

James Saunders

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Practice Overview

James joined New Square Chambers in October 2019 following successful completion of his pupillage under the supervision of Alexander Hill-Smith, Aidan Briggs, Mark Hubbard and Nigel Hood.

James appears frequently in his own right in the High Court and County Courts covering the full range of Chambers' practice areas. James' notable instructions have included: advising on a wrongful trading claim with a potential value of £2 million, a successful application to wind-up a deadlocked partnership with co-bankrupt partners, and advising on a complex family dispute involving issues of company decision making, directors' powers and discretionary trusts.

James has gained both led and unled trial experience, having been led by Nigel Hood in a four-week High Court trial concerning issues of civil fraud and partnership dissolution (*Sidhu v Rathor* [2020] EWHC 1916 (Ch)) and defending a possession trial in his own right.

James welcomes instructions across Chambers' practice areas in the full range of commercial-chancery work including insolvency, trusts and estates, property, commercial litigation, civil fraud and company. James can offer up to date advice on responding to the Corona Virus crisis, particularly in relation to property, insolvency, and bankruptcy issues.

James is also a contributor to the forthcoming Third Edition of Gough on Company Charges.

Before coming to the Bar, James spent ten months at the boutique litigation firm Lenczner Slaght in Toronto, specialising in commercial and financial litigation. Previously, James tutored trusts law at the London School of Economics and obtained first class honours in his LLB from University College London.

James can be instructed on a direct access basis.

Trusts and Estates

James gained extensive experience of trusts and estates disputes during pupillage including offshore litigation and non-contentious matters. James has gained recent experience of tracing and resulting trusts in the Isle of Man in a liquidation context. James has written on will variations for the leading international journal *Trusts and Trustees*.

James is familiar with trusts and estate practice, including:

- Applications for removal of trustees and executors, Beddoe applications and Benjamin orders, amongst other Part 64 procedures.
- Particular issues arising in respect of costs in trusts and estate litigation.
- Constructive and resulting trusts claims and tracing.
- 1975 Act claims.
- Rectification and rescission of trust instruments.
- TOLATA proceedings.

James' recent instructions include

- Advising executors on the correct interpretation of a testamentary disposition to a registered charity
- Advising on a contested application for a grant of letters of administration for beneficiaries entitled in the same degree
- Advising on proprietary estoppel claim against an estate
- Advising on various issues arising in estate administration including issues of the devolution of copyright
- Advising on a TOLATA action between former co-habiting partners
- Advising on the merits of a potential 1975 Act claim against an estate for financial provision

During pupillage James assisted with:

An application for the rendering of an account and subsequent distribution from an executor.

A successful High Court trial challenging a will and lifetime transfers for undue influence and want of knowledge and approval.

Advising on setting aside appointments, indemnities and powers of attorney for mistake and undue influence in a family trust context.

Research addressing the operation of arbitration clauses in trusts disputes.

Drafting Particulars of Claim to set aside lifetime transfers for undue influence.

Research concerning changes to the proper law of trust administration, rectification of trusts for disabled persons and taxation of pension trusts.

Property

James is familiar with the full range of Chambers' work in real property and landlord and tenant matters, including TOLATA proceedings, enforcement, possession proceedings (including mortgage possession and interim possession orders) and business tenancy renewals. James has a strong grasp of the interaction between real property issues and insolvency/bankruptcy.

James' recent instructions include:

Defending mortgage possession proceedings with issues of a mortgagee in administration.

Advising on a challenge to service charges in respect of a multi-million pound apartment.

Defending proceedings for a declaration and damages for infringement of an easement.

Advising on injunctive relief to prevent a sale at an under value by an LPA receiver
A 1954 Act application for renewal of a business tenancy.
Defending a fast-track possession trial under the Housing Act 1985.
Advising in relation to numerous dilapidations disputes concerning business premises.
An application for final charging orders over numerous properties and advice on a subsequent order for sale with consideration of service out of the jurisdiction.
Obtaining a stay of execution of a possession order on an urgent application in the High Court.
Advising on equitable accounting for interests in a marital home upon bankruptcy.

During Pupillage James assisted with:

The trial of a preliminary issue in a contested lease renewal under the Landlord and Tenant Act 1954.
A four-day trial with issues of proprietary estoppel and a lease/licence dispute over a houseboat.
A two-day Land Tribunal trial for removal of a registered restriction involving considerations of illegality and the use of nominees.
Advising in a claim resembling P&P and Dreamvar, with additional considerations of an intermediary party.

Insolvency

James accepts instructions across the full range of corporate insolvency and bankruptcy matters. James has gained recent experience of the liquidation regime in the Isle of Man.

James' recent instructions include:

A successful application to wind up a partnership with two bankrupt partners as an unregistered company under the Insolvent Partnership Order.
Advice on an English corporate administration with issues concerning intellectual property rights and non-assignment clauses and cross-jurisdictional arbitration considerations.
Advising on questions of unjust enrichment, tracing, knowing receipt and transactions at an undervalue in relation to an insolvency process involving multiple corporate entities.
Appearing on applications under 235-237 of the Insolvency Act 1986 to require cooperation with an office holder.
Advising on a wrongful trading claim with a potential value of £2 million.
Advice concerning a potential S.212 misfeasance action against delinquent directors of a company in liquidation for breach of fiduciary duty.
Numerous bankruptcy petitions appearing for both creditors and debtors, and associated applications.
Advising on the implications of retention of title security in liquidation.
An application for the appointment of an alternative first trustee in bankruptcy under The Administration of Insolvent Estates of Deceased Persons Order 1986.
Advising trustees in bankruptcy as to equitable accounting for a property between former spouses.
Advising on the novation of contractual liabilities in a pre-pack administration.
Advising on the effect of bankruptcy upon a shareholder's voting entitlements.
Resisting applications for validation orders.
Pursuing and opposing winding up petitions, annulments and rescissions

Civil Fraud

James' recent instructions include:

- Appearing in a 4-week High Court trial concerning the misappropriation of assets and various issues of partnership law led by Nigel Hood (Sidhu v Rathor [2020] EWHC 1916 (Ch)).
- Applications for final charging orders and third-party debt orders in the High Court in the context of corporate fraud and misappropriation of company assets.
- Preparing witness statements in a matter regarding fraudulent share sales, acquisitions and accounting.

During pupillage James assisted with:

Advice regarding the misselling of interest rate hedging products and liability for negligent misstatement. Assisting in skeleton argument preparation and advice concerning tracing under the Proceeds of Crime Act 2002. James has also gained an understanding of compensation and confiscation orders under POCA and the interaction with civil enforcement.

An application for Norwich Pharmacal disclosure in a stock trading platform fraud.

Assisting with applications for domestic and worldwide freezing injunctions.

Conference advice regarding allegations of fraudulent forgery of a will signature.

Company

James has recently advised on a complex family dispute involving issues of company decision making, directors' powers and discretionary trust powers in family settlements.

James is also familiar with applications to extend the period of registering company charges and for applying to restore companies to the register.

James regularly advises on disputes concerning breaches of directors' duties, often in an insolvency context. James has also gained recent experience of Company Law issues in an Isle of Man context whilst advising on an offshore liquidation.

During pupillage James assisted with:

Advice on vexatious resolutions and meetings of directors.

Drafting Particulars of Claim for breach of a joint venture investment agreement involving multiple corporate vehicles, unjust enrichment and constructive trust claims.

Advising in relation to Cooperative and Community Benefit Societies and Industrial and Provident Societies.

Drafting shareholder agreements for a settlement involving numerous family-owned corporate entities in multiple jurisdictions.

Advice and research concerning dispositions at an undervalue and directors' duties in the Cayman Islands

Commercial Litigation

James' recent instructions include:

- Advising on resisting an application for pre-action disclosure in connection with a claim for misfeasance in public office.
- Defending proceedings and security for costs applications pursued against a company for breach of a construction contract.
- Drafting proceedings for breach of a deed of guarantee.
- Assisting in drafting a defence to a debt claim with issues of conflict of laws, champerty, assignment and the Rome II Regulation

During pupillage James assisted with:

An advice regarding the misselling of interest rate hedging products and liability for negligent misstatement.
Drafting a Defence resisting a claim for breach of a service contract.
Drafting pleadings in a claim under the Consumer Credit Act and Financial Services and Markets Act concerning regulated mortgage contracts.
Drafting pleadings in a claim arising from a failed joint venture, involving considerations of unjust enrichment, constructive trusts and nominee companies.

Cases

Name: Rescinding Directors Disqualification Undertakings: The Right Type of Fraud will Unravel All

Reference: Georgallides v Secretary of State [2020] EWHC 768 (Ch).

Date: 21st April 2020

Court: Chancery Division

Facts:

Rescinding Directors Disqualification Undertakings: The Right Type of Fraud will Unravel All
Georgallides v Secretary of State [2020] EWHC 768 (Ch)

Summary

ICC Judge Barber's decision in *Georgallides* provides a useful exposition of the manner in which judgments, contracts and consent orders may be vitiated and rescinded on the basis of fraud. Applying the various fraud doctrines to disqualification undertakings it is now clear that the retrospective rescission of undertakings is available but will be permitted only on the narrow grounds which would apply to vitiate orders and private law contracts.

The principal mode by which the harshness of undertakings can be mitigated or extinguished (to a degree) will remain the power afforded by section 8A of the Company Directors Disqualification Act 1986 ("**CDDA**") to reduce the period of an undertaking or to terminate an undertaking altogether (prospectively). However, where a director feels pressured into offering an undertaking to stave off proceedings which arouse a suspicion of reliance upon fraudulent evidence there is now ground to investigate such allegations. Confirmation that a jurisdiction to rescind exists is welcome, but the high hurdle of demonstrating actual or imputed knowledge on the part of the Secretary of State ("**SoS**") will be extremely difficult to surmount.

Facts

The application sought orders that multiple disqualification undertakings be rescinded pursuant to the court's inherent jurisdiction, and for permission to use a prohibited name pursuant to section 216(3) of the Insolvency Act 1986. The application was novel, relying on the maxim that "fraud unravels all." The Applicant's case was that two of the companies in relation to which a seven-year undertaking was given were victims of fraud by the Reading branch of HBOS. A former banker with the branch and various associates swore affidavits in support of the Secretary of State's case in disqualification proceedings commenced in 2006 and due for trial in early 2010.

The Applicant argued that these caused him to offer the disqualification undertaking.

The Applicant sought the rescission of the expired 2010 undertaking for fraud, and thereafter the ability to resile from or the rescission of a further undertaking given in 2015 in consequence of this being based upon the 2010 undertaking.

The Judgment at First Instance

Deputy Registrar Baister held that the court lacked jurisdiction to rescind or vary undertakings retrospectively under section 8 of the CDDA or rule 12.59 of the Insolvency (England and Wales) Rules 2016 (covering appeals and reviews of court orders). However, the court could, in cases of fraud, retrospectively rescind undertakings under its inherent jurisdiction.

The Allegations of Fraud

The following points were relied upon by the Applicant:

1. An insinuation that the witness evidence for the SoS in disqualification proceedings was prepared in a misleading and dishonest manner.
2. Criminal proceedings were later pursued against Mr Scourfield, who it was contemplated may provide evidence for the SoS, based upon a scheme to exploit "victim" companies. The Crown's case in the criminal trial did not expressly mention the Applicant's company, but it was suggested that the Applicant's evidence that his company was targeted was consistent with this case.
3. Linked to point 2, the credibility of witnesses who later received criminal convictions would have materially and significantly impacted the disqualification proceedings and therefore the assessment of whether to offer an undertaking.
4. That Mr Scourfield, amongst others, had given fraudulent evidence for the SoS in the first disqualification proceedings.

Judge: Judge Barber

**Comment:
Reasoning and Conclusions**

The key points to consider when attempting to set aside orders on grounds of fraud are:

1. Particulars of fraud must be pleaded, and the allegations proved with cogent evidence, save where admitted or the evidence is incontrovertible;
2. The fraud must be conscious or deliberate and go to a material issue operating upon the court's judgment so as to entirely change that judgment once evidence of fraud has come to light;
3. Crucially, the fraud must be committed by a party to the proceedings, or at least be suborned by or knowingly relied on by that party. It is not sufficient to show that a judgment was obtained through perjured evidence. The evidence must arise directly from a party, or be attributable to or adopted by the same.

The court held that a disqualification undertaking was founded in contract but modified by statute. Disqualification undertakings thereby differ somewhat from typical judgments. In consequence, the court accepted the submission that as a form of "statutory contract", a disqualification undertaking was susceptible of rescission for fraudulent misrepresentation, which required the following elements to be proved:

1. The misrepresentation may be a, rather than the sole cause of the inducement;
2. Where the fraudulent statement is material, in that it is likely to induce a party to enter into a contract, it will be very difficult to rebut the presumption of fact that the party was thereby induced;
3. The misrepresentation must be made by the contracting party. Alternatively, if the representation is made by a third party, the contracting party must have actual knowledge that the representation was false.

In consequence, if these elements are *not* made out, the court has no residual supervisory jurisdiction to rescind the undertaking on the basis that "*fraud unravels all*" in the abstract. In reaching this conclusion, the court noted that the jurisdiction to rescind was exceptional and should remain so. However, where a party can satisfy the court that the grounds of fraudulent misrepresentation are made out, the discretionary jurisdiction to rescind undertakings retrospectively will be available.

In the particular context of disqualification undertakings, the applicant must prove that the SoS dishonestly made a material false representation which was intended to induce the Applicant to act to his detriment, or that the SoS

had actual knowledge of a material false representation made by a third party. This is likely to be a very difficult hurdle to surmount.

In Mr Georgallides' case, the grounds of fraud raised ere either implausible or were not shown to amount to misrepresentations made by, or attributable to, the SoS. Further, the requisite evidence of inducement was also lacking.

As a final point of note, the court expressed the obiter view that where a second undertaking is given to remedy a breach of a prior undertaking which is later rescinded for fraud this would not lead inevitably to the rescission of the later undertaking. The court adopted the decision in *Brian Sheridan Cars Ltd* [1995] BCC 1035 that variations of leave to act cannot be made with retrospective effect and extended this position to retrospective rescission. In short, a valid breach will have occurred, despite the later rescission of the first order.

James Saunders
21st April 2020

Name: The Manchester Ship Canal Company Ltd v Vauxhall Motors Ltd (formerly General Motors UK Ltd)

Reference: [2019] UKSC 46

Date: 23rd October 2019

Court: Supreme Court

Facts:

Facts

In 1962, the Manchester Ship Canal Company Ltd ("MSCC") reached agreement with Vauxhall Motors Ltd ("Vauxhall") in relation to the user of MSCC's land over which Vauxhall sought a right to discharge surface water and effluent into an adjacent canal. A land exchange dated 12 October 1962 conveyed some, but not all, of the relevant land and Vauxhall acquired the remaining rights by way of perpetual licence conditional upon payment of £50 annual rent and the performance of additional covenants. The licence also granted Vauxhall rights to construct, alter and maintain a spillway upon MSCC's land to enable discharge of surface water, along with an ancillary right of access.

Clause 5 of the licence contained a forfeiture provision engaged upon non-payment of rent or default in performance of Vauxhall's non-monetary obligations. Following non-payment, MSCC served a notice to terminate and forfeit the licence under clause 5 thereof. Vauxhall claimed relief from forfeiture which was granted at first instance and affirmed on appeal.

The Supreme Court's Analysis

The rationale for relief from forfeiture is given succinctly by Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691, at 723-724:

"[W]e should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result."

MSCC submitted that equitable relief from forfeiture concerning land was available only for proprietary interests, so that merely possessory rights including all licences were excluded. The Supreme Court noted that numerous decisions concerning forfeiture of personalty admitted purely possessory rights within the scope of relief. Such rights included patent rights, leases of video editing equipment and a contractual power to appropriate shares charged by way of equitable mortgage, amongst others.

The question for the Court was whether this settled extension to possessory rights in the context of personalty was to be applied to possessory rights over land. The Court unanimously determined that such an extension was warranted. Licences of varying character, including for residence and those akin to easements but absent the requisite degree of exclusive user, are now susceptible to relief from forfeiture. However, practitioners should

exercise caution in light of Lord Briggs's observation that the licence under consideration was "very unusual" because it granted virtually exclusive possession, a high degree of control over the relevant land and was granted in perpetuity. It remains to be seen if these qualities, particularly as regards perpetual grants, are strictly enforced at first instance.

Lord Briggs commented (obiter)[1] that the pre-condition that the right granted, whether over land or personalty, be perpetual may go too far in relation to *all* forms of property and particularly so in relation to land which is inherently a form of perpetual property.

As regards the division between proprietary and possessory rights, the Court approved Lewison LJ's reasoning in the Court below as to whether possessory rights will be generated by a licence. The bellweather for future assessments will be an application of the classic twofold criteria defining possession in *J A Pye*, requiring:

- (1) A sufficient degree of physical custody and control; and
- (2) An intention to exercise such custody and control on one's own behalf and for one's own benefit.[2]

A significant factor in the Court's determination that the licence gave rise to possessory rights was the degree of access retained by Vauxhall over the spillway from its own adjacent land for the purposes of servicing the drainage infrastructure. MSCC's rights to conduct maintenance in default of Vauxhall complying with its obligations or to reroute the spillway if required did not negative Vauxhall's possessory right. The grant of relief was upheld.

[1] MSCC v Vauxhall Judgment Paragraph 51

[2] *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30 applied by Lewison LJ at [59] and approved at [42] by Lord Briggs

Judge: Lord Carnwath, Lady Black, Lord Briggs, Lady Arden, Lord Kitchin

Comment:

This decision addresses the unprincipled lacuna between personal and real property as regards the rights courts are willing and permitted to safeguard through the relief from forfeiture jurisdiction. The decision recognises that valuable rights over land are often crafted falling short of full-bodied proprietary rights to exclusive user, but which nonetheless require safeguarding against trivial and remediable breaches of covenant.

Lady Arden's observation that some uncertainty in the application of relief is inevitable is true but the effect of the MSCC decision is to confine uncertainty to the Court's general discretion to grant relief and to the boundary between possessory and purely contractual rights. It is submitted that locating the outer limit of forfeiture at this point is both more principled and easier to define than the previous divide between proprietary and possessory rights which also led to a schism between varying rights over land.

Two points of interest emerge for the future:

- (1) How will the Court's adapt relief in the face of ever-expanding categories of property such as cryptocurrencies which straddle the rights boundary between possessory and purely contractual?
- (2) Will Courts of first instance restrictively apply the majorities' observations regarding the perpetuity of rights or adopt a more liberal line commensurate with broad justice on particular facts?

Practice Area: Property

Articles

Date	Title	Contributors
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Date	Title	Contributors
18th February 2021	Transactions at an Undervalue – Beneficial Interests and Declarations of Trust: Lyle v Bedborough [2021] EWHC 220 (Ch)	James Saunders
17th February 2021	Court refuses to approve tainted fiduciary decision making (Schumacher v Clarke) Published In <i>This article was first published by Lexis®PSL on 11/02/2021</i>	James Saunders
20th October 2020	Elections and changes of position in the Caribbean (Delta Petroleum v BVI Electricity Corp) Published In <i>LexisPSL</i>	James Saunders
1st October 2020	Not My Brother's Keeper – A Brief Guide to Inactive Directors' Liabilities IT Protect Ltd (In Liquidation) [2020] EWHC 2473 (Ch)	James Saunders
25th September 2020	When is a case sufficiently arguable for Norwich Pharmacal relief? (Hickox v Dickinson) Published In <i>Lexis PSL</i>	James Saunders
16th June 2020	Re Fowlds [2020] EWHC 1200 (Ch) (ICC Judge Jones)	James Saunders
27th April 2020	Top Ten Easy Mistakes to Make in Bankruptcy Petitions	James Saunders
21st April 2020	Top Ten Easy Mistakes to Make When Winding Up Companies	James Saunders

Date	Title	Contributors
20th April 2020	COVID 19: Revisiting Frustration in the Context of Leases	Jeff Hardman
30th March 2020	Imposing Quistclose trusts—knowledge, not notice, as the golden rule (Goyal v Florence Care Ltd) Published In <i>LexisPSL</i>	James Saunders
27th February 2020	Counterfactual defences to unjust enrichment restricted in Woolwich restitution claims (Vodafone Ltd & Ors v The Office of Communications) Published In <i>LexisPSL</i>	James Saunders
25th November 2019	Contractual silence - a gateway for unjust enrichment (Barton v Gwyn-Jones) Published In <i>LexisPSL</i>	James Saunders
5th November 2019	Wood v Commercial First Business Ltd (In Liquidation) [2019] EWHC 2205 (Ch)	James Saunders

Publications

Date	Title	Contributors
29th May 2020	The pitfalls of voluntary rectification (MV Promotions v Telegraph Media Group) Lexis PSL	James Saunders

Date	Title	Contributors
21st May 2020	Construing erroneously drafted public facing documents—construction declaration or rectification? (Pathway Finance SARL v Defendants) LexisPSL	James Saunders
24th April 2020	Actions speak louder than words—remedying material breaches (Bains v Arunvill Capital Ltd) LexisPSL	James Saunders