Falcon Chambers

**Section 22 of the Law of Property Act 1925**

In the fifth of the articles in our series of monthly articles commemorating the centenary of the passage of the Law of Property Act 1925 into law, Cecily Crampin and Imogen Dodds look at section 22, a section which deals with conveyances made on behalf of people suffering from mental disorders. The section provides a window into changing societal attitudes, and changing legal provision too post the Land Registration Act 2002 as to dealings with real property by someone without capacity to do so.

**Introduction**

1. Section 22 of the Law of Property Act 1925, as it is now in force, concerns conveyances made on behalf of persons suffering from mental disorders (as well as land held by such persons in trust). Following the enactment of the Mental Capacity Act 2005, section 22(1) it applies "*Where a legal estate in land… is vested, either solely or jointly with any other person or persons, in a person lacking capacity (within the meaning of the Mental Capacity Act 2005) to convey or create a legal estate*".

2. The section itself, if one looks behind that amended version, gives a snapshot of changing societal attitudes (and language) towards those who lack capacity. Gone (unsurprisingly) are the references in the original Act to property "*vested in a lunatic, or a defective*" that one sees in the original enactment. Gone is even the description "*a person suffering from a mental disorder*", wording that reflected the Mental Health Act 1983 approach until 2007 where the section was amended to give the current reference to "*lacking capacity*" reflecting the revolution that was the Mental Capacity Act.

3. Where subsection 22(1) of the 1925 Act as now in force is engaged, it empowers any deputy appointed for a person lacking capacity (or if no deputy is appointed, any person authorised in that behalf) to make or concur in making all requisite dispositions for conveying or creating a legal estate in the person's name and on his behalf (whether under an order of the Court of Protection, or the court, or any statutory power). Thus s22(1) allows effective dispositions of land belonging to a person lacking capacity to take that step himself.

4. The practical importance of such a provision is illustrated neatly by the case of *Re Tugwell* (1884) 27 CH D 309, cited in the brief commentary on s22 in Wolstenholme & Cherry 13th ed. It is a case which gives a snapshot of the approach in the nineteenth century. It shows some of the difficulties involved in conveyances by persons lacking capacity where there is no equivalent of a deputy or an order of the Court of Protection to ensure that a disposition of such a person's land has effect.

**The story of Phoebe Tugwell**

5. Phoebe Tugwell was the owner of some land in Clerkenwell. She was of unsound mind, although as the case records, she had not been so found by "inquisition". A search of the National Archives gives this insight into the treatment of "idiots" and "lunatics" and the role of inquisition for wealthy persons of that nineteenth century description. Their property was administered by the Crown with responsibility falling to the Lord Chancellor, so that the wealthy without capacity were sometimes known as "Chancery lunatics". The Chancery inquisition was a proceeding for a declaration that a person was of "unsound mind" so that the power of independent dealing with property was removed.

6. The City of London Corporation wished to compulsorily acquire Phoebe Tugwell's land and duly served a notice on Miss Tugwell. Miss Tugwell's uncle purported to act for her (although he had not been formally appointed to do so). He sent a claim to the Corporation on Miss Tugwell's behalf and also instructed a surveyor, who (together with a surveyor instructed on behalf of the Corporation) assessed the compensation payable for the land to be £4,468 15s. This sum was paid into Court and the Corporation took possession of the land.

7. Miss Tugwell then died. The question arose as to whether the sale had been effective so as to convert the purchase monies into personalty. The significance was that Miss Tugwell's heir-at-law who would have otherwise inherited the land was not the person entitled to her personal estate.

8. The case turned on section 7 of the Lands Clauses Consolidation Act 1845, a section which itself tells a story about the nineteenth century with the categories of persons included with lunatics:

> It shall be lawful for all Parties, being seised, possessed of, or entitled to any such Lands, or any Estate or Interest therein, to sell and convey or release the same to the Promoters of the Undertaking, and to enter into all necessary Agreements for that Purpose ; and particularly it shall be lawful for all or any of the following Parties so seised, possessed, or entitled as aforesaid so to sell, convey, or release ; (that is to say,) all … Committees of Lunatics and Idiots, … and the Power so to sell and convey or release as aforesaid may lawfully be exercised by all such Parties, … , not only on behalf of themselves, and their respective Heirs, Executors, Administrators, and Successors, but also for and on behalf of every Person entitled in Reversion, Remainder, or Expectancy after them, or in defeasance of the Estates of such Parties, … and as to such Committees, on behalf of the Lunatics and Idiots of whom they are the Committees respectively, and that to the same Extent as such Wives, Wards, Lunatics, and Idiots respectively could have exercised the same Power under the Authority of this or the special Act if they had respectively been under no Disability

9. The Court ultimately determined that that section 7 did not authorise Miss Tugwell to sell the land. Pearson J said:

> Now, looking at the terms of sect. 7, I am unable to come to the conclusion that it authorizes, or was intended to authorize, or that it can be construed as enabling, a person of unsound mind himself to do that which he would otherwise have been incapable of doing. Inasmuch as that section says that the persons who are to be able to sell the lands of lunatics or idiots are, not the lunatics or idiots themselves, but their committees, it seems to me impossible to conceive that it could have been intended that a person who from his condition of mind

was absolutely incapable of entering into any agreement should be able to enter into an agreement to sell his land.

10. It followed that the purchase money had not been converted to personalty. Strictly (the sale being ineffective), Miss Tugwell remained the owner of the land, but since her heir-at-law was content to accept the purchase monies rather than requiring the land back from the Corporation, the Court held that it could and would order that the money be paid over instead. Of course, as Miss Tugwell's uncle had not been formally appointed as her guardian or committee, section 22 would not have made any difference.

**If Phoebe Tugwell transferred her land today**

11. Would the Court would have reached a similar decision today? As is reasonably likely if we had a modern day Miss Tugwell, her land would have been registered. Since Miss Tugwell would have been the land's registered proprietor, by section 24 of the Land Registration Act 2002 she would have been entitled to exercise owner's powers in relation to a registered estate. If Miss Tugwell had purported to execute a TR1, would section 24 of the Land Registration Act 2002 have saved the sale, even if at the date of execution she did not have capacity for that act?

12. An answer one might consider is the doctrine of non est factum ("not my deed"), the effect of which might be to make the TR1 purportedly executed void. The registration of the disponee based on the void conveyance would be a mistake (and so capable of rectification under Schedule 4 of the Land Registration Act 2002).

13. Presumably a part of the application for rectification will be the applicant proving that Miss Tugwell did not have capacity for execution of the TR1 at the time she did so, a more nuanced question than the question of Miss Tugwell's lunacy in the nineteenth century appears to have been.

14. There are however nineteenth century cases about the enforceability of conveyances for valuable consideration entered into by a person suffering from a mental disorder but in a lucid interval which have echoes of the concept of capacity as we understand it

today. Such a conveyance will be binding if that person was capable of understanding the transaction he entered into when he entered into it.

15. For example, in Selby v Jackson (1843) 6 Beavan 192, at the time of executing certain deeds assigning away his property, Mr Selby was confined in a lunatic asylum. The judgment records that to enable him to do so he was "*partially relieved from his fetters with an intent which was carried into effect, of his being immediately afterwards subjected to the former constraint*". These circumstances were "*strongly calculated to invalidate the deeds*". However, taking into account all the circumstances, including that there was no allegation that Mr Selby had not at the time of execution been incapable of understanding what he did, the court declined to set the deeds aside. The court was it seems swayed by Mr Selby conducting his case himself "*with ability*". Judicial complements on advocacy before an adverse finding were a thing then as now.

16. To what extent does a buyer's knowledge of a seller's lack of capacity to convey affect the enforceability of a contract? In another nineteenth century case, The Imperial Loan Company, Limited v Stone [1892] 1 QB 599, the answer was clear. The seller could not void the contract at his own option even though made at a time when his mind was unsound. The contract was effective unless the buyer knew of the seller's lunacy at the time of the contract, an answer said to be "*of very old date*". As the court said in Beverley's Case (4 Co Rep 123 b), "*every deed, feoffment, or grant, which any man non compos mentis makes, is avoidable, and yet shall not be avoided by himself because it is a maxim in law that no man of full age shall be, in any plea to be pleaded by him, received by the law to stultify himself*". Imperial Loan has been followed in cases as recent as 2016.

17. What then of the buyer now from Phoebe Tugwell? Rectification of the Register under the Land Registration Act 2002 is not possible against a proprietor in possession unless "*he has by fraud or lack of proper care caused or substantially contributed to the mistake, or it would for any other reason by unjust for the alteration not to be made*" (schedule 4 para 3). A buyer knowing of the seller's lack of capacity would fall into that category. Phoebe herself could not it appears set up a case for rectification herself if the buyer did not have that knowledge. Thus the outcome in the case of the modern day Phoebe might well be a little different.

**Capacity and the court**

18. Looking away from dispositions and towards practice and procedure, it is widely recognised that the current Civil Procedure Rules do not adequately deal with capacity, in particular in circumstances where it is unclear *whether* a litigant in person lacks capacity. The effect of incapacity of a party for a piece of litigation are stark, and can make litigation difficult if no litigation friend can be found. CPR 21.3(4) provides that "*Any step taken before a child or protected party [i.e. someone who lacks capacity to conduct the proceedings] has a litigation friend has no effect unless the court orders otherwise)*".

19. Case law suggests that the Official Solicitor should be appointed in such a case, but the Official Solicitor is unlikely to do so, for example, for a possession claim in which a Defendant is said not to have capacity, and certainly not without the Claimant paying the legal costs of the Official Solicitor. What can happen in practice is that the provisions of the Mental Capacity Act 2005 play out against the Defendant. Under the Act, capacity is assumed unless proved otherwise. If the court adjourns for evidence as to capacity, and none has been provided by the return date, the court may well assume capacity and proceed without a litigation friend, an approach which allows the claim to proceed, but may prevent the protection that CPR 21.3(4) was intended to provide. The Civil Justice Committee has recently recognised that it is not appropriate to use the presumption of capacity as a means to avoid determining capacity issues where they arise.

    In its recent report, "The Procedure for Determining Mental Capacity in Civil Proceedings", the Committee recommends the introduction of a procedure for determining capacity issues, as well as the creation of a central fund of last resort for funding such inquiries. If that recommendation results in action, that seems a very useful step.

**Conclusion**

20. In the 100 years since 1925 we have seen a revolution in the treatment of capacity, both in societal attitudes and in the law. Yet the law is still bound to the world prior to the nineteenth century, and the practical treatment of those without capacity, outside the Court of Protection but in day to day civil litigation, may still be an experience falling to the favour of those with capacity due at least to a lack of funding to ensure the intended protection always applies.

**CECILY CRAMPIN**
**IMOGEN DODDS**