

Power to order sale of real property abroad

In *Pollard v Ashurst* (The Times, 29/11/00) Mr. and Mrs. Pollard were domiciled in the UK and jointly owned property in Portugal. Mr. Pollard was made bankrupt and his trustee in bankruptcy obtained a county court order for a sale of the property.



The Pollards appealed and lost in front of Jacob J. They appealed again on the grounds that the Portuguese courts had exclusive jurisdiction by virtue of Article 16(1) of the Brussels Convention, scheduled to the Civil Jurisdiction and Judgments Act 1982. Article 16(1) provides that regardless of the domicile of the parties, in proceedings which had as their object rights *in rem* in immovable property, the courts of the contracting state in which the property is situated have exclusive jurisdiction. Further, Article 16(1) provides that, in proceedings which have as their object the validity of entries in public registers, the courts of the contracting state in which the register is kept have exclusive jurisdiction. The Court of Appeal agreed that the Convention did apply to the trustee's application because it was a civil and commercial matter (article 1) and the fact that he was a trustee in bankruptcy was not sufficient in itself to bring

the proceedings within the bankruptcy exception (art. 1). The Court then considered the more difficult concept of whether the proceedings had as their object rights *in rem* (art. 16(1)). Parker LJ acknowledged that in one sense all proceedings involved legal rights of some kind but said an element of judicial interpretation of the article was required. To assist interpretation, he considered a number of decisions of the European Court of Justice, including: *Reichert v Dresdner Bank* (Case C-115/88)((1990) ECR I-27); *Sanders v van der Putte* (Case 73/77)((1977) ECR 2383); and *Webb v Webb* (Case C-294/92)((1994) QB 696). Applying these cases, the Court held that article 16(1) was to be given a restrictive interpretation and that it could have no application in this instance since no issue arose as to the factual situation in Portugal nor did the proceedings involve any question of Portuguese law or practice. Further, the proceedings did not seek to assert any property right against third parties/strangers but raised, instead, personal issues as between the trustee and Mr. and Mrs. Pollard and, therefore, the proceedings did not have as their object rights *in rem*. Although this case serves as a word of warning to bankrupts and their spouses, the Court cautioned that whether an order for sale would be made would depend on the nature of the order sought and the facts of each case and that, in the instant case, the orders were to be restricted to requiring steps to be taken within the jurisdiction by a trustee who was himself within the jurisdiction.▲

Kerry Bornman



ANOTHER FIRST FOR NUMBER THREE

Two members of the Pensions Team have recently completed a successful series of Seminars in conjunction with The Institute of Actuaries. This is the first time that the Institute's Pensions Education and CPD committee have sought help from a set of barristers' chambers in this way. The subject of the Seminars was "Pension Sharing on Divorce". The talks followed the provisions of the Welfare Reform and Pensions Act 1999 which gives the Courts in Ancillary Relief claims new powers to share pensions on divorce in cases where the divorce petition is issued on or after 1st December 2000. Fenner Moeran and James Gibbons joined Bernard Brindley, an actuary, to speak to audiences comprising solicitors and actuaries. Seminars took place in Oxford, Leeds, Bristol and London. Bernard Brindley is already well known to Chambers, having been instructed as an expert witness in the *Equitable Life* case, a case in which Sarah Asplin was instructed as first junior counsel by the successful GAR policyholders. Fenner Moeran and James Gibbons spoke on the practical issues and likely pitfalls arising from the new Act and its many ancillary regulations. One crucial point that arose repeatedly was the inherent

unreliability of valuation by reference to CETV in cases where ill health or underfunding was an issue or when dealing with scheme members employed in the uniformed services where early retirement at 50 was a probability. Historically, family law judges have avoided the concept of any entitlement of a divorced spouse (usually the wife) to treat pension provision (usually by the husband) on a par with other matrimonial property in the division of assets on divorce. The earmarking of pensions introduced by the Pensions Act 1995 has been viewed to be of limited application and use. It remains to be seen whether, in the application of the new Pension Sharing regime, the judicial reticence in the past to treat the Pensions of divorcing couples as property rather than as a future resource can be justified in the light of Lord Nicholls' "yardstick of equality" adumbrated in the recent House of Lords decision in *White v White* (2000) FLR 981.▲



new brochure – new logo

Many of you will now have received our new brochure. Some expressed surprise at the photographs of members of chambers, which had left (in some cases, vital) parts of their heads on the cutting room floor! We hope, nonetheless, that you will find the information that the brochure contains useful and informative. The new brochure also marks the introduction of a new logo for Chambers – still a triangle, but now equilateral rather than isosceles. Our web-site at 3stonebuildings.com is in the course of preparation and should be on-line after Easter.

chambers seminar programme

Our successful seminar programme is now in full swing. In February, we held a commercial litigation seminar. The speakers were Edward Bannister QC, David Lord, and Andrew Twigger. Their presentations were exceptionally well received. A professional negligence seminar is planned for June. We will see to it that as many of you are invited as humanly possible. In February, Geoffrey Vos QC delivered a lecture entitled "Linking chains of causation: an examination of new approaches to causation in equity and common law" to the Northern Chancery Bar Association. Anyone interested can obtain a copy from the clerks.

new member of Chambers

Since our last Newsletter, we are delighted to welcome Teresa Rosen Peacocke who has joined us from 13 Old Square (now Maitland Chambers). Teresa is a very well-respected Chancery practitioner specialising in Chancery and Commercial litigation including, in particular, professional negligence, company and insolvency, property and trusts and partnership. Teresa will be a great asset to Chambers.

and finally

We hope that you will find the articles in this Newsletter thought-provoking and useful. Happy Easter to all our readers.

Electronic exchange of Documents: a cautionary note

Following the incident of the now notorious "yummy" E-Mail of last December, most legal firms should now have policies to restrict the use made by their staff of the Office E-Mail. A point that may not, however, yet have been considered is a problem that can arise when word-processing files are circulated as attachments to E-Mails (or on floppy discs or similar media) in the ordinary course of practice.

It is now increasingly common to be asked to exchange copies of documents with one's opponents or counterparts electronically both in contentious and non-contentious matters. A point that is not always appreciated even by legal users of the common word processing packages (Word and Wordperfect – this Note is written with particular reference to Wordperfect 9 and Word 2000: although similar issues arise in relation to all versions of these and other programmes) is that it is possible when doing so to inadvertently reveal to ones opponents or counterparts far more than was ever intended. This is because both word-processing packages have the facility (unless the user is careful to disable it) to store with every copy of any document

they are used to create, previous versions or deletions and amendments to that document which any recipient can readily recover. Accordingly an unscrupulous opponent or counterpart may be able to recover and read material that was deleted from a document before it was finalised for exchange.

Accordingly, users of Wordperfect would be wise to ensure that the "Save Undo Redo items with document" check box (available on the Options Menu that is accessible if you click on the Undo/Redo History item listed on the "Edit" drop down Menu on the Toolbar) has not been "ticked" before exchanging documents electronically. (On a historical note, this precaution was not taken when the Starr Report on the Lewinsky affair was originally placed on the Internet: anyone who downloaded that Report could readily recover additional material that had been excised from the final version of the Report yet was still saved with it!) Users of Word should for the same reason ensure that the "allow fast saves" checkbox on the "Save" page of the Options Menu of the Tools Drop Down Menu on the Toolbar is not checked. Care should also be taken by Word users not to use Hidden text or to save additional versions of the document with the original document in any document that is circulated beyond the firm.

As an additional precaution it is always wise to copy or save the text of any information that is to be exchanged electronically into a new clean document before despatching it in the form of that "new" document. It is also wise if exchanging information on disc rather than by E-Mail to use for the purpose a new or newly formatted disc. Apart from the risk or transmitting viruses, simply deleting files does not delete from a disk the information which they contain or may previously have contained.

Robert Hantusch





PILKINGTON v WOOD: NO LONGER THE CLAIMANT'S MANTRA

The recent decision of Rimer J in the case of *Shelley v Phillips & Co* (18 July 2000, as yet unreported) further challenges the wisdom of chanting Harman J's dictum in *Pilkington v Wood* [1953] Ch 770 (at page 777) as a complete response to a defendant's charge that the claimant has failed to mitigate loss by not bringing (or continuing) litigation.

In *Shelley v Phillips & Co*, Mrs Shelley sued the solicitors who acted on her

purchase of a wool shop with money borrowed against her expected inheritance from her late mother's estate. She complained that she was inadequately advised of the risk that her new business could not withstand continued liability for interest payments on the loan in the event that the sale of her mother's house was delayed beyond her initial expectations. Rimer J found that if Mrs Shelley had been advised that the sale might be delayed, she would not have purchased the shop; but he dismissed her claim, primarily on the ground that the alleged advice was not part of the legal business relating to the purchase, but related to the commercial assessment of the transaction. It was accordingly outside the scope of the retainer. Having thus disposed of the claim, Rimer J went on to consider issues of contributory negligence and failure to mitigate. He held that the claimant had been contributorily negligent to the extent of 75% of the loss, which must be a record for a lay client. Importantly, Rimer J also held that, had Mrs Shelley been entitled to damages for the extra interest she had to bear on her loan account, he would have found that

she unreasonably failed to mitigate her loss by not compelling a sale of the house within a reasonable time. The Judge said "The story shows that [Mrs Shelley] needed to issue proceedings for an order for sale, but such an application would in my view have been a reasonable step for Mrs Shelley to take". This decision follows the reasoning of the Court of Appeal in *Western Trust & Savings Limited v Clive Travers & Co* [1997] PNLR 295, where lenders failed to recover any damages against solicitors for negligence in obtaining a mortgage executed by only one of two owners of the property, because the bank had abandoned possession proceedings brought against the borrowers. To Phillips LJ the result could be described equally as a failure by the bank to prove that the negligence (and not the abandonment of the proceedings) caused the loss, or as a failure by the bank to mitigate its loss by pursuing a remedy which was a normal incident of its business (see also dicta in *Dickinson v James Alexander & Co* (1990) 5 PN. 205 at page 211 and *Virgin Management Ltd v DeMorgan Group Plc* (1996) NPC 8). In claims by disappointed beneficiaries, the Court of Appeal held in *Walker v Geo.*

H Medicott & Son [1999] 1 WLR 727 that a duty to mitigate includes a duty to pursue a claim for rectification of a will. It is thought that the same result could be expected in any case where the remedy of rectification was reasonably available. The sweeping dictum of Harman J in *Pilkington v Wood* never did reflect the ratio of the decision in that case, which turned on the fact that the proposed mitigation was doubtful in law and would not have mitigated the loss caused by the breach; it was, instead, merely a speculative alternative source of compensation. The same analysis applies to the decision most often cited with *Pilkington v Wood*, being *London and South of England Building Society v Stone* [1983] 1 WLR 1242. The duty remains on the claimant to establish that reasonable steps were taken to mitigate loss, and it now appears clear that at least in the case of solicitors' negligence actions, this will include recourse to legal remedies which constitute a realistic response to the claimant's complaint in the event that the remedy against the solicitor was not available.▲
Teresa Rosen Peacocke

Re D. W. S. Deceased

In *Re D.W.S. Deceased* [2000] 3 WLR 1910 the Court of Appeal has recently dealt, albeit obiter, with one of those problems which has been in need of a clear answer for years: if a beneficiary under an intestacy disclaims or is disqualified from taking his or her interest who is entitled to take in his/her place?

Re D.W.S. was not in fact a case concerning disclaimer. Instead a beneficiary was prevented from taking as a matter of public policy by reason of the fact that he had murdered the deceased. However, it is clear from the judgments that the same principles, based on the construction of sections 46 and 47 of the Administration of Estates Act 1925, would apply.

Take the position where A dies intestate, a widower, leaving one son ("B"), his daughter and A's granddaughter ("C") and one sister ("D"). In these circumstances B would be the only person entitled to take on A's intestacy. What will happen if B disclaims or is disqualified from taking his interest? Is C entitled to B's interest under the "statutory trusts" or does D take that interest or does it pass bona vacantia to the Crown?

It may come as a surprise to find that according to Blackburne J at first instance, and Aldous LJ and Simon Brown LJ in the Court of Appeal, the answer is D, A's sister. According to Sedley LJ it passes bona vacantia to the Crown. The reasons for this decision are:

(1) Section 47(1)(i) is unambiguous: under the statutory trusts no issue can



take except where his or her parent has predeceased the intestate. Thus C could only take if the Court ignored the clear words of section 47(1)(i) or embarked on a wholesale rewriting of that clause. Neither Blackburne J nor the Court of Appeal, who were unanimous on this point, were willing to do this and therefore C could not take in any event because her parent had survived the deceased.

(2) Although the categories of beneficiary set out in section 46(1) who take under section 46(1)(iii)-(v) can only take if the intestate leaves no spouse and no issue, section 47(2) acts as a deeming provision so that the words "if no person attains an absolute vested interest" applies to cases of disqualification and disclaimer and deems the intestate to have died without issue. Alternatively the words "capable of taking" are to be implied into the opening words of each category under section 46. Sedley LJ disagreed on this point, holding that if the Court applied the literal construction of section 47 it should also do so in relation to section 46 and therefore as the deceased did leave issue no subsequent category of beneficiary could take and the estate therefore passed bona vacantia to the Crown.

The position in relation to disclaimers on intestacy therefore now appears to be as follows:

- (i) where there are a number of people within the same class e.g. three children of the deceased and one disclaims, his or her share passes to the other members of the class and not to his or her remoter issue under section 46;
- (ii) subject to (iii) below, where there is only one member of the class (including a surviving spouse) his or her share does not pass to his or her children or remoter issue under the

statutory trusts but to the next category of beneficiary set out in section 46(1); and
(iii) where the deceased left a surviving spouse the effect of a disclaimer or disqualification by another category of beneficiary may be to increase the

entitlement of the spouse rather than to pass the share down the line. It follows that great care must be taken in relation to disclaimers on intestacy to ensure that those intended to benefit will in fact do so.▲
Alexandra Mason

SPOT THE DELIBERATE MISTEAK

The deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty: section 32(2) of the Limitation Act 1980. In such cases, the period of limitation does not begin to run until the Claimant has discovered the concealment or could with reasonable diligence have done so.

Until recently it has generally been assumed that section 32 would only operate to deprive a defendant of a limitation defence if he had been guilty of some unconscionable conduct. Thus a

person who deliberately breached his duty could not take advantage of the fact that the innocent party might not discover the breach until after any claim had become time-barred.

However in *Brocklesby v Armitage & Guest* [2001] 1 All ER 172, the Court of Appeal decided that an act or omission was "deliberate" for the purposes of section 32 if the person who committed it knew of the act (or omission) and intended it. It is immaterial whether he was aware that a breach of duty had occurred.

The decision has been widely criticised. Its effect is to render sections 14A and 14B (the "latent damage" provisions) completely redundant. Furthermore, it treats the word "deliberate" as otiose: any act or omission is, it seems, "deliberate", unless it is unconscious. In claims against solicitors or other professionals it is difficult to imagine any circumstances in which the breach of duty will not be deemed to have been "deliberately concealed" in this sense – provided the solicitor was not actually asleep at the time. Brocklesby was followed at first instance in *Liverpool Roman Catholic Archdiocese Trustees Incorporated v Goldberg* [2001] 1 All ER 182. In the most recent case, *Cave v Robinson Jarvis and Rolf* (unreported, 20 February 2001), the Court of Appeal did not think it right to give permission to appeal.

It is possible that these cases have been wrongly decided. But it is comforting to think that if the Court of Appeal has got the law wrong, it has done so "deliberately" ▲
Gilead Cooper

