




---

**IN THIS EDITION:**


---

Case Round Up 2

**SPOTLIGHT ON  
EASEMENTS**

Prescriptive easements - a glass half-full: out with the negative; in with the positive 10

**SPOTLIGHT ON  
RESTRICTIONS AND NOTICES**

Keeping the Title Clean:  
Unwanted Notices and Restrictions 12

**SPOTLIGHT ON  
ESTOPPEL**

Estoppel in Pre-Contractual  
Negotiations 15

**SPOTLIGHT ON  
NEGLIGENCE**

The Curse of  
the Freebie 17

**SPOTLIGHT ON  
ALTERATION OF THE LAND REGISTER**

Voidable and  
no Mistake 20

Latest News 22

---


**Compiled by**
**Julia Petrenko**
**Mark Galtrey**



---

## From the editor: Kirk Reynolds QC

---



In the sense meant by the ancient Chinese curse, we “live in interesting times.” As predicted by Caroline Shea QC in her editorial to the last edition of this Newsletter, 2017 continues to be dominated by the uncertainties and complexities arising from the Brexit vote and the impact of the election of Donald Trump on world affairs. More recent events have cast their shadow over our area of work, especially in relation to landlord and tenant matters. The tragedy at Grenfell Tower has thrust the management and regulation of residential accommodation into the spotlight, and, if Sir Martin Moore-Bick does his job properly, the recommendations of his Inquiry are sure to be fundamental and far-reaching. The Government has brought forward proposals for major reform of leasehold properties, including the regulation of ground rents and service charges, and somewhat amorphous measures are again being touted in the hope of improving the behaviour of landlords.

Whatever changes occur, welcome or not, they will undoubtedly create new areas for dispute and debate, which is the essential raw material for future articles in this publication. Our Editorial policy is always to publish pieces that combine detailed analysis of topical issues with practical advice, and this edition is no exception. Guy Fetherstonhaugh QC introduces the new Boundary Disputes Protocol, which (perhaps optimistically) aspires to bring some rationality to this fraught area of litigation. Martin Dray and Jamie Sutherland highlight a welcome clarification of the evidential burden in establishing of a prescriptive easement, which should greatly assist claimants relying on long use that pre-dates their ownership. Adam Rosenthal cuts through the tangle of provisions surrounding unwarranted restrictions

and notices on the Register, and distils recent advice on when injunctive relief will be granted to have them removed. Toby Boncey reports on *NRAM Ltd v Evans* [2017] EWCA Civ 1013, and considers the distinction between alteration and rectification in a Land Registration context. Gavin Bennison, who has joined Chambers after a successful pupillage, analyses *West End Commercial Ltd v London Trocadero* (2015) LLP [2017] EWHC 2175 (Ch). This is a cautionary tale for anyone who has ever been tempted to rely on estoppel as a catch-all defence to a contractual claim. Finally, Oliver Radley-Gardner bravely gives some free advice on the vexed question of whether a kindly piece of free advice can expose the giver to a costly claim in negligence. He asks me to point out to you, Gentle Readers, that the usual disclaimers naturally apply!

Amid so much change and uncertainty, it is all the more important to have strength, stability and continuity closer to home. We are delighted to announce that Paul Letman (1987 call) has joined Chambers from 3 Hare Court. Paul's expertise in property law is recognised in the directories, and he was described in this year's Legal 500 2017 as “*Immensely knowledgeable and experienced in residential landlord and tenant work*”. It is a pleasure to be able to welcome him to Falcon Chambers. Our clerking team continues to flourish, and promotions for John Stannard and Mark Ball will allow them to build on their long experience in Chambers to continue to provide the excellent service on which we all rely. They are joined by Joanne Meah, who brings her own wealth of property clerking expertise. They, and all of us at Falcon Chambers, look forward to continuing to work productively with you over the months and years ahead.

## Case Round Up

*Grosvenor (Mayfair) Estate v Merix* [2017] EWCA Civ 190

The Court of Appeal was once again asked to consider whether a building was a house “reasonably so called” within section 2 of the Leasehold Reform Act 1967. The property in question was a six-storey London townhouse that had been unoccupied for 13 years and had last been used as office premises on four floors and residential on two, with an adjacent mews property that had been in residential use. The Court held that the question fell to be considered at the date at which the tenant made its application to acquire the freehold interest, and so the last user, or the last adaptation for use, was not necessarily determinative of the character and identity of the building. The property was not a house for the purposes of the Act. **Jonathan Gaunt QC** and **Anthony Radevsky** appeared for the Appellants.

*Balogun v Boyes Sutton and Perry* [2017] EWCA Civ 75

The case concerned an underlease conveyancing transaction of a lower floor unit intended to be used as a restaurant, which had a ventilation shaft running through the building to the roof. The upper floors contained flats which belonged to the freeholder, who disputed that B was entitled to access the shaft to carry out works. B issued proceedings against BSP, his conveyancing solicitors, seeking damages for breaches of duty in connection with the drafting of the underlease. Amongst other unsuccessful arguments that were not appealed, B argued that BSP should have (a) warned him that the wording of his underlease was sufficiently unclear that there was

a risk that he might run into difficulty in implementing shaft works, and had a “duty to warn” based on cases including *Queen Elizabeth’s Grammar School Blackburn Ltd v Banks Wilson Solicitors* [2001] EWCA Civ 1360; and (b) investigated a planning condition which required Council certification of ventilation apparatus. The trial judge rejected both arguments: there was no identifiable risk to which any drafting gave rise, and no risk had materialised in any event, and secondly because, on the evidence, B had not established that any further investigations would have revealed anything under the planning conditions. B appealed. The Court of Appeal rejected both of those grounds of appeal: although a duty to warn arose, on the facts of this case that did not go anywhere – on the basis of the factual findings below, including that the freeholder was not disputing the existence of B’s right but rather only the works that he was proposing to carry out, this allegation had no substance. Further, the objections to what B was proposing related to the extent of his rights under the headlease, not the underlease, and no allegation of negligence arose in relation to the headlease. In relation to the planning condition ground, the nature of the condition was such that a further enquiry would not have elicited any material that would have caused BSP to investigate further. **Oliver Radley-Gardner** appeared for the successful Respondent.

*London Sephardi Trust v John Lyon’s Charity* [2017] EWCA Civ 846

A landlord appealed against the determination of the price payable by a tenant for acquiring a freehold under the Leasehold Reform Act 1967, as

amended. The tenant had served notice that it wished to exercise its right to acquire the freehold interest in the property. The original lease had been due to expire in 2016, but in the early 1980s the tenants had extended it by giving notice under s.14 of the 1967 Act, so that it would expire in 2066. If the tenancy expired upon termination of the extended lease, the price for the freehold interest would be £1.748 million, compared to £2.866 million if determined in 2016. The saving provision contained in the Housing and Planning Act 1986 s.23(3)(c) had not been removed by amendments made to the Leasehold Reform Act 1967 s.9 by the Commonhold and Leasehold Reform Act 2002 s.143(4) and s.180. Tenants who wished to exercise their right to acquire the freehold interest in their property were therefore entitled to valuation of the freehold interest subject to an extended lease if they had served a notice seeking the extended lease before 5 March 1986. **Nicholas Dowding QC** and **Mark Sefton** appeared for the Appellant.

*Clarise Properties Ltd v Rees & Anor* [2017] EWCA Civ 1135

This appeal from the Upper Tribunal was dismissed by the Court of Appeal. The issue was the true construction of a rent review clause, which read that, every 25 years, the new rent should be: “... such annual rent (being not less than the rent payable immediately prior to each relevant Rent Review Date) being a sum representing the open market letting value of the land hereby leased as if it were a vacant site without any buildings thereon (“the Site”) to be assessed in accordance with current open market values of the Site at each relevant Rent Review Date when the said Site shall

## Case Round Up (continued)

fall to be re-assessed as if it were at such Rent Review Date available for residential development for purposes authorised by the Town & country [sic] Planning Acts ...". A peculiarity of that clause was that there was simply no open market evidence for the rental value of a cleared site in the open market. This is therefore a significant consideration of the operation of rent review clauses based on a hypothetical transaction for which there was, in fact, no comparable transaction evidence available in the real world.

**Barry Denyer-Green** appeared for the successful Respondents.

---

*Curzon v Wolstenholme* [2017] EWCA Civ 1098

The Upper Tribunal had held that an initial notice under s.13 of the Leasehold Reform, Housing and Urban Development Act 1993 which was not protected on the land register did not cease to have effect upon the transfer of the freehold to Mr Curzon's wife, even though it was conceded that she was not bound by the notice and therefore that the claim to acquire the freehold could not be enforced against her. Accordingly, when she transferred the freehold back to Mr Curzon, the nominee purchaser was entitled to proceed with the claim. The Court of Appeal disagreed with this analysis of the effect of the transfer to Mr Curzon's wife. It held that the notice ceased to have effect for all purposes and therefore could not be brought back to life when Mr Curzon re-acquired the freehold. Accordingly, this long-running enfranchisement claim was brought to an end. Although not necessary for its decision, the Court addressed a second issue which was argued and held that where the nominee purchaser and

reversioner agreed some but not all of the terms of the transfer, the agreement was binding and could not be re-opened before the First Tier Tribunal. **Adam Rosenthal** appeared for the successful Appellant.

---

*Derreb Ltd v Blackheath Cator Estate Residents Ltd & Ors, Re Manor Way* [2017] UKUT 209 (LC)

The Objectors objected to the significant residential development scheme for some 130 homes on a former sports ground on a private estate in Blackheath. A covenant restricted the use of the land to a sports ground, alternatively to the construction of detached houses. The only residential development for which planning permission was likely to be granted, however, was for a mix of detached, semi-detached and terraced houses, and apartment blocks. The Applicant sought modifications of the covenant in part under ground (a) and in part under ground (aa) of section 84(1) of the Law of Property Act 1925. Unusually, no planning permission was in fact in place at the date of the hearing of the application for modification. The Upper Tribunal was therefore required to hear expert planning evidence on the likelihood of planning permission being granted, and the form that such permission was likely to take. The Tribunal accepted that it was more likely that permission for the housing mix outlined above would ultimately be granted. The Tribunal was persuaded to grant an order in respect of the "sports ground" element of the covenant under the very rarely successful ground (a) - obsolescence. In so doing, it applied *Re Greaves' Application* (1965) 17 P&CR 57. As regards the application under ground (a) regarding the restriction confining

residential development to detached houses, the Tribunal considered whether there had been a change in character to satisfy ground (a). The Tribunal decided, however, that the modification should be granted under ground (aa) instead, in that it impeded the proposed scheme which did not secure a benefit of substantial value to the objectors, even in the absence of planning permission. The Applicant also persuaded the Tribunal to remove the requirement for the Vendor to consent to plans and elevations under ground (a). The Applicant agreed to the imposition of conditions on use of the proposed estate roads to address the objectors' concerns, under section 84(1C). **Janet Bignell QC** appeared for the successful Applicant.

---

*INEOS Upstream Ltd & Ors v Persons Unknown* (Chancery Division)

The Applicants sought an interim injunction restraining a wide range of unlawful conduct by protestors opposed to hydraulic fracturing ('fracking'). Licensed onshore share gas operators have recently been targeted by co-ordinated protest and direct action. Some of this protest has been both unlawful and dangerous, involving for instance trespass onto operators' sites, obstruction of the public highway by 'slow walks', 'lock-on' protests, criminal damage and harassment. A nationwide community of activists has targeted not only shale gas operators themselves, but also their upstream supply chain. Against this background, the Applicant shale gas operator sought pre-emptive injunctive relief protecting eight of its sites, as well as a range of connected third parties, from unlawful conduct. At an ex parte hearing on 28 July 2017, Morgan J was satisfied that the

## Case Round Up (continued)

applicants were able to demonstrate a real and imminent risk that that such conduct would occur if relief were not granted. The Court granted interim relief restraining five categories of Person Unknown from engaging in acts of trespass, public or private nuisance, harassment or unlawful means conspiracy to commit a series of criminal offences with the intention to disrupt the Applicants' lawful activities. The injunction did not in any way restrict protestors' rights to engage in peaceful and lawful forms of protest. On the return date on 12 September, the Applicants successfully secured the continuation of the interim injunctions with only minor modification, in the face of robust opposition by two 'anti-fracking' activists who were represented by leading counsel. The Applicants resisted arguments that the injunction was too broad and that it unlawfully interfered with protestors' rights to freedom of expression and assembly under Articles 10 and 11 of the European Convention on Human Rights. These arguments, and others raised in opposition to the injunction, will now be considered more fully at a three-day hearing in November. **Janet Bignell QC**, assisted by **Gavin Bennison**, appeared for the successful Applicants.

*Sparks v Biden* [2017] EWHC 1994 (Ch)

This case concerned whether a term should be implied into overage provisions in a sale contract requiring the purchaser/developer to sell properties on the development within a particular timetable after practical completion of the properties where the express terms of the contract did not impose any restrictions on the timing of the sales. HHJ Davis-White QC, sitting as a Judge of the Chancery Division,

held that a term fell to be implied that the properties were to be sold with a reasonable time after being completed. The case considers the need for clarity and precision in the formulation of implied terms. **Nathaniel Duckworth** appeared for the Defendant.

*Ghadami v Bloomfield and others* [2017] EWHC 2020 (Ch)

This is the last in a series of judgments by Norris J. in the various applications to strike out the claim of Mr Ghadami against 19 defendants. Judgment on the applications having been handed down in October 2016, Mr Ghadami sought to reopen the judgments before the orders were sealed and made a series of applications which were without merit. Mr Ghadami's applications were all dismissed and the Judge made a general civil restraint order. Of particular interest is an order made in favour of the sixteenth, seventeenth and eighteenth defendants, for whom **Adam Rosenthal** acted, restraining Mr Ghadami from entering further unilateral notices on the register of titles to properties held by these defendant companies in Mayfair. Mr Ghadami had continued to enter notices against the titles after they had been warned off and Norris J., relying on *Nugent v Nugent* [2015] Ch. 121, granted an interim injunction to these defendants under s.77(1) of the Land Registration Act 2002.

*Durberg v Small; Johnstone v Djurberg*

(Chancery Division, 1 September 2017) Buyers of houseboats brought two separate claims against Myck Djurberg, who agreed to sell them luxury houseboats to live in at Hampton Riviera. After payment of the purchase monies and after the boats had been

handed over to them, the buyers were met with further charges to moor the boats at Hampton Riviera and they subsequently learned that in any event, there was no planning permission for permanent residential moorings at Hampton Riviera. However, it was held that the boats were, effectively, worthless because there were no other locations on the River Thames where they could be moored. The eight-day trial (in May 2017) involved questions as to misrepresentation and estate agents' particulars, incorporation in contracts of terms agreed orally, entire agreement clauses and their enforceability under UCTA 1977 and payments made under duress. In the judgment, handed down on 1 September 2017, the buyers were awarded substantial damages to reflect the losses caused to them for misrepresentation and for breach of contract. **Adam Rosenthal** represented the successful Claimants.

*Wild Duck Limited v Smith* [2017] EWHC 1252 (Ch)

The lessee of five holiday homes on a site in the Cotswolds claimed damages from the lessor / freeholder for breach of an implied term not to prevent the tenant-owned management company from performing its obligations with regard to the maintenance and upkeep of the site following the insolvency of the developer at a time when the estate roads and grounds were unfinished and the sewage treatment plant had not been installed. Edward Murray, sitting as a Deputy High Court Judge, held that the landlord was subject to the implied term relied upon by the lessees (applying the principle in *Stirling v Maitland* (1864) 5 B & S 841 and *Barque Quilpé Ltd v Brown* [1904] 2 KB 264) but that there was no breach because

## Case Round Up (continued)

the landlord was entitled to act under a step-in clause in the lease in light of the Management Company's inaction. It was held that there was no positive duty of co-operation with the management company on the part of the landlord. The Court also considered questions of derogation from grant and nuisance and annoyance covenants in relation to plots which remained in the ownership of the landlord and which became unkempt. **Adam Rosenthal** acted for the Claimant.

*Hanina v McSpadden and others* [2017] (Central London CC)

HHJ Parfitt determined that each of the parking spaces in a development of three properties in London should be 2.1m wide. In addition, the Claimant and Third Party successfully argued that they had acquired rights to use a communal bin store situated on the Defendant's land by prescription. The Court also addressed issues relating to the construction of a restrictive covenant and dismissed claims for damages for trespass in relation to the use of the forecourt. **Gary Cowen** appeared for the Third Party.

*Co-operative Bank v Hayes Freehold Limited and others* [2017] EWHC 1820 (Ch)

The Court refused to imply into the surrender and release of the guarantor of an underlease which was expressed as being irrevocable and unconditional, a condition precedent that the release should only take place if the head lease was also surrendered. The Court also rejected claims made on the basis of fraudulent misrepresentation, common mistake, the rule in *Pitt v Holt* and unjust enrichment. **Gary Cowen** appeared for the guarantor to the underlessee.

**Jonathan Gaunt QC** and **Mark Sefton** appeared for the head lessee.

*Downs v Kingsbridge* [2017] UKUT 0237 (LC)

The President of the Upper Tribunal (Lands Chamber) has upheld the decision in *Shirley v Crabtree* [2008] 1 WLR 18. The appeal concerned a preliminary issue, namely whether an applicant hoping to succeed on retirement of the tenant to a tenancy under the Agricultural Holdings Act 1986 had to satisfy the principal source of livelihood test on a rolling basis until the application was adjudicated upon, or only in the seven years ending with the giving of the retirement notice. The President determined that the latter was the correct period and that *Shirley* was correctly decided. The decision contains a review of the statutory provisions governing both the death and retirement succession regimes.

**Stephen Jourdan QC** appeared for the Appellant, and **Oliver Radley-Gardner** appeared for the Respondent.

*Freehold Managers v Celestia* [2017] EWHC 1281 (Ch)

The Claimant held a head-lease of a development comprising 8 blocks of flats and associated amenity land. The head-lease gave the Claimant rights in common to use certain waterfront pathways, a bridge and an access road that lead to the development and required the Claimant to pay for their upkeep through service charge provisions. The sub-leases of the individual flats on the development were in tri-partite form; the Defendant management company was responsible for the provision of services at the development and recovered its costs of doing so from the tenants through

standard form service charge provisions in the sub-leases. Although the sub-tenants were also given the right to use the pathways, the bridge and the access road, the sub-leases did not specifically require either the Defendant to pay or contribute towards the service charge payable by the Claimant under the head-lease in respect of those areas. However, the sub-leases did impose a requirement that the Defendant pay: "pay all existing and future rates taxes duties assessments charges impositions and outgoings whatsoever whether parliamentary parochial local or of any other description which are now or during the said term shall be assessed charged or imposed or payable on or in respect of the entirety of the Development or its curtilage or Common Areas." The Claimant said that, having regard to the wide terms of that covenant and the commercial purpose of the overall leasehold structure, the Defendant was liable to indemnify the Claimant against the head-lease service charge. In determining the question of construction in the Defendant's favour, HHJ Jarman QC had regard to the 'requirement of clarity' where general words are used in service charge and related provisions – referred to in *Francis v Philips* [2014] EWCA Civ 1395 (which seemingly survives Supreme Court's decision in *Arnold v Britton* [2015] UKSC 36) – and held that the words relied upon by the Claimant were insufficiently clear to bring home to the tenants of the sub-leases that they were assuming a liability to pay the head-lease service charge. **Nathaniel Duckworth** appeared for the successful Defendant.

## Case Round Up (continued)

*Abdulla v Whelan et al* [2017] EWHC 605 (Ch)

This appeal from the County Court is the first High Court decision on an important question that relates to the disclaimer provisions in s.315 to 321 of the Insolvency Act 1986 and the position of the landlord where one of two or more joint tenants is declared bankrupt. The appellant (a potential third party creditor) argued that the purpose and function of the insolvency regime, as explained in dicta by the House of Lords in *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, would be frustrated if the bankrupt tenant was not allowed to escape all of her obligations under a jointly held lease. His position was that a disclaimer by the trustee in bankruptcy had the effect of terminating the lease such that no rent was payable by the bankrupt's estate thereafter. For the trustee in bankruptcy and the landlord it was argued that as a joint legal estate is by definition held on trust by the tenants for each other the tenancy does not fall into the bankrupt's estate. S.283(3) (a) of the Insolvency Act 1986 applied. It therefore followed that a purported disclaimer of a jointly held lease by the trustee in bankruptcy was void insofar as the legal estate was concerned. For the landlord in particular it was argued that the appellant's approach failed to distinguish between the rights and liabilities that flow from the legal estate, as opposed to the beneficial interest. All that could be disclaimed was the bankrupt's beneficial interest in the lease, if any, and the bankrupt tenant remained personally liable for the rent as he or she was before the bankruptcy and until the expiry of the term. Accordingly, the landlord was entitled to prove in the bankruptcy as

a creditor of the bankrupt. Mr John Male QC, sitting as a judge of the High Court, accepted the trustee's and the landlord's arguments and dismissed the appeal. **Joseph Ollech** appeared for the successful landlords.

*Ittihadieh v Metcalfe* (Chancery Division)

The Applicant sought a final charging order to enforce a costs order. After the application was made, the Respondent applied for permission to appeal the judgment underlying the costs order, and for a stay pending appeal. The Master held that an application for a charging order is a "without notice" application, so the applicant is under a duty to give full and frank disclosure of any matters of fact or law which are or may be adverse to the Applicant, and that the fact that the Respondent had applied for permission to appeal the judgment and a stay are matters which the Applicant is obliged to draw to the Court's attention. The Applicant's duty continues after the application is made. Therefore if the Applicant learns that the Respondent has made an application for permission to appeal and a stay after the application is made but before the Court has made an interim charging order, the Applicant must draw it to the Court's attention. If the Applicant breaches its duty, the Court has a discretion whether to discharge the interim charging order or make a final charging order. There is no presumption towards discharge. Discharge is only likely if the Court would have had serious doubts about whether to make the interim charging order if it had been aware of the application for permission to appeal and a stay. In the instant case, the Master made a final charging order, despite the Applicant's breach of duty. **Stephanie Tozer** appeared for the Respondent and

is an author of the Falcon Chambers book on Charging Orders.

*Brophy v Vodafone* (Manchester TCC, 15th March 2017)

This was an exceptionally rare case where a contested application for an order under the Electronic Communications Code came before the Court. Vodafone issued an application, under paragraph 5 of the Code, for an order granting them rights over Mrs Brophy's land and for the Court to determine the terms on which those rights would be given. The major issue was the amount of consideration payable. It was held that the industry standard rates for consideration were fair and reasonable consideration, since there was no special factor about Mrs Brophy's land that made them inapplicable. Since Vodafone did not seek to argue that, in light of *Bocardo SA v Star Energy* [2011] 1 AC 380, the industry standard rates (which were based on *Mercury Communications v LIDI* (1995) 69 P & CR 135) were too high, the Judge did not determine whether *Bocardo* had undermined the approach in *Mercury*. As to the other terms, Vodafone was not required to take an 80 year term because that is what Mrs Brophy wanted to give it (so as to justify her demand for a substantial premium), but instead it was appropriate to order that the rights should last until terminated by either party on 12 months' notice, with payments being made annually. The judgement also confirmed that a person against whom an order is made under paragraph 5 cannot apply for additional compensation under paragraph 16 of the Code. The financial terms were governed solely by paragraph 7. Paragraph 16 applied where (a) a person

## Case Round Up (continued)

is adversely affected by rights being exercised over his neighbour's land (but the operator has no rights over his land); and (b) a person has agreed that the operator can have rights over his land, but compensation for the impact on adjoining land owned by the same person has not been agreed. **Stephanie Tozer** appeared for Vodafone.

### *Chancellors Estate Agents v Hardland & Anrs* (Oxford CC)

In an unopposed lease renewal under the Landlord and Tenant Act 1954, the tenant sought to maintain the passing rent (last agreed in 2010) whereas the landlord sought a 25% uplift. HHJ Melissa Clarke in an ex tempore judgment, sitting in the County Court in Oxford, accepted that the market had stagnated in Bicester from evidence of a surplus of similar properties which had not rented within the last 12 months and, consequently, rejected the landlord's reliance upon two actual lettings from 2015. Further, when taken together with the historic rent review evidence of nearby properties the judge concluded that the passing rent remained the market rent. Further, the judge rejected the landlord's reliance on comparable evidence of self-contained offices as suitable when valuing ancillary accommodation; to do so would not be to properly value the 'holding' as required by s.34. Therefore, no uplift was justified since the 2010 rent. Following the decision the judge awarded the tenant 100% of its costs (summarily assessed) on the basis that the tenant had been 100% successful and had beaten its without prejudice offers. Therefore, this case demonstrates that the 'usual rule' of no order as to costs in rent only cases does not apply where either a party beats an offer or

one party substantively succeeds on its rental valuation. **Kester Lees** appeared for the successful tenant.

### *Garnier v Dow Properties* (Mayor's & City CC)

A landlord sought to oppose under s.30(1)(f) of the Landlord and Tenant Act 1954 the tenant's application for lease renewal, and so needed to establish a genuine and firm and settled intention, capable of implementation, to effect the proposed work. After a four-day hearing, the Judge held that the case was one where the landlord's proposals were essentially colourable, masking a simple desire to obtain possession. Although a case on its facts, a number of practical points may be derived from it. Firstly, company resolutions to effect the proposed work need to be clear with a degree of specificity. Secondly, care is required to ensure that the board has all the appropriate information before it, and that it can be produced to the court as being the information upon which it acted. Thirdly, one must ensure that any updated witness statement served shortly before the hearing clearly identifies the landlord's state of mind to accommodate any substantial changes which may have occurred since the earlier exchange of statements. Fourthly, oral evidence far removed from the documentation will undermine the suggestion of a genuine and firm and settled intention. Fifthly, any plea by a landlord that the detail with respect to the proposed work could not be provided to the court because the tenant refused access, there being no adequate provision for access under the tenant's lease, will not receive a sympathetic ear. A landlord in these circumstances has the simple expedient by way of an interim remedy

under CPR 25 enabling inspection to be undertaken. Sixthly, saving expense in not calling any form of expert evidence is short-sighted. The court will be unreceptive to a submission that the judge himself can draw the appropriate inferences as to the extent to which works are e.g. structural or affect the structure. **Wayne Clark** appeared for the successful tenant.

### *Matier v Christchurch Gardens (Epsom) Ltd* [2017] UKUT 56 (LC)

A tenant appealed against a costs order made against him in the FTT pursuant to Rule 13(1)(b) of the Tribunal Rules on the ground of acting unreasonably in the conduct of the proceedings. The Upper Tribunal delayed the determination of this matter until after it had handed down judgment in *Willow Court Management (1985) Ltd v Alexander* [2016] UKUT 0290. Notwithstanding the restrictive approach laid down in *Willow Court*, the Upper Tribunal nevertheless refused the tenant's appeal and endorsed the FTT's finding of unreasonable conduct. The appellant complained that the respondent's solicitors had interfered with the presentation of his papers in their preparation of the hearing bundle and the time and cost this added to the proceedings and to the hearing overrunning its allotted time estimate. His approach also led to extensive correspondence between the parties and the FTT in the lead up to the trial that would otherwise have been unnecessary. He was not in fact prejudiced in the presentation of his case because the respondent's solicitors did also provide all of the material he had prepared to the FTT in its original non-compliant form. The true position was that the appellant

## Case Round Up (continued)

had ignored the FTT's clear directions as to the presentation of evidence, and failed to respond constructively when this was pointed out to him. In addition, the witness evidence and written submissions he prepared were extremely prolix and unfocussed. The Upper Tribunal agreed that even "making every appropriate allowance for the fact that the material he wished to rely on had been edited and organised in a way inconsistent with his wishes, he nevertheless responded in an intemperate and unjustifiably aggressive manner." The Upper Tribunal also agreed that even though the appellant acted without legal representation the material he provided to the FTT "exceeded by a considerable distance what was reasonable and proportionate to deal with the six discrete issues raised in the proceedings". **Joseph Ollech** appeared for the successful Respondent.

---

*Burton & Anor v Bowdery & Ors* [2017] EWHC 208 (Ch)

The claimant buyers claimed relief against the first and second defendants for, inter alia, breach of an agreement to sell a property, entered into by exchange of contracts on 20 November 2009. The claim was issued on 5 March 2015. The third defendant was the conveyancing solicitor who acted or purported to act on behalf of the sellers in the transaction and in the exchange of contracts. In her defence, the second defendant denied that she was a party to the agreement or that the third defendant had authority to act on her behalf. The claimants amended their particulars of claim to claim, in the alternative set out in the second defendant's defence, a breach of warranty of authority by the third defendant. The claimants applied to join the third defendant on

2 September 2016 (after expiry of the primary limitation period). He was joined to the main claim by Deputy Master Lloyd without a hearing, the existing parties (but not the third defendant) having consented to joinder. The third defendant applied under CPR 3.1(7) to set aside the joinder order. Master Clark held that the third defendant had a reasonably arguable limitation defence, so that he should not have been joined if the doctrine of "relation back" under s35(1)(b) of the Limitation Act 1980 applied. However, she held that the claim fell within s35(1)(a) of the Limitation Act 1980, being a "claim made by way of third party proceedings" within the meaning of s35(2). Accordingly, the doctrine of "relation back" did not apply, the claim being deemed to have been commenced on service of the amended claim form and particulars of claim on the third defendant. Thus, there was no prospect of a reasonably arguable limitation defence being prejudiced by joinder, and the third defendant had been appropriately joined. It was held that *Chandra v Brooke North* (A Firm) [2013] EWCA Civ 1559 "is authority for the limited proposition that amendment (and joinder) should be refused where relation back would apply, and the defendant has a reasonably arguable limitation defence. It is not authority for the broader proposition contended for by D3's counsel, namely, that whenever the defendant raises an arguable limitation defence, joinder must be refused". **Toby Boncey** appeared for the successful Claimants.

---

*Zinc Cobham v Adda Hotels* (Chancery Division, 27 March 2017)

The Claimants alleged that the Defendants were in breach of

obligations to operate hotels to agreed high standards, and sought, inter alia, an order for specific performance requiring the Defendants to carry out work costing some £100 million, and in the alternative, damages. The Defendants applied for the claim for specific performance to be struck out, because it had no real prospects of success. Deputy Master Cousins granted the application, holding that damages would be an adequate remedy for the Claimants, and that it would be inappropriate to grant an order requiring the Defendant to carry on an activity. **Kirk Reynolds QC** appeared for the Claimants and **Elizabeth Fitzgerald** appeared for the Defendants.

---

*Minerva (Wandsworth) Ltd v Greenland Ram (London) Ltd* [2017] EWHC 1457 (Ch)

The Claimant company had sold a development site subject to a contract entitling it to apply for enhanced planning permission and charge the Defendant buyer overage if permission was granted. The Claimant was required to submit its "draft application" for the Defendant's consent before applying for enhanced permission, but that consent was subject to a tight timetable and was not to be unreasonably withheld. The Defendant failed to give consent despite two requests. The local authority nevertheless resolved to grant enhanced permission, subject to the Defendant entering into a revised s.106 agreement containing increased affordable housing obligations. The Defendant refused, so the enhanced permission was never granted, and the resolution lapsed. The Claimant submitted that it was entitled to the overage that it would have earned had the planning permission been granted. The Judge agreed.

## Case Round Up (continued)

### Nicholas Dowding QC and Mark

**Sefton** appeared for the successful Claimant.

#### *Rashid v Rashid* [2017] UKUT 332 (TCC)

The Appellant had forged documents in order to have himself registered as proprietor of property previously registered to the Respondent. The First Tier Tribunal had granted the Respondent's application for rectification of the Register, restoring him as the registered proprietor. Although such rectification would not ordinarily be granted where it adversely affected the (then) registered proprietor's title, a registered proprietor who has caused or substantially contributed to the mistake by fraud does not have that protection, and the register will be rectified unless there are exceptional circumstances that would justify not altering the register. The Appellant appealed, arguing that there were exceptional circumstances that would justify not altering the register, namely that he had in fact been in adverse possession of the land and that the Respondent's title had been barred. Judge Elizabeth Cooke rejected the appeal, holding that *Parshall v Hackney* [2013] EWCA Civ 240 prevented a person from being both the registered proprietor and in adverse possession, and that in any event, applying *Patel v Mirza* [2016] UKSC 42, the Respondent should not be allowed to rely on his own fraud.

**Stephanie Tozer** appeared for the successful Respondent.

#### *The Crown Estate Commissioners v Whitehall Court London Limited* [2017] UKUT 0242 (LC)

The Upper Tribunal (Lands Chamber) has decided that the no-Act assumption on lease extensions extends to the block containing the flat, not just the flat alone. It has been thought by many that the assumption in Schedule 13 of the Leasehold Reform, Housing and Urban Development Act 1993, did not mean that the subject flat was unique in having no right to a lease extension, but that the assumption applied to all of the flats in the block. However, no reported decision specifically confirmed it. The Lands Chamber in this decision has done just that. The valuation process for a lease extension in this case was complicated, because the headlease, owned by Whitehall Court, required payment of a rent to the freeholder worked out as a percentage of the headlessee's total income from the block above a certain fixed sum. The rents on all unextended leases of flats in the building doubled in 2029 taking the total income above the fixed sum. When valuing the loss in value to the freehold and headlease respectively resulting from the grant of a new lease of the subject flat the valuers needed to know if they were to treat as certain that the rents of all the other flats would double in 2029, or should allow for potentially diminishing rents due to future 1993 Act lease extensions.

The Lands Chamber thus had to decide the extent of the no-Act assumption, amongst other issues. They decided it in the Crown Commissioners' favour, allowing the appeal on this issue from the FTT below. **Stephen Jourdan QC** and **Cecily Crampin** appeared for the successful Appellants and **Paul Letman** appeared for Whitehall Court. Permission has been granted to appeal to the Court of Appeal, where additionally **Anthony Radevsky** will appear for Whitehall Court.

#### *Shortland v Hill* (Bristol CC, 15 August 2017)

The substantive dispute in this matter concerned the position of a boundary and interference with a right of way. The Judge also drew a distinction between equities arising by proprietary estoppel, which he held are capable of acting as overriding interests for the purposes of sections 29 and 116 of the Land Registration Act 2002, and "common law estoppels", such as by representation and convention, which could not. **Edward Peters** appeared for the Claimant and **Nathaniel Duckworth** appeared for the Defendant.

## Prescriptive easements - a glass half-full: out with the negative; in with the positive

by Martin Dray & Jamie Sutherland



He or she who asserts must prove. A claimant must establish all the ingredients of the claim, albeit (so far as the relevant facts are concerned) only on the balance of probabilities and not as a certainty. So much is well established. It reflects the ordinary burden of proof in civil litigation. However, a recent decision of the Upper Tribunal (Tax and Chancery Chamber) concerning the acquisition of prescriptive easements shows that the practical hurdles to establishing a legal right by long use are less than may commonly have been thought.

In order to establish a prescriptive right of way, use for a continuous period of at least 20 years must be shown. The use must be such as to carry to the mind of a reasonable person in possession of the servient land the fact that a continuous right of enjoyment is being asserted and ought to be resisted if the right is not recognised and if resistance to it is intended. Further, the use must be 'as of right' (or, more accurately, 'as if of right').

Use 'as of right' means use which is: not contentious (i.e. in the face of objection/protest), not secret (i.e. open) and not with permission. The inherently negative nature of these elements – in particular the first and third – should be noted.

Consistent with general principle, the legal burden of proving that the use was 'as of right' is on the party claiming the prescriptive right. This is confirmed by *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 299, HL, *Thomas W Ward Ltd v Alexander Bruce (Grays) Ltd* [1959] 2 Lloyd's Rep 472, CA and *Patel v W H Smith (Eziot) Ltd* [1987] 1 WLR 853, CA. The question arises, however, as to what evidence needs to be adduced to satisfy that legal burden.

*Welford v Graham* [2017] UKUT 297 (TCC) was a fairly typical case of a claim to a prescriptive right of way over a yard. As is not uncommon, the use of the access relied on was historical and occurred at times when both would-be dominant and servient tenements were owned by predecessors in title to the parties to the litigation. The evidence of use went back, as it often does in such cases, into the mists of time.

At trial [2017] UKFTT 0058 (PC) the claimants, by calling various witnesses, were able to demonstrate that vehicular and pedestrian passage via the route in question had been enjoyed for many years. However, their case then hit the buffers.

The problem was that the FTT held that the burden of proving that such use had been without permission at all relevant times (through the successive ownerships of the properties) had not been discharged by the claimants. There was, in the view of the FTT, 'an absence of evidence' in this regard. The FTT said at [52]:

*'It is impossible to prove a negative, but there must be something to tip the balance of probabilities and to show ... that it was more likely than not that [a previous owner of the claimant's land] did not have permission to use the yard ... and there is simply no evidence either way'.*

So the claim failed.

The claimants appealed. On appeal they took what seems to have been a new tack. They argued that, despite the *legal burden* resting on them, there is an *evidential presumption* that, in the case of long use which is open and of a quality which brings home to a reasonable servient owner that a right is being asserted, that the use is 'as of right'.

Morgan J agreed. He held that a line of old authority (separate to the above cases dealing with the legal burden of proof), including *Campbell v Wilson* (1803) 3 East 294 and *Dalton v Angus & Co* (1881) 6 App Cas 740, HL, does indeed support the existence of a such an evidential presumption.

The existence of the presumption is significant because it means that:

- (1) Use of the claimed easement openly and in the manner in which a person rightfully entitled would have used it for the requisite period of time raises a presumption of an earlier grant of the easement.
- (2) It is thus not necessary for the claimant in the first instance to prove affirmatively that there was no permission for, and no ignored objection to, such use. Non-secret (i.e. open) use will, without more, be deemed to be non-permissive and non-contentious; the **dominant owner** need **not** prove use *without* permission.
- (3) The evidential presumption of use 'as of right' may be rebutted by evidence that the use was with permission and/or despite protests – but this will require the defendant (servient owner) positively to assert, and to make out, one of the vitiating circumstances.
- (4) It is thus the **servient owner** who has the evidential burden of raising, and calling evidence to support, a plea

## Prescriptive easements - a glass half-full: out with the negative; in with the positive continued



that the use was with permission (or that there were objections which rendered the use contentious) and therefore not 'as of right'.

- (5) If (but only if) evidence of that nature is adduced, the court will decide on the evidence whether the presumption has been rebutted.

The presumption made all the difference to the result in *Welford v Graham* on appeal. It did not matter that the claimants could not prove that there had not been consent because the defendants had not called any evidence to rebut the presumption. The defendants had not put forward any positive case to support a finding that the use of the yard as an access had ever been with the permission of any past owner of the yard; they had merely relied on the claimant's inability to prove the absence of permission.

Therefore, the appeal was allowed and the claimed right of way established.

Morgan J referred to the existence of the evidential presumption making very good practical sense. So it does. Without it, a claimant would have to call positive evidence to disprove: (a) the existence of an express permission at any material time; (b) any facts from which an implied permission might be drawn during the entire relevant period; and (c) the existence of any objections to the use (in the form of e.g. correspondence and signs) over the years. Given that prescriptive easements are acquired over decades and that the benefitting and burdened lands often change hands in the meantime, very often this would be a practical impossibility. What is more, where no suggestion of any past permission or objection is advanced, the rejection of a claim on that footing would be rather nonsensical.

The appeal decision in *Welford v Graham*, which reflects a position in law which may otherwise have been overlooked, is to be welcomed. As was recognised at first instance, "it is impossible to prove a negative". The law should surely set its face against insistence on the impossible. It makes far more sense to say that, where a legal ingredient of a claim is negative in nature, the evidential onus lies on the defendant to assert and set up a contrary positive case on the facts – which, if proved, will see the claim fail for non-satisfaction of the legal element.

The practical result of *Welford v Graham* is that, compared with the received wisdom, the scales have rather tilted in favour of those claiming rights by prescription. Provided always that unbroken open long use for the requisite period can be demonstrated by the dominant owner, an otherwise good claim will not be undone simply because (at the remove in time, from the occurrence of the underlying events, when the dispute comes to be litigated) there is a dearth of evidence regarding issues of (i) permission or no and/or (ii) contentious use or no. The presumption rescues the claimant in that scenario. On such issues the onus has essentially been reversed; it is now firmly placed on the shoulders of the party seeking to resist the claim. The message for servient owners is that merely putting the claimant to proof is unlikely to suffice; effective opposition is likely to require an active contest.

All in all, *Welford v Graham* should make prescriptive easement claims more manageable and viable for claimants. Expect greater numbers in the future – *presumably*.

## Keeping the Title Clean: Unwanted Notices and Restrictions

by Adam Rosenthal



Under the Land Registration Act 2002 ("LRA 2002"), interests belonging to third parties may be protected by the entry of a notice and / or a restriction. However, it is possible that the system for the entry of notices and restrictions can thwart or, at least, hinder the alienability of land. Consider the following somewhat extreme scenarios.

A is the registered owner of an office building with a large forecourt. A enters discussions with B, the adjoining owner, for the grant of rights to park in the forecourt and the right to services across it. However, the discussions come to nothing. B, however, feels aggrieved and believes that he has been wronged by A and enters a unilateral notice against A's title. A manages to persuade B to remove the notice, but they fall out again and B subsequently lodges another notice. A applies to remove it, B objects, but the Registry declares the objection "groundless" and the notice is removed. The following day, B enters yet a further unilateral notice. And so on.

At around the same time, A granted a right of pre-emption over some land at the rear of the office building to C. That right of pre-emption was the subject of a restriction on the register, providing that no disposition of A's land could be registered without a certificate signed by C confirming that the right of pre-emption had been complied with. A wishes to sell the land in question. He offered it to C who ignored the offer. However, C refused to provide a certificate to enable a successor to be registered. The prospective purchaser eventually lost patience and declined to proceed. Subsequently another purchaser came along and, again, C ignored A's requests to provide a certificate. Although A applied to the Registrar to disapply the restriction, C objected and before the issue could be resolved, the further sale fell through.

A notice is an entry in the register in respect of the burden of a registered estate or charge: LRA 2002, s.32(1). The entry of a notice does not mean that the interest to which it relates is valid, but rather that the priority of such an interest, if valid, is protected for the purposes of s.29 and 30: s.32(3). A notice may be entered by the party claiming the benefit of the notice and the registered proprietor, jointly. This is called an "agreed notice".

Difficulty, however, can be caused by the entry of a "unilateral notice". Anybody can apply to the Registrar to register a unilateral notice, claiming the benefit of an interest in the registered title. Rule 83 of the Land Registration Rules 2003 provides that an application for a unilateral notice must be made using form "UN1". This form requires the applicant to state the nature of the interest claimed. Upon receipt, the Registrar will consider whether the UN1 form discloses, on its face, a registerable interest and, if it does, will enter the unilateral notice. Notice of the entry must then be given to the registered proprietor under s.35 and the registered proprietor can apply, under s.36, to cancel the unilateral notice.

Although the mere entry of the notice does not guarantee the validity of the interest it purports to protect, the existence of a notice on a registered title can make it impossible to deal with the title.

If the registered proprietor applies under s.36 to cancel a notice on the ground that the beneficiary is not entitled to have it registered against the title, the Registrar must notify the beneficiary of the notice of the application and if he objects, the Registrar must consider whether the objection is "groundless": s.73(6). If it is, it may be rejected and the application to cancel the notice will proceed. If it is not groundless, the disputed application must then be referred to the Land Registration Division of the First Tier Tribunal (Property Chamber) under s.73(7).

Another means of protecting an interest in registered land is by the entry of a restriction. This operates differently. A restriction regulates the circumstances in which the disposition of a registered estate or charge may be the subject of an entry in the register: s.40(1). It may prohibit the making of an entry in the register in respect of any disposition or a disposition of a specified kind or it may prohibit the making of an entry until the occurrence of a specified event, such as the giving of notice, obtaining consent or an order of the Court: s.40(2) & (3). By s.40(2), the Registrar has power to disapply a restriction. A restriction may be entered by the registrar if it appears "*necessary or desirable*" for the purpose of (a) preventing invalidity or unlawfulness in relation to dispositions of a registered estate or charge, (b) securing that interests which are capable of being overreached are overreached or (c) protecting a right or claim in relation to a registered estate. However s.42(2) provides that no restriction may be entered under (c) to protect the priority of an interest which is or could be the subject of a notice.

One material difference between the entry of a restriction and a notice is that a restriction may only be entered if the Registrar is satisfied of the matters in s.42(1) whereas a unilateral notice may be entered without any investigation into the veracity of the underlying claim by the applicant. Another difference is in the mode of operation. Notices regulate priority only. Restrictions can prevent the completion of dispositions, subject to the terms of the restriction. They are therefore, necessarily, more draconian in their effect.

However, in each case, there is scope for third parties to interfere with the freedom of the registered proprietor to

# Keeping the Title Clean: Unwanted Notices and Restrictions

continued

dispose of his property.

In the case of notices, the register proprietor's remedy lies in s.77(1) which provides that a person must not exercise the right to apply for the entry of a notice "without reasonable cause". The meaning of "without reasonable cause" was considered in *Fitzroy Development Ltd v Fitzrovia Properties Ltd* [2011] EWHC 1849, where it was held that a person with a reasonably arguable case in support of the existence of the interest claimed had "reasonable cause" to enter a unilateral notice to protect it, even if the court later ruled against the existence of the interest claimed.

In *Nugent v Nugent* [2015] Ch. 121, Morgan J. held that where a notice is registered on the application of a person who did not have reasonable cause, that person has committed a statutory tort under s.77. The Judge commented, at [23] as follows:

*"I can see no difficulty in principle which would prevent a court from making an order, before a person applies to register a unilateral notice without reasonable cause, to restrain such a person from committing such a tort. I can also see no difficulty in principle which would prevent a court, in a case where a person has registered a unilateral notice without reasonable cause, from making an order against that person requiring him to apply for the removal of the notice under section 35(3). If an application were made for such orders on an interim basis, the usual approach in American Cyanamid v Ethicon Ltd [1975] AC 396 and I or Nottingham Building Society v Eurodynamics Systems plc [1993] FSR 468 (on appeal, at [1995] FSR 605) would be applied."*

In many cases, the registered proprietor will not be aware of a third party's intention to enter a unilateral notice until notified that the application has been completed and the notice registered. However, as Morgan J. said, even in such a case, it would be possible to obtain interim relief requiring the notice to be removed. In either case (whether an order is obtained restraining an applicant for registering a notice, or requiring the applicant to apply to the Registrar to remove a notice) the registered proprietor would need to adhere to the *American Cyanamid* principles, which, in most cases would require a cross-undertaking in damages and evidence that the balance of convenience favours the order which is sought (e.g. because a sale is pending which would otherwise be thwarted).

In the recent case of *Ghadami v Bloomfield and others* [2017] EWHC 2020 (Ch), Norris J. made an interim order restraining the claimant from registering further unilateral notices against certain properties held by three of the defendants. The claimant had been claiming an interest in those properties by proprietary estoppel for many years and there was a pattern of unilateral notices being entered and the removed

by the Registrar on the application of the proprietors. After upholding the decision of a Master to strike out the claimant's claim, which included claims in relation to the properties in question and making a civil restraint order against the Claimant, Norris J. applied the obiter dicta of Morgan J. in *Nugent v Nugent* to grant an interim injunction restraining the claimant from entering any further unilateral notices against the properties.

S.77 applies where a person exercises the "right to apply for the entry of a notice" without reasonable cause. If a person has entered a notice with reasonable cause (because of an arguable case to be entitled to an interest) but it then becomes clear that the underlying case is not reasonably arguable (e.g. because new evidence emerges or a conditional contract lapses), it is not clear whether the statutory language is capable of extending to a case where the beneficiary of a notice fails to take action to remove the notice. The point was raised, but was not decided, in *Fitzroy Development Ltd v Fitzrovia Properties Ltd* [2011] EWHC 1849. The answer might lie in s.77(1)(c), by which the statutory tort is also committed by someone who, without reasonable cause, exercises the right to object to an application to the registrar. If the beneficiary of the notice objects to the proprietor's application to cancel the notice in this situation, he could be liable.

Ultimately, if a notice remains on the register which has no foundation, the proprietor can make an application to have it cancelled under s.36 or can apply to the court for an order requiring the removal of the notice. In *Nugent v Nugent*, Morgan J. considered the authorities under the Land Registration Act 1925 under which the Court exercised its inherent jurisdiction to vacate cautions and held that this applied also to notices under the LRA 2002. Where a claim to a unilateral notice is unsustainable, the court will order it to be vacated. Where the claim is properly arguable, pending a trial of the underlying issues, the court might require an undertaking in damages from the beneficiary of the notice in order to leave it in place. However, the court must also balance the position of the party who has entered the notice with that of the registered proprietor. Accordingly, where, as in *Nugent*, the registered proprietor needs to sell or charge the subject property in order to raise funds to defend the claim, the court can order that the notice be vacated and grant an interim injunction against the registered proprietor restraining any charge or disposition, subject to carefully defined exceptions to enable him to raise the necessary finance (following the route set by Templeman J. under the Land Registration Act 1925 in *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch. 146).

If the entry of a unilateral notice without reasonable cause causes loss to the registered proprietor (e.g. the loss of a development opportunity or the loss of a sale in circumstances

---

## Keeping the Title Clean: Unwanted Notices and Restrictions

continued

---

where the delay in finding another purchaser will, itself, cause loss), a claim for damages could be brought under s.77 of the LRA 2002. Such a claim was made in *Fitzroy Development Ltd v Fitzrovia Properties Ltd* (above), but failed because it was held that the notice had not been entered without reasonable cause.

By s.77(1)(b) the statutory tort is also committed if a person exercises the right, without reasonable cause, to apply for a restriction. However, it does not apply if a restriction is entered (as in the example, above) on terms which require the consent of a named person to a disposition and that person unreasonably withholds his consent. This issue arose in the recent decision of the Upper Tribunal (Tax and Chancery Chamber), on appeal from a decision of the Land Registration Division of the First Tier Tribunal (Property Chamber) in *Law v Haider* [2017] UKUT 212 (TCC) (also a decision of Morgan J.). One of the issues which arose in that case was whether the First Tier Tribunal was correct to reject an application by the beneficiary of an ineptly worded right of pre-emption (contained in a Tomlin Order) to enter a restriction to protect the right of pre-emption and one of the arguments against that course was that there was evidence of the grantees of the pre-emption right having previously acted in a way which caused difficulties for the registered proprietors when attempting to sell their property. It was therefore argued that it would be inappropriate to protect the right of pre-emption with a restriction which required the co-operation of the grantees on any future disposition of the registered title. In rejecting this as a reason for refusing to enter a restriction, Morgan J. referred to the jurisdiction of the Court to grant interim relief as explained in *Nugent v Nugent*. He said (at [76]):

*“If the Laws were to act wrongfully in withholding a certificate referred to in the restriction, then the Haiders could take steps to remedy the position. They could apply to the registrar to disapply the restriction. That procedure might take time if the Laws objected and the objection had to be determined by the FtT. Another possibility would be for the Haiders to apply in the Chancery Division for an order vacating the restriction under the jurisdiction recognised in *Nugent v Nugent* [2015] Ch. 121. That jurisdiction can be exercised on an interim application to the court and the established practice is to adopt a robust approach to the determination of any issues between the parties. Further, if the Laws showed that they had an arguable case to maintain the restriction, the court would have power to permit the restriction to remain but only if the Laws gave an undertaking in damages.”*

The jurisdiction of the Court to intervene where third parties seek to encumber registered titles without good cause or for ulterior motives should not be overlooked. The LRA 2002 contains procedures for the removal of notices or restrictions which are wrongfully impeding dispositions or other dealings with registered titles, but the proprietor is in the hands of the Registrar as to the procedure and the time taken by the process might, itself, prevent a transaction from proceeding. In such a situation, the court has powers to act swiftly. In cases where the merits are finely balanced, there is unlikely to be any quick fix. But, where a third party is seeking, for whatever reason, to inhibit dealings with a registered title without good cause, the court has ample powers to grant interim and final relief, in support of the right of a registered proprietor to deal with his title.

## Estoppel in Pre-Contractual Negotiations

by Gavin Bennison



### West End Commercial Ltd v London Trocadero (2015) LLP [2017] EWHC 2175 (Ch)

When one party to a contract, such as a licence to occupy property, objects to enforcement of the contract according to its terms, they may allege that the other party is estopped from doing so. The recent decision in *West End Commercial Ltd v London Trocadero* (2015) LLP [2017] EWHC 2175 (Ch) is a useful reminder that such arguments need to be properly analysed, and that due attention must be given to the requirements of the specific form of estoppel relied upon. *West End Commercial* concerns two types of estoppel: promissory estoppel and proprietary estoppel.

The facts were as follows: the defendant licensor (“LT”) granted a company, G7 Group Limited (“G7”), a licence to occupy a retail unit for one year, terminable by LT on 28 days’ written notice at any time from 5 months into the term. LT chose not to exercise the break. Towards the end of the term, Mr Abrar, the sole director of G7, commenced negotiations with LT for the grant of a new licence of the unit. The licensee was to change, from G7 to the claimant company, WECL, of which Mr Abrar was also the sole director.

Mr Abrar alleged that, during negotiations over the terms of the draft renewal licence, he asked that a break clause exercisable by LT on 28 days’ notice be deleted. LT’s managing agent responded that it was not possible to amend the wording; however, provided WECL paid the licence fee as required, and that there were no other breaches of the licence, LT would not exercise its break. Mr Abrar informed LT’s agent that he would rely on this assurance, and on this basis WECL proceeded to complete a licence containing a break exercisable by TL on 30 days’ written notice. There was no written record of the assurance.

On 14 July 2017, only about one week into the term of the renewal licence, LT exercised the break, and entered into a new, short-term licence of the unit in favour of a third party on similar terms.

WECL then applied for, and obtained, interim injunctive relief restraining LT from giving notice to terminate the WECL licence. WECL pleaded estoppel: LT’s agent had given an unequivocal representation that LT would only exercise the break clause if WECL was in breach of the terms of the licence. LT had relied to its detriment upon this representation by entering into the renewal licence. So LT was estopped from exercising the unilateral break.

On the return date, the estoppel argument was again advanced. However, Snowden J, applying *American Cyanamid*

principles and assuming the facts in LT’s favour pending trial, rejected it. His Lordship’s reasoning was as follows:

- (1) The Particulars of Claim did not specify the type of estoppel which had arisen. It was incumbent on WECL to do so, as English law lacked a unified theory of equitable estoppel based simply upon notions of unconscionability. Each ‘sub-species’ of estoppel had its own particular requirements: [28].
- (2) The facts alleged by WECL could not found a **promissory** estoppel. A promissory estoppel can only arise where (1) one party to a transaction makes to the other a clear and unequivocal promise or assurance that she will not enforce her strict legal rights; (2) the promise or assurance is intended to affect the legal relations between the parties; and (3) before the promise or assurance is withdrawn, the promisee acts in reliance upon it, altering her position in such a way that it would be inequitable to permit the promisor to withdraw the promise or to act inconsistently with it. However, a promissory estoppel must be based upon an existing legal relationship, not an anticipated one: *Thorne v Major* [2009] 1 WLR 776 at [61], per Lord Walker. As WECL had no existing legal or other relationship with LT prior to the execution of the WECL licence, it could not rely on promissory estoppel.
- (3) The facts alleged were also incapable of founding a **proprietary** estoppel. A proprietary estoppel arises where (i) the defendant makes a promise or assurance, expressly or by implication, that the claimant is or will be entitled to an interest in specified property; (ii) the claimant subsequently relies to her detriment on the assurance; and (iii) it would be unconscionable for the defendant to resile from the assurance.<sup>1</sup> Snowden J, considering remarks by Lords Hoffmann and Walker in *Thorne v Major*,<sup>2</sup> concluded that proprietary estoppel requires that the claimant be promised a proprietary interest in land or other property. A mere personal interest, such as a contractual licence, is insufficient. As, WECL did not allege that it had been promised a proprietary interest in land, but rather simply the continuation of a licence for its contractual term, it could not rely on proprietary estoppel.

Accordingly, Snowden J held that, even assuming the facts in WECL’s favour, neither a promissory nor a proprietary estoppel could be made out. There was thus no ‘serious issue to be tried’.<sup>3</sup> The interim injunction granted by Henry Carr J was discharged.

<sup>1</sup> *Thorne v Major* at [2], per Lord Hoffmann, and [29], per Lord Walker.

<sup>2</sup> at [2] and [33].

<sup>3</sup> Snowden J further held that, in any event, WECL had not shown that it had relied to its detriment upon the assurance ([40]), and that even if WECL had shown a ‘serious question to be tried’, it would not be unjust in the circumstances to confine WECL to its remedy in damages ([47]-[55]).

# Estoppel in Pre-Contractual Negotiations

continued

Snowden J's judgment provides food for thought for practitioners considering situations where one party has represented, in a pre-contractual context, that it will refrain from enforcing a contractual agreement according to its terms following its execution.

Firstly, the decision adds weight to a body of authority in support of the proposition that an existing legal relationship is an essential element of promissory estoppel. This proposition has historically been controversial,<sup>4</sup> and it cannot be said that *West End Commercial* decisively settles the matter.<sup>5</sup> However, practitioners should now be very cautious before alleging that a promissory estoppel has arisen from an assurance made prior to the execution of the agreement to which it relates.

Secondly, the requirement for an existing legal relationship, if it exists, appears to be a question of form, and not one of substance. In *West End Commercial*, Mr Abrar was the sole director of both WECL and G7; the new licence was to take effect immediately upon the expiry of the existing licence to G7; and the terms of the licence were to remain substantially unaltered. The renewal licence was, nonetheless, a formally distinct contract from the G7 licence, and WECL a legally distinct entity from G7. Thus the court held that no promissory estoppel could have arisen in respect of the renewal licence prior to its execution.

Thirdly, the decision raises the question as to how the requirement of an 'existing legal relationship' would apply where a contract is renewed on the same or substantially similar terms between the *same parties*. Could an assurance not to enforce the first contract be relied upon following its renewal? Or would the assurance need to be re-stated at some point following the renewal? The answer seems most likely to be that, in order to found a promissory estoppel in relation to the renewal contract, there must be some evidence from which it can be inferred that the promisor's assurance is a continuing one.

Fourthly, Snowden J's clarification that proprietary estoppel requires the defendant to promise or assure the claimant an interest in land which is of a *proprietary* character is instructive. Whilst the Court may decide to *satisfy* a proprietary estoppel by the grant of a mere personal right (such as a licence to use the land in question), no such estoppel will arise in the first place unless the defendant's acts or assurances can properly be characterised as having promised the claimant an interest in land of a proprietary character. This requirement is distinct

from the further requirement, affirmed in *Thorner v Major*,<sup>6</sup> that the promise or assurance must relate to identifiable property. It should be borne in mind, however, that *West End Commercial* was a commercial case. In a domestic context, where a greater degree of informality in the dealings between individuals is to be expected, the courts may be willing to tolerate a greater degree of imprecision in the promise or assurance.

Finally, when considering potential estoppel claims arising from statements made in pre-contractual negotiations, it is important not to overlook other potential causes of action, such as rectification or misrepresentation. If a claimant is able to show an objectively manifested common agreement which was intended to be reflected in the terms of final written document, and which persisted until the point of execution, the claimant may seek to rectify the document to accord with that common agreement.<sup>7</sup> Alternatively, where a party is able to prove that another party to an agreement misstated their present intention in the course of negotiations,<sup>8</sup> it may be possible to seek rescission of the agreement or damages under section 2(1) of the Misrepresentation Act 1967. In order to do so, however, the claimant would need to prove that the defendant subjectively intended to act otherwise than in accordance with its stated intention, which may be challenging.

Estoppel claims, though often advanced by claimants, present considerable legal and evidential difficulties. Navigating and distinguishing the various types of estoppel can be challenging. Pre-contractual negotiations might, for instance, give rise to one or more of: (i) an estoppel by representation, arising from a statement of present fact; (ii) a proprietary estoppel, arising from a promise or assurance as to the claimant's entitlement to a proprietary right, or (iii) estoppel by convention, where the parties proceed on an assumed state of affairs (whether factual or legal) underlying the transaction between them. It appears, however, in light of *West End Commercial*, that promissory estoppel is unlikely to arise if there is no pre-existing legal relationship between the parties.

The firm advice to any client therefore has to be: if you choose to enter into a contract knowing that you do not wish it to be enforceable against you according to its terms, but if for whatever reason you are unable to procure a suitable variation to the text of the agreement, you should ensure that a variation is recorded in writing in a side letter or collateral contract. Reliance upon oral assurances made during the course of negotiations is a recipe for future difficulties.

<sup>4</sup> See the discussion in Spencer Bower: *Reliance-Based Estoppel* (5th Ed., 2017) at 14.22 – 14.25.

<sup>5</sup> given for instance, the contrary dicta of Mance LJ in the Court of Appeal decision in *Baird Textile Holdings v Marks and Spencer* [2001] EWCA Civ 274 at [91], that the parties should have the objective intention 'to make, affect or confirm' a legal relationship.

<sup>6</sup> at [61], per Lord Walker.

<sup>7</sup> *Chartbook Ltd v Persimmon Homes* [2009] 1 AC 1101.

<sup>8</sup> Such a statement may found a misrepresentation claim: *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483, per Bowen LJ.

## The Curse of the Freebie

by Oliver Radley Gardner



It is sometimes said that “free advice is worth exactly what you paid for it”. That flippant opening needs a qualification: if the advice given is negligently wrong, then the giver of the advice may well find him- or herself liable in tort for the negligent performance of services, or negligent misstatement. It ought now to be abundantly clear that the mere fact that the advice was free will not afford a defence to any claim. Therefore, another (equally flippant) opening line for this short note could have been “no good deed goes unpunished”.

Is it possible to distil any principles from the cases in which gratuitous assistance rendered to a friend or neighbour (but by the time of the Court action, former friend or neighbour) attracts liability? To a degree the answer is obviously “depends” – we know that responsibility for an act triggering a duty of care can be assumed even in the absence of a proper contract (or event concurrently with a contract) between the Claimant and the Defendant. That is what negligent misstatement is all about. When the Court will find such a duty is a question of fact and law. Nonetheless, a look at the cases on this is instructive.

The first case that requires consideration is *Chaudhry v Prabhakar* [1989] 1 W.L.R. 29. Ms Chaudhry had just passed her driving test. Now she just needed a car. The problem was that she knew nothing about cars. As luck would have it, she had a close friend, Mr Prabhakar, who did. He wasn't a mechanic, but he was an car enthusiast. He agreed to help her out. He found a car which was being sold by a panel-beater whom he did not know. Although it was repaired, Mr Prabhakar realised that the bonnet had crumpled, and that it must therefore have previously been in an accident. He did not check that with the panel-beater. Unwisely, Mr Prabhakar told Ms Chaudhry that the car was in excellent condition, that the panel-beater was a friend, and that the car had not been in an accident. When the car had been purchased on that advice, and was subsequently checked, it turned out to be a lemon. On appeal, Mr Prabhakar conceded that he owed a duty of care. It is maybe not surprising that the Court of Appeal found by a majority (Stewart-Smith and Stocker LJ) that Mr Prabhakar was liable in tort. The statements were clearly wrong, and were intended to be relied upon. Further, Mr Prabhakar was acting as Ms Chaudhry's agent in going into the world on her behalf to find a car. Such agents owed their principals a duty of care, even if the services provided were gratuitous. Stuart-Smith LJ explained that (page 34):

*“I have no doubt that one of the relevant circumstances is whether or not the agent is paid. If he is, the relationship is a contractual one and there may be express terms upon which the parties can rely. Moreover, if a paid agent exercised any trade, profession or calling, he is required to exercise the degree of skill and diligence reasonably to be expected of a*

*person exercising such trade, profession or calling, irrespective of the degree of skill he may possess. Where the agent is unpaid, any duty of care arises in tort. Relevant circumstances would be the actual skill and experience that the agent had, though, if he has represented such skill and experience to be greater than it in fact is and the principal has relied on such representation, it seems to me to be reasonable to expect him to show that standard of skill and experience which he claims he possesses. Moreover, the fact that principal and agent are friends does not in my judgment affect the existence of the duty of care, though conceivably it may be a relevant circumstance in considering the degree or standard of care.”*

The Court of Appeal did not, however, confine itself to saying that free services are subject to tortious duties of care only if they amount to a gratuitous agency relationship. The fact of a (gratuitous) agency simply served to underline the fact that, although the relationship between the parties was in origin social, the activities of Mr Prabhakar when looking for a car for Ms Chaudhry had assumed a business character:

*When considering the question of whether a duty of care arises, the relationship between the parties is material. If they are friends, the true view may be that the advice or representation is made upon a purely social occasion and the circumstances show that there has not been a voluntary assumption of responsibility.*

At page 482 of *Hedley Byrne v Heller and Partners* [1964] A.C. 465 Lord Reid said:

*“The law ought so far as possible to reflect the standards of the reasonable man, and that is what Donoghue v. Stevenson sets out to do. The most obvious difference between negligent words and negligent acts is this. Quite careful people often express definite opinions on social or informal occasions even when they see that others are likely to be influenced by them; and they often do that without taking that care which they would take if asked for their opinion professionally or in a business connection. The appellant agreed that there can be no duty of care on such occasions, and we were referred to American and South African authorities where that is recognised, although their law appears to have gone much further than ours has yet done.”*

# The Curse of the Freebie

continued

*But where, as in this case, the relationship of principal and agent exists, such that a contract comes into existence between the principal and the third party, it seems to me that, at the very least, this relationship is powerful evidence that the occasion is not a purely social one, but, to use Lord Reid's expression, is in a business connection. Indeed the relationship between the parties is one that is equivalent to contract, to use the words of Lord Devlin at page 530, save only for the absence of consideration.*

Stocker LJ also sought to delineate a boundary between purely social matters on the one hand, and relationships which had moved into the "business" sphere on the other: he said that "... in my view, in the absence of other factors giving rise to such a duty, the giving of advice sought in the context of family, domestic or social relationships will not in itself give rise to any duty in respect of such advice". May LJ dissented. He thought that the imposition of a duty of care in the context of a social relationship risked distorting such relationships. It will immediately be seen that the boundary between a definitive utterance on a social occasion (the example in *Hedley Byrne*) and a more sustained course of activity (the case in *Chaudhry*) might be quite hard to draw.<sup>1</sup>

So we go to *Lejonvarn v Burgess & Anor* [2017] EWCA Civ 254. The Burgesses owned a house which had a garden. The garden needed landscaping. Mrs Lejonvarn is a former friend and former neighbour of the Burgesses. She is an architect. She agreed to help the Burgesses out, and Mrs Lejonvarn sorted out contractors to get the underlying work done, and was de facto project manager. The idea was that she would then be paid for the subsequent lighting and planting of the garden, when the heavy lifting had been done. She never got that far as the heavy lifting was done badly by the contractors. The Burgesses dismissed Mrs Lejonvarn and said it would cost over £265,000 to put it all right. They said that their neighbour in fact was also their neighbour in law for the purposes of the test in *Donoghue v Stephenson* [1932] A.C. 562. Being a neighbour in fact can be nice (but sometimes not). The problem with being a neighbour in law is that it is not nice at all – the only reason that you are called that is so that you can then be sued, and that is what the Burgesses promptly did. They won at first instance ([2016] EWHC 40 (TCC)), and established that a tortious duty of care was owed on a preliminary issue. The basis for that duty was that Mrs Lejonvarn had assumed responsibility by entering into the *Hedley Byrne* type "relationship akin to contract". Although there was no consideration here (and no contract), there may as well have been.

As was explained in *White v Jones* [1995] 2 A.C. 207<sup>2</sup> by Lord Browne-Wilkinson (at 273-274), "assumption of responsibility [is] for the task not the assumption of legal responsibility ... If the responsibility for the task is assumed by the defendant he thereby creates a special relationship between himself and the plaintiff in relation to which the law (not the defendant) attaches a duty to carry out carefully the task so assumed". It followed that there were two classes of recognised case where the principle operated to impose a duty in law (though the categories are not closed):

*"(1) where there was fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice. In both these categories the special relationship is created by the defendant voluntarily assuming to act in the matter by involving himself in the plaintiff's affairs or by choosing to speak."*

Where the facts fit either category, the alternative three stage test for imposing a duty of care recognised in *Caparo Industries plc v Dickman* [1990] UKHL 2 was displaced: see *Customs and Excise v Barclays Bank plc* [2006] UKHL 28. Under that approach, the Court would need to ask not whether there has been an assumption of responsibility, but rather whether the loss was reasonably foreseeable; whether there was a sufficient relationship of proximity, and whether in all the circumstances it is fair, just and reasonable to impose a duty of care. This meant that Mrs Lejonvarn could not argue that the duty was not fair, just and reasonable under the third limb of the *Caparo* test (though the point is somewhat academic, as the authorities show that the same considerations under that third limb also ought to influence the Court in considering whether a duty has arisen on the assumption of responsibility test). In any event, it was found to be fair, just and reasonable to impose a duty. That duty was a duty of care and skill in the provision of architectural and project management services. This included a duty to direct, supervise and inspect the works being done, and keeping an eye on timing and progress, control cost and budgeting, and other matters. As a consequence of her initial offer of help to her neighbours, Mrs Lejonvarn suddenly found herself lumbered with a duty of care in the provision of architectural services of:

- (1) project managing the Garden Project and directing, inspecting and supervising the contractors' work, its timing and progress;

<sup>1</sup> For consideration of friendship and whether this gives rise to a fiduciary duty, see *Hurst v Hone* [2010] EWHC 1159 (QB), in which one of the victims was the appropriately-named "Mr Innocent", a co-claimant in that case but a dream name for a Defendant.

<sup>2</sup> The case of the solicitor who negligently failed to write a will at all, thereby depriving the expectant quasi-heirs of their *spes successionis*.

---

# The Curse of the Freebie

continued

---

- (2) preparing designs to enable the Garden Project to be priced sufficiently for a fairly firm budget estimate to be prepared;
- (3) preparing designs to enable the Garden Project to be constructed;
- (4) receiving applications for payment from the contractor, and advising and directing the Claimants in respect of their payment; and
- (5) exercising cost control by preparing a budget for the works, and overseeing actual expenditure against it;

This is plainly an area of developing jurisprudence, though we may have strayed from what Lord Reid said in *Hedley Byrne*, and are now more ready to impose liability for free advice and services rendered gratis than perhaps he might have been. From the above cases, we can see that the boundaries of liability are exceptionally fluid, but also that in both cases the conduct of the alleged tortfeasor was protracted, related directly to some expertise the alleged tortfeasor, and was plainly intended to be relied upon by the recipient of the statement or services. Against that background, one can suggest the following:

- (1) Whether free advice or services lead to liability in tort will depend on the facts;
- (2) Relevant factors include:
  - a. Whether the Defendant has a special expertise or holds himself or herself out as having such expertise.
  - b. Whether the advice or services were related to that skill.
  - c. Whether the advice was plainly intended to be acted on.
  - d. The context of the advice or service provided (was it a request for a specific reference or a general discussion of a third party? Was it financial advice or a share tip shared by a friend?).
  - e. The type of loss caused – whether property damage or pure economic loss.
  - f. Whether the course of conduct was a “one off” or an extended course of dealing.
- (3) The content of the duty, and the standard of care for its performance, is shaped by the underlying facts of the case.

## Voidable and no mistake

by Toby Boncey



In *NRAM Ltd v Evans* [2017] EWCA Civ 1013, due to an internal administrative error, NRAM mistakenly submitted an e-DS1 to discharge a registered legal charge held over the Property of Mr and Mrs Evans, despite certain sums remaining secured by that charge.

NRAM had successfully claimed to rescind the e-DS1 for mistake. HHJ Milwyn Jarman QC had further held that since Mr and Mrs Evans were in possession of the Property as registered proprietors, rectification of the register could only take place if they had contributed to the error by lack of proper care.

Having found that Mr and Mrs Evans had contributed to NRAM's error through a lack of proper care (because they wrote to NRAM referring to one, but not all, loans secured by the charge), the Judge ordered that the register should be "altered and/or brought up to date by re-registration of NRAM's charge against the Property...".

One of the grounds upon which Mr and Mrs Evans sought to appeal was that the Judge had erred in ordering rectification to reinstate the charge to the register because (a) there was no mistake which required correction or (b) if there was, the appellants had not caused or substantially contributed to the mistake.

Before the Court of Appeal, NRAM sought to uphold the order below on the alternative bases that:

- (1) NRAM was entitled to an order for alteration for the purposes of correcting a mistake and the order would not prejudicially affect the appellants' title so it would not amount to rectification;
- (2) even if such an order would amount to rectification, it would be to correct a mistake to which the appellants had, by lack of proper care, substantially contributed and/or it would in any event be unjust for the alteration not to be made; or
- (3) following rescission of the e-DS1, NRAM was entitled to an order altering the register to bring it up to date under paragraph 2(1)(b) of Schedule 4 to the Land Registration Act 2002 ("LRA 2002").

The Chief Land Registrar intervened on appeal and made arguments designed to avoid the result that an indemnity was payable to the appellants under Schedule 8 LRA 2002 since there was neither rectification nor a mistake whose correction would involve rectification. In particular, it was argued that:

- (1) rectification under Schedule 4 involves the correction of a mistake in the register;
- (2) here, removal of the charge from the register was not and did not generate a mistake in the register since, although the e-DS1 was voidable due to NRAM's mistake, it was a

valid disposition at the time of alteration of the register; and

- (3) the subsequent rescission of the e-DS1 did not retrospectively convert the deletion of the charge into a mistake; but
- (4) the register did require alteration to bring it up to date and the Judge was right to so order.

The Court of Appeal held that there is no mistake where the registrar registers a disposition that is voidable but has not been avoided at the date of registration. If a change in the register is correct at the time it is made it cannot be called a mistake. Accordingly, there is a distinction between void and voidable dispositions; alteration pursuant to a void disposition is a mistake, but alteration to reflect a voidable disposition is not.

The authors of *Emmet and Farrand on Title* said that "The implications of this legalistic distinction... [have] been described as outrageous". By contrast, in the view of Kitchen LJ, the distinction was "principled and correct" since "a voidable disposition is valid until it is rescinded" and although the disposition may have been made by mistake "it is entries on the register with which Schedule 4 is concerned".

It was further held that if the disposition is later avoided, this cannot convert the entry into a mistake. Otherwise "the policy of the LRA 2002 that the register should be a complete and accurate statement of the position at any given time would be undermined". It might be added that, otherwise, any disposition could render any earlier entry in the register mistaken, as opposed to out of date.

The Court of Appeal went on to hold that following avoidance of the voidable disposition, the register could be altered to bring the register up to date. Accordingly, the concern expressed by Jacob LJ in *Baxter v Mannion* [2011] that "it is difficult to see why... a transaction induced by fraudulent misrepresentation... could not be corrected once the victim had elected to treat it as void" did not cause any difficulty. However, this form of alteration would not be rectification, nor was there a mistake whose correction would involve rectification, so no indemnity would be payable.

This Court of Appeal's decision is to be welcomed since:

- (1) it provides clarity as to what constitutes a "mistake" within the meaning of Schedule 4 LRA 2002: the Schedule is concerned with entries in the register, not transactions;
- (2) it properly reflects the proper legal analysis of voidable transactions;
- (3) it does not subject the public purse to indemnity claims in circumstances where the register is updated to reflect the true (current) legal position;

---

# Voidable and no mistake

continued

---

- (4) the register may still be kept up to date following avoidance of a transaction; and
- (5) it provides reassurance to lenders whose securities are mistakenly discharged but upon which they continue to rely.

By way of some concluding observations:

- (1) Whether a matter gives rise to rectification or alteration will depend upon a careful analysis of the facts of the particular case- practitioners should be astute to distinguish between mistaken dispositions and mistakes in the register;
- (2) In cases of alteration (which do not involve rectification), the applicant does not require the consent of the registered proprietor in possession and nor is it necessary to show that the registered proprietor has by fraud or lack of proper care caused or substantially contributed to a mistake in the register, or that it would for any other reason be unjust for the alteration to be made;
- (3) The court must make an order for alteration of the register unless there are exceptional circumstances that justify not doing so: LRA 2002 Schedule 4 para 3(3) (rectification) and Land Registration Rules 2003 r126 (other alterations); and
- (4) Lenders should ensure where possible that their systems flag up all loans secured by an all-monies charge. If they do not do this and accidentally discharge a charge upon repayment of one, but not all, of the loans, as here, they will incur the expense of applying for alteration of the register and the costs of any attendant dispute.

## Latest News

### New Clerking Team

Falcon Chambers are delighted to announce that, since 1 June 2017, **Johnathan Stannard** has been promoted to the position of Senior Clerk, and **Mark Ball** has been promoted to First Junior. **Joanne Meah** has joined Chambers as Second Junior.

John and Mark have both been with chambers for a number of years, and will be well known to many of you. Joanne joins from Tanfield Chambers, where she was a Senior Practice Manager.

Our Joint Heads of Chambers, Jonathan Gaunt QC and Guy Fetherstonhaugh QC, comment:

*"We are very pleased that John is going to be our new Senior Clerk. He brings to the job a wealth of clerking experience, built up here over the last 10 years, and prior to that at Quadrant Chambers and at 5 Stone Buildings. Because of John's depth and breadth of experience in these Chambers, he knows our members and clients very well. We are delighted with the new team, which we are confident will help chambers to remain as one of the leading property sets providing excellent customer service to all our clients".*

John Stannard adds:

*"I am delighted to have been appointed Senior Clerk, and I look forward to working with Mark, Joanne and the rest of the clerking team at Falcon Chambers. Providing an excellent service to clients continues to be one of our main areas of focus, and I look forward to getting out and meeting as many of them as possible in the up-and-coming months."*

### Emily Windsor nominated for Real Estate Junior of the Year



Chambers are delighted to announce **Emily Windsor** has been nominated for real estate junior of the year at the Chambers UK Bar Awards.

### Paul Letman joins Chambers



Falcon Chambers are delighted to announce that Paul Letman (1987 call) formerly of 3 Hare Court will be joining Chambers on Monday 16th October.

Paul's practice is entirely property based, comprising the following main specialisms: (1) Leasehold reform (enfranchisement) claims, some 1967 Act work but mainly under the 1993 Act (2) Landlord & Tenant, both residential and commercial including service charge disputes, breach of covenant and forfeiture claims and right to manage (3) Real property with extensive experience of adverse possession and s.84 restrictive covenant applications (4) Agricultural tenancy and drainage work, particularly disputed succession and bad husbandry claims, and (5) Building & Construction work (international and domestic), particularly residential and NHBC building defects claims and adjudication.

Legal 500 2017 says of him *"Immensely knowledgeable and experienced in residential landlord and tenant work."*

Chambers UK Guide 2017 says *"He is able to identify issues extremely quickly and a pleasure to be against. He presents his case strongly but in a very affable manner."*

**Please contact John in the Clerks Room for any further information or to instruct Paul.**

## Latest News

### New Tenant Gavin Bennison



Falcon Chambers are pleased to announce that Gavin Bennison has successfully completed pupillage and will join Chambers as a tenant from 1st October 2017.

Gavin undertook pupillage under the supervision of Elizabeth Fitzgerald, Nathaniel Duckworth, Oliver Radley-Gardner and Mark Sefton.

As a pupil, he gained experience of the full range of Chambers work, working on cases concerning, amongst other areas, adverse possession, forfeiture, marine rights, agricultural tenancies, easements, freehold covenants and land registration.

As a second six pupil, Gavin was also led by Janet Bignell QC in the Chancery Division on two occasions, successfully obtaining and continuing a wide-ranging injunction restraining unlawful activities by protestors against hydraulic fracturing ('fracking'). This attracted considerable media attention.

Gavin has a particular interest in human rights claims as they arise in relation to property disputes.

Before coming to the Bar, Gavin obtained a first class degree in Geography (Part I) and Law (Part II) from St John's College, Cambridge. He came top of his year in Geography and sixth in his year in Law. Upon graduation, he returned to Cambridge to teach Equity at Sidney Sussex College whilst completing the BPTC at City Law School, in which he was graded outstanding.

Prior to commencing pupillage, Gavin worked as a paralegal for Stephenson Harwood LLP, assisting the property litigation process.

**Falcon Chambers September 2017 E-zine for UK Finance is now available online:** <http://emaild.ukfinance.org.uk/BCL-5203L-2CQ65XEVE4/cr.aspx>

### The Boundary Disputes Protocol

In 2014, members of these Chambers together with Nicholas Cheffings and Mathew Ditchburn of Hogan Lovells International LLP launched the Property Protocols website, as a free resource to property practitioners (see [www.propertyprotocols.co.uk](http://www.propertyprotocols.co.uk)). In our introduction, we expressed the hope that the Protocols would become a suite of documents that would outline, in readily understandable prose, a series of practical steps that parties should consider taking if they wish to avoid or minimise property disputes.

Our first two protocols sought to outline the steps that should help to prevent the spats that can arise on the occasion of dealings with leasehold title, and alterations to leased properties. Not all disputes are avoidable, but our strategy is to help parties to eliminate the arguments about process that usually bedevil litigation, and allow them to concentrate their time, energy and money on the substance of the issues in dispute.

For our third protocol we have turned to a different area of legal contention: the boundary dispute. The reasons are obvious: boundary disputes often become toxic very rapidly, leading the parties to spend considerable sums of money over tiny pieces of land. And at the end of the dispute (usually after the judge has ticked off both sides for behaving like idiots), the disputants still have to face each other across the fence.

The Protocol sets out a series of common steps which seek to guide the parties' behaviour to a successful outcome. It is accompanied by a guidance note, which supplements and explains the process. There is also a supplementary guidance note produced by David Powell FRICS of PSL Chartered Surveyors, on what to expect from surveyors in boundary disputes.

We think that this latest Protocol will help to eliminate or minimise the damaging friction that is inherent in boundary disputes, and steer the parties towards a successful compromise without resort to ruinously expensive proceedings – or at least to proceedings in which the issues for debate have been confined. The Property Litigation Association agrees with us, and has been kind enough to add its input and considerable support to the Protocol.

The Protocol, Guidance Note and Supplementary Guidance Note can be accessed free of charge on the Property Protocols website: [www.propertyprotocols.co.uk](http://www.propertyprotocols.co.uk).

*Guy Fetherstonhaugh QC*

The other authors of this Protocol are Stephanie Tozer and Jonathan Karas QC of Falcon Chambers and Nicholas Cheffings and Mathew Ditchburn of Hogan Lovells International LLP

A longer version of this article was published in the Estates Gazette on 23 September 2017.

## Latest News

### Karen Richards and Billie-Jean Marcelle

Chambers are proud to announce that receptionists Karen and Billie have been recognised by The Legal 500 as providing a service which is “impossible to fault in any way, shape or form”.

### Publications

The third edition of Wayne Clark and Tony Radevsky's book “Tenants’ Right of First Refusal” has been published.

Tenants’ Right of First Refusal is a thorough and authoritative guide to all aspects of residential tenants’ right of first refusal under the Landlord and Tenant Act 1987. This new edition has been fully updated to take account of the latest case-law such as *Artists Court Collective Ltd v Khan* [2016] EWHC 2453 (Ch).

The first supplement to the Second Edition of Adverse Possession by Stephen Jourdan QC and Oliver Radley-Gardner is now available.

This supplement bring the second edition, which was published in 2011, fully up to date.

### Agricultural Road Shows

This year Falcon has teamed up with Savills and Bonhams (Auctioneers) and held some Agricultural Seminar around the country.

Locations so far have been, Jockey Club Newmarket, Harewood Castle York, Cowdery House West Sussex, Ragley Hall Alcester, Hopetoun House Edinburgh.

Topics covered by members of chambers have been Estate Planning – The Legal View, Electronic Communications, Proprietary Estoppel, Possession for Development and the new Compulsory Purchase Code.

The last two remaining seminars for 2017 will be held at Somerley Park Hampshire and Chavenage House Tetbury.

### Cecily Crampin appointed to the council of the NARA



Falcon Chambers are pleased to announce that Cecily Crampin has been appointed to the council of the NARA, the Association for Property & Fixed Charge Receivers.



UK  
FINANCE  
2017 Associate

Chambers is pleased to be an associate member of UK Finance.



## Falcon Chambers Members

Derek Wood CBE QC	Joanne R Moss	Greville Healey
Jonathan Gaunt QC	Anthony Radevsky	Nathaniel Duckworth
Kirk Reynolds QC	Wayne Clark	Oliver Radley-Gardner
Guy Fetherstonhaugh QC	Barry Denyer-Green	Tamsin Cox
Timothy Fancourt QC	Paul Letman	Philip Sissons
Jonathan Karas QC	Gary Cowen	Joseph Ollech
Jonathan Small QC	Martin Dray	Cecily Crampin
Stephen Jourdan QC	Anthony Tanney	Jamie Sutherland
Janet Bignell QC	Catherine Taskis	Kester Lees
Caroline Shea QC	Emily Windsor	Ciara Fairley
	Mark Sefton	Toby Boncey
	Stephanie Tozer	Tricia Hemans
	Edward Peters	Julia Petrenko
	Adam Rosenthal	James Tipler
	Charles Harpum	Mark Galtrey
	Elizabeth Fitzgerald	Gavin Bennison



Falcon Chambers

Chambers Director: Edith A. Robertson

Senior Clerk: Johnathan Stannard

Falcon Court, London EC4Y 1AA

Telephone: 020 7353 2484 Fax: 020 7353 1261

DX 408 Chancery Lane

[www.falcon-chambers.com](http://www.falcon-chambers.com)

[clerks@falcon-chambers.com](mailto:clerks@falcon-chambers.com)

[@FalconChambers1](https://twitter.com/FalconChambers1)

**Disclaimer:** The articles in this publication are intended as a general guide only.