Hardwicke

BEST NON-PROPERTY CASES FOR PROPERTY LITIGATORS

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Brie Stevens-Hoare QC
Hardwicke

Brie Stevens-Hoare QC is a very client focused specialist in property and property related work. Her main focus is on real property and the more commercial aspects of property work including disputes around property developments and commercial property. In addition, Brie has considerable experience of property related professional negligence and contentious probate matters.

Brie has been recommended in the Legal 500 as a leading property practitioner every year since 2002 and has also been ranked within Chambers UK for the same length of time. In 2005 Brie was appointed as a Deputy Adjudicator to HM Land Registry. In 2010 she was reappointed and continues a Tribunal Judge. That appointment draws on her extensive experience of property litigation and has allowed her to further enhance her knowledge and skills.

She has been described in the directories as "...bright, academic and super organised", “...wonderful to use and doesn’t stand on ceremony...” and as having “...a comprehensive knowledge of the law....a very good advocate who is well prepared.”

Mediation is another major string to Brie’s bow. She has the benefit of a great deal of experience of mediation from both angles: representing clients in mediations and as a mediator. She is increasingly in demand in both capacities. Brie has also contributed to several editions of Foskett “The Law and Practice of Compromise” and Cousins “The Law of Mortgages”.

HARDWICKE
Hardwicke Building
Lincoln’s Inn
London WC2A 3SB

Tel: 020 7691 0036
Fax: 020 7691 1234
Email: brie@hardwicke.co.uk
Website: www.hardwicke.co.uk

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THE BEST NON-PROPERTY CASES

FEATURED CASES

Case Name	Subject	Reference
Prest v Petrodel Resources Ltd	Lifting the Corporate Veil	[2013] 2 AC 415
In re L and anr (Children)	Power to reverse decisions	[2013] 1 WLR 634
Benedetti & anr v Sawiris & ors	Restitution	[2013] 3WLR 351
Talal El Makessi v Cavendish	Penalties	[2013] EWCA Civ 539
JE (Jamaica)	Limiting appeal costs from nil or low cost jurisdictions CPR 52.9A	[2014] EWCA Civ 192
Blankley v Central Manchester	Client's Incapacity	[2014] EWHC 168
Asbeek Brusse	Unfair Consumer Contract Regulations 1999 and tenancies	[2013] HLR 38
Agri Energy v McCallion	Forfeiture of Purchaser's Deposit	[2014] CSOH 12

Brie Stevens-Hoare QC

INTRODUCTION

1. These days the majority of legal professionals are very specialist in their area of practice. The better the quality their firm/chambers and work they do greater the likelihood and degree of specialism. Solicitors' and Barristers' familiarity with developments in the law are likely to be confined to those cases that impact most directly on their specialism. For most practitioners even their electronic alerts from the various legal know how providers operate by focusing on their identified specialist areas of interest.
2. As a result the prospect of missing a case which is ostensibly related to another specialist area but which could be relevant to our own cases and area of practice keeps getting greater.
3. This paper contains details of a number of relatively recent cases that fall into that category.

LIFTING OR PIERCING THE CORPORATE VEIL

Prest v Petrodel Resources Ltd – Supreme Court – [2013] 2 AC 415

There is a limited power to lift the corporate veil.

The power arises when a person under an existing legal obligation/ liability or subject to an existing legal restriction deliberately evades it or deliberately frustrates enforcement by interposing a company under his control

The power is exercisable only for the purpose of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality."

The Matrimonial Causes Act 1973 gives no wider power to lift the corporate veil.

4. The legal persona of a company, as distinct from that of its shareholders or other companies in the same group is fundamental to the concept of limited liability. Across the world corporations exist to shield the personal assets of shareholders and the shareholders themselves from liability for the debts or actions of the corporation. The lifting or piercing of the corporate veil in the UK is very rare.

5. The distinction between the company and its shareholders has a long history. In **Salomon v Salomon & Co Ltd** [1897] AC 2 the distinction and its central importance were elucidated upon. The Court acknowledged that "a company is at law a different person altogether from the subscribers to the memorandum".

6. The corporate veil works equally well in the other direction. The liabilities or entitlement of a shareholder cannot be enforced against the corporate assets. So in **Macaura v Northern Assurance Co Ltd** [1925] AC 619 the sole shareholder of a company could not claim on insurance for fire damage to trees owned by his company because the insurance was in his own name.

7. Generally the corporate veil is only lifted when the distinction between corporate and person is being used as a façade and/or there is a suggestion of fraud. That principle; namely that it is possible to disregard the corporate veil in some circumstances, was revisited by the Supreme Court twice last year.

8. In **VTB Capital PLC v Nutritrek International Corp** [2013] 2 AC 337 the Court described the existence of a limited principle that enabled it to disregard the separate legal identities of the company and its shareholders. The Court rejected an attempt to lift the corporate veil in order to make the controller and owner of a company liable as if he was a party to a contract when no one had intended him to be a party. Moreover the court did not take the opportunity that case presented for it to set out when the principle might operate.

9. The same legal principle was considered in the context of ancillary relief proceedings **in Prest v Petrodel Resources Ltd** [2013] 2 AC 415 which gives us a better understanding of its operation.

10. The husband was the sole owner of a group of companies. One of the companies was the registered legal owner of 5 residential properties in the UK and another company owned two other residential properties. At first instance the Judge concluded there was no general principle entitling him to pierce the corporate veil but that there was a distinct but wider discretion under s24 of the Matrimonial Causes Act 1973 to do the same thing. On the appeal the Court of Appeal disapproved of the family courts practice of treating company owned assets as the assets of one party to a marriage because that party was a sole or major shareholder.

11. Subsequently, the Supreme Court reviewed all the authorities and concluded there was indeed a principle of English Law that permitted the Court to pierce the corporate veil. Lord Sumption considered the principle to be “a limited principle of English law”. The Supreme Court’s press release described as a principle that operated in “very limited circumstances”. The Court made it clear the principle operated in order to ensure the law was not disarmed in the face of abuse and that the limits of the principle must be both understood and respected.

12. Lord Sumption explained its operation as follows

> “when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then lift or pierce the corporate veil for the purpose, and only for the purpose of depriving the company or its controller of the advantage that they would otherwise have obtained by the company’s separate legal personality.”

13. The Supreme Court concluded that the abuse of the corporate legal personality could justify disregarding it. Abuse occurred when a party relied on the distinction in an attempt to “evade the law or to frustrate its enforcement” in circumstances where there was a link between the action of introducing the distinction and the attempt at evasion or frustration. The idea that the family courts had a wider discretion under the MCA was rejected.

14. The Supreme Court highlighted that in most situations it would not be necessary to pierce the corporate veil. Usually it was possible on the facts to establish a legal relationship between the company and the individual that gives the individual legal or equitable rights over the company’s assets. In this particular case the Court concluded on the available facts the proper inference was that the companies held the properties on resulting trust for the husband. In those circumstances the family court was entitled to treat them as matrimonial assets and make orders related to them.

CHANGING FINDINGS & JUDGMENTS

In re L and anr (Children) (Preliminary Finding: Power to Reverse) – Supreme Court – [2013] 1 WLR 634

A judge/the Court has power to reverse a decision at any time prior to the perfecting of the consequential order by it being sealed

The power is not limited to exceptional circumstances

The overriding objective in exercising the power was to deal with the case justly

Relevant factors would include

- *A party having already acted on the judgment*
- *The undesirability of a mistake by the court*
- *The failure of a party to draw the court's attention to a relevant fact or point of law*
- *The discovery of new facts*

The justice of the case might require a revisiting of a decision simply because the Judge had a carefully considered change of mind

The judge should exercise the power judicially and after giving the parties an opportunity to comment

15. Most of the decisions and practice directions relating to this subject have occurred in the context of family proceedings but they apply to all civil matters equally.

16. In October 2011 the Court of Appeal issued a practice note as part of In re **A and anr (Children) (Judgment: Adequacy of Reasons) [2012]** 1 WLR 595. That practice note and decision dealt with the Court's obligation to give adequate reasons and an advocate's obligation to assist the Court in giving proper and adequate reasons.

17. In particular, whether or not the Judge invites it, an advocate is obliged to, on notification of a Judge's reasons, to raise with the Judge:-

Any material omission
Any genuine query or ambiguity
Any perceived lack of reasons
Any other perceived deficiency in the Judge's reasoning process.

18. The court also noted that it was then a matter for the Judge how he or she would proceed. The tone of the practice note and decision were more focused on perfecting the Judge's reasons then changing them, although nothing in either excluded that possibility. It is also important to note that the Court of Appeal made it clear that decisions such as findings of fact that were not followed and encapsulated by an immediate order could nevertheless be appealed. Where the Judge is not given the opportunity to deal with those matters the appeal court may decide the matter on the basis of the judgment as it stands including its factual errors or it may remit the matter with almost inevitable cost consequences for the appellant.

19. The power of a Judge to change a decision, including by reversing it, after a decision has been communicated to the parties, even in draft, was considered by the Supreme Court last year.

20. It is a difficult area and it might be thought to be a rare event. However, it is now clear there is more scope than might have been assumed for a judgment to be changed after it has been communicated and for the parties to influence change. The writer is aware of 4 incidences of a first instance Judge exercising that power in 2013.

21. **In re L and anr (Children) (Preliminary Finding: Power to Reverse)** involved an oral judgment given a few weeks after the end of a fact finding hearing.

22. The case involved care proceedings brought because of concerns about non-accidental injuries suffered by one child of the family. Each parent alleged the other was the sole perpetrator of the injuries. There was a fact finding hearing over several days devoted to establishing the perpetrator. The Judge gave an oral judgment about 3 weeks after the hearing concluded. The Judgment was partially transcribed. The effect of the Judgment was that the injuries sustained were non-accidental and the father was the perpetrator. At the hearing and in subsequent emails counsel for the father, acting on the 2011 Practice Note, invited the Judge to address a number of matters in an addendum to her judgment.

23. The parties draw up an order in accordance with the judgment and it was submitted to the court for sealing. Unbeknown to the parties that order was not sealed until 28 February 2012. In the meantime at a directions hearing on 23 January 2012 the Judge had indicated she would provide a perfected Judgment on 9 February 2012. In fact the written "perfected judgment" changed a number of

the conclusions given in the oral judgment. In particular the draft perfected judgment included a finding that although it was likely that all injuries were caused by one parent it was not possible to say which one.

24. The parties had had no warning that Judge was considering changing her decision. When invited to give an opportunity for further submissions and to explain the change the Judge indicated that having considered the matter carefully she could not exclude the possibility the mother was the perpetrator.

25. When the 2012 practice note and In re L are considered side by side it is clear there is a heavy burden on advocates to raise with the first instance judge many points that may form the subject matter of an appeal in particular omissions, errors of fact or law or any inadequacy in reasoning. Those who are unhappy with an outcome should consider how far they should raise any points they might wish to make on appeal with the Judge and whether to do so on the basis they are inviting the Judge to consider a reversing some or all of the decision. That exercise can be undertaken at any time prior to the sealing of a consequential order. However, in order to have the best prospect it should be done quickly and the other side should certainly be put on notice that representations will be made to the Judge inviting a change to the decision so it should not be relied upon in the interim.

26. Those who are happy with a decision have a clear interest in obtaining a sealed order as quickly as possible.

27. It should be noted that the 21 day time limit for filing of an appellant's notice, in the absence of any order, starts on the "date of the decision of the lower court". This is the date the Judge makes a decision not the date when the order reflecting that decision is drawn up or sealed: **Sayers v Clarke Walker** [2002] EWCA Civ 645.

28. There is therefore an odd and potentially unhelpful inconsistency of approach to how fixed and significant a decision/judgment in the absence of a sealed order is considered to be and the consequences that flow from it. It is entirely possible that technically the time for appealing could well expire before the Judge has decided whether to reverse a decision and/or before the possibility of a change has been removed by the provision of a sealed order.

29. Ultimately, there is significant scope for parties to seek improvements in draft judgments, ex tempore judgments or even judgments handed down without a

sealed order. In 2013 alone there were at least 4 attempts to persuade a first instance Judge to change the content of a judgment prior to the sealing of order that flowed from it.

Thomas Cook v Louis Hotels [2013] EWHC 2469 (QB): refusal to re-open summary judgment in light of decision in other jurisdiction

R (GSTS) v HMRC [2013] EWHC 1823 (Admin): refusal to redact commercially sensitive information in judgment

Walton Homes v Staffordshire [2013] EWHC 2554 (Ch): judgment corrected to expand on reasons

Rabiu v Marlbray Ltd [2013] EWHC 3272 (Ch): effect of draft judgment reversed in relation to one of 4 contracts as a consequence of correcting an error as to the content of the contract.

RESTITUTION

Benedetti & anr v Sawiris & ors –Supreme Court – [2013] 3 WLR 351

A restitutionary award on the basis of unjust enrichment must be calculated by reference to the benefit received by the defendant at the claimant's expense

The benefit is valued at the time it is received

Where the benefit is services the starting point is the objective market value of the services

The valuation is tested against the price a reasonable person in the defendant's position would have had to pay taking account of factors that objectively increase or decrease value

Subjective revaluation or overvaluation by reference the defendant placing a value on the service which was higher than the market valuation was not generally recognized

Subjective devaluation is an issue that relates to freedom of choice and should be considered as part of a holistic determination of whether the defendant was enriched

30. Mesne profits for use of land without wrong are a restitutionary remedy. Whether mesne profits for trespass are a restitutionary remedy appears to be a matter of difference between the Court and academics. Subrogation whether involving lenders, co guarantors/sureties or insurers involves restitution. Claim for quantum merit relating to services or goods provided in contemplation of a contract that fails or does not materialize is restitutionary as is a claim to recover property conferred under a contract set aside for undue influence and/or unconscionable bargain.

31. Where the remedy is a restitutionary award it reflects the benefit the defendant received at the claimant's expense. The court is not involved in assessing the amount of such an award where the remedy involves the literal return of property or goods or repaying of a sum paid out. Where the benefit was the use of the claimant's property or goods or services provided the court is involved in determining the amount of the award.

32. The proper basis of such an assessment, whether it should be from the perspective of the claimant or the defendant and the degree of subjective evaluation has been the subject matter of much debate by both academics and practitioners.

33. Whilst recognizing that this area of law is still in the early stages of its development and all of its ramifications have not been identified and resolved the Supreme Court has taken the opportunity to give some much needed guidance.

34. **Benedetti v Sawiris** involved an acquisition scheme relating to a company. The first claimant and first defendant entered an agreement which provided for the first claimant to handle negotiations with investors and made limited provision for him to be remunerated.

35. As matters progressed the first claimant entered a brokerage agreement with a company he controlled. That was unknown to the first defendant. The original acquisition agreement was abandoned when the parties were unable to find the necessary investors. The first defendant, with the first claimant's participation then negotiated a sale and purchase agreement under which all four defendants acquired the majority of the shares in the company. When the accounts were drawn up the first defendant learnt of the €87M sum payable to a company connected to the first claimant. He objected to the size of the payment and the parties settled on a payment of €67M.

36. The first claimant then turned to his own remuneration. The first defendant offered €75.1M which the first claimant rejected as too low. The first defendant's offer was maintained notwithstanding the suspicion that the first claimant had already had the benefit of the €67M paid to the company connected to him. The first claimant brought a claim for his remuneration claiming an even greater sum by reference to the abandoned acquisition agreement.

37. At the trial the court concluded that the market value of the services provided by the first claimant and his company was at most €36.3M and that the payment to the first claimant's company was referable to 60% of those services. Accordingly the market value of the first claimant's services was €14.52M but as the first defendant had been prepared to pay €75.1M for those services even after being aware of the €67M the correct quantum meruit figure was €75.1M.

38. On appeal to the Court of Appeal the court concluded no weight could be attached to the offers of €75.1M and awarded €14.52M as the market value of the services actually provided by the first claimant.

39. The Supreme Court dismissed the first claimant's appeal seeking a subjective revaluation increasing his award to the value the first defendant put in his services by making the offer of €75.1M. The Supreme Court also concluded that the €67M originally paid by the first defendant related to services provided by both the first claimant's company and the first claimant and accordingly reduced the first claimant's award to nil.

40. The Supreme Court gave a clear message that the objective market value is the starting point for such restitutionary awards and most adjustments a party may seek by reference to particular conditions that applied could and should be address as factors in determining the market value. Those factors would also be part of a purely objective exercise. The possibility of subjective revaluation was not completely ruled out but it was confined to a possibility and only in exceptional circumstances.

CONTRACT - PENALTIES

Talal El Makessi v Cavendish Square Holdings BC & anr – CoA – [2013] EWCA Civ 1539

The test to determine whether a liquidated sum due on breach is a penalty

- *is whether the clause is extravagant and unconscionable with the predominant function of deterring breach such that the court should not enforce it*
- *is accordingly broader than simply whether the sum is a genuine pre estimate of loss, although the answer to that question will be relevant, provisions that are genuine pre estimate of loss will not penal*

Where there is a range of possible losses and a liquidated sum is payable on any loss the following guidelines apply

- *If the sum exceeds the maximum conceivable loss it will be penal*
- *A sum which does not exceed the maximum conceivable loss may nevertheless be penal*
- *As sum payable on a particular event is not presumed to be penal because the event could be caused by various breaches of various terms*
- *A sum payable on different breaches of the same term is not presumed to be penal because the effect of the breach may vary*
- *A sum payable for breach of a number of terms which will result in losses which are likely to be of the same kind is not presumed to penal*
- *A presumption a sum is penal may arise if the same sum applies to breaches of different terms that are different in kind;*
- *There is no presumption a sum is penal because in some circumstances that sum may be larger than the actual loss*
- *Where there are a range of losses and the sum provided for is out of proportion to some of them it may be penal*

In considering whether a single sum applicable to a range of losses is penal the extent of the likely losses rather than of all conceivable losses will be most relevant

The party claiming penalty must establish it is by reference to the terms of the clause in the context it was agreed

The contract must be examined as a whole

It may be necessary or appropriate to adduce evidence as to the effect of the clause or it any other matter rendering it unconscionable

The fact a contract is a commercial contract, between parties of equal bargaining power and with high level legal advice will weigh against a provision being penal but is not determinative, commercial contracts are not immune

Whether a sum is a genuine pre-estimate of loss amounts to a question whether it is a reasonable estimate of the likely recoverable loss

41. The parties entered into an agreement to sell a substantial shareholding in a company. As a result the sellers reduced their majority shareholding to 40% and the purchaser increased their minority shareholding to 60%. The sellers entering into a number of restrictive covenants to protect the good will of the company from them competing.

42. The agreement contained two clauses which were triggered if either seller became a "defaulting shareholder". A defaulting shareholder included a sellers who breached their restrictive covenants. One clause would deprive the defaulting shareholder of installments of the purchase price for his shares not yet paid. The other clause imposed an option which enabled the purchasers to acquire the defaulting shareholders remaining shareholding at the net asset value.

43. The Court of Appeal undertook a wide ranging review of the law on penalties. The Court of Appeal made a number of useful points about penalties generally. The broader test in **Clydebank Engineering v Don Jose Ramos** [1905] AC 363 rather than the narrower **Dunlop t**est was approved.

44. The relevance of the equality or inequality of bargaining power and/or to decree to which one party's standard terms were imposed was highlighted. The Court also warned against the failure to exercise caution when dealing with the presumptions or absence of presumptions that may arise and commented that the limited use of the guidelines given the importance of the facts of each individual case.

A FEW MORE IN SUMMARY

45. **JE (Jamaica) v the Secretary of State for the Home Dept** – CoA - [2014] EWCA Civ 192 – CPR 52.9A empowers the Court to make orders to limit the recoverable costs of an appeal where the appeal is from a "no costs" or "low costs" jurisdiction. The power is to place limits on the costs recoverable by a winning party. It is not a power to impose a costs order in favour of a party whether they are ultimately the winning or losing party.

46. **Blankley v Central Manchester & Manchester Children's University Hospitals NHS Trust** – QBD - [2014] EWHC 168 – When a solicitor's client loses mental capacity during the course of a retainer the solicitor no longer has the client's authority (**Yonge v Toynbee**). However that, in itself does not terminate the underlying contract of retainer and/or a CFA. The terms of the retainer will be relevant to determine the position between the parties.

47. **Asbeek Brusse and de Man Garabito v Jahani BV** – CoJ of the EU [2013] HLR 38 – Subject to contractual terms which reflect mandatory statutory or regulatory provisions required by National laws, the Unfair Terms in Consumer Contracts Regulations 1999 apply to a residential tenancy between (i) a landlord act for the purpose of his trade/business/profession and (ii) a tenant acting for purpose which do not relate to his trade/business/profession. A national court is only obliged of its own motion to examine whether the regulations have been complied with if it has power under the National procedural laws to do so. The regulations give a Court no power, upon finding a provision unfair, to reduce its effect. On making such a finding the Court must disapply the provision completely.

48. **Agri Energy v McCallion** [2014] CSOH 12 – unlike English law, in Scotland a provision for the forfeiture of a deposit paid by a purchaser upon the purchaser's breach of contract may be void as a penalty.

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