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Trustees finally obtain possession order over pub despite objection of one beneficiary

*Philip Baker and Raymond Preedy v. Jonathan Dunne,
Sarah Fenton and Peter Dunne
[2016] EWHC 2318 (Ch)*

Article by David Bowden

The Albert Arms in Esher was owned by the late Mrs Jean Montgomery who died in 1997. Under her Will she left her estate in equal shares to her 3 children. Jonathan Dunne was one of her sons and he carried on running the pub business. The trustees of the Will wanted to sell the pub and divide the proceeds 3-ways to all the children. The trustees brought a possession action and obtained costs protection by means of a series of *Beddoe* orders. Jonathan disputed the possession claim saying he had a proprietary estoppel. On 2 October 2015 Master Matthews dismissed Jonathan's defence to the possession claim and an appeal against that ruling was also dismissed by the Court of Appeal on 21 July 2016. The trustees returned to court seeking to enforce the possession order and for another *Beddoe* order. Jonathan tried to intimate a claim for goodwill and passing off claiming that if the trustees sold the pub, they would be selling it with the goodwill of the Albert Arms brand that he had developed in the 20 years since he had run the pub. Chief Master Marsh made a further *Beddoe* order. He ruled that the purported passing off claims were an abuse of court process and could not proceed. The trustees are now able to obtain vacant possession. The trustees are going to appoint a professional manager whilst they endeavour to finally sell the pub. Subject to the resolution of costs, the proceeds can then be divided equally amongst Mrs Montgomery's 3 children.

Philip Baker and Raymond Preedy v. Jonathan Dunne, Sarah Fenton and Peter Dunne
[2016] EWHC 2318 (Ch) 20 September 2016
High Court of Justice, Chancery Division (Chief Master Marsh)

What are the facts?

Mrs Montgomery owned the freehold to a public house in Esher called the Albert Arms. She had 3 children – Sarah, Peter and Jonathan. She died on 6 September 1997 and her Last Will and Testament was drafted by her solicitor (Mr Shilson). In it she left the Albert Arms to her husband (Bruce) for life and on his death the proceeds were to be split equally between her 3 children. Bruce died on 1 February 2013. Mrs Montgomery's son Jonathan Dunne initially assisted Bruce in running the pub and eventually he ended up running it on his own. He did this on his own account and through 2 limited companies.

Mr Shilson and an accountant, Mr Preedy, were appointed trustees of Mrs Montgomery's estate. Jonathan Dunne spent substantial sums of money on renovating the pub after an electrical fire. £201,479 was spent in 1999-2000 renovating the ground floor and a further £140,433 was spent in 2003 in renovating the first floor. Following Bruce's death, the Trustees wanted possession of the pub so that it could be sold and the sale proceeds divided equally amongst Mrs Montgomery's 3 children. Mr Dunne and his 2 companies resisted the claim for possession on the basis that Mr Shilson had (he claimed) made a to him as to the terms of his occupation which was made by Mr Shilson as trustee and amounted to a proprietary estoppel.

What happened when the case first came before Master Matthews in the Chancery Division of the High Court?

A fuller note on the hearing is [here](#). The judge ruled that Bruce Montgomery carried on a pub business at The Albert Arms after the death of his wife in premises belonging to the trustees of Mrs Montgomery's Will. The judge found that no promises were made by either Mr Shilson or Mr Preedy to Jonathan Dunne about rights to remain on the premises. In any event Mr Shilson had no authority to bind Mr Preedy in respect of any such promises. Neither Jonathan Dunne's sister nor brother promised, or acquiesced in the promises of others, about such rights.

The judge commented that the fundamental problem for Jonathan Dunne in this case had been that he paid for the refurbishments without securing a clear commitment from the trustees or his siblings as to whether any of them (and if so who) should repay him for them. They were in effect loans to the pub trading business.

What happened in the Court of Appeal?

On 21 July 2016 Jonathan Dunne's appeal was unanimously dismissed on all grounds with the judgement delivered by Lord Justice Vos. A fuller note on this appeal hearing and its outcome is [here](#). Vos LJ noted that '*what actually happened was that the parties never did agree anything. Not only that, there never was a shared understanding of how the monies that Jonathan had spent were to be treated. The correspondence makes this abundantly clear.*' Vos LJ ruled: '*Estoppels are indeed*

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intended to meet the justice of the case. But they must be based on legal principle, not a vague idea that somehow someone will be able to obtain repayment of monies expended for a worthy purpose.'

What is a *Beddoe* order?

In *Re Beddoe Downes v Cottam* [1893] 1 Ch 547, the Court of Appeal dealt with a trustee's costs from his unsuccessful defence to an action in relation to the custody of deeds. The prevailing Chancery practice had been to give a trustee his costs out of the trust estate as a matter of course but court rules had then changed to make the award of costs a matter of discretion even in trust cases.

Lindley LJ ruled that 'a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards costs, even if he acts on counsel's opinion.' Bowen LJ added that a trustee could only be indemnified from the trust for legal costs where they had been 'properly incurred for the benefit of the trust - a proposition in which the word "properly" means reasonably as well as honestly incurred'. Bowen LJ said the solution was:

'If a trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit, he is provided by the law with an inexpensive method of solving his doubts in the interest of the trust. He has only to take out an originating summons, state the point under discussion, and ask the Court whether the point is one which should be fought out or abandoned. To embark in a lawsuit at the risk of the fund without this salutary precaution might often be to speculate in law with money that belongs to other people.'

Why is a *Beddoe* order significant here?

The 2 claimants are the trustees of the last Will and Testament of the late Mrs Jean Montgomery. They were seeking to realise the assets of her estate to distribute in equal shares to her 3 children. Jonathan Dunne (one of her children) was disputing this claiming that he had an entitlement to carry on running the pub business. In order to protect themselves, the Trustees needed to obtain a *Beddoe* order from the court that continuing with the possession proceedings (including resisting an appeal to the Court of Appeal) was an action properly incurred for the benefit of the trust. With the benefit of a *Beddoe* order, even if the Trustees were unsuccessful, they would still be able to charge their legal costs to the estate rather than having to meet them out of their own pockets.

What *Beddoe* orders had been made here?

Throughout the litigation, various Chancery Masters had granted the trustees *Beddoe* orders at various stages including:

- Prior to issue of the possession proceedings in 2014,
- At the hearing of the possession claim on 27 November 2014 giving the trustees permission to pursue the action, and
- On 8 June 2016 before the Court of Appeal hearing.

What was the application that Chief Master Marsh had to determine?

The Trustees had obtained a possession order for the pub on 27 November 2014. Although Jonathan Dunne was granted limited permission to appeal to the Court of Appeal, no stay of the possession order was granted. On 26 April 2016, the trustees were given permission to issue a writ of possession to enforce the earlier possession order. Master Marsh had to determine an application issued by the Trustees for a further *Beddoe* order in relation to enforcing their possession order. Strictly the trustees did not need another *Beddoe* order, but given the history of the litigation they issued an application out of an abundance of caution.

What was the trustee's position?

The trustees sought a further *Beddoe* order and permission (if it were needed) to continue to enforce the possession order. They proposed to do this by obtaining vacant possession, evicting Jonathan Dunne from the pub, appointing a professional manager to run the pub whilst it was sold and then to seek a buyer for the freehold of the pub along with its fixtures, fittings and goodwill.

What was the expert evidence on valuation of the pub?

Interestingly the valuations from the experts on either side were not very far apart.

Mr Jonathan Dunne instructed Mr Martin Willis FRICS of Fleurets. In January 2015 his valuations were:

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- £2.1million for the freehold of the pub with vacant possession, or
- £1.58million as investment value of the pub with Jonathan Dunne continuing to trade there, and
- £100,000 a year for the annual rent of the premises.

Although Mr Jonathan Dunne had continued to run the pub, the Master noted he had not paid any rent at all for his occupation of the pub for over 3 years.

The trustees instructed Mr Trevor Watson of Coffey. In June 2016 his valuations were:

- £2million for the freehold of the pub with vacant possession and as a fully equipped operational entity, or
- £1.6million were the pub occupied by a publican on a full repairing and insuring lease paying a market rent.

Who supported the trustees?

Sarah Fenton and Peter Dunne being the other 2 beneficiaries and children of the late Mrs Jean Montgomery '*strongly supported the trustees' case*'

What grounds did Jonathan Dunne make for resisting the possession order?

Jonathan Dunne sought to resist the enforcement of the possession order by claiming that he and/or companies under his control owned goodwill or rights in the brand name of the 'Albert Arms'. He and 2 of his companies claimed ownership of the copyright in both the 'Albert Arms' name and logo. He also claimed to own various fixtures and fittings at the pub.

What did the Trustees say about this goodwill claim?

The trustees disputed this on 3 bases:

- The trustees denied that Jonathan Dunne had any legitimate right to the Albert Arms brand,
- In relation to items such as windows, doors, staircases and flooring which Jonathan Dunne was threatening to remove, they said such items were fixtures and belonged to the trustees as legal owners of the freehold of the pub, and
- They said the goodwill claim was an abuse of process because it could have been made far earlier in the possession proceedings themselves

What ruling did the Master make on the passing off claims?

These were roundly dismissed.

Although the Master noted that the position had been '*at least superficially complicated by a series of overlapping and entangled rights and entitlements*', nevertheless he ruled that Jonathan Dunne had '*never had any legal or personal interest in the Albert Arms and no right to possession of it.*' Although the Master correctly observed that '*some of the goodwill relating to the business is undoubtedly personal to Jonathan and his companies*' he said that '*inevitably much of the goodwill relating to the business of running a pub and hotel at the Albert Arms is adhesive to the property.*'

As to a passing off claim the Master reserved judgement on the logically prior issue as to whether it could be said that any representations had been made by a trader in the course of trade. With that qualification, the Master ruled that '*the right to use the name of the property and goodwill of the business was given to the Trustees*'. This was because the Will of Jean Montgomery expressly stated that she gave to her executors '*all my interest in the freehold public house known as the Albert Arms...including...the goodwill of the business of publicans run from the premises*'.

Pointedly the Master ruled that it was not the Trustees who a claim of passing off could be made against but the other way round when he pointed out that it was not open to Jonathan Dunne '*to appropriate the goodwill to himself by virtue of his occupation and use of the Albert Arms without legal entitlement*'. To hammer the point home he went on to rule that this '*is not a case of the Trustees appropriating Jonathan's property but rather claiming back from property which had had no right to occupy*'.

What ruling did the Master make about fixtures at the pub?

He ruled that these formed '*part of the property*' and that Jonathan Dunne '*had no right to remove them*'. However he ruled that chattels such as '*chairs, tables, beds, optics*' which had '*been used for*

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the purpose of running a pub and a hotel' might belong to Jonathan but this would depend on the date when they were acquired.

What ruling did the Court of Appeal give on abuse of process in *Goldberg Linde*?

In *Stuart v. Goldberg, Linde & Vardinoyannis* [2008] EWCA Civ 2, the Court of Appeal laid down a 4 stage test to determine if a proposed 2nd claim was an abuse of process or not. Lloyd LJ laid down these principles:

- Prospects of success,
- Delay,
- Failure to use reasonable diligence, and
- Failure to warn the Defendant.

What ruling did the Master make on the abuse of process point?

When then Master applied these 4 *Goldberg Linde* principles his conclusion was clear that the attempt by Jonathan Dunne to try and bring a second claim raising passing off issues was an abuse of process.

As to whether this 2nd claim had any prospects of success, the Master was scathing noting that '*it has all the hallmarks of a last desperate attempt to prevent a sale taking place*'. He said '*the passing off claim has no substance and no real prospect of success*' and noted that the claim for alleged breach of trust amounted to '*little more than a complaint that the Trustee have chosen not to sell the Albert Arms to Jonathan*'. As to delay, the Master ruled that Jonathan had all along '*known the facts upon which such a claim is based*' and that '*he failed to investigate the legal position adequately*'.

For these reasons the Master ruled that Jonathan's attempt to bring the passing off claim against the trustees '*is an abuse of the court's process and should not be permitted*'.

What will happen next with this case?

We will have to see if Jonathan Dunne seeks permission to appeal Master Marsh's ruling.

The trustees will reap the benefit of their *Beddoe* orders. If Jonathan Dunne had won on proprietary estoppel, then the trustees would have taken their costs from the estate meaning that the pool available to distribute to the 3 beneficiaries would be correspondingly reduced.

However as the trustees have won, then their legal costs have to be paid by Jonathan Dunne. Jonathan will also need to account to the trustees for 3 years back rent. There will need to be some accounting done, but the likely end point is that Jonathan is likely to receive little from his late mother's estate. However his brother and sister are likely to receive close to a half share in the proceeds of sale of the pub rather than the one-third share in the Will.

In the judgement the judge records that the trustees on obtaining possession of the pub want to '*create a "pop up" pub and hotel business at the Albert Arms with the assistance of a professional manager*'. The judge states that Jonathan '*will be free to bid for that business*' along with any other prospective purchasers the trustees find. The Master also notes that if there is a '*lack of market interest in the Albert Arms*' that this could work to Jonathan's advantage because he could then either '*obtain the property at an under value*' or at least for less than the value indicated in Coffey's expert report.

What lessons can pub owners or pub operators learn from this case?

Both should carefully heed the Master's words about *the 'series of overlapping and entangled rights and entitlements'*.

In our earlier piece on the Court of Appeal ruling we noted that this case illustrates what can go wrong when there are no proper agreements in place. Those operating a pub business in a pub owned by someone else should negotiate an agreement before they start that business. This agreement should cover goodwill, its valuation and ownership as well as who is responsible for payment of repairs or improvements. A pub operating company cannot assume that if it undertakes renovations that benefit the pub owner that it will be reimbursed for them without a clear agreement to this effect. Although a partnership can exist under the Partnership Act 1890 without a written agreement, it is rarely safe to

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leave business matters involving valuable assets without a proper written agreement. As can be seen in this case, a general plea at the end that “this is not fair” will usually simply not wash.

These agreements need to cover repairs and improvements and be clear as to who will own items bought and introduced into the premises which are not regarded as fixtures.

Although the Master here ruled that the goodwill of running a pub business was ‘*adhesive*’ to the property itself, this ruling was made in the context of the Albert Arms having been operated as a pub ‘*since the mid-19th century*’. It is important to note that this will not always be the case – for example with new pubs but this distinction can also be drawn for older pubs which previously did not have a good reputation. The agreement between a pub operator and owner needs to make this clear.

Where a pub operator turns around a pub, and develops substantial goodwill, then that will affect the overall price of the business. As can be seen here there are expert valuers who can value not just the building where a pub is located but also its investment value. Broadly the goodwill figure will be the difference between these 2 figures. Some of the problems in this case could have been avoided if the pub operating company had a clear agreement with the pub owner setting out a percentage entitlement to any increase in goodwill as well as the mechanism for valuing that when the pub operator decides to sell, retire or move on.

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David Bowden is a solicitor-advocate and runs [David Bowden Law](http://DavidBowdenLaw.com) which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.