testamentary incapacity based on 'insane delusions'.

Clitheroe v Bond

Mrs Justice Falk (as she was) found that overall the finding of testamentary incapacity should stand.

Clitheroe v Bond

Points of interest;

1. It confirmed the correct test for capacity is that set out in *Banks v Goodfellow (1869-70)* rather than the test under the Mental Capacity Act 2005;
2. A detailed analysis of "insane delusions" on the part of the testator.

Antonio v Williams [2022] EWHC (Ch)

The High Court made an award of £50,000 for reasonable financial provision to the deceased's 12-year old son under the Inheritance (Provision for Family and Dependants) Act 1975.

The award was made before a grant of representation had been issued in the deceased's estate contrary to a note in the current White Book (57.16.6)

Guest v Guest [2022] UKSC 27

A proprietary estoppel case.

The son of a farming family was promised that he would inherit a substantial share of the farm and business by his father. In reliance on this promise the son worked on the farm for 30-years for long hours and little pay.

Upon the family falling out, the father changed his will disinheriting the son. At first instance the High Court found that a proprietary estoppel had arisen.

The Supreme Court were to rule on the remedy available.

(1) The estoppel claim was against the estate of the parents which had not as yet been devised (the parents being still alive)

(2) Alternatively, a trust in the son's favour was suggested by Lord Briggs as an option for the parents, but such an option would substantially reduce their testamentary freedom.

This case should be a lesson for us all that Christmas time is replete with sentiment and booze and we must be careful of the promises we make to family members of what we intend to leave them in our wills.

Caveats

On 25 October, HM Courts & Tribunals Service ("**HMCTS**") issued simplified probate caveat application forms. Applicants can use the updated PA8A form to apply to stop an application for a grant of representation for up to six months and can apply for caveat extensions using the new PA8B form.

Furthermore, after 25th October 2022 HMCTS will no longer accept applications to enter or extend a caveat by email.

Merry Christmas

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Insolvency

Conor Kennedy

Directors' Duties to Creditors

BTI 2014 v Sequana [2022] UKSC 25

- €135m dividend paid to sole shareholder in May 2009.
- Company was solvent on both balance sheet and commercial (cash flow) basis, but had undertain long term pollution-related contingent liabilities, so there was a *"real risk"* of insolvency.
- Company went into administration 10 years later.

Directors' Duties to Creditors

BTI 2014 v Sequana [2022] UKSC 25

- SC held that there is a rule, preserved by s.172(3) of Companies Act 2006 by which directors' fiduciary duties extends to the interests of creditors as a whole.
- Where insolvency is inevitable, the shareholders cease to retain any valuable interests in the company, with the consequence that the creditors' interests become paramount.
- 'Real risk' of insolvency not sufficient to trigger the duty. The trigger was either when company was probably insolvent, or when the directors knew or ought to have known it was insolvent *(obiter).*

Phoenix Companies and Directors' Liability

PSV 1982 Limited v Langdon [2022] EWCA Civ 1319

- Considered ss.216 and 217 of the Insolvency Act 1986.
- *"A person is personally responsible for the relevant debts of a company if the remainder of the requirements in s.217 are met and the person is jointly and severally liable for those debts with the company and any other person who is liable for them. That meaning is consistent with the context in which the provisions arise, the mischief they are intended to address and their purpose."*

Phoenix Companies and Directors' Liability

PSV 1982 Limited v Langdon [2022] EWCA Civ 1319

- *"Director will have committed a criminal offence under s.216(4). That is to be weighed against the creditor who has suffered as a result of his conduct. In those circumstances, it is hard to see that it is contrary to what Parliament must have intended that the creditor should, if possible, be saved the expense and time of further proceedings against the director to establish the company's debt."*
- In a case of breach of contract, the relevant debt/liability incurred for the purpose of s.217(3)(a) is the date of breach, rather than the date the contract is entered into.

Enforcing against Debtor Pensions

Bacci v Green [2022] EWHC 486 (Ch)

- Claimants sought to enforce against art-dealer fraudster's pension.
- S.281(3) Insolvency Act 1986 provides that discharge does not release bankrupts from any bankruptcy debt incurred in respect of fraud.

Enforcing against Debtor Pensions

Bacci v Green [2022] EWHC 486 (Ch)

- Claimants sought to enforce against art-dealer fraudster's pension.
- S.281(3) Insolvency Act 1986 provides that discharge does not release bankrupts from any bankruptcy debt incurred in respect of fraud.
- Following judgment, D was declared bankrupt and most of his assets fell into his estate in bankruptcy. However, pursuant so s.11 of the Welfare Reform and Pensions Act 1999, one exception was rights under his pension scheme.

Enforcing against Debtor Pensions

Bacci v Green [2022] EWHC 486 (Ch)

- Claimants initially tried charging order, unsuccessfully due to s.91 Pensions Act 1995.
- Then sought injunctions under s.37 Senior Courts Act 1981 requiring delegation of powers to Cs.
- Sums paid out could then be subject to Third Party Debt Orders.

See also *Lindsay v O'Loughnane* [2022] EWHC 1829 (QB)*; and also Brake v Guy* [2022] EWHC 1746 (Ch)

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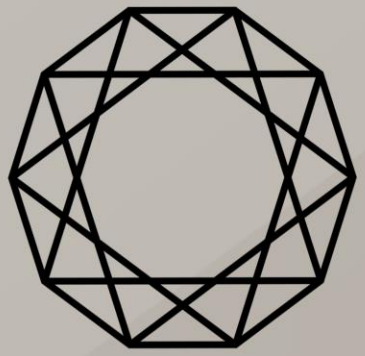
Thank you for your attention

Questions?



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