Charity Newsletter

Winter 2016 Charity Newsletter

Welcome to our last edition of our Newsletter of 2016.

It has been an exceptionally busy year for Gardner Leader, culminating in the firm winning the Halsbury's Legal Award for Business Development in September, the LawNet Firm of the Year award in November, and moving our Maidenhead office to new improved premises at 7 Frascati Way in December.

In our final newsletter of 2016, Tara McInnes, a Senior Associate in our Dispute Resolution Team, gives her thoughts on the latest instalment of the ongoing landmark case of Ilott -v- Mitson. Sam Pinder, a paralegal in our Dispute Resolution team takes another look at the uncertainty surrounding Brexit and his own recent experience of The Supreme Court and Cate Beavis considers the impact of badly worded wills. Finally, Penny Wright, a Senior Associate in our Inheritance Protection team considers whether the tide is turning against charitable schools.

As always if you would like to discuss any of the topics contained in our newsletter with us further, or anything else in general, please do give us a call.

I hope you enjoy our Newsletter and wish you all a wonderful Christmas and a happy 2017.

Alastair Goggins

Gardner Leader (as well as Brexit) in the Supreme Court

By Sam Pinder, Paralegal in Dispute Resolution

In order for the UK to leave the EU and give effect to the recent referendum, it must first notify the European Council pursuant to Article 50 of the Treaty of the European Union. On 3 November 2016, the High Court ruled that the Government cannot legally begin this process without first consulting Parliament as legislation (and not the Government's power alone) is needed in order to end the UK's

membership. The four day hearing started in the Supreme Court on 5 December 2016. It heard an appeal brought by the Government, which argues that it has the necessary prerogative powers to be able to act alone. It is a constitutionally significant moment, as for the first time all 11 Justices heard a single case. It was broadcast live on the websites of both the BBC and Channel 4. The number of visitors to the court's website (which streams every hearing) has risen 70% in November 2016, compared to the corresponding month last year.

I would personally like to think that this spike in interest is as a result of the case of Lowick Rose LLP (in Liquidation) v Swynson Limited and another, which was heard on 24 November 2016. This was the first time that Gardner Leader LLP has been in the Supreme Court, and I was fortunate to assist Michelle Di Gioia, who has overseen this firm's previous successes in this case in both the first instance decision in the High Court and in the Court of Appeal. Walking into court room 1, setting up our laptops and files and sitting behind Counsel was unbelievably exciting. There are no witnesses called at Supreme Court hearings, with advocates basing their oral submissions on their respective written cases, lodged prior to the hearing. There is almost an air of informality, judges do not wear wigs and they sit at the same height as everyone else (unlike other courts). Counsel were not robed and nor were they theatrical in delivering their message. It's a question and answer session of the highest order.

At a recent lecture, Lord Neuberger, the court's President, has commented on the importance of ensuring that hearings are less adversarial and more like a seminar. All three court rooms as well as the court's museum are open to schoolchildren, tourists and interested parties, who are able to walk in and out of hearings. There is a great sense of occasion at the beginning of every session when the whole courtroom rises to the likes of Lord Neuberger, Lord Mance and Lord Clarke, judges that you hear of when studying law and who are now determining your firm's own case. The court hears a very limited number of cases (84 last year) and only those that raise points of law of general public importance. We now eagerly anticipate the outcome that we are expecting in the New Year. Clearly the Justices will have their hands full in the meanwhile.

Ilott v Mitson

By Tara McInnes, Senior Associate in Dispute Resolution

The long awaited case of Ilott v Mitson was heard in the Supreme Court on 12 December.

Those of you familiar with the case, will recall that it concerns a claim brought by Heather Ilott against the estate of her late mother, Melita Jackson. The claim is brought under The Inheritance (Provision for Family and Dependants) Act 1975 on the ground that her late mother's will failed to make reasonable financial provision for her. Prior to her death Ms Jackson had been estranged from her daughter for many years.

What's exciting about this case is that despite many such cases being issued in the High Court every year, this is the first time one has ever reached the Supreme Court (or its predecessor – the House of Lords). The court at first instance awarded Ms Ilott £50,000 from the estate, after various appeals, in 2015 The Court of Appeal awarded her £163,000, which equates to almost a third of the estate. The animal charities (the major beneficiaries) appealed and the matter was referred to The Supreme Court.

The Supreme Court now has to consider the following issues:-

1. Whether the Court of Appeal should have set aside the award of £50,000 made at first instance and make a more substantial award, structured in such a way as to preserve Ms Ilott's 'means tested' benefits;
2. Whether the Court of Appeal erred in considering the position as at the date of the appeal rather than date of the hearing;
3. Whether it was mistaken in its approach to the 'maintenance' standard under the 1975 Act;
4. Whether it was wrong to structure the award in such a way as to preserve Ms Ilott's benefits;
5. Whether it was wrong in the way it calculated the balancing exercise under the 1975 Act.

So having watched some of the Supreme Court case, what can one conclude? There was certainly a lot of consideration of the nature of Melita Jackson's relationship with the Appellant and whether there was an obligation to provide for her daughter. This was exemplified to consider what the nature of such an obligation might be and what a 'reasonable' person would expect a parent to leave their daughter in their Will. The judges also acknowledged the far reaching impact of any decision especially with regards to charities and that the court's decision will affect 'legacy giving' as a whole.

Whilst one can speculate as to what decision the judges will make, what's clear is that whatever their decision, it will have a big impact on contested probate, claims under The 1975 Act and legacy giving as a whole. Earlier this year, it appeared that the courts were taking a stronger approach against claims brought by adult children following the recent case of Ames

v Jones 2016 EW Misc B67 CC, where the judge held that the applicant was capable of working and her unemployment was a 'lifestyle choice'. However, the stark difference between the two cases is that the Ilott defendants are charities and the Ames Defendant, the elderly widow of the deceased, complete with her own financial needs. Contrast the decisions made in the Ames case with the comments made by the Court of Appeal in the Ilott matter where they considered that anything the charities received amounted to a 'windfall'. This demonstrates that the fact that it was charitable organisations defending the claim was a strong factor for the court when considering what award to make. It is entirely possible that The Supreme Court will continue along this vein and find in favour of Ms Ilott. We really can only wait and see.

The decision is due in January.

Is the tide turning against charitable independent schools again?

By Penny Wright, Senior Associate in Inheritance Protection Team

Charitable independent schools are once again in the spotlight, as the controversy over whether they do enough to justify charitable status has re-emerged in the news recently. The Department for Education's consultation (which closes on 12 December 2016) received a proposal from the Independent Schools Council to provide 10,000 free places to pupils from lower income families - but only if the government contributes £5,500 per pupil.

Critics (including the Chief Inspector of Schools, according to the BBC), argue that this is inadequate and that the places should be fully funded by the independent schools. However many independent charitable schools would struggle financially under the burden of fully funding such places.

There is also a concern that the scheme would cream off the brightest pupils from the state sector, further disadvantaging state schools.

Charitable independent schools benefit from various special rates and taxes as a result of their charitable status. In exchange for this status, charities are obliged to provide a public benefit. Opinions vary as to how far such schools should go in ensuring the educational benefits and facilities they provide are available to a sufficiently wide sector of society. Arguably there is insufficient public benefit if only rich people can afford the fees charged, because less well-off people are excluded from benefit.

The same issue was hotly debated following controversial Charity Commission guidance in 2008. The guidance applied to all charities, not just schools; but it attempted to set out in detail the sort of things a school should do in order to comply with the public benefit requirement, for example offering free places to poorer pupils. The controversy culminated in a legal case in 2011 which largely found in favour of the independent schools and criticised the Charity Commission's approach. As a result the Charity Commission re-wrote its guidance with a less strict approach.

The result of the consultation is expected to be reported in Spring 2017 and will, no doubt, provoke fresh debate.

Is your will accurately working?

By Cate Beavis, Trainee in Dispute Resolution

Are you certain that all your assets are accurately referred to in your Will? If there is any ambiguity it can have consequences which are difficult to resolve.

A recent case in the Chancery Division of the High Court *The Royal Society v Robinson [2015] EWHC 3442 (Ch*) has declared that due to the testator's inaccurately worded Will, the Channel Islands and the Isle of Man are to be read as 'the UK' when looking at all the facts of this case.

Background

The testator was an eminent physicist who had spent a lot of his working life in Switzerland. Together with his wife, in 1986 they contacted the Royal Society ("the Society") to discuss the possibility of leaving their assets to the Society on their death. The testator wrote a Swiss Will to deal with the assets he owned in Switzerland.

The testator's English Will, which he rewrote after his wife's death in 2006 and further amended in 2009 to make some specific gifts declared he was domiciled in England, his Will and any Codicil should be construed to take effect according to English Law, and his Will and any Codicil shall "extend only to property of mine which is situated at my death in the United Kingdom."

Upon the testator's death, a lot of his wealth was tied up in off-shore accounts in Jersey and on the Isle of Man. If the accounts were "situate in the United Kingdom" then they passed under his Will; if they were not then the testator died partially intestate and his next of kin were his specific legatees.

The Court's decision

The technical meaning of the United Kingdom does not include Jersey or the Isle of Man. It was therefore for the Court to look at the circumstances and the facts when construing a Will. In this case section 21 of the Administration of Justice Act applies, following a ruling in *Marley v Rawlings p2014] UKSC 2*. This section allows the Court to consider evidence of the testator's intention where there are ambiguities, specifically in this case as the language was ambiguous in light of the surrounding circumstances.

By looking at the testator's intention in this case the Court was satisfied that he had intended to include the offshore accounts within his Will and had intended his residual estate, saving the provisions in his Swiss Will, to pass to the Society. The testator's intentions hadn't changed since his original Will: the later additions were made to allow for some gifts to his family (of which there had previously been none); to deal with the Swiss will; and to make arrangements for the sale of his car (the proceeds of which were also being paid to the Society). There was also a document in which the testator had included the off-shore accounts within his "English" assets.

What is striking and a cause for reflection is this: if section 21 had not applied, and the Court had not been allowed to consider the testator's intention, then the Court would have had much more difficulty reaching the conclusion which could have resulted in the testator's wishes not being followed.

Conclusion

The importance of using correct terminology in your Will that accurately reflects a person's wishes is extremely important. Rather than limiting the Will to certain assets, donors need to be encouraged to ask their solicitors to draft their Will to deal with all assets 'other than those in X'. This wording will reduce the chances of assets failing to be covered by a specific reference. For charities, which often benefit as residuary beneficiaries this could mean the difference between benefitting or not benefitting under a Will. Whilst charities have limited control over how their donors draft their Wills they can continue to press the importance of donors instructing appropriately qualified solicitors to draft their Wills, which hopefully will minimise any inaccuracies in the Will.