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YOUR UPDATE OF RECENT CHANCERY & COMMERCIAL LAW

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Managing expectations, disappointing hopes

The House of Lords' recent decision in *Cobbe v Yeoman's Row Management Limited* [2008] 1 WLR 1752 represents another big step in the recent trend of tightening the standard for proprietary estoppel claims, particularly in commercial cases. Arguably, it changes the law to such an extent that many practitioners may want to revisit old advices and pleadings, to check that they have not been over-optimistic, or insufficiently precise.

Mrs Lisle-Mainwaring (who rejoices in the first name of Zipporah) and her husband owned the defendant company, YRML, which in turn owned the eponymous property, consisting of a block of flats in Knightsbridge. She agreed with Mr Cobbe that if he succeeded in obtaining planning permission for the property to be rebuilt as a terrace of six luxury townhouses, he would be entitled to buy it from YRML for the very reasonable sum of £12 million, plus 50% of any proceeds of sale over £24 million. Several terms remained to be agreed, such as the timescale for evicting the existing tenants of the property, and how to secure YRML's purchase price pending completion. But the basic deal having been struck, Mr Cobbe believed that these terms would inevitably be agreed, and although he was aware the contract was not legally binding, he thought both parties considered themselves bound 'in honour', and he proceeded to seek and obtain permission for the development. The day after the council agreed to grant permission, Mrs Lisle-Mainwaring reneged on the deal on rather spurious grounds (as she had intended for some months) and demanded instead £20 million plus 50% of the proceeds over £40 million for the property. Litigation rapidly followed, based primarily on a proprietary estoppel claim.

Reversing Etherton J and a unanimous Court of Appeal led by Mummery LJ, an equally unanimous House of Lords rejected Mr Cobbe's claim. All Mr Cobbe had expected, said Lord Scott in a speech with which three of the other Lords agreed, was an opportunity to negotiate further, not a defined interest in the property. He knew he did not have a binding agreement, and that was fatal to the estoppel. His detrimental reliance and Mrs Lisle-Mainwaring's unconscionable behaviour were not enough. Mr Cobbe's alternative plea of constructive trust was also dismissed, and he was instead awarded a *quantum meruit* for his work.

This means that in the future the courts will be less willing than previously to fill in missing details as to the interest that the promisee expects to acquire. Lord Walker's concurring speech accepts some responsibility for the tendency towards a "unified doctrine of detrimental reliance" (as in *Yaxley v Gotts* [2000] Ch 162 for example), which he now disowns. Although the House cannot be taken to be disapproving the line of cases (*Gillett v Holt, Jennings v Rice, etc.*) that allows estoppels to arise in relation to testamentary dispositions notwithstanding that wills are inherently revocable, one might be forgiven for thinking that if reliance on the assurance "all this will be yours" sets up an estoppel, then reliance on a deal where the main terms were agreed and the rest would surely follow ought to do the same.

The trend of tightening the standard for proprietary estoppel claims can also be found in *Thorner v Major* [2008] EWCA Civ 732, a recent, heart-rending case where the claimant's huge efforts over 30 years on the deceased's behalf went unrewarded after the deceased revoked his will in the claimant's favour, apparently accidentally, because the deceased, a man of few words, had not expressed his intentions clearly enough, even though it seems the claimant had understood him. The Privy Council too has been clamping down on proprietary estoppel claims in *Knowles v Knowles* [2008] UKPC 30, where Sir Henry Brooke held that "it is … important that the courts do not penalise those who through acts of kindness simply allow other members of their family to inhabit their property rent free".

Lord Scott considered the 'subject to contract' defence, discussed in *AG of Hong Kong v Humphrey's Estate (Queen's Gardens) Ltd* [1987] AC 114, which makes it nigh impossible for an estoppel to arise from 'subject to contract' negotiations. He applied it by analogy to cases where both parties know that their negotiations are legally unenforceable. So is there a higher standard in commercial transactions than domestic situations? Mrs Lisle-Mainwaring 'knew her way around a negotiating table' as did Mr Cobbe, and this was clearly an important point for Lord Scott. Lord Walker, however, makes it plain that it is not that there is a different standard in play, just that the parties in domestic cases are often unaware of the necessary formalities, and unaware that the oral representation was not legally enforceable. Accordingly, he notes, some of the domestic cases might have been decided differently if there had been more rigorous cross-examination as to whether the promisee had a genuine expectation, rather than just a hope.

Ultimately, however, it appears that Mr Cobbe's claim would not have succeeded even if he had been unaware that the agreement was unenforceable, as Lord Scott also expressed the view that a proprietary estoppel would not get round the statutory requirement for writing. But this may have a strange effect: claims where there would be a valid contract but for the effect of the statute will fail, yet bare promises, unsupported by consideration, which do not purport to be contracts, may be enforceable

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through estoppel. That is surely counter-intuitive. It seems that the justification for limiting the availability of proprietary remedies in these cases (particularly given the drift towards awarding only compensation measured by reliance rather than the full expectation), was the availability of personal, restitutionary remedies. But if the presence of those remedies was a comfort to their Lordships in this case, one can expect injustice to result in cases where, for one reason or another, no restitutionary remedy is available. Here, Mr Cobbe's expenditure on seeking planning permission had resulted in YRML's gain, so that a claim in *quantum meruit* was made out. But where the promisee's reliance had not resulted in any gain to the promisor (and gain to the promisor has never been necessary for an estoppel to arise: *Crabb v Arun DC*), from where will the personal claim spring?

Finally, it is interesting to note that the quantum of the restitutionary claim would be the same under both unjust enrichment (measured as the benefit to the defendant) and *quantum meruit* (the value of the claimant's work). This was because YRML already owned the potential to obtain planning permission, and all Mr Cobbe did was to unlock that potential. Here, it seems to me that the value of Mr Cobbe's work should be increased by a 'success fee', given that he knew he would not be paid for his time if planning permission had not been granted. He would surely have insisted on an uplift if he had been taking on the job on 'no-win, no-fee' terms.

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John Ross Martyn

Carry on varying

The context

***"Infamy, infamy, they've all got it in for me",* said Julius Caesar (a.k.a. Kenneth Williams) in *Carry on Cleo*. Beneficiaries who wish to vary the beneficial interests in an estate or under a trust cannot make this kind of complaint. If they are of full age and capacity, they can vary trusts and estates. Indeed Parliament has helped them to do so, in at least three ways:**

- Section 142(1) of the *Inheritance Tax Act 1984* allows beneficiaries to vary the dispositions of the estate of a deceased person so that the Act applies as if the variation had been effected by the deceased (subject to the provisions of the section itself, not least the requirement that the variation be done within two years of death).
- The *Variation of Trusts Act 1958* allows the court to approve variations on behalf of certain persons who cannot, for specified reasons, do so themselves.
- Orders made by the court under the *Inheritance (Provision for Family and Dependants) Act 1975* have the effect of varying the interests of beneficiaries in estates. Sometimes, of course, these orders are the result of hard-fought litigation.They are sometimes, however, rather similar to consensual variations. The existing beneficiaries of an estate recognise that the applicant has a good claim, and negotiate a consent order. Sometimes, indeed, the beneficiaries may themselves want the consent order made, for example where the order will reduce the inheritance tax payable on the estate (and they may have prospects of eventually inheriting from the applicant).

The problem

There is, however, a basic rule that may stop a variation. It has to be possible under the general law of estates and trusts, as modified by the statutory provisions I have mentioned. For example, a consent order under the *Inheritance Act* may adversely affect the interest of a minor beneficiary (provided that the court approves it on behalf of the minor). However, an order under the *Variation of Trusts Act* may only be made if it is for the benefit of the persons on behalf of whom the court is giving consent. As for section 142, it does not extend the ability to vary at all: unless the variation is effective under the general law, it cannot give the tax privilege provided by the section. To take another example, where an executor or trustee is a beneficiary, the rule against self-dealing may obstruct the variation.

In order to prevent useful acts by trustees being breaches of trust, many modern wills and trusts give wide powers to executors and trustees. However, some do not, or at least do not give the unusual powers that may be needed. Moreover, the problem may not be the simple one that the general law does not allow the variation. It may be one of uncertainty as to whether the general law allows it or not.

Possible solutions

The court may be able and willing to help, in three different ways:

- It can give executors power to make a specific variation within section 142, under section 57 of the *Trustee Act 1925*, as long as the power conferred is administrative. This may be (and in one case in my experience has been) useful where section 142 is to be used to move assets from the estate of one deceased person to

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another deceased person (the so-called "double death variation"). The result of the variation will be that the same beneficiaries take under one estate rather than another, and that arguably requires their consent (at least, HMRC may take the point that it does). Perhaps, however, they cannot easily be found or do not have legal capacity. The court can give the executors power under section 57 to make the variation, without the consent of the beneficiaries.

> Where counsel has advised that the general law allows the variation, one or more of the parties may be unwilling to act on that without further comfort (there can be no guarantee that counsel is right). Suppose that a compromise of an application under the *Inheritance Act* is agreed, but the parties wish it to be implemented by a payment from a trust fund, rather than out of the estate. Counsel thinks, on the particular facts, that there is power to use the trust fund for this purpose, but someone is doubtful. The executors can apply for an order under section 48 of the *Administration of Justice Act 1985* that they do have permission to act on counsel's written opinion. They will be fully protected, and provision can be made in the way the parties wish. Section 48 has been successfully used in this way.

> The court has an inherent jurisdiction to supervise the administration of trusts and estates: *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709. Even when there is no real doubt as to the nature of the powers of the executors or trustees, and they have decided how they wish to exercise them, the court is willing to approve the proposed exercise, at least where it is *"particularly momentous": Public Trustee v Cooper* [2001] WTLR 901 at 923, citing Robert Walker J in an earlier case.

In all these three situations, especially the second, the court may well be willing to make the order without a hearing.

Conclusion

If you have problems varying estates and trusts, the court may be able to help.

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The end of some bank charges?

Charlotte Ford

Introduction

Most holders of private bank accounts receive banking services for which no fee is charged so long as their account remains in credit. Many customers also use authorised overdraft facilities, for which an agreed fee will usually be payable. But up to 20% of bank account holders also use 'unauthorised banking facilities': overdraft facilities that have not been agreed by the customer and the bank in advance, which generally arise where the customer gives a payment instruction that takes an account into debit (or, where an overdraft facility has been agreed, exceeds the agreed limit). Customers have to pay high rates of interest on funds borrowed in this way, together with specified 'unauthorised overdraft' charges.

In recent years, customers of leading banks have been attempting to challenge in the county courts the charges for unauthorised overdrafts and other related fees levied on their accounts. Under litigation agreements with the largest banks in the UK, the Office of Fair Trading ("the OFT") brought a case in the High Court to test the legal issues involved in such claims. Those issues were:

> Whether clauses in customer contracts that allowed banks to levy unauthorised overdraft and other similar fees were penalty clauses; and

> Whether such clauses could, as a matter of principle, be assessed for fairness under the Unfair Terms in Consumer Contracts Regulations 1999.

Andrew Smith J handed down his judgment in April 2008, reported as *Office of Fair Trading v Abbey National plc* [2008] EWHC 875 (Comm). The judge held that the banks' terms were not penalty clauses but were subject to the assessment for fairness. This article considers Andrew Smith J's decision and its implications for customers.

Charges are not penalties

Many of the individual cases pending before the county courts allege that the charges are penalties at common law, and so unenforceable. Andrew Smith J decided that the charges were not payable upon a breach of the contract between the bank and the customer, and so were not penal in character.

The 1999 Regulations

The 1999 Regulations apply to *"contracts concluded between a seller or a supplier and a consumer"* (see regulation 4(1)), where (a) terms have not

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The fee terms for unauthorised overdrafts used by banks can as a matter of principle be challenged under the 1999 Regulations.

been individually negotiated (which will be the case for most, if not all, of the banks' terms), and (b) the term(s) in question, contrary to *"the requirement of good faith"*, create a significant imbalance in the contractual relationship to the consumer's detriment.

The 1999 Regulations are important because, pursuant to regulation 5, they enable certain contractual terms to be assessed for fairness: the consequence of a finding of unfairness is that the unfair term(s) do not bind the consumer (see regulation 8). But there are limits to the type of term that can be reviewed. Importantly for our purposes, regulation 6(2)(b) provides that the assessment of fairness of a term shall not relate to the adequacy of the price or remuneration, in comparison with the goods or services provided in exchange, so long as the term is in *"plain intelligible language"*.

The banks argued that regulation 6(2)(b) operated to exclude the terms from assessment on the basis that the charges were the price for the services provided by them to their customers. The judge rejected these submissions, holding that the application of regulation 6(2)(b) is confined to payments which may properly be said to be payable by way of exchange for the provision of services. In so holding, the judge explicitly rejected the dual arguments of the banks that:

> the charges were for a 'whole package' of services (an argument rejected because the charges could not be said to be levied *in exchange* for services provided when the account is in credit, nor were they the *price or remuneration* for those services within the natural meaning of that phrase, see [398]), and alternatively

> the charges were for 'specific services' (an argument rejected because the charges were not levied in exchange for services involved in making payments, but instead by reason of the particular circumstances in which those services were provided – i.e. outside the confines of an arranged overdraft; there was thus no element of exchange between bank and customer, see [406] et seq).

Consequences for customers

In May 2008, the banks announced that they would be appealing against Andrew Smith J's decision. Permission to appeal was granted shortly thereafter. All pending cases have been stayed pending the determination of those appeals. But even when the outcome of the banks' appeals are known, it will be quite some time before customers can be confident of their position. For instance:

> Andrew Smith J's decision of April 2008 concerned the terms used by banks in January 2008. He heard submissions in July 2008 as to whether the fairness of historic terms may also be assessed. A ruling is expected at some time in the autumn of this year.

> If Andrew Smith J's decision is upheld, it will have been decided that the fee terms for unauthorised overdrafts used by banks can *as a matter of principle* be challenged under the 1999 Regulations. The next step will be for the OFT, the body charged with investigating potential breaches of the 1999 Regulations (see regulation 10(1)), to consider whether the actual terms used by the banks are unfair. Given the stakes, there is likely then to be an appeal from the OFT's conclusions.

> The OFT has not officially or publicly reached any conclusions as to the fairness of the banks' terms. However, in August 2008, an internal NatWest memo was leaked and widely reported. Its contents suggest that the OFT has informally warned the banks that it is minded to conclude that their overdraft terms are unfair.

The bigger picture

Banks receive a huge amount of income from overdraft charges. At present, the UK is one of a few countries to enjoy 'free-if-in-credit' banking, unlike countries such as the USA, where a monthly or annual fee is levied for the use of a current account. If the banks are told to stop charging such high overdraft fees (or indeed to stop making such charges at all), they may decide that the present system cannot be maintained. Ultimately, and far from being a victory for the customer, could this decision be the beginning of the end of free banking?

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