



## Working with the Supremes

*In September 2009, William East was appointed by a selection panel chaired by Lord Hope of Craighead as one of eight judicial assistants to the new Supreme Court, returning to Chambers in July of this year. In this article he considers the role of the judicial assistant and the insights he gained during his secondment at the country's top court.*

In October of last year, with much press fanfare and a visit from the Queen, who was accompanied by a panoply of leading politicians and judicial notables from around the world, the new Supreme Court finally opened in the converted Middlesex Guildhall on Parliament Square.

The creation of the Supreme Court was not uncontroversial. Many suggested that formalising the Law Lords' independence was an unnecessary expense, given the circa £60m cost of refurbishing the building and the fact that the running costs would be many times that of the House of Lords. Others welcomed the development of the new court as an important milestone in the promotion of the separation of powers and open justice.

One change that many commentators missed, however, was that the creation of the court allowed the Law Lords (now known as Justices) to negotiate a significant boost to the level of research support available to them. Not only was a fully-sized and adequate law library provided for the first time (incredible as it may seem), but the number of judicial assistants was boosted from four to eight.

Unlike the post of law clerk to the U.S. Supreme Court, the post of judicial assistant is not one that carries much recognition in the UK legal community, at least for now. This is partly because 'JAs', as we were known in our time at the court, are a relatively recent innovation. The programme only began in the 1990s and, until last year, the four JAs were

housed in a pokey attic of the House of Lords well away from the action on the Law Lords' corridor. By contrast, the law clerk scheme in the U.S. has been running for nearly two hundred years and the clerks are famous for, amongst other things, actually writing their Justices' judgments.

As Lord Hope, the Deputy President of the UK court remarked in a recent speech, however, the move to the Guildhall has placed judicial assistants right at the centre of the court's operations. Each of us were assigned to either one or two Justices (in my case Lord Walker and Sir John Dyson SCJ) and had three principal roles:

- Assisting the Justices with research in connection with the appeals that came before the court, commenting on draft judgments and discussing the overall decision on each case.
- Summarising permission applications and advising as to their outcome. We were encouraged to attend the meetings at which permission is decided and voice our views.
- Assisting the Justices with extra-judicial speeches and lectures.

The first duty forms the majority of the work and offered the daunting, but exciting challenge of working with some of the finest legal minds this country has produced on some of the most exciting cases of the last year. Unlike practitioners, judges have to be generalists, and so do judicial assistants. Although each judicial assistant is appointed for their specific expertise (in my case, of course, Chancery law), JAs are expected to work on all types of cases. One day the court will be dealing with the rights of gay asylum applicants seeking to escape foreign regimes where homosexuality can be punished with the death penalty (*HJ (Iran)* [2010] UKSC 31), the next it will be a complicated appeal on limitation and the rules surrounding derivative actions by the beneficiary of an estate (*Roberts v Gill & Co* [2010] UKSC 22). Picking up

new areas of law from day to day, and discussing them with highly skilled and experienced judicial office holders sometimes felt a little like being dragged from pillar to post, but was ultimately enjoyable in an era in which practice at the Bar has become increasingly specialised.

Yet the greatest pleasure for me in working as a JA was seeing the effect that your work can have on individual cases and the development of the law – an experience that I will cherish throughout my career. It is too much to say that JAs ever influenced the outcome of an appeal, although permission decisions have in the past been overturned following the intervention of a JA. Yet through our research and advice we were often able to influence the form of reasoning employed by the Justices, and hence the rules of law that are applied in future cases. That alone is a recommendation to any young lawyer of the attraction that a stint working at the Supreme Court can offer.



William East



Ruth Hughes

## The Removal of Trustees and Executors

**The test for the removal of trustees found in *Letterstedt v Broers*<sup>1</sup>, that trustees should be removed if it is in the interests of the due administration of the trust, is well known and is also applied to the removal of executors under s 50 Administration of Justice Act 1985. There have been some interesting applications of the principle this year: *Kershaw v Micklethwaite*<sup>2</sup>, *Alkin v Raymond and Whelan*<sup>3</sup> and *Angus v Emmott*.<sup>4</sup>**

### *Kershaw v Micklethwaite*

This case involved the administration of Mrs Kershaw's estate by the executors (her two daughters Mrs Micklethwaite and Mrs Barlow and an accountant). One of the beneficiaries of the estate, the deceased's son Mr Kershaw, asked the court to remove all three executors on the basis that:

- 1 the executors had failed to value the assets of the estate properly for the purposes of the IHT account;
- 2 they had failed to update Mr Kershaw and keep him informed of the progress of the administration of the estate;
- 3 they had failed properly to identify the assets of the estate;
- 4 there was a potential conflict of interest in that the will gave Mrs Micklethwaite and Mrs Barlow power to appropriate certain real property in satisfaction of their interests in the estate but did not give the same power in satisfaction of Mr Kershaw's interest therein;
- 5 there was a breakdown in relations between the executors and Mr Kershaw and he lacked confidence in their competence.

Newey J rejected an argument that the test for removing an executor was not as stringent as that for removing a trustee because an executor is only involved in gathering in a person's estate and distributing it in accordance with the will whereas a trustee may have important discretionary powers. The judge also followed *Letterstedt v Broers* in rejecting an argument that mere hostility could be a justification for the removal of an executor without more. Nevertheless hostility would be a factor to be taken into account where the hostility is or might obstruct the administration of the estate. The testatrix's choice was a relevant factor because of her knowledge of the characters and relationships involved.

It was held that there was nothing in the first three allegations listed above that would justify removal of the executors; the conflict of interest was not of the sisters' own making but had been placed upon them by the testatrix and such conflicts often arose where family members are executors. It is entirely possible for this conflict to be managed. The breakdown of relations between the beneficiary and the executors was not sufficiently serious to have a detrimental affect on the administration of the estate.

### *Alkin v Raymond and Whelan*

In this case the testator left his estate on various trusts that gave certain income to his widow Mrs Alkin and certain capital and income on discretionary trusts for his daughter Mrs Price and his granddaughters. The testator appointed his friends Mr Raymond and Mr Whelan to be his executors and trustees. Mr Whelan was particularly well known to the testator as they were engaged in property developments together.

Mrs Alkin and Mrs Price sought the removal of Mr Whelan and Mr Raymond as executors on a number of grounds:

- 1 very little income had been paid to Mrs Alkin in respect of her interest;
- 2 the executors had paid Mr Whelan's company a substantial sum (£163,000) in respect of an invoice backdated to Mr Alkin's lifetime but rendered after his death that Mrs Price contended was not due;
- 3 the executors had dealt inappropriately with reporting lifetime gifts to HMRC;
- 4 the executors, and in particular Mr Whelan, had dealt with Mrs Price in an inappropriate and disrespectful manner by suggesting, among other things, that she should have cosmetic surgery and by sending her lingerie as a Christmas present.

A.G. Bompas QC, sitting as a deputy judge of the Chancery Division, held that little income had arisen for the benefit of Mrs Alkin and that in any event her care was not jeopardised as she was a woman of independent means. He further found that there was nothing in Mrs Price's allegations of disrespectful conduct and that she did not find them "embarrassing and frustrating" on the basis of her gracious thanks for the present. The totality of the allegations was described by the deputy judge as "desperately unattractive".

It was also held that the executors had failed properly to attribute lifetime gifts from the testator to Mrs Price – in particular they attributed to her a £40,000 gift of "cash in a

bag" that Mr Whelan thought he had seen during the testator's lifetime but which had not surfaced after death. Nevertheless the executors then put HMRC on notice of the alleged gift.

Although the foregoing would not have been enough for the deputy judge to conclude that Mr Whelan and Mr Raymond should be removed, the fact that Mr Whelan submitted a wholly unjustified (and apparently unjustifiable and backdated) invoice in connexion with the joint building venture he was engaged in with the testator that Mr Raymond was prepared to pay without scrutiny, was sufficient for the executors' removal.

### *Angus v Emmott*

This case concerned the estate of Anthony Steel who had been wrongly convicted of murder and whose conviction had been quashed after he had spent nearly two decades in prison. His executors were his lover (Mrs Angus) and his sister and her husband (Mr and Mrs Emmott). Mr and Mrs Emmott were pecuniary legatees under Mr Steel's will and Mrs Angus took residue. The estate consisted principally of Mr Steel's claim for compensation from the Home Office for wrongful conviction. The estate was also subject to an Inheritance Act claim by a third party.

There was a divergence of views as to the submissions which should be made to the Home Office and whether a statement, apparently by Mr Steel but in which he had been aided by *inter alia* Mrs Angus, should be submitted. Mr and Mrs Emmott identified material inaccuracies in the submissions and were aggrieved that the statement did not dwell on the support Mr Steel had had from his family.

Richard Snowden QC, sitting as a deputy judge of the Chancery Division, held that the discretion of the executors as to what should be submitted to the Home Secretary could not in the circumstances properly be surrendered to the court, but that the submissions proposed would have to be amended because they were in some respects materially inaccurate. Given the hostility between the executors (they had previously litigated as to where Mr Steel should be buried) and the need for an objective consideration of the submissions and because Mrs Angus could not give the statement following her involvement in its drafting, it was held that all of the executors should be removed and replaced by an independent administrator.

1 (1884) 9 App Cas 371.

2 [2010] EWHC 506 (Ch).

3 Unreported 7 May 2010.

4 [2010] EWHC 154 (Ch).

## Outgoing Partner's Claim against his firm – Beware Delay

*Judge Frances Kirkham sitting as a Chancery Judge in Birmingham has clarified an aspect of the law on limitation in relation to claims between ex-partners. The basic rule is that the ex-partner's claim, which is a claim to an account, can only be brought within six years, because equity applies by analogy the common-law limitation period.<sup>1</sup> This rule became statutory in the Partnership Act 1890:*

*"43. ...the amount due from surviving or continuing partners to an outgoing partner or the representatives of the deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death".*

The consequence is that where no action for an account has been commenced within the six-year period (or 12 years, if there is a partnership deed under seal) no action may be brought. Normally such inactivity is only found where the net partnership assets or liability are of a trivial amount. But sometimes a substantial asset or liability makes an unexpected appearance after the time limit for the bringing of a partnership account has expired. Does this mean that a partner who has suffered the liability, or who has not received the benefit, has no contribution claim against his former partner or partners? The answer is that it all depends upon what stage the taking of the partnership dissolution accounts has reached:<sup>2</sup>

- a If a claim to a partnership account has been commenced but not resolved, then the item in question can form part of those accounts.
- b If the accounts have been resolved and closed the new item can be borne between the partners in their ordinary partnership shares without any general reopening of the arithmetic.
- c If the partners have not "squared up" by agreeing the final accounting position, and an action for partnership accounts is out of time, then it is also too late to bring the new item into account. So a partner who has left the accounts unresolved cannot claim his due share (or an indemnity for his due liability) on the new item in question.

The harshness of this rule may sometimes be mitigated if the partner to be charged has acknowledged (or partly paid) the debt, under section 29 Limitation Act 1980. But the section only applies to acknowledgements that are in writing, and arise where "the right of action has accrued to recover...any debt or other pecuniary claim". Her Honour Judge Kirkham held<sup>3</sup> that where two former partners in a dissolved firm instructed the accountants to prepare dissolution accounts (which in the end were not agreed) this did not amount to an "acknowledgement" of any "debt" from one to the other. So the partner who had borne the debt in question was left to bear the liability alone.

The moral is that partnership dissolution accounts should either be agreed within the limitation period, or a protective claim should be issued before that time expires.

- <sup>1</sup> *Cox v Gye* (1872) LR 5 HL 656
- <sup>2</sup> See the decision of the Privy Council in *Gopala Chetty v Vijayaraghavachariar* (1922) 1 AC 488
- <sup>3</sup> *Manning v English* (2010) EWHC 153 (Ch)



Mark Blackett-Ord

## Speaking Events Seminars

Christopher Whitehouse is speaking at several STEP meetings throughout the next few months. For more details please contact STEP on 020 7340 0500 or [www.step.org/events](http://www.step.org/events). He is also speaking at several regional Law Society events including one in Bristol on 18th November, Birmingham on 23 November, London on 18th January, Manchester on 17th February.

11 NOVEMBER 2010 - VILLA D'ESTE  
Shân Warnock-Smith  
*The Private Client Forum*  
[www.privateclientforumeurope.com](http://www.privateclientforumeurope.com)

24 NOVEMBER 2010 - LONDON  
Julia Abrey, David Rees,  
Thomas Entwistle & Barbara Rich  
*"Recent Developments in the Court of Protection"*  
at The Irish Club, London  
Tel 020 7421 7870 or [www.5sblaw.com](http://www.5sblaw.com) for more information. This seminar is full but we hope to repeat it in the New Year.

24 NOVEMBER 2010 - HENLEY  
Joseph Goldsmith  
*The STEP Thames Valley Branch Annual Conference*  
Tel 01865 262 633

3-5 MARCH 2011 - PROVENCE  
Shân Warnock-Smith  
*Chairing the Trusts & Litigation Forum*  
in Terre Blanche, France  
[www.trustandestateslitigationforum.com](http://www.trustandestateslitigationforum.com)

Please contact Annie Girling on  
020 7421 7870 for further details.

## Members' News

In this year's directory from **Chambers and Partners UK Guide** five of the eleven barristers appearing in Band 1 for "Traditional Chancery" are from our Chambers, and we also have Band 1 members in "Partnership," "Pensions" and "Private client tax".

**Henry Harrod** our Head of Chambers has been advising one set of trustees about the complications of the title to a landed estate acquired by the family in 1909 and another set about the ownership of historic chattels. **Mark Herbert** has been researching the prospects for promoting new legislation to validate arbitration clauses in trust instruments for the Trust Law Committee and in his spare time he has been working hard organising next year's Chancery Bar Association annual conference. **Shân Warnock-Smith QC** has been establishing her new chambers in the Cayman Islands as an addition to her London practice and is preparing for the Court of Appeal hearing in *Sutton v England* on the scope of section 57 of the Trustee Act 1925. **Christopher Whitehouse** has been busy with tax advice. **Mark Blackett-Ord** has been advising on disputes about inheritance and on a high-level claim against solicitors for their advice to the manager of a private equity fund. **Martin Farber** has been engaged in a long-running commercial action involving the music industry. **Andrew Simmonds QC** represented BT in the trial of issues relating to the scope of the Government guarantee of BT's pension liabilities granted on privatisation in 1984. **Penelope Reed QC** has been appointed a Civil Recorder. She has been removing trustees in *Alkin v Price* and dealing with the rule in *Parker v Felgate* in *Perrins v Holland*. **Christopher Tidmarsh QC** had been advising on Lehman Bros Pension Scheme and acting in litigation for HMRC in relation to the Intangible Asset Regime and appearing in litigation in Cayman Islands in connection with a family trust. **Michael O'Sullivan** is acting for the owner of a very substantial landed estate in a Court of Protection matter and for an executor in the compromise of an action to remove her as trustee of a £20 million

charitable trust fund. **Patrick Rolfe** has been busy with property matters. **Barbara Rich** acted in *Gorjat v Gorjat*, a claim to set aside a transfer of balances in a Swiss bank account into joint names of husband and wife, and in *Kings v Bultitude* where she successfully argued that a gift to the Ancient Catholic Church failed as a charitable gift on the death of the testatrix; she was shortlisted as Chancery Junior of the Year at the Chambers Bar Awards 2010. In addition to advising clients in relation to probate and trusts disputes, over the summer **Tracey Angus** has been acting in the High Court trial of a property dispute. **Henry Legge** has been busy on tax and pensions matters. **David Rees** has been involved in a number of cases involve multi-jurisdiction estates, and he recently appeared in the case of *Re MN* which established the principles upon which the Court of Protection will recognise and enforce orders of foreign courts. **Anna Clarke** represented the successful appellant in the Court of Appeal in *Smith v Cooper*, a case concerning the rebuttal of the presumption of undue influence and restitution on setting aside transactions. **Leon Sartin** is dealing with various tax negligence claims and drafting trust documents for banks and insurance companies and assisting with trust aspects of a large corporate transaction and he has been co-authoring a new edition of *Drafting Trusts and Will Trusts*. **Sarah Haren** has been engaged in the High Court with a proprietary estoppel claim, has appeared several times in the Court of Protection and has been advising on a number of Inheritance Act matters. **Tom Entwistle** has been busy. In addition to his involvement in several large-scale pension disputes, **Joseph Goldsmith** has been advising in a case concerning artwork looted by the Nazis and has been litigating over the ownership of another painting in the ecclesiastical courts. **Mark Baxter** has been preparing applications to and appearing in the County Court, the High Court, and the Court of Protection, and advising and drafting in relation to probate, tax, professional negligence, and land law matters. **Ruth Hughes** recently obtained a



**A Grand Day Out at the Grand Court**

mandatory injunction prohibiting a mortgagor interfering with the rights of a Law of Property Act receiver. **William East** returned to Chambers after a year working as judicial assistant to Lord Walker and Sir John Dyson at the Supreme Court, and he has appeared in the High Court defending an application in relation to a £4m estate and in the county courts on a number of consumer credit matters. **Jordan Holland** has completed his Pupillage with us and will become a full member of Chambers next year after he has finished a period as a judicial assistant in the Court of Appeal.

### News from Cayman

Chambers and Shân Warnock-Smith QC are delighted to announce the opening of ICT Chambers in the Cayman Islands. ICT stands for International Chancery and Trusts and Shân and fellow Chancery practitioner Andrew De La Rosa will operate there in association with 5 Stone Buildings. Shân will also continue to practise from London and the Cayman Chambers is designed to offer an on-the-spot service to Cayman clients and to those of our international clients for whom it is a more convenient hub.

She has been granted general admission to the Cayman Bar - the accompanying photograph shows her and Andrew De La Rosa on that happy occasion with the Chief Justice of the Cayman Islands and with Sara Collins of Conyers Dill and Pearman in Cayman who moved her admission with her characteristic style and charm. In Cayman she will act as a referral barrister just as in the UK. Clients will of course continue to have full access to all the members of 5 Stone Buildings for Cayman and international work just as they do now but with the added advantage that facilities are available to them through ICT Chambers. The development reinforces the already high standing of 5 Stone Buildings in the sphere of international trusts.

Please contact the Clerks at 5 Stone Buildings for further details - and watch out for news of the launch parties in London and Cayman shortly to be announced.



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