

## Jonathan Arkush

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Jonathan conducts a wide range of commercial and chancery litigation, including contract, real property, company, insolvency and partnership. His practice also extends to estates and trusts including wills, family provision and probate. Clients vary from individuals to banks, building societies, PLCs and major retail operators. Jonathan is a highly experienced mediator and member of the mediation panels of the Chancery Bar Association, Property Bar Association, Property Law UK, Association of Contentious Trust and Probate Practitioners and Dispute Mediation Limited. He received the ADRg Award 2006 for his contribution to ADR and was cited as one of the group's most successful mediators. Jonathan is author of the chapter Landlord and Tenant Disputes in ADR and Commercial Disputes (Sweet & Maxwell). He is recommended as a leading junior in property litigation.

### Commercial

Jonathan regularly deals with commercial agreements of many kinds, including the sale and supply of goods (international and domestic), banking, conflict of law issues, disputes as to forum, agents' claim for commission and commercial agents' disputes. He also has experience of claims between employers and employees, past and present, particularly those involving non-competition and non-solicitation covenants and other issues of restraint of trade and intellectual property.

### Employment

His particular experience lies in litigation and advice on the drafting and enforcement of employment covenants (including covenants against competition and solicitation) and associated intellectual property issues. He also has wide experience in bringing and defending claims for wrongful dismissal and other breaches of contracts of employment. He is well used to being instructed at short notice on applications for interim injunctions in these areas. The practical and strategic effect of these applications is of major importance to the parties and frequently determines the outcome of the case.

### Fraud

He has experience in a wide range of commercial fraud cases, including a number that have involved international jurisdictions and cross-border enforcement. He is accustomed to working with lawyers in other jurisdictions. He is well used to being instructed at short notice on applications for interim injunctions, such as freezing and search and seizure orders that are vitally important in this area. He has very considerable experience in effective cross-examination of difficult witnesses should the matter come to trial.

### Insolvency

He has experience in a wide variety of insolvency matters, particularly where they concern property. He appeared in the leading case in the House of Lords on the effect of the disclaimer of property under the Insolvency Act, *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997], where he acted for the successful respondent. He also has experience in corporate and individual insolvency, including setting aside statutory demands and questions arising in winding up, receivership and administration. Long experience has taught him how to read and understand (see through!!) company accounts.

## Professional negligence

His considerable experience includes a wide range of professional negligence cases against accountants, solicitors, surveyors, insurance brokers and others. He acts both for claimants and professional indemnity insurers and has seen many cases through to trial, although effective presentation of the cases usually results in an earlier settlement. His particular experience is in matters that are property-related but also extends to other fields of negligence.

## Property litigation

He has a wide experience in most types of disputes and litigation involving property. These include such matters as vendor & purchaser, conveyancing, title, misdescription and misrepresentation in contracts for the sale of land, auction contracts, rights of way and other easements, boundary disputes, squatters and trespassers, adverse possession, licences and disputes over shares in property between unmarried couples. He has dealt with markets and fairs, both statutory and under charter, and rights to prevent rival markets. He is frequently instructed in relation to mortgage disputes both by lenders and borrowers and has considerable experience of advising and litigation in Barclays Bank v O'Brien and Royal Bank of Scotland v Etridge cases.

## Landlord & Tenant

His landlord and tenant experience includes disputes and litigation, primarily, but not exclusively, involving commercial property. He is frequently instructed by both landlords and tenants in relation to such matters such as forfeiture and relief from forfeiture, breaches of covenant and the scope of covenants generally, rent review, service charges, questions whether an agreement comprises a lease or a licence. He often deals with business tenancies under Landlord & Tenant Act 1954.

## Probate

He has wide advisory and litigation experience in probate, including interpretation of wills, questions involving disputed wills and other testamentary documents, intestacy, undue influence and lack of testamentary capacity claims, administration of estates, breach of duty by executors and trustees and Court of Protection and mental capacity work. These often involve sensitive family conflicts where strategy and negotiations are vital in ensuring that the case is firmly progressed either to trial or to a resolution of the issues by agreement.

## Charities

He has wide experience in litigious and non-litigious aspects of charity law. He acts for major charities in relation to a very wide range of contentious probate matters. He is also used to dealing with trust companies and other professional executors.

## Inheritance

He has considerable experience in claims for financial provision under the Inheritance Act - both in bringing and resisting such claims. These frequently overlap with the range of sensitive conflicts and other matters described under probate.

## Cases of interest:

### Property

#### **Fairview New Homes Ltd v Spencer Michael**

Jonathan acted for house builders in extensive claims and counter-claims to enforce contracts for the sale and purchase of new homes to a self-styled property entrepreneur. The proceedings were interrupted and then stayed when the defendant was made bankrupt.

### J E Ltd v T

Jonathan acted for well-known firm of estate agents in this claim against a former client of the firm who denied that it had been the effective cause of a successful sale of the property. The claim was settled before reaching trial.

### D v D

Jonathan acted for the claimants in this family dispute alleging that a member of the family entrusted with managing a family trust had misapplied the assets. There were protracted issues involving the family's right to disclosure of the trust documents and records.

### D v D & GJ

Jonathan acted for the daughter in a claim brought against her mother in circumstances where the mother concealed the existence of a trust for her daughter created by her grandmother's will 20 years earlier. The dispute also involved the daughters claim against the solicitors who were co-trustees with the mother.

## Contentious Probate

### M v M

Jonathan acted for the sons in a claim over the validity of their father's will, executed very shortly before his death, which left the bulk of his estate to his second wife. The will was made in very suspicious circumstances by an inexperienced solicitor who knew nothing of the family's circumstances and did not ask any questions about the testator's very obvious serious illness and apparent incapacity. The claims alleging lack of testamentary capacity and want of knowledge and approval went to trial where they settled on the 5th day - in the midst of Jonathan's cross-examination of a key witness for the defence.

### F v F

This was a dispute between an uncle and nephew. Jonathan acted for the uncle, who claimed the return of a large sum of money on the grounds that the nephew had exceeded his authority when the nephew transferred it from the uncle's account to his own. The uncle died and the claim was pursued by his executor. The nephew's defence was that the money was a gift and he counterclaimed for an interest in the uncle's estate, alleging that the uncle's last will was invalid for lack of testamentary capacity. The case was unusual in that evidence had to be received from a Swiss banker in the Zurich District Court and Jonathan was given special permission to address that court. The evidence was unfavourable to the nephew, who settled the claim immediately before the trial in England was due to begin.

### K v K

This was a family dispute between six siblings over their mother's estate. Jonathan acted for Michael, who was the executor. Three of his brothers, led by James, claimed an order under s. 50 AJA 1985 that he should be removed. They alleged various breaches of duty which Michael strongly denied. Michael had his own claim to recover a property which had been transferred by the estate to James as part of his entitlement, as an unexpectedly high tax bill had left the estate with a shortfall. This claim raised interesting issues of law as to the circumstances in which distributions made out of an estate could be recovered by the executor. The parties agreed to go to mediation soon before a four day trial was due to commence, at which they settled their differences.

### Bunting v W High Court of Protection [2005] EWHC 1274 (Ch) 86 BMLR 39

Receiver appointed under Mental Health Act 1983 - Application to re-open accounts delivered to Court of Protection - Allegation of fraudulent use of funds for personal benefit of receiver - Negligent mis-statement or negligence - Application to High Court under Mental Health Act 1983, s 139(2) - Jurisdiction of High Court - Powers of Court of Protection to order re-opening of accounts rendered by receiver.

### Basso v Estry & Others Chancery Division (Manchester District Registry), [2005] All ER (D) 44 (Nov), (Approved judgment), 3 November 2005

#### **Abuse of Process - Res Judicata - Fraud**

Jonathan Arkush successfully represented the Defendants, who were sued for fraudulent breach of trust in relation to their dealings with a pension fund. This was the second bout of litigation between the parties, the Claimant having previously sued the Defendants arising out of the same facts, initially alleging fraud in a letter before action but in the event confining his pleaded allegations to negligence (the "First Action"). The First Action went to trial but on the opening day the Claimant applied for permission to amend to plead fraud. The application was refused, largely on the

ground that it was made much too late in the day. The First Action was settled on terms that allowed the Claimant to bring forward the fraud claim in other proceedings, but equally preserved the Defendants' right to apply to strike them out. The proceedings were duly brought forward and the Defendants applied to have them struck out as an abuse of process.

The court struck out the proceedings. The fraud allegations they comprised could and should have been made, if at all, in the First Action. There was an underlying public interest that there should be finality in litigation and that a party should not be vexed twice in the same subject matter. In seeking to raise the claims in a second action that could and should have been raised in the First Action, the Claimant was misusing or abusing the process of the court and here were no special circumstances that would excuse or justify him being permitted to do so.

The strike-out judgment was in fact an application of the rule in [Henderson v Henderson](#) [1833] 3 Hare 100 where there is a well-known statement by Sir James Wigram V-C at 114-5: "... the court requires the parties ... to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case."

In [Johnson v Gore-Wood](#) [2002] 2 AC 1 the House of Lords considered the rule. Lord Bingham stated that seeking to raise allegations in a second claim that could have been raised in earlier proceedings is not necessarily an abuse, but the court should make a "broad merits-based judgment" taking account of all the circumstances.

The decision in [Basso](#) is a useful reminder of a longstanding rule designed to prevent a party being harried by repeated litigation. It also confirmed that the rule applies not only where the first action was disposed of by judgment, but also where it was concluded by settlement.

### [Ross v Perrin-Hughes Chancery Division, \[2004\] EWHC 2559 \(CH\), \[2004\] All ER \(D\) 159](#) **Wills - Mortgages - Real Estate**

Jonathan Arkush represented Irene Perrin-Hughes, the fiancée of David Ross who died at a young age of a brain tumour. He left what he described as "my apartment" to Irene.

At his death David owned the freehold reversion of a building comprising two self-contained maisonettes as well as the long lease of the upper floor maisonette where he lived. He had purchased these interests with the assistance of an endowment mortgage linked to a life policy. His executor claimed that Irene took "my apartment" subject to the mortgage by virtue of s.35 Administration of Estates Act 1925, whereby any interest in property subject to a charge disposed of by will is primarily liable for payment of the charge unless the deceased signified a contrary intention by will, deed or other document. The executor also contended that "my apartment" did not extend to the freehold reversion.

The judge held that the endowment mortgage gave rise to a contrary intention under s.35, as it must have been David's intention for the mortgage to be repaid out of the proceeds of the linked life policy. Thus Irene was entitled to take the flat unencumbered by the mortgage. Further, the phrase "my apartment" was wide enough to extend to the freehold reversion under the principle that a testamentary gift of property, however phrased, discloses an intention to give the entirety of the estate and interest of the testator at his death.

Prior to this case, there was virtually no authority on s.35 but the case is important because of the frequency with which endowment mortgages were taken out, especially during the 1980s and early 1990s. It is also an unusual example of a non-testamentary document lacking the usual testamentary formalities, having testamentary effect.

Moreover, on their face, the words used by David did not extend to the freehold reversion. But the court was willing to act on a little-known principle to give a wide meaning to gifts of property.

### **A v B** **Solicitors - Trustees**

Jonathan Arkush acted for a nephew of T, who at his death owned several properties one of which he left to the nephew. The estate was insolvent and T's solicitor as executor sold the property to an associate who, in turn, albeit several years later, sold the property to the solicitor/executor's daughter for £1. In the meantime the solicitor/executor

had made several planning applications for the property, some of which succeeded and considerably enhanced its value.

The solicitor and his daughter vigorously defended the proceedings up to trial - but on the morning of the first day before the court sat, their resistance collapsed and they agreed amongst other things to restore the property to the nephew and pay his costs on the indemnity basis. They accepted liability on the basis that the solicitor had breached the strict rule against trustees' self-dealing and/or that the transactions were not genuine arm's length sales to an unconnected party.

## What others say

He is recommended in Legal 500 as a leading junior in property litigation. Chambers & Partners recommend him as a mediator both for dispute resolution as well as for all circuits. The directories highlight:

Sources say Jonathan Arkush of 11 Stone Buildings "comes up with solutions others wouldn't have thought of, often enabling a clean break scenario." He is regularly instructed on high-value matters, and his recent mediations have included a wrongful dismissal claim and an inheritance dispute. (*Mediators All Circuits - Chambers UK 2012*)

Arkush has a broad commercial and chancery-based mediation practice with a particular focus on land, inheritance and trust disputes. He brings a calm and patient approach to the mediation process, as well as judicial expertise gained from his work as a Chancery Master. "He's got the right degree of gravitas to carry both parties and gives people a lot of confidence", say sources. (*Mediators Dispute Resolution & Mediators All Circuits - Chambers UK 2011*)