

legal update

Your digest of recent chancery and commercial cases

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■ A new body of law

The Freedom of Information Act 2000 rarely gets a good press. Maurice Frankel, the director of the Campaign for Freedom of Information, reminds us, however, that it has begun to illuminate places ministers prefer to keep secret. We have learnt that the Government considered weakening money-laundering controls to encourage US-style casinos in the UK. We have had fuller figures about British casualties in Iraq, and details of landings at British airports by planes thought to be transporting US prisoners to countries where they may face torture.

The Act applies to over 100,000 public authorities and affects the citizen at home and at work. The Information Commissioner is inundated with applications. The Information Tribunal has now decided 48 cases, many of them raising the question, where does the public interest lie? How do the Tribunal and the Commissioner approach this question? It is instructive to consider the recent decision about the disclosure of the minutes of a meeting of the BBC's governors.

■ The BBC case

Guardian Newspapers Ltd v Information Commissioner EA2006/0011 and 0013 was decided by the Information Tribunal on 8 January 2007. The background to the case is well known. A Government dossier was published in September 2002 entitled *Iraq: Weapons of Mass Destruction*. In March 2003 the United Kingdom went to war against Iraq. In May 2003 Mr Andrew Gilligan, during a BBC broadcast, made criticisms of the accuracy and truthfulness of the dossier, which in some respects went beyond what his source, Dr David Kelly, had told him. In July 2003 Dr Kelly took his own life.

Lord Hutton's "Report of the inquiry into the

circumstances surrounding the death of Dr David Kelly CMG", published on 28 January 2004, made certain criticisms of the BBC in connection with Mr. Gilligan's broadcast. Later the same day the Governors of the BBC met to consider the Hutton Report; the Chairman and the Director-General of the BBC resigned.

The Guardian and a freelance writer, Ms Heather Brooke, sought the release of the minutes of the Governors' meeting. The BBC declined to supply the information, contending that disclosure would inhibit the free and frank exchange of views for the purposes of deliberation and citing the Freedom of Information Act 2000, section 36(2)(b)(ii). The Guardian complained to the Information Commissioner. He agreed with the BBC that the section 36 exemption applied and decided that "the public interest in maintaining this exemption currently overrides the public interest in disclosing the requested information". So the decision was against disclosure. The applicants appealed to the Information Tribunal.

The Tribunal heard evidence from Mr Greg Dyke, who had resigned as Director-General. He said that the public had a right to know why the decisions had been taken.

The exemption in section 36(2) applies if, in the reasonable opinion of a qualified person, disclosure would or would be likely to inhibit free and frank exchange of views. The BBC itself was the "qualified person" for the purpose of the section. The exemption is only a conditional exemption subject to the public interest test – a two stage procedure. The questions for the Tribunal therefore were:

- Was the BBC's opinion that the exemption applied reasonable;

and

- Where did the public interest lie?

■ Was the BBC reasonable?

The Tribunal held that the opinion must be both reasonable in substance and reasonably arrived at. They pointed out that the provision was a protection which relied on the good faith and proper exercise of judgment by the qualified person and that the protection would be reduced if the qualified person was not required to give proper rational consideration to the formation of the opinion.

The Tribunal found that the criticisms of the BBC's opinion advanced by The Guardian were in reality all criticisms of process, rather than of the conclusion itself. It was urged on behalf of The Guardian that the BBC's opinion was mere assertion, not based on evidence as to the effect on the free and frank exchange of views. The Tribunal considered there was force in this criticism. But while they had reservations about the quality of the process by which the BBC reached its conclusion, the Tribunal was unable to say that the BBC's opinion as to the likelihood of future inhibition was not a reasonable opinion. Accordingly the Tribunal found that the contents of the minutes of the BBC's Governors' meeting of 28 January 2004 constituted exempt information.

■ The public interest test

That was not the end of the matter, for the Tribunal then had to apply the public interest test. They approved the following propositions of general application:

- The scheme of the Act as a whole involves a presumption in favour of disclosure;
- It is, however, a presumption that will only operate in cases where the respective public interests are equally balanced;
- The Environmental Information Regulations require public authorities to apply a presumption in favour of disclosure. There is no comparable provision in the 2000 Act;
- There is always likely to be some public interest in disclosure and the strength of that interest must be assessed on a case by case basis;
- The Act was designed to shift the balance in favour of greater openness;

- The lower the likelihood that the free and frank exchange of views will be inhibited, the lower is the chance that the balance of public interest will favour maintaining the exemption;
- The public authority is not permitted to maintain a blanket refusal;
- The passage of time may have an important bearing on the balancing exercise;
- When considering factors that militate against disclosure, the focus should be on the particular interest which the exemption is designed to protect;
- Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.

In the context of section 36(2), the Tribunal said that the right approach was this: the Commissioner, having accepted the reasonableness of the qualified person's judgment, must give weight to that opinion as an important piece of evidence, but was entitled to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation would or might occur.

■ Balance of public interest in the BBC case

The Tribunal then turned to the facts of this particular case. Counsel for The Guardian submitted that BBC Governors were unlikely to be shrinking violets, who would be inhibited from doing their duty by the thought that their deliberations might at some point become public. Against this the BBC provided no evidence from any Governor to assist in relation to the likelihood, severity, extent or frequency of any such inhibition.

The Tribunal said it was left with the impression that the BBC had a greater concern with the maintenance of secrecy than with the specifics of why these particular important minutes should or should not be published.

Counsel for the BBC concentrated on the sensitivity of the material contained in the minutes. She submitted rhetorically that if material of this high level of sensitivity was to be disclosed, then what prospect was there of anything being protected from disclosure? She suggested that disclosure of the material would have a chilling effect on future deliberations.

The Tribunal were unpersuaded by the submissions. The Tribunal decided unanimously that the public interest in maintaining the exemption did not outweigh the public interest in disclosing the information.

It allowed the appeal and ordered disclosure.

There is to be an appeal to the High Court.

Transcripts of the decisions of the Information Tribunal can be downloaded at

www.informationtribunal.gov.uk/ourDecisions.htm

John Macdonald Q.C.

John Macdonald Q.C. was called to the bar in 1955 and took silk in 1976. He is an editor of the leading practitioner text, *The Law of Freedom of Information* (OUP, 2003).

How big is an equity ?

Cobbe v Yeoman's Row Management Limited

[2006] 1 WLR 2964 (CA)



Adrian Pay

■ What is an equity?

When a claimant establishes the requisite elements of proprietary estoppel, he has a right to equitable relief. The extent of the equitable relief is in the discretion of the court and, to that extent, indeterminate. There are two stages in a claim in proprietary estoppel: (i) establishing the necessary requisite elements ("raising the equity") and (ii) determining the extent of the equitable relief ("satisfying the equity").

Why does everyone want one?

Proprietary estoppel is usually needed when a claim in law would, for some reason, fail. So, the two typical examples are: (i) where there is an agreement for the sale of land which is void for non-compliance with Law of Property (Miscellaneous Provisions) Act 1989, section 2; or (ii) where a will fails to give effect to some prior representation of testamentary intention. Recent well-known instances of the former kind of claim are *Yaxley v Gotts* [2000] Ch 162 and *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372; of the latter kind, *Gillett v Holt* [2001] Ch 210 and *Jennings v Rice* [2003] 1 P&CR 100.

How do I get one?

If A, under an expectation created or encouraged by B that A should have an interest in property, acts to his detriment in reliance on that assurance, the court may grant A equitable relief (*Taylor's Fashion Ltd v Liverpool Trustees Co (Note)* [1982] QB 133). Thus, there are three elements: (i) assurance, (ii) reliance and (iii) detriment. These are not 'watertight compartments'; the overriding principle is to prevent 'unconscionable conduct' (*Gillett v Holt* [2001] Ch 210).

■ *Cobbe v Yeoman's Row Management Ltd: the facts*

Mr Cobbe was an experienced property developer. He made an oral agreement 'in principle' to buy a property from Yeoman's Row Management Ltd ("YRML") for redevelopment. The property was a block of flats in Knightsbridge which was to be redeveloped into

townhouses. The agreement was to the effect that Mr Cobbe would buy the property for £12million and would be entitled to all the profits of the development, subject to an average agreement whereby the gross proceeds over £24million would be split 50%/50% between Mr Cobbe and YRML.

Mr Cobbe spent 'substantial labour, skill, time and money' in relation to the planning application. Planning permission was eventually obtained. However, after planning permission was granted, YRML resiled from the deal. YRML refused to sell for £12million and demanded £20million.

■ *Cobbe v Yeoman's Row Management Ltd:*

'raising the equity'

At first instance, [2005] EWHC 266, Etherton J made very clear findings of fact that (i) Mr Cobbe, although he knew the agreement was not legally enforceable, thought it was binding on him 'in honour'; (ii) Mr Cobbe had acted to his detriment relying on the agreement; (iii) YRML had encouraged Mr Cobbe's belief and his detrimental reliance; and moreover, (iv) YRML had, before the grant of planning permission, specifically decided not to honour the agreement but continued deliberately to encourage Mr Cobbe to believe that the agreement would be honoured.

As one might anticipate, Etherton J found a clear case of proprietary estoppel. Although various arguments were raised on appeal as to whether or not the claim was made out, the Court of Appeal dismissed those arguments relatively summarily.

■ *Cobbe v Yeoman's Row Management Ltd:*

'satisfying the equity'

The difficult problem in *Cobbe* was the question of the extent of relief necessary to satisfy the equity. In *Jennings v Rice* [2003] 1 P&CR 100, the Court of Appeal had given a thorough analysis of the principles on which the court should approach the question of satisfying the equity. The court had emphasised that although the extent of (i) the claimant's expectation and (ii) the claimant's detriment were relevant considerations, the court's discretion

was not tied to either expectation or detriment. The court has to fashion the relief to the particular circumstances of the case to do justice to the parties and in a way which is proportionate to the circumstances.

In *Cobbe*, quantifying Mr Cobbe's detriment was relatively easy – it was the value of the substantial labour, skill, time and money he spent on the project. Quantifying his expectation presented considerable difficulties: in order to realise any profit, Mr Cobbe would have had to finance the purchase of the property and the redevelopment. There would be risks in the development and putting a figure on expected profit was speculative. Moreover, an award based on expectation would give Mr Cobbe all the benefit of the deal without him having to spend the time and incur the risk and expense of the development.

The solution of Etherton J, based on the reasoning in *Holiday Inns Inc v Broadhead* (1974) 232 EG 951, was to award Mr Cobbe 50% of the increase in value of the property attributable to obtaining planning permission. He derived from the agreement an intention 'broadly speaking, that [YRML...] and Mr Cobbe should share equally the increased value or commercial potentiality arising from the grant of planning permission'. The Court of Appeal endorsed this relief.

The striking feature of the relief granted is that it was neither related to the detriment (which the Court of Appeal understandably felt would not adequately compensate Mr Cobbe, the deal having been made with a view to profit), nor was it directly related to expectation, apparently since that would be too speculative a figure to quantify. The extent of the relief was based on a speculative inference from the agreement (did the agreement really demonstrate an intention that the value of the development potential would be split equally?). Mummery LJ's conclusion was no more than that 'the relief granted appears to be the least unsatisfactory of the various forms that relief might take'. Dyson LJ's views were similar - relief based on detriment was rightly rejected, Etherton J had to fashion 'some form of expectation relief'; the relief granted was 'well within

How big is an equity? ~ continued

the margin of discretion afforded to the court' (implying that a different judge might, without error, have awarded a different form of relief).

Probably the result in *Cobbe* was one which reasonably accorded with the 'justice' of the circumstances; but one must feel some alarm at the difficulty of making a proper link between the parties' bargain and the relief granted. But for the mere accident that Mr Cobbe's agreement was not in writing and was only an agreement in principle, it would seem that the court would have had no option but to award Mr Cobbe damages on a strict contractual basis, and to undertake the exercise of properly quantifying the expectation.

Thus, despite this being a quasi-contractual case, the court found a remedy which would not seem to have been available in contract.

■ So how big is an equity?

If *Cobbe* illustrates anything, it illustrates the uncertainty which practitioners face when considering what relief the court is likely to grant. The facts of *Cobbe* were not particularly complex – indeed, one can imagine similar cases with very substantial amounts of money at stake where the claimant's expectation may be harder to quantify. The justification for the final award appears to be no more than that it was the least unsatisfactory (or most convenient?) of a number of alternatives. The flexibility of the

remedy of proprietary estoppel has often been emphasised and, it seems, uncertainty is a necessary price to pay. In a case involving proprietary estoppel, albeit on a different point, Weeks J made the following memorable comment "one might as well forget the law of contract and issue every judge with a portable palm tree." (*Taylor v Dickens* [1998] 1 FLR 807).

Perhaps, then, the answer to the last question is 'you will have to wait and see'.

Adrian Pay

Adrian was called to the bar in 1999. He has a broad commercial-chancery practice with a focus on real property, landlord and tenant, and trusts and estates work.

A sharp carving knife rather than a salami slicer

The attitude of Family Division courts to trust arrangements



Leigh Sagar

■ Introduction

In applications for financial provision in divorce cases, "Matrimonial Causes Act 1973 s 25 rules the day" (per Coleridge J in *Charman v Charman (No 2)* [2006] 9 ITEL R 173, at 184). Section 25(2) of the 1973 Act provides that, when exercising its powers to make orders for payments by one spouse to the other, the court must have particular regard to (amongst other things) each spouse's "income, earning capacity, property and other financial resources".

Judges of the Family Division take this obligation seriously, viewing themselves as having a "quasi-inquisitorial role" (per Wilson LJ in *Charman v Charman* [2005] 9 ITEL R 43, at 63). Assets subject to trusts have been increasingly brought into account in such applications, particularly in "big money" cases (see *Miller v Miller* [2006] 2 AC 618, where £17.5m was involved). The existence of trusts of which a spouse is a beneficiary is now one of the things about which the other party's legal team should generally be inquiring as a matter of course.

■ Powers to distribute income and capital

Where there is an irrevocable discretionary settlement, the trustees may have power, for up to 80 years, to distribute the capital and the income amongst a class of beneficiaries, including, in some cases, the settlor. Very often, beneficiaries will make requests of the trustees for the investment and application of the trust fund and there is nothing untoward in this; indeed, decisions taken by trustees will largely be the result of such requests, rather than any initiative of the trustees.

■ How does the court take into account the fact that a spouse is a beneficiary under a trust?

The first case to consider when assessing this question is *Howard v Howard* [1945] 1 P 1. There, the husband applied for a reduction of the maintenance that he had been ordered to pay to his ex-wife on the divorce. It was held that a court could not make an order that would leave the husband without enough to live on, with a view to putting pressure on trustees of a discretionary trust to exercise their

discretion in favour of the husband. If, on the other hand, he had been receiving regular payments from the trustees, those payments could be taken into account as part of his means (see Lord Greene MR's comments at [1945] 1 P 1, 6).

Another important decision is *Browne v Browne* [1989] 1 FLR 291, a case which considered a husband's application for financial provision. The judge ordered the wife to pay a lump sum to the husband. The wife applied for leave to appeal on the ground that the judge was wrong in finding that she had effective control over trusts, set up outside the UK, of which she was the beneficiary. Refusing the application, it was held that, although it is wrong for a judge to put pressure on discretionary trustees to act in a way that is not in accordance with their discretion, the court has to look at the reality of the situation. Before the divorce, the trustees complied with every request by the wife for funds and so the judge was justified in concluding that she had immediate access to the funds and that those funds could be taken into account as part of her capital resources. If the foreign assets could not be used directly to pay the husband, the judge could take them

A sharp carving knife rather than a salami slicer ~ continued

into account in calculating the amount of the wife's English assets the husband should receive.

■ Can the court take into account the fact that children may benefit from a trust?

Without legal capacity, minor children may well be unable to seek to persuade trustees of anything. In *J v J (C intervening)* [1989] 1 Fam 29, after a divorce the husband was ordered to make maintenance payments for the two minor children of the marriage, whose custody was given to the wife. The wife then died, leaving her residuary estate to be divided between the two children, who went to live with their maternal grandmother. As the children were still minors, they could not call for their shares in the residuary estate and, until then, the funds were held by trustees on accumulation and maintenance trusts under section 31 of the Trustee Act 1925 with a power of advancement under section 32 of that Act. The court was told that the trustees did not intend to give funds for the purpose of maintaining the children unless they were compelled to do so. The judge said that the children's interests under the trust were financial resources of theirs that needed to be taken into account and refused the application. On appeal Booth J said ([1989] 1 Fam 29, at 35):

"When faced with such a situation as this, the court has to perform a careful

balancing exercise to ensure that the children's needs are met without requiring the father to pay more than he can properly afford while at the same time not placing improper pressure on the trustees to exercise their discretion in such a way that they would not otherwise have thought it right to exercise it. ... Any statement made by a trustee as to the future exercise by him of his discretion under the trust needs to be evaluated. ... It is also necessary for the court to have regard to the nature of the trust under which the child is a beneficiary."

■ Other remedies that may be available to the court

There may be other courses of action available to the applicant spouse, for example an application under section 37 of the 1973 Act for an order setting aside the transfer of assets into the settlement if it was made with the intention of defeating an application for financial provision, or under section 423 of the Insolvency Act 1986. Further, the applicant could apply to vary a nuptial settlement under section 24 of the 1973 Act.

Finally, he or she could, in appropriate circumstances, claim that the trust instrument is a sham (see *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 and *Shalson v Russo* [2005] Ch 281).

■ Conclusion

Upon an application for financial provision the court should be performing a balancing exercise, using "the sharp carving knife rather than the salami slicer," whether or not the applicant is a minor or an adult. Where the respondent to the financial provision application is a beneficiary of a trust, the court should not put improper pressure on the trustees to exercise their discretion for the benefit of the respondent but, at the same time, the court must look at the reality of the situation. If, on the evidence, any exercise by the trustees of their discretion in favour of the respondent would not appreciably damage the interests of the trust or the other beneficiaries, the court is entitled to assume that a genuine request for a distribution to the respondent would be met by a favourable response. If the court then decides that it would be reasonable for the respondent to seek to persuade the trustees to release capital to him in order to make proper financial provision for his spouse and children, the court will not be putting improper pressure on the trustees (*Thomas v Thomas* [1995] 2 FLR 668).

Leigh Sagar

Leigh Sagar was called to the English bar in 1983 and the New York State bar in 1997. He specialises in national and international trusts and estate litigation and advice, including pensions, tax and corporate issues.

The lawfulness of trade marks as metatags

■ Introduction

Every day more and more people become 'computerate' (to a greater or lesser extent), and more and more people start to use the internet or to use it more fully. Additionally every day there is an increased coverage of broadband internet access. Commercial enterprises and other organisations of all varieties recognise the opportunities presented by this expansion and inevitably they seek to have an appropriate presence on the internet. As a consequence there is great competition between websites for visits by the right type and

maximum number of clients or customers. One of the main ways of achieving this is by the use of 'metatags'. These are key words which are inserted in the source code of the website and which act as 'sign posts' to the 'search engines'. Such metatags are not visible in the normal use of websites.

Using key words which are mere descriptions of a product or service as metatags is, of course, unobjectionable. However a simple and effective way of alerting the internet user to a particular website is to insert as a metatag the name and/or trade

mark of the leading player in the particular field of endeavour. Thus in these circumstances, when the user conducts a search for the website of that leading player, the search engine will also list other websites which are in competition with that of the leading player. It is perhaps understandable that owners of such names and/or trade marks are unhappy about the use of their brands for the specific purpose of attracting customers and clients to a competitor's website. But is such metatag use of names and trade marks an infringement of any intellectual property rights?



Malcolm Chapple

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We offer a wide range of chancery and commercial expertise.

The lawfulness of trade marks as metatags - continued

■ Can Company A use Company B's name or trademark as a metatag?

This question was addressed in the English Courts by the leading authority, *Reed Executive plc v Reed Business Information Limited* – in the High Court at [2002] EWHC 1015 and in the Court of Appeal at [2004] EWCA Civ 159.

■ Background – passing off

The relevant background law relating to passing off is conveniently summarised in the speech of Lord Oliver in *Reckitt and Colman Products Limited v. Borden Inc.* [1990] RPC 341 at page 406:-

[Passing off] may be expressed in terms of the elements which the plaintiff ... has to prove in order to succeed. ... First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get up' ... under which his particular goods or services are offered ... such that the get up is recognised by the public as distinctive of the plaintiff's goods or services. Secondly he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. ... Thirdly he must demonstrate that he suffers ... damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.

In the briefest summary, the Claimant must show 'the classical trinity' of (1) a reputation, (2) a misrepresentation, and (3) damage.

■ Background – trademarks

The relevant law in the United Kingdom in relation to registered trade marks, either Community Trade Marks (CTM) or United Kingdom Registered Trade Marks (UKTM) derives from the Council Directive (EEC) 89/104. Of particular note are the provisions of Article 5.1:-

The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

- (a) *any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;*
- (b) *any sign where, because of its identity with or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion between the sign and the trade mark.*

■ Reed – the facts

The relevant facts of the *Reed* case are that (1) the Claimant carried on business as a well known employment agency, (2) the Claimant was the registered proprietor for the UKTM for REED in respect of employment agency services, (3) the Defendant was part of a publishing group which diversified by creating a jobs dedicated website, *totaljobs.com*, (4) such website used at material times the metatag REED BUSINESS INFORMATION, ie its own name, for a website and (5) an internet search for REED JOBS listed *totaljobs.com* below the Claimant's website.

■ Reed – the Court of Appeal's decision

In essence, at first instance Pumfrey J found that in relation to such metatag use, there was (1) infringement under Article 5.1(b), ie 'similar sign and identical/similar goods/services and a likelihood of confusion', and (2) passing off. However on appeal, Jacob LJ, who gave the leading judgment of the Court of Appeal, decided that there was (1) no passing off (at paragraph 147) and (2) no infringement pursuant to Article 5.1(b) (at paragraph 150). In particular he observed that nobody had been misled or confused by the metatag use of REED JOBS by the Defendant.

■ Conclusion

At first sight the Court of Appeal judgment seems to indicate that the use of offending metatags is not passing off or infringement of a registered trade mark. However caution must be exercised since (1) it is clear that the issue of metatags was tacked onto the end of the case at first instance and never received the necessary mature consideration of evidence at first instance, (2) passing off and infringement of registered trade marks are fact-based torts, and so a slightly different set of facts could produce a completely different result (particularly if the two parties did not bona fide share the same name), and (3) in any event Jacob LJ was undecided about Article 5.1(a) infringement (which avoids the requirement of proving a 'likelihood of confusion').

Malcolm Chapple

Malcolm was called to the Bar in 1975. His practice is evenly divided between commercial business litigation and intellectual property disputes. He is described by Chambers & Partners 2007 as "a senior junior who knows his stuff".