



Welcome to the Autumn 2009 edition of the College Chamber's newsletter. In this publication you can expect to find articles covering a wide range of legal issues all of which we are able to further advise upon should you wish. We hope you will find the content both topical and of interest.

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## WHAT HAPPENED TO EQUITABLE ACCOUNTING?

We are all accustomed to the phrase "equitable accounting" when dealing with cases under s14 of the **Trusts of Land and Appointment of Trustees Act 1996**. It has been a principle relied on for a very long time to deal with the excluded party's entitlement for occupation rent and the remaining party's entitlement for credit in respect of mortgage payments or improvement costs paid. It is the catch-all claim inserted in the statement of case or witness statement after the request for a declaration and an order for sale.

However, in **Stack v Dowden [2007] 1 FLR 1858**, Baroness Hale of Richmond made it very clear that the issue in respect of occupation rent which might be payable by the occupying beneficiary to the excluded beneficiary must be considered in accordance with the statutory provisions of s12, 13 and 15, which replace the old doctrines of equitable accounting in this regard.

The key provisions to bear in mind are as follows:-

- s12(1) gives a beneficiary who is entitled to an interest in land the right to occupy that land if the purpose of the trust is to make the land available for his occupation. So an unmarried couple cohabiting in a property in which they each have beneficial interests will be entitled to occupy that property.
- s13(1) gives the trustees of a trust of land power to exclude or restrict that entitlement. This power must be exercised reasonably (s13(2)).
- s13(3) gives the trustees power to impose reasonable conditions upon the occupying beneficiary. Such conditions may be for the payment of outgoings or expenses in relation to the land (s13(5)).
- s13(6) gives the trustees power to require the occupying party to pay compensation to the excluded / restricted beneficiary.
- s13(7) confirms that the powers conferred on the trustees by s13 may not be exercised so as to prevent any person

who is in occupation of the land from continuing to occupy the land, or in a manner likely to result in such person ceasing to occupy the land unless that person consents or the court has given approval.

- s13(8) states that when the court is asked to give approval, the matters to be considered include those set out in s13(4) (a) to (c).

It is well worth remembering that under s14(2)(a), both trustees and beneficiaries can apply to the court for an order relating to the exercise of the functions under s13. The court must consider the factors set out in s15(1)(a) to (d) (namely intentions of the persons creating the trust; its purpose; welfare of any minor occupying the property or might reasonably be expected to occupy the property and the interests of any secured creditor of any beneficiary). S15(2) also ensures that the court considers the circumstances and wishes of the beneficiaries who are entitled to occupy under s12.

As it transpired, Mr. Stack was not awarded occupation rent due to him vacating the property. The reasons of the House of Lords are helpful for those cases in which one parent remains living in the jointly owned home with children with the other parent having left voluntarily. The reasons were:-

- The purpose for which the property was held included the provision of a home also for their children;
- Mr. Stack's previous undertaking not to live in the property;
- Until sale, the property was needed as the children's home;

There was no suggestion that Miss. Dowden was in any way responsible for any delays in achieving a sale of the home.

*Carol Davies*

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## DIARY OF EVENTS

■ THURSDAY,  
29<sup>th</sup> OCTOBER 2009  
20<sup>th</sup> ANNIVERSARY  
DRINKS RECEPTION  
Newclose County Cricket  
Ground, Newport,  
Isle of Wight -  
5.30pm - 8.30pm

■ THURSDAY,  
12<sup>th</sup> NOVEMBER 2009  
DRINKS RECEPTION  
Celebrating Robin Belben's  
40<sup>th</sup> year at the Bar  
De Vere Grand Harbour Hotel,  
Southampton -  
5.30pm - 8.30pm

■ THURSDAY,  
17<sup>th</sup> DECEMBER 2009  
CHRISTMAS  
DRINKS RECEPTION  
College Chambers  
19 Carlton Crescent,  
Southampton -  
6.00pm onwards

For further details of any of these events, or to reserve your place, please contact  
**Mark Windebank on (023) 8023 0338**

# A PLATFORM FOR SUING PROPERTY VALUERS

In *Platform Funding Ltd v Bank of Scotland plc (formerly Halifax plc)* [2008] EWCA Civ 930, the Claimant had instructed the Bank of Scotland (then trading as 'Colleys') in their capacity as valuers to perform a valuation of 1 Bakers Yard on which a borrower had applied for a mortgage. When the valuer visited the property, he was led to believe by the borrower that 1 Bakers Yard was in fact 5 Bakers Yard, a completed house. 1 Bakers Yard was in fact largely unbuilt. The borrower was unable to keep up payments on the property and eventually the property was repossessed. Platform suffered a shortfall upon the subsequent sale and attempted to recover damages for breach of contract from the valuer.

In a split decision the Court of Appeal held that the valuer, in addition to the duty to exercise reasonable care and skill in his valuation, had undertaken an unqualified obligation to value the correct property and in not doing so was in breach of contract. Moore-Bick L.J., noted that professionals

would normally be expected to undertake work with "the degree of care and skill to be expected of a competent professional in a reasonable field" but that there could be circumstances in which professionals also assume "an unqualified obligation in relation to particular aspects of their work."

In *Platform* the borrower appears to have engaged in fraudulent conduct while the valuer's conduct did not fall below that expected of a competent professional. Valuers and other property professionals should now be concerned not to enter into any unintended conditions and warranties because it may now be easier for claimants to sue for a breach of a strict warranty as opposed to professional negligence. With the current economic crisis and the consequent fall in house prices, Platform may be the first of a series of cases where similar facts are shown to exist.

*David Harby*

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## FINDING OF FACT HEARINGS – *Re D*

In May of this year I was before the Court of Appeal to argue a point of law in care proceedings, *Re D*\*. I was not looking forward to the situation, or the forthcoming ordeal as I saw it to be, as I was seeking to overturn on appeal, findings of fact made in care proceedings concerning the identification of which parent was said to have inflicted serious injuries on their two children.

The other two parties to the appeal were represented by silks. The application for permission to appeal had been refused on paper, but permission had been granted at an oral hearing by the slimmest of margins. To make matters worse, Wall LJ who had refused the paper application, was going to be the lead judge considering the full appeal hearing. The odds were stacked against me.

The point of law to be argued was a novel one. The House of Lords in *Re B (2008) UKHL 35*, had confirmed that in family proceedings the test for proving an allegation was simply the balance of probabilities. The Court at first instance is just concerned with finding the most likely outcome from the various alternatives placed before it. We have a binary system of justice. If something is proved that counts as a '1', but if an allegation cannot be proved that counts as '0'. It is only the '1's that go into the balance at the end of the day when a judge makes his or her decision.

In *Re D*, it was argued by one of my opponents, that the impact of *Re B* in finding of fact hearings where injuries to a child could have been caused by one or either of the parents was that a court must now be able to specifically determine which parent caused the injuries, i.e. on a balance of probabilities test a court must be able to find, it was argued, that an injury was caused by either the mother or the father, but a finding that either of them could have done it was no longer open. Taking this argument to its logical extreme a court must be able to examine the evidence and conclude that if a mother had say a 49% likelihood of causing injuries, and a father had 51% chance of causing injuries; on that basis the father would have a '1' added against his name, and the mother would escape with a '0'. For what it was worth, I felt that this new approach made no sense, and could not have been the House of Lords' intentions in *Re B*.

Well, I am happy to report that the Court of Appeal agreed with me. I can do no better than report what Wall LJ said at the beginning of my full appeal:-

*"Nothing in Re B, in our judgment, requires the court to identify an individual as the perpetrator of non-accidental injuries to a child, simply because the standard of proof for such an identification is the balance of probabilities. If such an identification is not possible - because, for example,*

*a judge remains genuinely uncertain at the end of a fact finding hearing, and cannot find on the balance of probabilities that A rather than B caused the injuries to the child, but that neither A nor B can be excluded as a perpetrator - it is the duty of the judge to state that as his or her conclusion. To put the matter another way, judges should not, as a result of the decision in Re B, and the fact that it supersedes Re H, strain to identify the perpetrator of non-accidental injuries to children. If an individual perpetrator can be properly identified on the balance of probabilities, then for the reasons given in Re K it is the judge's duty to identify him or her. But the judge should not start from the premise that it will only be in an exceptional case that it will not be possible to make such an identification. There will inevitably be cases - of which this, in our judgement, is one - where the only conclusion which the court can properly reach is that one of two parents - or both - must have inflicted the injuries, and that neither can be excluded."*

*Re D* is also useful on the issue of the desirability of continuity in the judge hearing a case. \**Re D* has now been reported in *The Times* (25 August 2009) or a full transcript can be found at *EWCA (2009) Civ 472*; or simply request a copy via my email address below.

*Anthony Hand*

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# “A MAN MIGHT AS WELL TRY AND OPEN AN OYSTER WITHOUT A KNIFE, AS A LAWYER’S MOUTH WITHOUT A FEE”...

Ah, those were the days, money up front, fee with instructions, or ‘on the brief’.

If Cherie Booth tells me once more that I should dedicate a week of my year to pro-bono work, I will not be responsible for my actions!

The fact is, those doing publicly funded work already feel as though they are working pro-bono for much of their time - with little thanks and no recognition from the authorities and / or our clients.

During the course of 2009, both Family, and more recently Criminal, practitioners have been under attack from a government with a chip on its shoulder, and no understanding or appreciation of the work we do, or the catastrophic consequences on the court system, and eventually society, if we are made redundant.

The meetings I have had with our local politicians have highlighted their indifference to the plight of their constituents who are involved in court proceedings, in favour of:-

“...Well, we are all feeling the pinch, lawyers are not immune you know.”

Would it not be a relief to be able to concentrate on work and helping those same constituents, without worrying whether we will be there to look after them, at all, in 2010?

Incidentally, it came to my attention that the LSC was attempting to mislead many solicitors with respect to the proposed changes, even suggesting that they would earn more under the new scheme. Those who have analysed the figures carefully know this suggestion to be untrue; unless of course each firm had the time to administer their whole caseload through one person and entirely without support staff, or indeed Counsel.

Well, the good news is that we have bought ourselves more time, because the next announcement on fees will not now be until the end of this year or early next. The LSC and that Sweetie, Lord Willie Bach, have accepted that their figures were rubbish and unsustainable, though not in as many words!

We have much to thank the Commons’ Legal Affairs Select Committee for, they tore apart the government’s proposals at the last moment having heard from a powerful team of witnesses, and I believe that was the last straw for the proposals as they then stood.

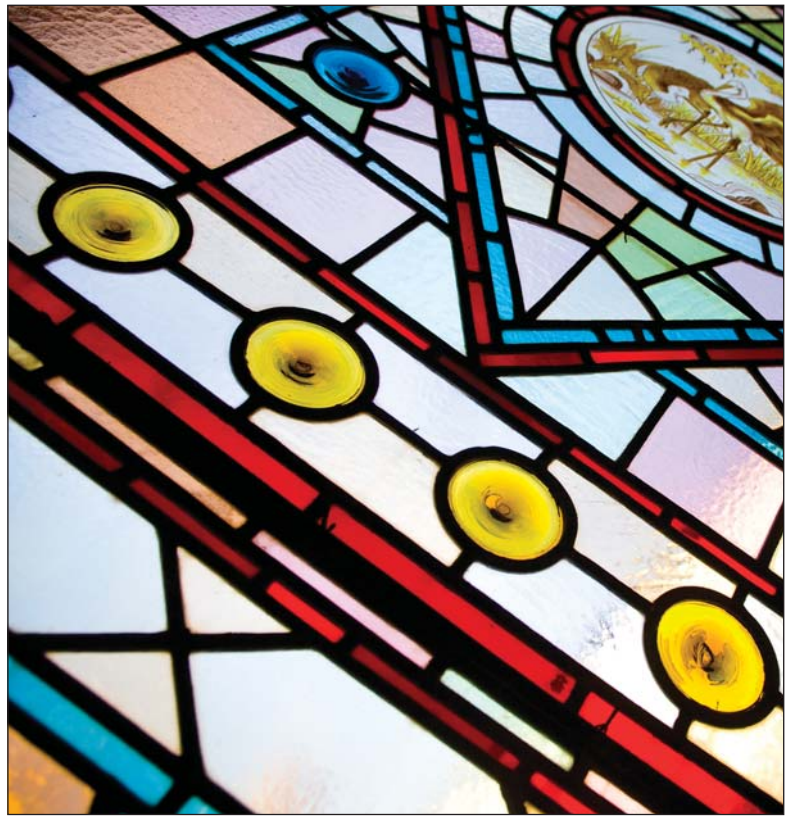
The Bar have taken a hit on LSC fees since 4 August 2009, particularly in respect of ancillary relief matters: We accept we have lost this battle, but the full extent of the proposed changes for all of us might yet be consigned to history as we approach an Election year.

Of course, if we have to keep on our toes, complacency is our enemy. The government have plainly tried to wear us down. What they had not accounted for is that we were already worn down, in fact we present quite a shiny and resilient surface. I expect there to be more skirmishes and battles; however, we know where the ‘line is drawn’ and I am confident that, whatever the ‘colour’ of the politicians attacking us, we will not be pushed back over it.

Have faith brothers and sisters, have faith!

*Douglas Taylor*

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## HAVE A BREAK...

A new landlord to a business lease may still achieve a redevelopment break clause if the premises are subject to unopposed renewal proceedings on the proviso that such a term be notified as soon as practicable.

The landlord would have to show that it could not reasonably undertake such redevelopment without obtaining possession of the premises. A landlord’s intention must be genuine, firm and settled and not likely to be changed, as per Asquith L.J, in *Cunliffe v Goodman* [1950] 2 KB 237, must have ‘moved out of the zone of contemplation - out of the sphere of the tentative, the provisional and the exploratory-into the valley of decision’. The landlord must further show that the intention will be fulfilled shortly after the date of the hearing: *Betty’s Cafés Ltd v Phillips Furnishings Stores Ltd* [1958] 1 ALL ER 607, HL.

The court will determine a length of term as is reasonable, limited to 15 years, beginning on the ending of the current tenancy: s33(1), *Landlord and Tenant Act 1954*, taking into consideration the length of the previous tenancy (*Betty’s Cafés Ltd*); the nature of the business; the premises’ age and state of repair; the comparative hardship between the parties; and the landlord’s intended plans for the premises: *Davys of London Wine Merchants Limited v City of London Corporation and Saxon Land BV* [2005] 1 P. & C.R. DG 8. In *Roehorn v Barry Corp* [1956] 2 ALL ER 742, CA, it was

held that the land was ripe for development, and the new tenancy should not impede this; thus a six-month break provision notice by either party was included. Similarly, in *London and Provincial Millinery Stores Ltd v Barclays Bank Ltd* [1962] 2 All ER 163, the premises were ripe for development; the Court of Appeal reduced the term to one year because of the urgent need to demolish and reconstruct due to premises’ dilapidated state.

Conversely, the courts have granted longer leases with break clauses, operable by either party or a landlord’s break clause exercisable only on the landlord’s intention to redevelop. In *National Car Parks Ltd v The Paternoster Consortium Ltd* [1990] 1 EGLR 99, the landlord wished to redevelop the premises in the future along with other property and so a break clause was to be included in the new lease. The court considered that the tenant would be adequately protected under the 1954 Act, if the landlord were given general right to break with six months’ notice of its intention to redevelop.

Therefore, it is a question of make or ‘break’, at the time of the hearing, for the Landlord to demonstrate that all has been done in terms of any redevelopment save for the redevelopment of the premises due to the tenant’s occupation.

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*Agency  
Boundary Disputes  
Building Disputes  
Clinical Negligence  
Commercial Law  
Company Law  
Consumer Credit  
Contractual Disputes  
Costs  
Criminal Law  
Detailed Assessments  
Employment Law  
Environmental Law  
Family Law  
Housing Law  
Immigration & Asylum  
Inheritance & Probate  
Insolvency  
Intellectual Property  
Landlord and Tenant  
Land Law & Real Property  
Licensing  
Mental Health Law  
Mediation  
Partnership  
Personal Injury & Death  
Planning Law  
Professional Negligence  
Sale and Supply of Goods  
Social Security Disputes  
Trust*

# UPLIFTING

As is well known, in fixed cost cases involving a funding arrangement of either a Conditional Fee Agreement or a Collective Conditional Fee Agreement, a Claimant in a road traffic accident case (provided the RTA giving rise to the dispute occurred on or after 6 October 2003) is entitled to recover a success fee under CPR, r45.11. Recently, we have encountered some general confusion as to what percentage uplift counsel is entitled to and where the line is drawn between an 'at trial' uplift and a 'pre-trial' uplift. Subject to any application under r45.18 to apply (in strictly defined, limited circumstances) for an alternative percentage increase, the relevant percentage increases of solicitors' and counsel's fees are governed by r45.16 and r45.17, respectively. Under r45.16, the percentage increase permitted in relation to solicitors' fees is 100% where the claim concludes at trial and 12.5% where the claim concludes at any time before a trial has commenced, or even before a claim is issued. CPR, r45.17, whilst it similarly provides for a percentage increase of 100% where the claim concludes at trial, there are differing provisions in relation to the pre-trial position. If a claim has been allocated to the fast-track then a percentage increase of 50% is applicable if the claim concludes 14 days or less before the date fixed for the commencement of the trial. If the claim is concluded more than 14 days before the trial date, or before any such date has been fixed, then the percentage increase is then deemed to be 12.5%.

For multi-track cases, both the timescales and percentage uplift alter. A percentage increase of 75% is applicable if a claim concludes 21 days or less before the date fixed for the commencement of trial, with the uplift reduced to 12.5% where the claim concludes outside of the 21 day period. Where a claim has been issued but concludes before it has been allocated, 12.5% is the relevant percentage increase.

There is often confusion when cases settle at the door of the courtroom, but before the case has been formally opened before the judge, as to whether the 100% trial uplift is applicable. Despite it meaning that parties are provided with no incentive to settle matters before reaching court, the answer would appear to lie within r45.17(4) which states that 'where a trial period has been fixed and the claim concludes...on or after the first day of that period; but (b) before the commencement of the trial' the relevant uplifts are 50% for fast-track cases and 75% for multi-track cases. This situation was confirmed last year in the unreported case of *Styler v Ingham* (Leeds CC 31/7/2008) where the costs' judge determined that even where the advocates had been before the trial judge to request more negotiating time, the trial had not started and so the pre-trial uplift was applicable.

*Adam Langrish*

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## WE WELCOME YOUR COMMENTS...

- Would you like us to give a lecture on a particular subject at your firm?
- Do you have any friends or colleagues you think should receive our newsletter?
- Are our records of your details correct?

## NEWS FROM THE CLERKS' ROOM



*(Wayne Effeny - Senior Clerk)*

We have much to celebrate in our twentieth year. We congratulate Robin Belben and Anthony Hand on reaching 40 and 20 years Call to the Bar, respectively. We are pleased to welcome David Barker and Adam Langrish as tenants following completion of their pupillage.

Over the last few months, family barristers have seen a reduction in Legal Aid fees. College Chambers understand the pressures that solicitors are also facing with family fee changes and, despite these changes, we continue to be fully committed to representing both legal aid clients and private clients.

If you have queries on any aspect of work undertaken by us, or in relation to the new fee changes, please feel free to contact the clerks on either (023)80 230338 or [clerks@college-chambers.co.uk](mailto:clerks@college-chambers.co.uk).