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Civil liberties protest- a step too far

by
Sally Ramage

Having read the hysterical and highly provocative article on the 13th January 2010 by Matthew West, "Banning Islam4UK is the wrong move", it is time to address the issue of English civil liberties law.

Matthew West enjoys freedom of speech (see his article at http://uk.news.yahoo.com/blog/talking_politics/article/88502/) but such freedom must be used with great care. He stated:

> *"Protestors prosecuted for their slogans, a minority group banned and a trial without jury: whatever happened to British justice? I will honestly remember it as the day Britain really did go to the dogs. It marked the day when we all lost a little more freedom. Not only has a minor political/religious group - which would have probably disappeared into obscurity had the media let it - been banned by the government but we also had the start of the first trial without a jury in 350 years...If Islam4UK can be banned, why not the English Defence League? The English Defence League has organised demonstrations outside mosques and in towns with large immigrant communities in deliberately provocative displays of racial and religious hatred. Why not ban an organisation whose that' sole purpose is to intimidate whole sections of a local community? ...Protestors have the right to call soldiers murderers, rapists and baby killers if they want to...How even more ludicrous that we also saw the start yesterday of the first juryless trial in 350 years? In addition, the pretext? It would cost too much money to try to protect the jury from the accused who might try to influence jury members presumably through either bribes or menaces. ...".*

In France, civil rights civil rights are restricted to citizens of France and 'aliens' cannot enjoy civil rights. In Germany, the term 'civil rights' is used for human rights that do not refer to aliens. In the United Kingdom, civil rights refer to basic entitlements that are enacted by Parliament in the due course of ordinary legislation. In contrast, human rights derive from the distinction between rules and principles. Both are legal norms. Only rules can proscribe or prohibit one particular conduct. As the 2009, police report *Adapting to Protest*, stated:

> *"Balancing the rights of protesters and other citizens with the duty to protect people and property from the threat of harm or injury defines the policing dilemma in relation to public protest. In a democratic society policed by consent, planning and action at every level must be seen to reconcile all these factors, particularly when a minority of people may be determined to cause disorder or worse. Peaceful protest requires careful interpretation of the law. The law is an important consideration in public order..., ECHR Article 11 is a qualified right, which means that the police may impose lawful restrictions on the exercise of the right to freedom of assembly provided such restrictions are prescribed by law, pursue one or more legitimate aims and are necessary in a democratic society (i.e. fulfil a pressing social need and are*

proportionate). The police have powers under both the common law and the Public Order Act 19868 to impose conditions on public processions and public assemblies..."

Furthermore, stopping the Islam4UK protest cannot be regarded as contrary to the rule of law because the 'rule of Law' is a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions. The Islam4UK group is a distasteful minority set of people, which cannot be said to represent all Muslims in the UK. In the most basic sense, the rule of law is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power. The Rule of Law is an aspect of the British Constitution and is an important part of British politics. The British Constitution can be found in a variety of legal texts, namely, the Magna Carta of 1215; the Act of Settlement of 1701; the laws and customs of the UK parliament; in political conventions; in English case law; in constitutional matters decided in a court of law and in documents written by experts on British constitutional law. Everyone in the UK, regardless of their position in society, is subject to the law, including the UK Terrorism laws, the Terrorism Act 2000; the Anti-Terrorism, Crime and Security Act 2001; the Prevention of Terrorism Act 2005; the Terrorism Act 2006; the Terrorism (Northern Ireland) Act 2006; the Justice and Security (Northern Ireland) Act 2007; and the Counter-Terrorism Act 2008. These laws all aim at early intervention through Executive measures, which can respond to risk.

Extradition update

by

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Policing and Crime Act 2009

Part 6 of the Policing and Crime Act 2009 (‘the Act’) came into force on 25 January 2010 and will amend the Extradition Act 2003 (‘EA’).

Of particular note, is the introduction of sections 153A to D to Part 3 of the EA. These set out a framework for the Secretary of State to provide undertakings to a requested country as to the treatment of a person whose return to the UK is being sought and their eventual return to the requested state. The Home Secretary may even undertake that the person will be detained in custody pending the conclusion of the UK proceedings. Unlike sections 143 and 144 EA, which are to be repealed, these provisions encompass both category 1 and 2 territories and do not just apply to EU Member States.

The Act amends section 6 EA to allow a judge to increase the period of time a person provisionally arrested under section 5 EA can be detained by a further 48 hours if he considers, on the balance of probabilities, that it is not reasonable to comply with the initial

48 hour deadline imposed for the production of the necessary documents, including the arrest warrant. Section 6 is also amended to exclude weekends and certain specified public holidays from the calculation of the initial and further 48-hour period. This provision will only apply to a person arrested on or after 25 January 2010.

The Act introduces sections 8 A-B and 76 A-B to the EA. These new provisions supplement existing sections 22, 23, 88 and 89 in respect of domestic proceedings to require the judge to adjourn extradition hearings, which have yet to begin based on a domestic prosecution. Should those proceedings in the UK result in a sentence of imprisonment or other form of detention, the judge may further adjourn the extradition proceedings until that person is released from detention (whether on licence or otherwise). These provisions will only apply to extradition requests received on or after 25 January 2010.

Passage of time

In the conjoined appeals of *Gomes v Trinidad and Tobago; Goodyer v Trinidad and Tobago* [2009] UKHL 21, the House of Lords considered the correct approach to the passage of time bar set out in sections 14 and 82 EA. Both appellants had fled Trinidad and Tobago ('Trinidad'), in breach of their bail conditions, while awaiting trial on drugs charges. Some years later, they were arrested in the UK following an extradition request by Trinidad. Both argued unsuccessfully before the district judge that it would be unjust or oppressive for their extradition to be ordered because of the passage of time since the alleged offence (over five years in Goodyer's case and eight and a half years in Gomes' case). On appeal, the Divisional Court considered that while it was relevant that both appellants had fled the jurisdiction, Trinidad itself was guilty of culpable delay in seeking their extradition (particularly in Goodyer's case where it had lost the prosecution case file for three years).

However, in *Krzyzowski v The Circuit Court in Gliwice, Poland* [2007] EWHC 2754 (Admin), another constitution of the Divisional Court found that the views expressed by the Divisional Court in *Goodyer* were inconsistent with *Kakis v Cyprus* [1978] 1 WLR 779 HL. It found that the district judge in Krzyzowski had been right to hold that once a suspect had been found guilty of deliberate flight he could not rely on the passage of time save in the most exceptional circumstances.

The House of Lords followed *Kakis* and overruled the Divisional Court's decision in *Goodyer*. It held that any delay in the commencement or conduct of extradition proceedings brought about by the accused fleeing the country, concealing his whereabouts or evading arrest could not be relied upon to found an argument that his return would be unjust or oppressive. Neither appellant could invoke the passage of time to establish that their extradition was unjust or oppressive and still less to establish "the most exceptional circumstances" as set out in Kakis. Only a deliberate decision communicated to the accused by the requesting state not to pursue him, or some other circumstance instilling a similar sense of security could properly allow an accused to assert that the effects of further delay were not "of his own choice and making" within the meaning of Lord Dip lock's speech in Kakis. This approach minimises the incentive for the accused to flee and prevents an expensive and time-consuming investigation of the requesting state's resources and practices to determine whether the passage of time involved fault on its part.

Their Lordships also considered the concepts of oppression and injustice within the meaning of section 82 and found that neither test would be easily satisfied. Concerning oppression, the Court found that hardship, a commonplace consequence of an extradition order, was not enough. The concept of injustice requires one to establish whether a fair trial is possible.

Trinidad was to be assumed to have the necessary safeguards against an unjust trial and, even in countries where extradition arrangements are more ad hoc, the presumption should be that justice would be done despite the passage of time. The burden is on the accused to establish otherwise.

Article 8 ECHR

In *Jansons v Latvia* [2009] EWHC 1845 (Admin), the appellant appealed against the decision of a district judge to extradite him for the theft of two mobile phones. The day after the order, the appellant made a suicide attempt, which had nearly succeeded. He indicated that his suicide attempt had been to avoid being extradited to Latvia where he had previously been imprisoned and he alleged that his inmates had assaulted and tried to kill him. Psychiatric reports stated that he suffered from a depressive illness and post-traumatic stress disorder, both of which would be aggravated by his extradition, thereby making another suicide attempt highly likely.

The appellant argued that he should be discharged under s21 (on the grounds of a violation of Articles 3 and 8 of the European Convention on Human Rights ('ECHR')) and/or section 25 (relating to his physical or mental condition) EA. The appeal was allowed on Article 8 and section 25 grounds. The Court held that it would be oppressive, pursuant to section 25, to order his return in circumstances where the evidence established a substantial risk that he would attempt suicide if extradited. In respect of Article 8, the Court was satisfied that the striking and unusual facts test was met (*Jaso v Spain* [2007] EWHC 2983 (Admin)*)* and that the risk of suicide outweighed the seriousness of the offences, the need to honour international treaties and the finding that the Latvian authorities would take all reasonable steps to protect him.

In considering the proportionality of the offence to the risk of suicide, the Court commented that the theft of two mobile phones was not, in the present case, a trivial offence. However, had it found the offences trivial, the Court said that of itself was not enough to found an argument on Article 8 grounds. In *Sandru v Romania* (Divisional Court, 28 October 2009, unreported) it was held that a Court would not refuse extradition on the basis that the triviality of the offence or the disproportionate length of a sentence leads to a violation of Article 8. In that case, extradition was sought for the theft of ten chickens.

Article 8 rights are currently being considered in two high profile cases. Ian Norris, the former Chief Executive of Morgan Crucible who is in poor health, has appealed to the Supreme Court because his extradition to the United States would breach his Article 8 rights. His appeal was heard by nine Supreme Court justices on 30 November 2009. A date is yet to be given for the judgment to be handed down.

Gary McKinnon, has sought judicial review of the Secretary of State's decision not to prevent against his extradition. Mr. McKinnon's application is based because his extradition would be a violation of his Article 3 and Article 8 rights.

Given the increasing numbers of European Arrest Warrants, which are being executed in the UK, there is also an ongoing debate at EU level as to whether it is appropriate for EAWs to be issued for what might be considered relatively minor offences especially as some of these were allegedly committed many years ago.

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Perpetuities and Accumulations Act 2009- a critical analysis

By
Sally Ramage

The Perpetuities and Accumulations Act gained Royal Assent on 12 November 2009 and will come into force on such day as the Lord Chancellor appoints by order. It was drafted following a recommendation from the Law Commission of England and Wales since 1998 (Report No. 251, titled '*The Rules Against Perpetuities and Excessive Accumulations*', published on 11th February 1998) which recommended the modernisation of two exceptional technical legal rules affecting trusts and property ownership in England and Wales. The Law Commission had published a consultation in 1993 identifying potential defects in the law and had suggested four options in relation to the rule against perpetuities, these being, *'no change in the law; abolishing the rule against perpetuities; replacing the rule against perpetuities with a new rule; or reforming the rule against perpetuities'.*

The 2009 Act amends the law relating to the avoidance of future interests on grounds of remoteness and the law relating to accumulations of income. It makes for a simplification and modernisation of the law and has the following effects: the restriction of the rule against perpetuities to rights under trusts; it changes the perpetuity period to 125 years; and abolishes the rule against excessive accumulations in respect of non-charitable trusts. The 2009 Perpetuities and Accumulations Act does not affect the rule of law, which limits the duration of non-charitable purpose trusts.

Keeping up with other countries to avoid tax

As far as increasing the period to 125 years, we are certainly following behind many states in the US, where between 1997 and 2000 alone, seven US states repealed the rule against perpetuities. However, some are of the opinion that this herd-like repeal of the rule against perpetuity is not because the world has become more socially equal but because wealthy individuals have successfully lobbied to alter and even repeal this rule in order to create perpetual dynasty trusts to exploit the 'generation- skipping transfer tax' system of most common law countries. The evidence is as follows:
There were 204,000 trusts known to Inland Revenue in 2005-2006, which received £2,595 million pounds in income. In the fiscal year 2005-2006, these trusts paid £685 million in income tax, and £445 million in capital gains, thereby increasing in value by £1,465 million in just one year. The Probate Registry proved over 200,000 wills in 2007. Probate solicitors admit that between 75% and 90% of wills where the testator has a family; involve the creation of future interests. In addition, Assets held in life assurance and pension funds were £2,070 billion in 2006.

At the end of June 2008, there were almost 170,000 'main' charities on the Charity Commission's register with a total annual income of £46, 160 million. There are also a number of charities associated with those on the register, as well as unregistered charities. The proportion of charities' annual income that is subject to trusts for, or powers of, accumulation is unknown. However, a significant number of governing documents of charities contain these kinds of provisions. Property developments and transactions make up a significant part of the UK economy. The UK construction industry provides a tenth of the UK's gross domestic product, employs 1.4 million people, and is worth around £65,000 million per annum, with an output of £81, 900 million in 2002, according to research undertaken by Corporate Watch.

Rule against perpetuities

The 2009 Act refers to the expression 'rule against perpetuities' in eight sections but does not define the rule, though the Law Commission of England and Wales made a full explanation of the rule in its 1998 report, '*The Rules against Perpetuities and Excessive Accumulations'.* For centuries, the common law has acted against the possibility of a person's tying up his property in perpetuity. The rule against perpetuities is an absolute one. Skilful drafting cannot circumvent its effects. This rule against perpetuities was formed in the 17th Century to restrict future dispositions of property by prescribing a time limit, the perpetuity period, in which those dispositions must take effect; and to make void those dispositions that actually fall outside it. The rule against perpetuities evolved in the context of family settlements, where the '*dead hand rationale'* was and remains a compelling reason for the rule.

The 'dead hand'

The one reason against the rule of perpetuities is its use as applied to most Proprietary interests. The applicability of the rule in transactions in property, is a major obstacle, it has been argued.

Widening the loophole with a 125-year period

Caselaw has shown how perverse and ingenious is human greed, illustrated in *Belmont Finance Corporation Ltd v Williams Furniture Ltd* (No.1) [1979] Ch250 [1979] 1 All ER 118, even though it was not proved without doubt, that the defendant may have been involved in fraudulent breach of trust. Where a person not appointed as trustee, has received trust property with *knowledge* that it is trust property transferred in breach of trust, or has acquired knowledge after such receipt and then dealt with the property inconsistently with the trust, he is liable as a constructive trustee.

In the case of *Baden , Delvaux and Lecruit v Societe General pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* [1983] BCLC 325; affd [1985] BCLC 258n,CA, there were five categories of *knowledge* set out by the court, these being relevant for the purpose of a constructive trust. These five categories of knowledge are: actual knowledge, wilfully shutting one's eyes to the obvious; wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make; knowledge of circumstances which would indicate the facts to an honest and reasonable man and knowledge of the circumstances which would put an honest and reasonable man on inquiry.

Fraud and Discretionary Trusts

The High Court has recently exercised its jurisdiction to continue until trial a freezing injunction against assets held in an ostensibly discretionary trust by a third party. This is an important development of the exercise of what is known as the court's '*Chabra*' to grant a freezing order against third parties where it is ancillary and incidental to the cause jurisdiction of action against the principal defendant. In effect, this form of relief against a third party is in aid of, and forms part of, freezing relief granted against the defendant to the substantive claim.

Both the procedural history of, and the parties involved in, *Dadourian* are somewhat complicated. The case arose out of a bitter dispute between members of the Dadourian family. In essence, in 2002 an arbitration had taken place between the claimants (which included two members of the Dadourian family) and Charlton Corporation Plc, as a result of which an order had been made in favour of the claimants for approximately US$4.5 million. Non-payment of that money resulted in the present action in England, which involved various claims, including against two other members of the Dadourian family (Jack and Helga Dadourian), of conspiracy and fraudulent misrepresentation. Part of the claimants' case was that Jack and Helga Dadourian owned, directed and controlled Charlton. In February 2004, a worldwide freezing order was granted by the courts against the assets of four of the defendants, including Jack and Helga Dadourian.

The discretionary trust

In March 2005, a further freezing injunction was granted by another English judge against the respondent in the present action, Azuri Limited, an English company. The question which then came before Edward Bartley Jones QC was whether to continue this injunction against Azuri. Azuri was not a party to the action; however, by a complicated chain of arrangements and transfers, Azuri was the owner of a Paris flat which was one of the homes of Jack and Helga Dadourian. The flat had, according to Helga, been purchased in her maiden name from her own resources in 1984. As a result of various share transfers effected by her, the flat was now fully owned by a French company, SCI, which in turn was fully owned by Azuri, the shares of which were held on trust by a Geneva lawyer for a trust called Brinton, which had been established by Helga in 1994. (To further complicate matters, the Geneva lawyer had transferred the shares to hold on trust from an American individual who had also previously held them on trust for Brinton.) As noted by the judge, there was 'extreme reluctance' by any of the parties involved to disclose any information about the Brinton trust, as a result of which the Judge drew the inference that Helga Dadourian was concerned that the claimants should not discover the identity of Brinton and, more to the point, that Azuri was itself anxious to follow Helga's wishes.

Having traversed the relevant case law relating to third party freezing injunctions, Edward Bartley Jones QC held that it was not necessary to establish beneficial ownership by the relevant defendant in a strict trust law sense. The true question, according to the judge, was not whether the defendant had a legal or equitable right to the asset, but what he described as the 'substantive reality of control' over the assets, namely, whether the defendant had some right in respect of, or control over, or other rights of access to, the assets. Accordingly, he held that placing assets in a discretionary trust would not prevent the

exercise of the Chabra jurisdiction against that trust if the substantive reality were that the defendant controlled the exercise of the discretionary trust.

To come to any other conclusion would, in the judge's view, "*entirely defeat the ability of the English Courts to take drastic action and would allow the Court's orders to be evaded by manipulations"*, an outcome wholly contrary to the powers and duties of the Court as set out in the earlier case of *International Credit and Investment Co (Overseas) Limited* v *Adham*. On an interim application (and after a number of other interim applications), there was a strong indication of 'shady' dealings with assets by the relevant defendants This decision shows that, whether a Court chooses to identify a discretionary trust as a sham, 'pierce the corporate veil', or identify a controlled discretionary trust as a bare trust.Assets held in apparently discretionary trusts, even if not a party to the main action are not beyond the reach of freezing injunctions. The Charities Act 2009, sections 2 (2) and 2(3) state:

> *"(2)The rule does not apply to an estate or interest created so as to vest in a charity on the occurrence of an event if immediately before the occurrence an estate or interest in the property concerned is vested in another charity.*
> *(3) The rule does not apply to a right exercisable by a charity on the occurrence of an event if immediately before the occurrence an estate or interest in the property concerned is vested in another charity."*

If the aims and objectives of this Act were genuinely to look after our social well-being, it beggars belief that this clause so constrains charities, including religious charities which will have advisers who will simply find ingenious ways of reforming the organisations themselves every 21 years, although caselaw is a plenty for distinguishing what a religious charity is or is not (See *Re South Place Ethical Society* [1980] 1 WLR 1565, [1980] 3 All ER 918) ; what is charitable or no (see *British Museum v White* (1826) 2 Sim & St 594; and *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (1982) 154 CLR 120). A trust for the advancement of education, the relief of poverty or the advancement of religion is *prima facie* charitable and assumed to be for the public benefit (see National *Antivivisection Society v IRC* [1948] AC 31, 42 and 65).

Rule against accumulations

The rule against excessive accumulations works a similar mischief in relation to trusts, as was revealed in the Law Commission's consultation. It is the predecessor of the 'discretionary trust' in which 'powers to accumulate' is an important element and where the distinction between a trust and a power are blurred, the more relevant being the 'non-exhaustive discretionary trust' where the trustees may decide not to distribute any income but to accumulate it. The common law against perpetuities developed by the courts, has an infamous example in the case of *Bristow v Warde* [1775-1802] All ER Rep 369, 2 Ves 336. Caselaw had held that property must vest within 'a lifetime plus 21 years'.

Caselaw preceding the Accumulations Act 1800

The case of *Thellusson v Woodford* (1799) 4 Ves 227, (affd HL (1805) 11 Ves 112, [1803-13] All ER Rep 30) was an English trust law case. The lawsuit had resulted from the will of Peter Thellusson, an English merchant who died in 1797. He directed that the income of his property, consisting of real estate of the annual value of about £5000 and personal estate

amounting to over £600,000, to be accumulated during the lives of his children, grandchildren and great-grandchildren, living at the time of his death, and the survivor of them. The property so accumulated, which, it is estimated, would have amounted to over £14,000,000, was to be divided among such descendants as might be alive on the death of the survivor of those lives during which the accumulation was to continue.

There followed another lawsuit, *Thellusson v Lord Rendlesham* (1859) 7 HL Cas 429, relating to who were the heirs and the House of Lords decided that the heirs were both Lord Rendlesham and Charles Thellusson, though both cases took their toll of the estate in terms of lawyers' fees and neither party gained anything except the original amounts left by Peter Thellusson.

These cases were the impetus for the Accumulations Bill, which gained Royal Assent to become the Accumulations Act 1800 which stated that no property should be accumulated for any longer term than either the life of the grantor; or the term of 21 years from his death; or during the minority of any person living or a *foetus in utero* at the time of the death of the grantor; or during the minority of any person who, if of full age, would be entitled to the income directed to be accumulated. (In the case of *Occleston v Fullalove* (1873-74) L.R. 9 Ch. App. 147, a foetus born later was allowed to share with her sisters after a Will). This short period of 21 years was because in the 1800s, England's wealth was in the hands of very few persons and was mostly in land. Long-term provisions for accumulation would result in a huge swathe of the country owned by one family fund.

Law of Property Act 1925 and Perpetuities and Accumulations Act 1964

Although the rule against perpetuities and accumulations was originally developed in respect of trusts and other dispositions of land and other property, it has been applied to other matters, notably future interests such as easements and certain 'option' and 'pre-emption' rights in property, (s. 164 Law of Property Act 1925 having been amended by s.13 Perpetuities and Accumulations Act 1964). This use of the rule against perpetuities placed restrictions on the creation of future options and easements, for example and such use of the rule can be a significant obstacle to properly planned developments. Such restrictions were often contrary to other decisions made in cases where the rule was not applied to options in leases and in cases where the rule was applied to other property rights.

One of the problems with this law was that, if one could not state with certainty the date of the disposition that the property would vest in the perpetuity period, the disposition would be void. Most cases on the distinction between trusts and powers have arisen on the question as to whether a disposition is void for uncertainty. The term 'disposition' describes every mode by which property can pass, whether by act of the parties or by law. Section 10 (1) of the Legitimacy Act 1976, (now revised) defines '*disposition*' as including the conferring of a power of appointment and any other disposition of an interest in, or right over property. Section 10 (1) also defines the word '*existing*', the words '*legitimated person'*. Section 10 (1) also defines the terms '*power of appointment'* and '*void marriage'*.

The Perpetuities and Accumulations Act 1964 made three reforms. The first reform is to be found in section.1, 'power to specify perpetuity periods', which enabled a fixed period not exceeding 80 years to be the perpetuity period. The second reform is found in section 3, which states:

> "…*a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time, the disposition shall be treated, until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period, as if the disposition were not subject to the rule against perpetuities; and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise."*

Section 3 created the so-called 'wait and see' rule under which, a disposition (which under common law would be void for uncertainty) would be valid if it actually vests in the perpetuity period. The third reform that the 1964 Act created protects gifts which would otherwise be void, e.g., reducing a vesting age to 21 years (s. 4(1), (2)) and (s. 4(3) (4)). Note that prior interest in a property makes a perpetuity deed void, as per section 6 ('saving and acceleration of expectant interests') of the 1964 Act which states:

> "*A disposition shall not be treated as void for remoteness by reason only that the interest disposed of is ulterior to and dependent upon an interest under a disposition which is so void, and the vesting of an interest shall not be prevented from being accelerated on the failure of a prior interest by reason only that the failure arises because of remoteness."*

The 2009 Perpetuities Act- 125-year accumulation period

When the 2009 Act comes into force, the rule against perpetuities will apply only to the interests listed in section1 of the Legitimacy Act 1926. These interests are the family property interests created by lifetime or testamentary dispositions, for which the rule was originally developed, including successive interests of estates in property, interests subject to 'condition precedent', 'rights of reverter' if conditions imposed on the disposition are broken, and the exercise of powers: for a full list see the section. The rule will cease to apply to future property rights.

By s2 of the 2009 Act the rule does *not* apply to certain rights relating to charities or to pension schemes (otherwise than in respect of instruments nominating benefits and powers of advancement) and section 163 of the Pensions Act 1993 has been repealed as has section 13 Perpetuities and Accumulations Act 1964. By section 3 of the 2009 Act, the Lord Chancellor may specify other exceptions.

Section 5 provides that the perpetuity period is 125 years, and no other period, from the date on which the instrument making the disposition takes effect. This is a sea change from s.13 Perpetuities and Accumulations Act 1964 which provided that the 80 year period would apply if the instrument so provided. Section 13 of the 1964 Act is repealed. The '*wait and see'* rule and gift saving provisions in the 1964 Act remain. The definition of a special power of appointment in s11 of the 2009 Act widens the definition in s7 of the 1964 Act to include a power exercisable by Will to transfer the property to the personal representatives of the person holding the power.

Accumulation period (21 years) for charitable trusts

Section 13 abolishes the rule against excessive accumulations, but s.14 creates a new rule limiting the accumulation period for charitable trusts to 21 years from the first day on which the income must or may be accumulated. In contrast with the rule against perpetuities, the rule against excessive accumulations is statute made, originally by the Accumulations Act 1800 and currently in s164 of the Law of Property Act 1925 and s13 of the 1964 Act, both repealed.

If the trustees believe that it is difficult or not reasonably practicable for them to ascertain whether the lives in a 'life in being perpetuity period' have ended and therefore whether the perpetuity period has ended, they may execute an *irrevocable deed* stating their belief and that the instrument creating the trust has effect as if the perpetuity period were 100 years as per s12 of the 2009 Act.

Interests not under instrument

The 2009 Act applies to provisions made otherwise than by an instrument, as if the provision were contained in an instrument taking effect on the making of the provision (s.19).

Interests under instrument

The provisions of the 2009 Act apply only to interests under instruments that take effect on and after the Act is in force and, in relation to instruments exercising a special power of appointment, only if the instrument creating the power was made on or after that date(s.15(1)). Testamentary dispositions take effect at the date of death (s.20 (6)). The provisions in s.12 (for a perpetuity period of 100 years) apply to a will executed before the commencement date of the 2009 Act, whether or not it takes effect before that day, and to any other instrument taking effect before that day (s.15(2)).
The Act will not affect any interests (including easements, profits à prendre, powers of entry, and so on) that exist when it comes in to force and are subject to the rule against perpetuities, though no such interests will be subject to the rule after the Act comes into force.

Rationale of the 2009 Act

The Act enables the rule to practically cease to apply to rights over property such as options, rights of pre-emption and future easements. The existing exclusion from the rule of some pension schemes is widened to include virtually all such schemes. A single perpetuity period of 125 years now exists and the principle of 'wait and see' applies for this period. The real reason for this Act is to stop the country from becoming a bankrupt country; to give the financial market time to recover from massive high risk securitisation transactions it has gambled on and to preserve the wealth of the immediate Royal family, for example; the Duke of Westminster and other wealthy gentry who actually have money and properties to last into perpetuity. This is not an Act that relates to the common or garden citizen.

Private equity securitization provided several benefits for sponsors of such transaction. It provided early monetisation of their investments through the *sale of debt* backed by these investments to third party investors. This was advantageous because the cash needed for investment programs was reduced through the use of such securitised leverage, allowing these sponsors of such transactions an alternative means of improving the liquidity of their investments without incurring the typical steep discount of a sale in a secondary transaction. The role of trustees in the structured finance markets in the UK has been subject to some scrutiny recently from investors, the Law Commission for England and Wales, and the rating agencies.

Also, securitisation makes use offshore Special Purpose Vehicles (SPV) to avoid taxation since a standard securitisation will result in the flow of profits back to the UK originator whilst securitisation SPVs do not accumulate cash or retain substantial profits, and so the offshore location of the SPV will not necessarily cause problems from a direct tax perspective . There are many instances in which the securitisation structure is simply facilitating tax avoidance.

This Act governs such transactions, giving them a hundred year breathing space.

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