

DAVID SCHMITZ



Call 1976

David Schmitz has a wealth of experience in most areas of Chancery and Commercial practice, and this background makes him particularly adept at dealing with complex problems that require knowledge of several fields. To take a recent example, he has advised a national charity, with a large property portfolio, on how to get in the title to the freehold and leasehold interests of a property, where the titles are unregistered, the trusts pre-date TLATA and the ownership of both interests is vested in an associated company which has been dissolved.

His practice has an emphasis on property litigation and on professional negligence cases involving property, but he also deals with private client work, in particular pensions and charities, and with cases of insolvency, undue influence and cohabitation.

He is a qualified mediator.

He is working, when time permits, on a book on Art and the Law, and has prepared draft chapters on copyright, ownership, interference with ownership, claims by and against states, claims arising out of crimes and other acts of states, and liability for misattribution.

From 2010 to 2014 he was a borough councillor in Haringey, London and served on the planning committee for three years.

Property

David undertakes all manner of property work (including landlord and tenant). He advises and represents developers, as well as persons who have been caught up in cohabitation and undue influence disputes, where his experience goes back to *Grant v Edwards* [1986] Ch 629 and *CIBC v Pitt* [1994] AC 200). He has also done many cases of professional negligence relating to property transactions (please see below).

Recent Highlights

Location

Ten Old Square
Lincoln's Inn
London
WC2A 3SU

Contact Us

T +44 (0)20 7405 0758
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E: clerks@tenoldsquare.com
DX: LDE Box No 306

- An ongoing arbitration concerning a joint venture agreement that relates to the mismanagement of a commercial estate.
- Advising about the consequences of the purported grant of a right to erect advertisements.
- Negotiating with a landlord, on behalf of a non-residential tenant of property in a block of flats, about the extent of the tenant's liability to make contributions through its service charge, both generally, and in particular with regard to the removal and replacement of defective cladding.
- A claim against the Land Registry for compensation for removing the registration of the proprietor, upon a purported sale by a trustee in bankruptcy, where the proprietor was not the bankrupt, but where instead the bankrupt was a namesake of the proprietor.
- A dispute between a leaseholder and a freeholder as to the ownership of the roof and the space above, where the freeholder wished to add another storey.
- A claim for breach of a contract of sale for part of an estate, where one of the joint sellers was subject to an order under the Proceeds of Crime Act 2002.

Reported Cases

- *Brightlingsea Haven Ltd v Morris* [2009] 2 P & CR 169: Whether a caravan site owner was precluded by proprietary estoppel from ending periodic tenancies by notice; whether the structures in question were caravans for the purposes of the relevant legislation.
- *HSBC Trust Co v Quinn* [2007] All ER (D) 125 (Jul): Standard of proof where proprietary estoppel is alleged against deceased person; what is necessary in order to evidence an intention that a document should take effect as a deed.
- *Ledger-Beadell v Peach* [2007] 2 FLR 210: Claim against one cohabitant by the parents of the other for repayment of monies provided to buy a house for the couple. Claimants alleged monies were advanced as a loan; claim defended on basis that monies were subject to presumption of advancement or alternatively that they were held subject to constructive trust.
- *Abidogun v Frolan Health Care Ltd* – [2001] All ER (D) 305 (Oct): Established the principle that a forfeiture, caused by a tenant's denial of the landlord's title, is capable of relief and that it cannot be acted upon unless a S 146 LPA notice is served.
- *CIBC Mortgages plc v Pitt* [1994] 1 AC 200: Decided at the same time as *Barclay's Bank v O'Brien* [1994] 1 AC 180; it considered, in a case where an entry into a mortgage had been induced by undue influence comprising actual pressure upon the victim, what it was necessary to prove in order to establish such undue influence. It further considered when a mortgagee should be deemed to have been on notice of the undue influence, so as to deprive the mortgagee from being able to enforce the mortgage against the victim.
- *Grant v Edwards* [1986] Ch 638: Constructive trusts; co-ownership of house by co-habiting couple; significance of registered proprietor's statements to cohabitant of his reasons for not putting property into joint names.

Professional Negligence

David employs his experience in property law (above) to good effect in claims against solicitors and other professionals. He has frequently dealt with the complexities which affect the measure and recoverability of damages. Recent and current examples include:

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- Representing a vendor of property in a claim against solicitors for negligent advice about whether his rights to overage would survive a sale by the buyer's mortgagee to a third party.
- Representing a purchaser/developer of property in a claim against a solicitor for failure to advise about the risk that satisfactory planning permission might not be in place.
- A claim by a developer against an architect for losses consequent upon the architect misdescribing the scope of a planning permission which the architect had obtained on the developer's behalf.
- A claim against solicitors for losses resulting from their failure to advise a purchaser of development land, as to the risks of proceeding without confirmation that the boundaries of the land comprised the whole of what was needed for an intended development.

Commercial & Business Disputes

David advises and represents clients in commercial disputes. Examples of his work in this field include:

- The High Court trial of a claim for the repayment of several substantial loans, where the principal issue was whether the monies had been lent to an individual borrower or to the borrower's overseas insolvent company.
- Advising a firm of solicitors on a claim by a litigation funder for reimbursement of monies advanced for claims which had not proceeded to litigation.
- Representing some of Esso's franchisees in a case in the Commercial Court which concerned the liability of the franchisees to pay the costs of the "Tiger Tokens" promotion scheme.

Reported under *Esso Petroleum Co. Ltd. v Addison and others* [2003] All ER (D) 253 (Jul).

Insolvency & Bankruptcy

David has acted in a number of matters where substantial questions in the law of insolvency have arisen. These include:

- An appeal to the Court of Appeal, settled just before the hearing, where the issue was whether, under the Insolvency Rules and the terms of the IVA in question, a mortgagee, voting in favour of the IVA, had thereby abandoned its security over a property for which it was seeking possession.
- An appeal to the Court of Appeal for the setting aside of a statutory demand, where the point in issue was whether a contract of guarantee, set out in a single document, can bind the signatories if any of the persons, who are named in the document as a guarantor, has yet to sign it.
- An appeal to the Court of Appeal which considered whether, in an application to set aside a statutory demand on the ground that the debt is disputed, the Court ought to refuse the application, if the ground was not raised in an earlier, successful, application to set aside an earlier demand for the same debt, on a different ground.

Reported Cases

Harvey v Dunbar Assets PLC [2013] B.P.I.R. 722. An appeal to the Court of Appeal where it was successfully contended that the debt was disputed on substantial grounds because the guarantee was set out in a single

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document and because there was credible evidence that one of the parties had not signed it.

Harvey v Dunbar Assets PLC (No. 2) [2017] B.P.I.R. 450. An appeal to the Court of Appeal which considered whether, in an application to set aside a statutory demand because there is a substantial defence to the claim, the Court ought to apply the doctrines of res judicata and issue estoppel and thereby refuse to allow if the defence was not raised in an earlier, successful, application to set aside an earlier demand for the same debt, on a different ground. The Court also considered whether any part of any decision can create an issue estoppel if the decision is subsequently overturned on appeal.

Krasner v Dennison [2001] Ch 76. An appeal contesting a trustee in bankruptcy's assertion that, absent any statutory exception, a bankrupt's personal pension passes entirely to his trustee in bankruptcy, notwithstanding tax legislation which imposes penalties upon alienation of those rights and notwithstanding any contractual restriction purporting to prohibit such alienation. Note: legislative protection of pensions was brought into force shortly after the decision, and the case itself was settled after the appellant obtained permission to appeal to the House of Lords.

Trusts & Estates

David has been involved in a number of pensions cases over the years. These include Krasner v Dennison (above, under the heading Insolvency) as well as:

- A forthcoming appeal to the Court of Appeal on the construction of the National Health Service Pensions Regulations 1995, where the principal issue is whether a scheme member's estate acquires the member's pension entitlement if the member retires, but dies before the expiry of a period equivalent to a period of annual leave not taken during the member's lifetime.
- Representing a junior employee, who had been persuaded to accept the role of a trustee of a pension fund, and who, when the employer embarked on a "pensions liberation" scheme, became caught up in a claim by the Pensions Regulator and was made the subject of a freezing order.
- Representing, in an application to the Chancery Division, the administrators of a company scheme which was being wound up with a surplus. The issues were firstly whether there was a discretion to apply any of the surplus to the members of the scheme whose pensions were in payment, as opposed to the members whose receipt of pension benefits was prospective, and secondly whether any of the surplus could be applied to overcome sex inequality among the members of the scheme.

Reported under *Leadenhall Independent Trustees Ltd v Welham* [2004] All ER (D) 423 (Mar).

David has done many cases where trust law questions form a part of the questions in issue. He is also the author of the LexisNexis practice note on trustees' negligence and he has done applications by trustees for the court to approve settlements on behalf of persons lacking capacity. He is engaged in a case to expand the investment powers of a trustee, whose statutory powers were excluded by a home-made will.

Qualifications

- BA, Syracuse University (USA)

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Associations & Memberships

- Chancery Bar Association
- Professional Negligence Bar Association
- Property Bar Association

Publications

“Trust disputes – claims in negligence against trustees for their administration of the trust.” Lexis PSL Private Client (2019, 2022)

“Student Lettings, Frustration and the Pandemic” Legalease March 2021 (available on the Ten Old Square website).

Atkin’s Court Forms Vol 37 (1) – Specific Performance (2015) (2020)

“Neighbourhood Watch” (the effect of *Coventry v Lawrence* on nuisance claims where there have been changes in the locality): Property Law Journal Dec. 2017 and Jan. 2018

“Threat to Independence (Charities and Gagging Clauses)” Legalease April and May 2014

“An Unresolved Question – “Whether the Will Must Be Present when the Testator Acknowledges his Signature”: Trusts and Estates Law and Tax Journal Sept. 2013

Speaking Engagements

David delivers talks at Ten Old Square seminars as well as in-house seminars for chambers clients.

Edwards v Aurora Leasing Ltd. [2021] EWHC96 (CH): The circumstances where a trustee in bankruptcy can recover a payment or a preference that is made by a bankrupt between the presentation of the bankruptcy petition and the making of the bankruptcy order, and the surprising contrast with the situation with regard to payments or preferences made before the petition, or with regard to payments or preferences made by a company. Ten Old Square blog post (2021). Available on Ten Old Square website.

Business and Property Court Pilot Scheme on Disclosure: Pre action to Close of Statements of Case and e-Disclosure (2019)

Fire Safety and Cladding in Blocks of Flats: Liability and Prevention (2018) A wide-ranging review of the relevant common law and statutes.

“Digging the Dirt on Basements” (2017). A survey of the issues arising out of excavations of basements.

“Powers and Duties of Mortgagees, Receivers and Administrators in the Management and Sale of Property” 2016.

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