15:35: Juniors' Session: "Hidden Gems" - the most important cases you may never have heard of

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Litigation

Redstone Mortgages v B Legal Ltd:

How (not) to prove that a disclosed document is not authentic

Andrew Gurr

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Starting Point: CPR r32.19

"32.19— Notice to admit or produce documents

(1) A party shall be deemed to admit the authenticity of a document disclosed to him […]* unless he serves notice that he wishes the document to be proved at trial.

(2) A notice to prove a document must be served—

(a) by the latest date for serving witness statements; or

(b) within 7 days of disclosure of the document,

whichever is later."

* NB: not yet updated to refer to PD 57AD.

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Comparable provisions:

- England & Wales:
  - FPR r. 22.16
  - RSC Ord.27, r.4
- Cayman: GCR Ord.27, r.4
- Bermuda: RSC Ord.27, r.4
- BVI: ECSC CPR r.28.18

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What is the effect of a notice?

- *Redstone Mortgages Ltd v B Legal Ltd* [2014] EWHC 3398 (Ch), at [57]-[58] (Norris J):
  - All that is needed to prove the document is "*apparently credible evidence of sufficient weight that the document is what it purports to be.*"
  - I.e. (1) is there evidence? (2) is it "*on its face so unsatisfactory as to be incapable of belief*"?
  - Otherwise, the challenging party will need to adduce sufficient evidence to disprove the document.

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Alleging forgery:

- Crucially, at [58]:

> "It is vital that the process of challenge is fair. *Criticism of the evidence about the authenticity of the document cannot amount to a covert and unpleaded case of forgery. If a case of forgery is to be put then the challenge should be set out fairly and squarely on the pleadings.*"

A recent application:

Lemos v Church Bay Trust Co Ltd [2023] EWHC 2384 (Ch), at [34]-[52]:

- It is not enough to just put in a notice to prove if you want to allege forgery, even if the authenticity of the document is not something to which you would need to plead.
- If not appropriate to plead to the document, raise the allegation in correspondence as soon as possible.
- Depending on *when* the document is disclosed: late disclosure => more flexible approach

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Other Rules/Guidance:

Commercial Court Guide, Section E.4.1(a)-(b):

- Serve notices "*well before the deadline for witness statements*"
- If any specific feature of the document (e.g. date) is to be challenged so that witnesses will need to be called to prove the contents, then:
  - Notify in writing "*in good time prior to the exchange of witness statements*".
  - Set out grounds of challenge in skeleton argument.
- ! – this section of the guide is under-drafted, and complying with it may not be enough.

Sangha v Sangha and others [2023] EWCA Civ 660

Revocation clauses & the requirements for execution

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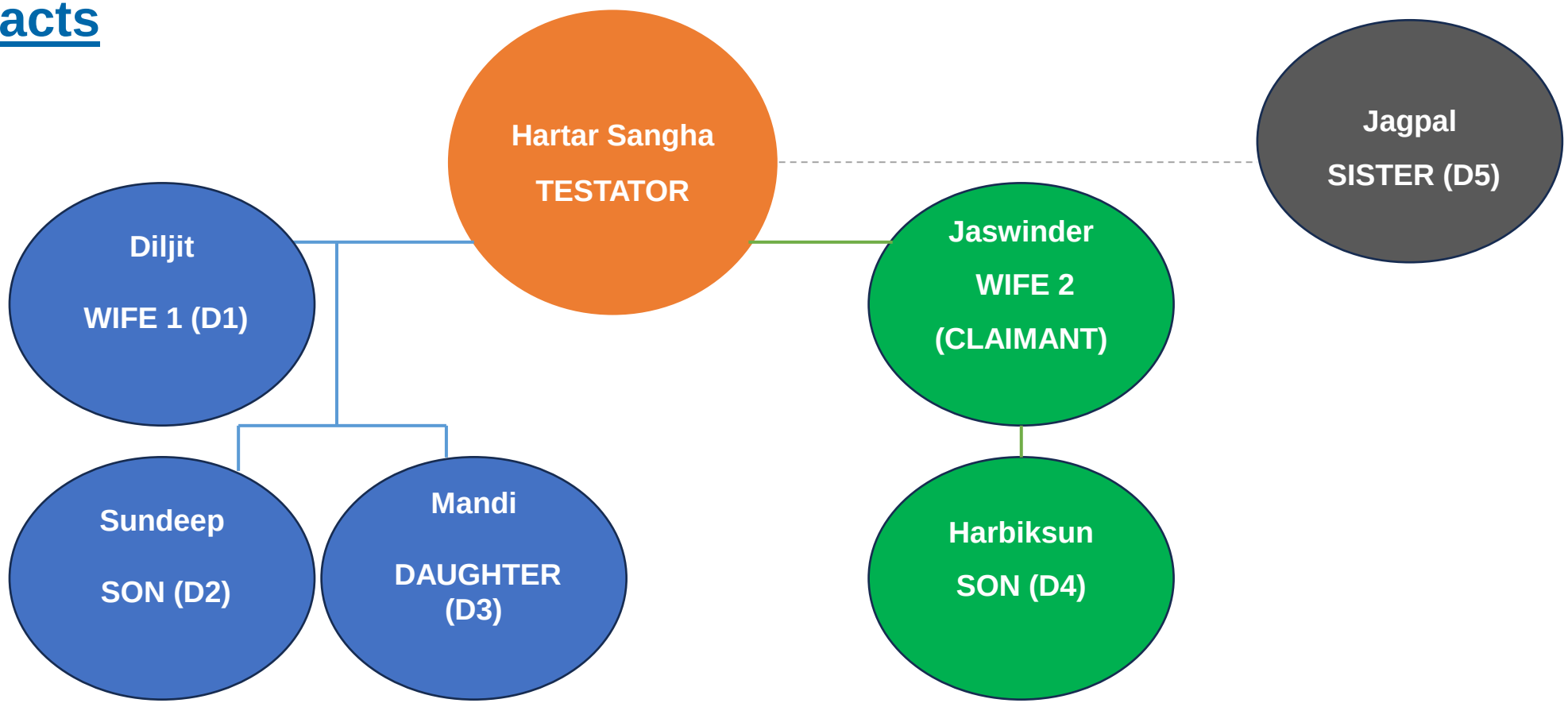
The Facts



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Relevant wills

- **2007 Will**
  - Executed in India
  - Disposes both Indian and UK assets
  - All property to Claimant (wife 2) or, failing that, their son (D4)

- **2016 Will**
  - Executed in India
  - Disposes only Indian property
  - Indian property divided equally between D1-3 and Sister (D5)
  - No mention of the Claimant or their son

"This is my last and final WILL and all such previous documents are cancelled"

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Revocation: key principles [47] - [49]

1. “In the court of probate the whole question is one of intention: the animus testandi and the animus revocandi are completely open to investigation.”

   Sir John Nicholl in *Methuen v Methuen,* cited by Lord Wilberforce in *Re Resch’s Will Trust* [1969] 1 AC 514

2. Question whether or not the Testator intended such a clause to have its natural effect

3. A general revocation clause is in itself powerful evidence of the Testator’s intention.

   There is a “heavy burden” to establish otherwise: *Lowthorpe-Lutwidge v Lowthorpe-Lutwidge* [1935] P 151

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The approach below [55]

"34. It seems to me that where a will is expressed to apply to specific, identified property in a particular jurisdiction, is made in that jurisdiction with the assistance of lawyers established and qualified in that jurisdiction, and has no other connecting factor with any other jurisdiction, the starting point should be an assumption that the will as a whole is only intended to apply to that property in that jurisdiction unless there is some good reason to believe otherwise. In this case there was none."

- Simon Gleeson QC (sitting as a Deputy High Court Judge) - [2022] EWHC 2157 (Ch)

➢ "seems to me to go further than is justified by any of the authorities we were shown"

Nugee LJ

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The ‘corrected’ approach

“60. The starting point in the circumstances I think is that Hartar is prima facie to be taken as having intended the 2016 will to be not only his primary will but his only will (which is what the revocation clause on its face provides), and if the court is to reach some other conclusion it needs some basis in the evidence to do so. This is the approach adopted, correctly in my view, by the deputy master…”

*“62…**clear evidence** [is] needed **to displace the prima facie effect** of the clause.”*

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The presumption against intestacy [67ff]

- Lord Green MR, *Re Abbott* [1944] 2 All ER 457 at 459: *"a very dangerous line of thought"*

- Lewison LJ in *Partington v Rossiter* [2021] EWCA Civ 1564 at [32]:

> *" The policy underlying the principle is, in my judgment, threefold.*
>
> *First, a court strives to give effect to the testator's intention and purpose as expressed in a will; and the purpose of a will is (at least generally) to dispose of all the testator's estate.*
>
> *Second, the rules of intestacy are to some extent arbitrary (to the extent that they may not represent the wishes of an individual testator, but are default rules for the population at large).*
>
> *Third, the testator's own dispositions promote legal certainty."*

➢ Nugee LJ at [70]:

"What I think the cases taken overall illustrate is that although the presumption exists, and can in certain cases be useful for resolving ambiguities, ***its force varies from case to case*** *with the circumstances."*

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Execution

- "… a point of statutory construction of some general significance" [75]

Wills Act 1837 s.9

"No will shall be valid unless —

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

(b) it appears that the testator intended by his signature to give effect to the will; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) each witness either—

(i) attests and signs the will; or

(ii) acknowledges his signature,

in the presence of the testator (but not necessarily in the presence of any other witness),

but no form of attestation shall be necessary."

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Execution

Wills Act 1837 s.9 – the sequence of events matters

*"Seen in this light, **it remains a requirement of section 9** as amended by section 17 AJA 1982 **that the steps required take place in sequence**. The testator must sign (or the will be signed at his direction). The testator must either do this in the presence of both witnesses together, or must acknowledge his signature in the presence of both together. This is the essential act. The witnesses must then confirm that they have witnessed this essential act. They do this either by signing the will, or, if they have already signed, by acknowledging their signature after the essential act."*

Nugee LJ at [93] - see also Arnold LJ at [109]

Uavend v Adsaax
[2020] EWHC 2073 (Comm)

Are corporate trust providers vicariously liable for the actions of their employees in their capacity as directors?

Ryan Tang

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Summary

- The claimant, Uavend, alleged that Vistra (D2) was vicariously liable for the acts of two of its employees in their capacity as directors of Adsaax (D1)
- Employees were obliged to accept appointment as directors of companies within a trust structure in their capacity as employees of a corporate trust services provider
- Wearing two hats – but insisted that they always viewed the two roles as separate

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Vicarious Liability

- Vistra Singapore was not vicariously liable for the actions of their employees when they acted as directors
- When the directors signed corporate documents, they did so exclusively in that capacity. They had no authority to sign documents on behalf of a company when wearing their hat as an employee of the trust provider
- Distinguish between the day-to-day management of a company (carried out in their capacity as director), and exercising high-level oversight of the overall trust structure

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Other jurisdictions?

Bumi Armada Offshore Holdings Ltd v Tozzi Srl [2019] SGCA(I) 05 – Singapore Court of Appeal judgment by Lord Neuberger

- [50]: "*the simple fact that the individual was employed by the parent does not mean that the individual was also acting for the parent – let alone that he was only acting for the parent*"
- "*Cogent additional evidence*" needed to show that the employee was only acting for the parent company

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Recent application

Carey Street Investments Ltd v Brown [2023] EWHC 968 (Ch) at [269]-[298]

- Claim failed in its entirety as the allegations of breach of trust against the individual director were made out
- But even if the director had consciously preferred the interests of his employees, it would be wrong to impose vicarious liability: [287], [290]
- A corporate trust services provider is unlikely to benefit if the director prefers the interest of the trust structure to the company: [285]

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Conclusion

- Very commonplace in trust structures for corporate trust services providers to appoint their employees as directors of companies within the trust structure
- Offer reassurance that it is very unlikely for the employer to be held vicariously liable for the acts of their employees when wearing their "director hat"
- Not a change in the law – *Uavend* cites and applies the UKPC authority of *Kuwait Asia Bank plc v National Mutual Life Nominees Ltd* [1991] AC 187, but a welcome clarification in the offshore trusts context

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Max Marenbon (Chairman)

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