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Shades of grey

Mike Muston outlines the extent of judicial discretion when considering relief from the forfeiture rule

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The recent case of *Macmillan Cancer Support v Hayes* [2018] saw the court needing to consider whether and how to exercise the discretion available to it, in the context of a very tragic scenario involving the deaths of an elderly couple. While not necessarily an area commonly encountered by practitioners, it is an issue that does arise from time to time and may be one regarding which, understandably, practitioners do not have an in-depth understanding. Importantly, the case of *Macmillan* demonstrates that the application of the forfeiture rule is far more of a grey area than many may appreciate.

A brief history of the forfeiture rule

To put into context the issues which the court needed to address within *Macmillan*, it is appropriate to consider the history of the forfeiture rule, together with two notable Court of Appeal cases.

The forfeiture rule emanates from the public policy principle that a person should not be permitted to benefit from their own crime. This is a principle applied, perhaps most strongly, in relation to unlawful killing. The principle, which was ultimately recognised by statute in the Forfeiture Act 1982, defines unlawful killing by reference to a person who has:

> ... unlawfully aided, abetted, counselled, or procured the death of that other person...

The forfeiture rule therefore not only applies to murderers, but also those who have committed manslaughter and, so it has been found, those who have assisted with another's suicide.

The starting point is that such a person will not be entitled to benefit under the deceased person's will, nor under intestacy. This rule extends further, providing that a person might also forfeit other benefits received as a result of a death, such as nominations under a life insurance policy or property inherited by survivorship (with forfeiture acting retrospectively to sever joint tenancies).

The forfeiture rule will apply regardless of the moral culpability of the offender. However, the application of the rule is merely the default position and clearly there will be cases at different ends of the spectrum. Compare, for example, an intentional, premeditated and violent murder to an unlawful death that arises in the context of an individual assisting with the suicide of their terminally ill partner. It is highly likely that the sentences (were there to be any conviction at all in the latter case) would vary significantly. Accordingly, it seems appropriate for the courts to have discretion when considering whether (and to what extent) relief should be granted from forfeiture in any given case.

Statutory recognition of flexibility for granting relief was provided within the Forfeiture Act 1982, with s2 of the 1982 Act confirming the power of the court to modify the strict application of the forfeiture rule in order to provide relief to the offender. Further guidance is provided within the 1982 Act indicating that:

> The court shall not make an order under this section modifying or excluding the effect of the forfeiture

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> rule in any case unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified or excluded in that case.

Section 3 of the Act then provides that, notwithstanding the application of the forfeiture rule, a person shall not be precluded from certain applications against an estate, including an application under the Inheritance (Provision for Family and Dependants) Act 1975. With regard to such applications, it would seem that a claim may succeed even if the claim has only arisen as a result of the application of the rule of forfeiture, ie in circumstances where the claim is made by a person who, but for the operation of forfeiture, would be the sole beneficiary of the estate.

Notably, however, both the power to modify and the s3 exceptions shall not apply to cases of murder.

The Court of Appeal recognised that there was limited guidance within the Forfeiture Act as to how discretion under s2 should be exercised.

Dunbar v Plant [1997]

A notable case concerning the forfeiture rule (and indeed one referenced heavily within the *Macmillan* case) is that of *Dunbar*, where questions relating to an application for relief from forfeiture came before the Court of Appeal.

The case related to a suicide pact between a couple, Miss Plant and Mr Dunbar. Miss Plant was under investigation, suspected of having misappropriated funds from her place of work. She had been informed that she was imminently due to be arrested. When discussing their fears for the future, Miss Plant told Mr Dunbar that she had decided to take her own life. Mr Dunbar informed her that he could not face life without her, so he wished to end his life with hers. The couple then made several attempts to take their own lives. Mr Dunbar was ultimately able to do so, but Miss Plant survived the various attempts.

The main asset of Mr Dunbar's estate was his half-interest in the home that he held with Miss Plant as joint tenants. Mr Dunbar also had two insurance policies, one which discharged the outstanding mortgage liability upon his death and a second taken out on his life, in the sum of £31,801. The house was sold for £35,000 and, by operation of the forfeiture rule, the joint tenancy between the two was severed.

Following the failed suicide attempt Miss Plant was pursued by her former employers in relation to the misappropriation of funds, the result of which was that almost all of her half-interest in the property was paid in satisfaction of the judgment entered against her.

It was partly upon this basis that Miss Plant sought relief from forfeiture.

At first instance relief from forfeiture was granted, but only in respect of Mr Dunbar's share of their jointly owned home and the related insurance policy which was used to discharge the mortgage. Relief was not granted in respect of the separate life insurance policy. Further to a subsequent order for costs, taking into account the fact that Miss Plant had failed to beat an offer made by Mr Dunbar's father to settle the proceedings before trial, Miss Plant effectively ended the proceedings without receiving any benefit.

She therefore appealed both the decision in respect of granting relief from forfeiture and the order as to costs.

By a majority of 2:1, the Court of Appeal overturned the first instance decision and granted full relief from forfeiture – thus also negating the impact of the costs order made against her at first instance. This was upon the basis that, for Phillips LJ and Hirst LJ, it was seen as appropriate to relieve the unsuccessful party to a suicide pact.

The Court of Appeal recognised that there was limited guidance within the Forfeiture Act as to how discretion under s2 should be exercised. Within his dissenting judgment, Mummery LJ indicated the matters which he felt to be of relevance to the exercise of discretion, explaining:

> The court is entitled to take into account a whole range of circumstances relevant to the discretion, quite apart from the conduct of the offender and the deceased: the relationship between them; the degree of moral culpability for what has happened; the nature and gravity of the offence; the intentions of the deceased; the size of the estate and the value of the property in dispute; the financial position of the offender, and the moral claims and wishes of those who would be entitled to take the property on the application of the forfeiture rule.

While not granting further relief from forfeiture following his assessment of the above factors, Mummery LJ made clear that what was not required was for the court to seek to reach a position which does justice between the parties. The Court of Appeal was unanimous in its agreement on this issue, which was the basis upon which the judge at first instance had reached his decision.

Re DWS [2000]

Interestingly this case did not concern an application for relief by an offender – there being no doubt that the son who had killed his parents should be denied from benefiting from their estates. Instead, in circumstances where the parents had died intestate, the

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Re DWS [2000]

Interestingly this case did not concern an application for relief by an offender – there being no doubt that the son who had killed his parents should be denied from benefiting from their estates. Instead, in circumstances where the parents had died intestate, the application was made by the son of the offender, upon the basis that it would be unjust for the operation of the forfeiture rule in relation to the statutory trusts arising under ss46 and 47 of the Administration of Estates Act 1925 to preclude him from benefiting from his late grandparents' estates.

After initially being denied at first instance in seeking a declaration that he should inherit the estates of his late grandparents (in place of his father), the son took his case to the Court of Appeal. Again, however, his application was dismissed.

The principal issue in the case was the wording of s47(1)(i) of the Administration of Estates Act 1925. In the view of the court, the wording was 'wholly unambiguous' in providing that the issue of any child of an intestate can only inherit if the relevant parent predeceases the intestate. It was commented that the 1925 Act is repetitious on this point, also noting that 'no issue shall take whose parent is living at the death of the intestate'.

Accordingly, while the court had sympathy for the position of the grandson, it simply could not see how he could satisfy the conditions of the 1925 Act to inherit his grandparents' estates under intestacy. As explained within the judgment of Aldous LJ, with reference to previous authorities, 'the rule of public policy is that the murderer is disqualified or struck out, not that his existence… should be disregarded'. Put simply, therefore, given that his father survived his grandparents, the claimant was not able to take the share that, but for the forfeiture rule, would have passed to his father.

It was argued by counsel for the grandson that his offending father should be treated as if he had predeceased the unlawfully killed grandparents, meaning that the strict interpretation of the wording of s47 of the 1925 Act would not present an issue. However, this argument was rejected, both at first instance and on appeal, despite the sympathy the court appeared to have for the position of the grandson. Quoting the comments of Blackburne J at first instance, Aldous LJ recorded that:

> While the rule of public policy obliges the court to disregard what would otherwise be the wrongdoer's entitlement under the statute, it does not require the court to go further. It does not enable the court, in the case of s47(1)(i), any more than in the case of a will, to disregard the plain meaning of the relevant provision with a view, having disregarded the wrongdoer, to enable one person to take… rather than another or others.

In the view of the court, the wording of s47(1)(i) of the Administration of Estates Act 1925 was 'wholly unambiguous' in providing that the issue of any child of an intestate can only inherit if the relevant parent predeceases the intestate.

The issues which arose within this case were considered by the Law Commission as part of a consultation process which commenced in 2003. As summarised within the Law Commission's report, while the exclusion of the son of the unlawfully killed individuals was 'clearly right', the subsequent exclusion of the grandson seemed unfair, with the report commenting:

> This outcome appears arbitrary: it is not based on public policy, but is a by-product of the way the intestacy legislation is drafted. Similar problems may arise in other situations, such as where the killer forfeits property under a will…

This review in light of the *Re DWS* decision ultimately culminated with the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011, which sought to amend the relevant legislation for wills and intestacy such that, where a person forfeits an entitlement to inheritance in relation to a death after 1 February 2012, either under intestacy or under a will, that person shall be treated as if they had died immediately before the unlawfully killed person. This was, notably, the argument run by counsel on behalf of the grandson in *Re DWS* and, were a similar case to be brought forward today, it appears the grandson would not be precluded from inheriting.

Macmillan

Similar to *Dunbar*, the *Macmillan* case also provides a very sad tale relating to an alleged longstanding pact of suicide between a couple, albeit in circumstances where the offender died shortly after the death of the unlawfully killed individual.

As mentioned, the case involved an elderly couple, Peter and Sheila Thomson, who, so it was accepted by the court and the parties involved, had enjoyed a loving and devoted married life for many years. The Thomsons did not have children. They instead each left wills which provided that, should their spouse not survive them, then their estates were to be divided between various charities (including Macmillan Cancer Support (the charity)) and between some of their friends.

On 19 April 2015, Mr and Mrs Thomson were found dead at their home. Mr Thomson's body was found with a note attached to it explaining that the couple had previously discussed their futures and that, when they felt that their 'normal lives' were over, it would be better if they both brought their lives to a close, while they were still capable of doing so. Prior to their deaths, Mrs Thomson had been diagnosed with dementia, had been assessed as lacking capacity and a decision had recently been taken by Sussex Partnership NHS Foundation Trust to place her in permanent residential care. Mr Thomson had

recently been diagnosed with prostate cancer and also suffered with a grossly enlarged aorta, which reportedly could erupt at any time.

In contrast to *Dunbar*, however, with Mrs Thomson lacking capacity at the relevant time, all necessary actions were taken by Mr Thomson, without his wife being able to consent to them. On the day of the death he collected his wife from her care home, took her out for lunch and then returned home to sedate and suffocate her. Mr Thomson then wrote the note explaining his actions, before taking his own life.

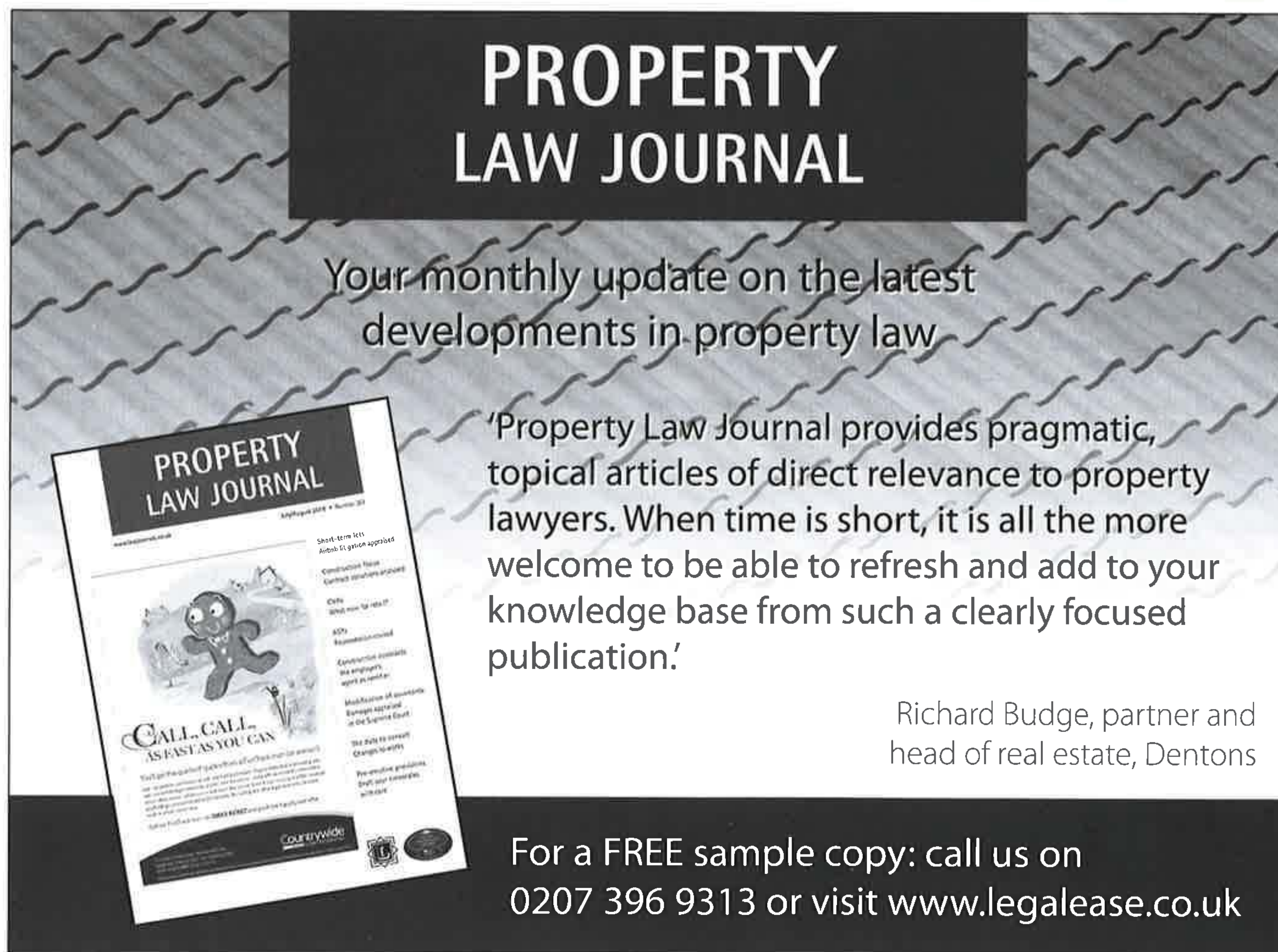
It does not appear there was any substantive dispute between the interested parties to the case, with many of the potential beneficiaries willing to allow the court to consider the case and decide how the rule of forfeiture should be applied.

At first glance, it might seem that the question was somewhat academic, given that both Mr and Mrs Thomson essentially had the same beneficiaries within their wills, in default of the estate passing to the survivor. However, in circumstances that were somewhat analogous with *Re DWS*, it was not simply the case that the entire joint estates were passing to the charitable beneficiaries and friends. Mr Thomson had clearly survived his wife, which meant that the charities and friends would not be in a position to take in his place. Accordingly, were the court simply to adopt the starting position that Mr Thomson should be precluded from benefiting from his wife's estate in accordance with the rule of forfeiture, Mrs Thomson's estate would instead need to be shared out between family members in accordance with the intestacy rules. The potential effect of the application of the forfeiture rule from the perspective of the charities was to see their potential inheritance reduced by half.

It does not appear there was any substantive dispute between the interested parties to Macmillan, *with many of the potential beneficiaries willing to allow the court to consider the case and decide how the rule of forfeiture should be applied.*

By agreement, the charity, on behalf of the named beneficiaries in both wills, brought an application for relief upon two grounds:

- that relief be granted under s2 of the Forfeiture Act 1982, such that Mr Thomson would be entitled to inherit his late wife's estate entirely and his estate would then be distributed in accordance with his will; or, alternatively
- that, in accordance with s33A of the Wills Act 1837 (as inserted by the Estate of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011), Mr Thomson should be treated as having died immediately before his wife, thus enabling the listed charities and friends to benefit from her estate.



The judge's decision

Due to the circumstances of the case and notwithstanding the fact that there had not been the opportunity to commence criminal proceedings against Mr Thomson, the judge (HHJ Raeside QC) found that he was able to determine that Mr Thomson had not murdered his wife, but he had unlawfully killed her. Accordingly, despite Mrs Thomson's death having been peaceful and non-violent, this was still a case to which the forfeiture rule applied.

The decision then was whether the judge felt it was possible to grant relief under s2 of the Forfeiture Act 1982. In undertaking this exercise, the judge considered the conduct of Mr and Mrs Thomson, together with the factors set out within the (albeit obiter) judgment of Mummery LJ in *Dunbar*.

In finding in favour of relief being granted from forfeiture, the judge included the following points within his reasoning:

- The relationship between Mr and Mrs Thomson was one of a happy marriage.
- Moral culpability: the evidence suggested that Mr Thomson genuinely believed he was acting in his wife's best interests, upon the basis of the pre-agreed arrangement between the two of them.
- Nature and gravity of the offence: while found to be a premeditated unlawful killing, it was not a cruel act and Mr Thomson went out of his way to ensure his wife was comfortable and did not suffer.
- Moral claims of those entitled to take the property upon forfeiture: Mrs Thomson's relatives, including distant relatives in Australia, had not expressed any interest in seeking the estate and therefore no moral case could be implied on their behalf.

The judge found he was able to determine that Mr Thomson had not murdered his wife, but he had unlawfully killed her. Accordingly, despite Mrs Thomson's death having been peaceful and non-violent, this was still a case to which the forfeiture rule applied.

The judge concluded that justice would be best served in the case through allowing Mrs Thomson's wishes to be put into effect, albeit through her late husband's will. He further noted, with support from the judgment of Phillips LJ in *Dunbar*, that the public interest did not appear to be best served by refusing to grant relief from forfeiture.

In circumstances where the judge found himself able to grant relief under the Forfeiture Act, he then elected not to consider the position as to whether Mr Thomson should instead be treated as having predeceased his wife in accordance with the recently inserted s33A of the Wills Act 1837. This avoided the judge needing to consider whether the strict wording of s33A would permit the charities and the friends to benefit from Mrs Thomson's estate. That potential issue aside, the judge recognised that the intention behind s33A (if not the wording) was clearly to produce a result which, in any event, would see the same beneficiaries inheriting in this case.

Conclusions for practitioners

As mentioned at the outset, cases of forfeiture are not common and no doubt many practitioners will hope they will not be required to deal with such a case in practice. These cases are terribly tragic and the above examples, none more so than the recent case of *Macmillan*, highlight the broad spectrum covered by unlawful killing under the forfeiture rule and the importance of the court having the ability to grant relief.

The only technical point which appears to arise from the case of *Macmillan* concerns the wording of s33A of the Wills Act 1837. As commented by HHJ Raeside QC, concern has been expressed as to whether the wording adopted by Parliament achieves the intention that was clearly set out within the Law Commission's report preceding the enactment of the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011. This may have presented a problem in the *Macmillan* case should the judge have been unable to find that relief from forfeiture should be granted, potentially creating the debate as to whether the wording of s33A enables those benefiting under a specific substitution clause (as was the case for the charities and friends) to inherit should forfeiture apply. As was indicated by the judge, however, the intention behind the legislation is clear from the explanatory notes attached to the draft bill, which should hopefully mean courts are able to take a pragmatic approach where such issues arise in the future, without being constrained by the strict wording of s33A. ■

Re DWS
[2000] EWCA Civ 282
Dunbar v Plant
[1997] EWCA Civ 2167
Macmillan Cancer Support v Hayes & anor
[2018] WTLR 243