Falcon Chambers

Summer 2018

Newsletter

IN THIS EDITION:

Compiled by

Gavin Bennison

Mark Galtrey

From the editor: Jonathan Karas QC

Falcon Chambers takes pride in being the only set of Chambers at the Bar all of whose members are specialists in land law. Yet this does not mean that our work has a narrow compass. Lots of things happen on and to land which cause problems. So, as well as dealing with issues relating to commercial and residential property, members of Chambers have expertise in solving problems relating to and arising out of development, agricultural and rural law, infrastructure projects and natural resources and the environment.

In this edition, Jonathan Gaunt QC provides an overview of mines and minerals, beating the bounds of an area of law which despite its antiquity is of paramount economic importance. Gavin Bennison addresses another topic of considerable importance to landowners, developers and infrastructure providers: whether trespassers might deploy human rights law in order to frustrate and delay possession proceedings brought by private sector landowners and developers.

Stephanie Tozer and Cecily Crampin meanwhile turn their attention to mortgage receivership in light of the forthcoming publication of their book *"Mortgage Receivership: Law and Practice"*. This is due to be published in September 2018 and can now be pre-ordered. Their article discusses a series of recent cases in which the courts have considered whether interim injunctions should be granted to or against fixed charge receivers seeking to carry out their mandate.

Finally, James Tipler looks at a topical issue for those about to take their summer holidays (or planning what they might do with their flats while away). In *Bermondsey Exchange Freeholders Ltd v Koumetto* the Court accepted the submissions of James Tipler at first instance and Mark Sefton QC on appeal that a long residential tenant who let out their flat for bookings on *"AirBnb"* had granted sub-leases as opposed to mere licenses. The case is plainly of significance for landlords and long leaseholders of residential property as well as for the leisure industry.

These articles also show that property law is a dynamic field, its doctrines continually evolving in response to changing economic and technological circumstances. Falcon Chambers remains at the forefront of the law as it develops, and its members continue to be authors of the leading texts. This year will not only see Stephanie Tozer and Cecily Crampin's text on mortgage receivership, but has already seen the publication of the 15th Edition of *Muir Watt & Moss on Agricultural Holdings*. This leading practitioners work has been fully updated by a star team comprising Timothy Fancourt QC (now Mr Justice Fancourt), Caroline Shea QC, Catherine Taskis, Emily Windsor, Ed Peters and Jamie Sutherland. Meanwhile, later this year will see the publication of another new Falcon Chambers book: *"The Electronic Communications Code: Practice and Procedure"*, to which Guy Fetherstonhaugh, QC, Jonathan Karas, QC, Barry Denyer-Green, Wayne Clark, Oliver Radley-Gardner, Stephanie Tozer and Toby Boncey have all contributed. Members of Chambers have also spoken and lectured widely on the changes introduced by the new Code since it came into force last year.

On a more personal level, Chambers were delighted to see Timothy Fancourt QC appointed as a Judge of the Chancery Division, now Mr Justice Fancourt, in January 2018. In February, the appointment of Mark Sefton QC as Queen's Counsel and of Dr Charles Harpum as QC (Honoris Causa) shortly before his retirement, was a similar cause for celebration. We hope that you enjoy reading this edition of the Newsletter as well as finding it of some use.

Case Round Up

Burrows Investments Limited v Ward Homes Limited [2017] EWCA Civ 1577
The Claimant obtained planning permission to build a residential housing estate. Part of the land was sold to the Defendant housebuilder subject to the terms of a contract which included an overage agreement by which 30% of profits above a fixed ceiling were payable to the Claimant. Certain disposals were "Permitted Disposals" not triggering the overage payment. These included "the transfer … of land … for roads, footpaths, public open spaces or other social/community purposes". The Court of Appeal held, applying the *eiusdem generis* principle as a "flexible aid to construction", that a disposal of a completed unit to a registered social landlord was not a transfer of land "for social/community purposes" and so was not a permitted disposal. The words "social/community purposes" had to be read in light of the three specified purposes preceding them. The decision also extensively considered the availability of "negotiating damages" for breach of a negative contractual restriction. This issue has since been considered by the Supreme Court in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20. **Oliver Radley-Gardner** appeared on behalf of the successful appellant, led by Hugh Sims QC.

Starham Ltd v Greene King Pubs Ltd (County Court in Central London, 28 September 2017)
The Claimant claimed that the Defendant's use of a piece of land owned by it as a beer garden was a trespass. The Defendant claimed that it was entitled to use the land as a beer garden by virtue of a right created by a conveyance dated 24 August 1855, which was expressed to permit the Defendant's predecessor in title to enter and use the land "as Garden Ground and for agricultural purposes or for such other purposes except building…". The right was variously referred to in the conveyance as an easement and as a "licence to use". HHJ Parfitt upheld the Claimant's contention that the right was a contractual licence and so was not capable of binding a successor in title to the grantor. As a matter of interpretation, a licence was what the parties intended to create. Further, the right was not capable of being an easement because it was not granted to accommodate (benefit) neighbouring land. The uses of the purported dominant and servient tenements were unconnected at the time of the grant. Finally, the right could not be a restrictive covenant as it did not touch and concern the land held by the person seeking to enforce it. HHJ Parfitt ordered Greene King to clear the land and pay damages for its use of the land assessed by reference to a hypothetical licence fee. **Stephen Jourdan QC** appeared for the successful claimant.

Fitzpatrick v Spencer [2017] EWHC 2868 (Ch)
This appeal concerned the extent of an easement of drainage acquired by prescription. The judge below had struck out the parts of the claim based upon the asserted easement on the basis that there was no real prospect of the claimant establishing an easement to drain sewage as well as surface water. On appeal Morgan J. held that the scope of the easement had to be decided at trial. The judge below had also held that it was self-evident that the proposed new activities would involve a substantial increase or alteration in the burden on the servient tenement and so the Claimant would inevitably fail the test in *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214), but Morgan J. held that this was not self-evident, particularly because the drain ran to the public sewer, and the servient owners discharged sewage into it themselves. **Greville Healey** acted for the successful appellant

Burnley Hall LLP v Domicilium Limited (Chancery Division, 14 November 2017)
The claimant sought specific performance of a put option requiring the defendants to take back leases that they had granted to the claimant. Despite the existence of an arbitration clause in the agreement, proceedings were issued and the defendants sought a 28-day extension of time for their defence, to which the claimant agreed. The defendants then, as required by CPR r.15.5(2), sent a letter to the Court notifying the Court of the agreed extension. The day before the expiry of the extended period, the defendants applied for the claim to be stayed under s.9(1) of the Arbitration Act 1996. Birss J, on appeal, upheld the first instance judge's decision that in giving notice to the Court of an agreed extension of time for the Defence, the Defendants were "taking a step in the proceedings to answer the substantive claim", thereby losing the right to apply for a stay under s.9(1). The defendant's actions precluded them from applying for a stay. **Adam Rosenthal** appeared for the successful claimant/respondent.

INEOS Upstream Ltd & Ors v Persons Unknown [2017] EWHC 2945 (Ch)

Case Round Up (continued)

The UK's largest holder of licences for onshore shale gas exploration and a number of private individuals successfully obtained the long-term continuation of interim injunctions restraining a wide range of unlawful conduct by protestors opposed to hydraulic fracturing ('fracking'). The injunctions were initially obtained on an ex parte basis in July 2017 and continued with only minor modification at an opposed hearing on 12 September 2017. At a three-day hearing in November 2017, the claimants successfully resisted wide-ranging arguments that the injunctions granted were too broad in scope, improperly brought against persons unknown, and unlawfully interfered with the protestors' rights to freedom of expression and assembly under Articles 10 and 11 of the European Convention on Human Rights. Morgan J held that the risks that the claimants would be targeted by unlawful direct action, including trespass, interference with rights or way, obstructions of the public highway, theft and criminal damage, were imminent and real, and continued the interim injunctions pending trial or further order with relatively little modification. **Janet Bignell QC** and **Gavin Bennison** appeared on behalf of the successful claimants.

Mahmut v Jones [2017] EWCA Civ 2362
The appellants had purchased the freehold of a building from a landlord who had failed to give the tenants the right of first refusal under Part I of the Landlord and Tenant Act 1987. The tenants, the respondents, served a s.12B purchase notice, which the appellants ignored. The respondents served a default notice under s.19(2) of the Act and then obtained an order requiring the appellants to transfer the freehold to them. The appellants failed to comply with the order and later served a notice under s.17(4) of the Act seeking to terminate the respondents' rights on the basis that no binding contract had been entered into between the parties (s.17(4)(b)). The Court of Appeal held that the order was equivalent to a binding contract within the meaning of s.17(4). It took the place of the contact that should have been entered into had the appellants complied with their obligations under the purchase notice and section 17(4) was not therefore engaged. The appellants were not allowed to rely on their own wrong in order to engage section 17(4). Further, as the order provided a series of steps which should have led to the transfer of the freehold to the Respondents' nominee, and there was liberty to apply for the purpose of carrying it into effect, the claim for that order was not 'determined' within the meaning of s.17(4) until the freehold was transferred pursuant to it. **Anthony Radevsky** appeared for the successful respondents.

O'Connor (Senior) v The Proprietors, Strata Plan No.51 [2017] UKPC 45
A luxury residential condominium development in the Turks and Caicos Islands was registered under the Strata Titles Ordinance in 2005. The respondent was the body charged under the Ordinance to make by-laws for the purpose of regulating the use and enjoyment of the strata lots at the development. These bylaws restricted the use of each strata lot to a "private residence of the Proprietor or for accommodation of the Proprietor's guests and visitors". Rentals were however permitted, provided that each rental did not exceed one month in duration. The respondent sought an injunction to restrain the appellants from letting their unit on week-long lets to holidaymakers. The Privy Council held in favour of the respondent, finding that the by-law relied upon was valid as a legitimate restriction on the use of residential strata lots and it did not involve an impermissible restriction on leasing contrary to the provisions of the enabling Ordinance. The decision was of profound significance in the Commonwealth, departing from the vast majority of decisions in Australia where similar by-laws had been held invalid on the basis that the same infringed the provisions of the governing statute imposing restrictions on leasing. **Guy Fetherstonhaugh QC** and **Martin Dray** appeared on behalf of the successful respondent.

Sinclair Gardens Investments (Kensington) Ltd, Re George Court [2017] UKUT 494 (LC)
The appeal concerned the FTT's approach to valuation of a lease extension. The Upper Tribunal agreed that the FTT had made a series of errors of principle in reaching its conclusion. The FTT had wrongly presumed, in the absence of supporting evidence, that the purchaser under a comparable leasehold transaction was likely to have been an investor-purchaser, and further asserted that such a purchaser would attach no value to 1993 Act rights. Also, the FTT did not make time adjustments for the same earlier comparable transaction using a standard Land Registry index, which had showed a steady increase in values in the months

Case Round Up (continued)

before and after the valuation date. The Upper Tribunal also held that the approach adopted by the FTT made inappropriate use of graphs of relativity, as opposed to market evidence. **Oliver Radley-Gardner** appeared for the successful appellant landlord

Re Midland Freeholds Ltd and Speedwell Estates Ltd's Appeals [2017] UKUT 463 (LC)
These 7 combined appeals to the Upper Tribunal were from decisions of the First-tier Tribunal involving flats in the West Midlands. Each case concerned the valuation of a new lease under the Leasehold Reform, Housing and Urban Development Act 1993. The Upper Tribunal held that the FTT should not have (i) increased the deferment rate by 0.25% on account of an additional risk of deterioration; (ii) made a nil or nominal allowance for the benefit of rights under the 1993 Act in assessing relativity (the appropriate allowances were 10% and 7%); or (iii) made a deduction of 6% from the freehold reversion for the risk of a lessee remaining in possession as an assured tenant under Schedule 10 to the Local Government and Housing Act 1989. There was no evidence to support any deduction where the unexpired term was 46 years. **Anthony Radevsky** acted for the successful appellants.

Ralph Kline Limited v Metropolitan and County Holdings Limited [2018] EWHC 64 (Ch)
The defendant argued that upon the true construction of a lease of a series of buildings in Finchley Road, London, the whole of the buildings including the roofs and the airspace immediately above the roofs had been demised to the lessee. When a later lease of the airspace was granted to the claimant, the claimant's lease should therefore have been registered as being subject to the defendant's lease. Edwin Johnson QC, sitting as a Deputy Judge of the Chancery Division, accepted these arguments, applying *Waites v Hambledon* [2014] EWHC 651 (Ch) and distinguishing the proposition in *Ali v Lane* [2006] EWCA Civ 1532 that a later document could be admitted as an aid to construction. The Judge held that this principle applied only to a boundary dispute and not to a case where the issue was whether the airspace was included within the demised premises. **Gary Cowen** appeared for the successful defendant.

Mundy v Trustees of the Sloane Stanley Estate [2018] EWCA Civ 35
In this much-anticipated decision, the Court of Appeal upheld the decision of the Upper Tribunal (Lands Chamber), which had rejected the Parthenia model of relativity in valuing new lease claims under the Leasehold Reform, Housing and Urban Development Act 1993, based on the use of hedonic regression. The Court of Appeal held that the Tribunal had been entitled to hold that the Pathenia model was "a clock which strikes 13", because it produced an impossible result which suggested that the value of a lease without Act rights was worth more than the lease was actually sold for, with Act rights. It was common ground that rights under the Act were valuable. The Tribunal had also carefully examined the Parthenia model at a 9-day hearing, with extensive expert evidence, and concluded that it was defective. There was ample evidence to support the Tribunal's rejection of the model. **Stephen Jourdan QC** and **Anthony Radevsky** acted for the successful respondents.

Apexmaster Ltd v v URC Thames North Trust (High Court, Chancery Division, 23 February 2018)
The Claimant sought an interim injunction to restrain an alleged trespass into airspace above the Claimant's property by oversailing scaffolding erected as part of the Defendant's building works. In refusing the application, the court reaffirmed the principles as to when without notice proceedings are appropriate and refused an injunction on the basis that the injury complained of was minor, and that, in London, neighbours have to be reasonable about minor inconveniences caused during building work which is being carried out considerately. **Tamsin Cox** appeared on behalf of the successful defendant.

Generator Developments Ltd v Lidl UK GmbH [2018] EWCA Civ 396
The appellant property development company had entered into negotiations with the respondent supermarket for the purchase of land as joint venture partners. An offer was made and accepted on the basis that the respondent would be named as the sole purchaser in the heads of terms, which were drafted but never signed or agreed. Each draft was headed "subject to contact". The sale then proceeded and the respondent denied the appellant's claim to an interest in the property. The Court of Appeal held that no beneficial interest in the property had been acquired by way of a *"Pallant v Morgan"* equity, clarifying that *Pallant v Morgan* [1953] Ch 43 was decided on

Case Round Up (continued)

the basis of a breach of fiduciary duty and that a *Pallant* equity did not arise on the facts in a commercial context where both parties were negotiating on a "subject to contract" basis. **Jonathan Gaunt QC** and **Adam Rosenthal** acted for the appellant.

The Corporation of Trinity House of Deptford Strond v 4-6 Trinity Church Square Freehold Ltd [2018] EWCA Civ 764
In this appeal the Court of Appeal considered section 1(4) of the Leasehold Reform, Housing and Urban Development Act 1993 for the first time. In a collective enfranchisement claim, the participating tenants are entitled to claim the freehold of land, outside the building containing the flats, which lessees are entitled to use in common under the terms of their leases. In such a case the right to the freehold can be satisfied by the grant of permanent rights over the land which are nearly as may be the same as those enjoyed under the terms of the leases. In this case, the leases granted a revocable licence to use a garden. The Court of Appeal held that, to satisfy the requirement of permanence in s.1(4), this required the grant of an irrevocable easement to use the garden. **Anthony Radevsky** acted for the landlord.

KNBY LND PR1 LTD v 1-3 Upper James Street (Technology and Construction Court, 19 April 2018)
Kirk Reynolds QC successfully resisted an application for permission to appeal a decision by an arbitrator to rentalise tenant's fit outs in the context of a rent review. The arbitral Award in question valued restaurant premises in part on the assumption that the premises were fully fitted out at no cost to the tenant, resulting in a 10% uplift in the valuation. This approach reflected the expressed words used in the lease. O'Farrell J held that this was clearly an approach open to the Arbitrator and was not obviously wrong. Permission to appeal pursuant to section 69(2) of the Arbitration Act 1969 was refused.

Bermondsey Exchange Freeholders Limited v Ninos Koumetto (as Trustee in Bankruptcy of Kevin Geoghegan Conway) (County Court in Central London, 1 May 2018)
A long leaseholder who let his flat to short-stay guests for profit via Airbnb and other online platforms failed to appeal against a decision granting his landlord an injunction. The use amounted to a breach of covenants against subletting and permitting others to occupy the flat otherwise than by an authorised subletting or assignment, and also of a user covenant requiring the flat to be used as a "residential flat with the occupation of one family only". The grant of an injunction was an appropriate exercise of discretion in the circumstances. **Mark Sefton QC** appeared on the appeal for the successful respondent, who was represented by **James Tipler** at first instance.

Zinc Cobham 1 Ltd v Adda Hotels [2018] EWHC 1025 (Ch)
This was an appeal against an order of Deputy Master Cousins striking out the part of the claim which sought specific performance of leasehold covenants requiring Hilton Hotels to maintain active trade and to keep and run ten of their hotels in accordance with certain "Operating Standards". The order for specific performance would have required Hilton to spend over £100m on works. Andrew Hochhouser QC upheld the Master's decision. There was no real prospect of persuading a judge at trial that the remedy of specific performance was appropriate and thus the landlord was confined to its remedy in common law damages. **Kirk Reynolds QC** appeared as leading counsel for the appellant and **Elizabeth Fitzgerald** as junior counsel for the respondent.

Patel v Johal & Johal
These were opposed renewal proceedings under the Landlord & Tenant Act 1954. The claimant was the tenant of a popular corner shop. The landlord relied upon the quite rarely encountered second limb of ground (g), namely that he intended to occupy the holding for the purposes of his residence. Ground (f) was relied upon as well, but ground (g) was more prominent. The tenant successfully applied prior to the commencement of the proceedings to have his business (as opposed to the premises) recognised as an Asset of Community value. The proceedings were twice stayed, first to enable the landlord to appeal to the Planning Inspectorate in respect of the unexpected refusal of a planning permission by the local planning authority, and again whilst the tenant unsuccessfully challenged the appeal by way of judicial review. Ultimately the parties agreed a date for possession and the terms of statutory compensation shortly before trial. **Joe Ollech** appeared for the successful defendant landlord.

Roberts v Parker [2018] EWHC 1206 (Ch)
This case raised a number of issues

Case Round Up (continued)

concerning a right of way over a private road which the claimant intended to use to implement planning permission for the erection of a 5000 sq. ft. house in the rear garden of a house in Cobham. The Deputy Judge held that an easement granted in 1923 was impliedly released by a series of transactions in the 1950s, but that a subsequent grant was capable of benefitting the building plot notwithstanding the fact that it was expressed to be made in connection with the use of land which did not include the building plot. The Court also decided that a restrictive covenant which prevented building on the development plot was not enforceable for want of registration because although the covenant itself was noted on the register of title, the Land Registry had erroneously noted that it did not affect land within the relevant title. **Adam Rosenthal** appeared for the defendants.

Great Dunmow Estates v Crest Nicholson Operations (High Court, Chancery Division, 11 June 2018)
This decision highlights the potential significance of a statement of agreed facts prepared for the purpose of an expert determination. The claimant and first defendant entered into a conditional contract for sale of land owned by the claimant which provided for the appointment of a valuer to estimate the "Assumed Value" of the property. The duly appointed valuer directed the parties' own experts to produce a statement of agreed facts. In this statement, the experts agreed that the valuation date would be the date when the valuer issued his determination. In his determination, the valuer stated that he disagreed with the valuation date set out in the statement of agreed facts. The claimant successfully challenged this determination. The Court held that the parties and the expert were contractual bound by the matters agreed by the parties in the statement of agreed facts, which had binding legal force. **Guy Fetherstonhaugh QC** appeared for the successful claimant.

Office Depot International v UBS Asset Management & Ors [2018] EWHC 1494 (TCC)
The tenant of a large warehouse in Manchester brought a claim against its landlord for a declaration as to whether any works were required to put the roof of the demised premises into repair and, if so, what these works were. The landlord had earlier settled a claim against the developer of the premises relating to defects in design and construction. The landlord did not then seek to enforce the tenant's repairing covenant. The tenant wished to know what it was obliged to do to put the roof of the premises into repair and to claim on its collateral warranties against the developer. The landlord successfully applied to strike out the tenant's claim for a declaration. The Court accepted the landlord's submission that the choice of works required to maintain the warehouse to the necessary standard of repair was a matter for the tenant. It was not open to the tenant to require either the landlord to the Court to approve any particular scheme of works in the absence of any positive case being advanced by the tenant. **Stephen Jourdan QC** and **Adam Rosenthal** acted for the successful landlord.

Lowe v William Davis [2018] UKUT 0206
This appeal to the Upper Tribunal has settled the uncertainty as to whether the First-tier Tribunal (Property Chamber) (Land Registry) has jurisdiction to determine disputes about the true line of a boundary when an application for a determined boundary under section 60 of the Land Registration Act 2002 is referred to it. This uncertainty arose following the decision in *Murdoch v Amesbury* [2016] UKUT 3. Mr Justice Morgan, sitting as a judge of the Upper Tribunal, determined that the FTT did have this jurisdiction, even in circumstances where, as in the present case, the plan accompanying the application did now show the exact line of the boundary with the required degree of accuracy. The Judge held however that it is was matter for the FTT's case management discretion whether to stay the proceedings and direct the parties to commence Court proceedings to determine the location of the boundary, or to determine it itself. **Stephanie Tozer** acted for the successful respondent.

Elmfield Road v Trillium (Prime) Property [2018] EWCA Civ 1556
In this appeal the appellant tenant sought to contend that a rent review indexation clause in a lease contained an ambiguity or an obvious mistake as to the date by reference to which the reviewed rent was index-linked. The tenant submitted that this ought to be cured by an amendment to the drafting and that the court was precluded from applying the literal meaning of the rent review clause. The Court of Appeal, accepting the landlord's counter-submissions, held that there was no ambiguity in the language of the rent

Case Round Up (continued)

review clause. The Court further rejected the invitation to depart from the literal meaning of the clause in light of the commercial background and commercial consequences of literal interpretation. The test for doing so set out in *Chartbrok v Persimmon Homes* [2009] 1 AC 1101 applies and was not satisfied. **Guy Fetherstonhaugh QC** acted for the successful respondent.

Wild Duck Ltd v Smith [2018] EWCA Civ 1741

In this appeal a long lessee of a number of holiday homes sought damages against the lessor for breach of an implied term in the leases not to prevent the management company (also a party to the leases) from performing its obligations. It was common ground that the lessee-owned management company had become responsible for completing the site following the insolvency of the original developer. However, there were lengthy delays in it doing so. As a result, the landlord sought to rely on his "step-in" rights under the leases to carry out the work himself. The claimant argued that the landlord did not have the right to do so and, in any event, having invoked that right, then acted in a way which did not conform to the step-in rights under the lease. The Court of Appeal held that it could not interfere with the trial judge's conclusion that the landlord was not in breach of its implied obligation. The landlord was entitled to invoke the step-in rights because, although the management company was gearing up to perform, it had not yet carried out the works. The fact that the landlord sought to impose his own terms on carrying out the works did not mean that he ceased to act pursuant to his contractual rights under the lease. Further, the judge was entitled to have regard to the fact that the management company did not contest the landlord's right to rely on his step-in rights under the lease but rather sought to co-operate with the landlord. **Adam Rosenthal** appeared for the appellant.

Mineral rights
How do they arise and what is a mineral?

by Jonathan Gaunt QC

The origin of Mineral Rights

The starting point is that a freehold owner is entitled to all the mines and minerals under his land down to an unlimited depth except gold and silver (which belong to the Crown), petroleum (which was nationalised in 1934) and coal (which was nationalised in 1948). One consequence is that if a person sinks a shaft or a well or a pipe **at any depth** under my land, he commits trespass and can be sued for an injunction and/or damages.

The title to the minerals and to the surface may, however, have been severed by:

- exception/reservation in a conveyance;
- grant;
- an inclosure award;
- enfranchisement of copyhold land;
- compulsory purchase of the surface (e.g. for railways or canals).

Each of these will be considered further below.

There is a distinction between a reservation/grant of "mines" and of "minerals". If "mines" are excepted, the transferor keeps a stratum of the land. If he extracts the minerals underground, the tunnel is his. If he does not, the stratum is his. If anybody else enters the tunnel or penetrates the stratum, that is trespass.

When the mines and the surface are severed, at common law the surface will enjoy an inherent right of support (subject to the terms of the grant). The buildings on it or on adjacent land do not but they may have acquired an easement of support by prescription if they have been there for 20 years.

Typically the grant or reservation of mines and minerals will contain:

- specified working rights;
- provisions as to subsidence (e.g. a right to "let down" the surface); and
- provisions as to compensation for subsidence or damage to buildings.

The working rights may limit working to underground working or to surface working and may permit the working of the minerals to cause subsidence or prohibit it or provide for compensation for it.

Severance by Statute (Railways and Canals)

When land was acquired for railways or canals, *"any mines of coal, ironstone, slate or other minerals"* were excepted – so the undertaker did not have to pay for them - but if later the mine owner wants to work the mine, he can serve a notice or approach; if the undertaker serves a counter notice, he has to pay compensation; if he does not, the mine owner can work the mine; the common law rights of the surface owner are superseded. This is the effect of the "Mining Code".[1]

Severance by Statute - Inclosure

By a series of Acts of Parliament known as Inclosure Acts, land within a manor which was the waste of the manor and therefore common land was converted into arable land and apportioned among the inhabitants of the district. The Act would appoint Commissioners who would implement it by an award under the powers conferred by the Act. Typically the mineral rights will have been reserved to the Lord of the Manor and will have devolved from him. His working rights may also be specified in the award. Precisely what substances have been reserved will depend on interpreting the Act and the Award.

Severance by Enfranchisement

Copyhold was a form of tenure by which land was held from the Lord of the Manor according to the custom of the manor. Copyhold land could be enfranchised and turned into a freehold by agreement between copyholder and lord or pursuant to statute. The last traces of copyhold were abolished by Part V of the LPA 1922, which enfranchised all remaining copyholds BUT preserved the mineral rights of the Lord of the Manor.

Copyhold is unusual in that the copyholder was entitled to possession of the surface and the minerals but title to the minerals was in the lord. So neither lord nor copyholder could work the minerals without the agreement of the other.

This predicament was addressed by the Mines (Working Facilities and Support) Act 1923, which enabled a mineral owner to apply for the grant of ancillary working rights in return for paying compensation to the surface owner. The relevant Act is now the Mines etc Act 1966, which enables the Court to grant ancillary rights and award compensation. Compensation is assessed on compulsory purchase principles (including the Pointe Gourde rule) and so does not include any ransom value.

The other thing to note about enfranchised copyhold land is that:

(a) the mineral rights of the Lord are very widely defined specifically to include limestone, lime, clay, stone, gravel,

Mineral rights
How do they arise and what is a mineral?
continued

pits and quarries as well as any mines and minerals, with wide working rights; but

(b) the surface owner is expressly empowered to disturb or remove the soil for making roads, drains, erecting buildings or obtaining water.[2]

Construing "Other Minerals" in a Statute or a Deed

What minerals and rights are reserved or conferred depends on the words of the Deed or the Statute, which will often contain a list of specified substances followed by *"and other minerals"*. The question then is what is meant by *"other minerals"*? There is a large body of law on this which essentially says that it all depends on context. There are three major tests which are equally applicable to statutes and deeds:

(1) the Exceptionality Test;

(2) the Vernacular Test;

(3) the Working Rights Test.

The Exceptionality Test is essentially whether the substance in question is something special – i.e. exceptional in use, in value and in character and not the ordinary soil of the district. Under this test, china clay and fire clay have been held to be minerals but brick clay, sand and gravel have been held not to be.

The Vernacular Test involves enquiring what the phrase meant in the vernacular of the mining world, landowners and commercial men at the time of the grant/reservation/entry.

As to the Working Rights Test, if the method of working is prescribed, the grant is unlikely to extend to substances which were not worked in that way.

For a modern example of the application of these tests, see Coleman v Ibstock Brick Limited [2008] EWCA Civ 73.

Some Common Problems

Foundations, drains, site levelling:

If there is a mineral stratum near the surface which does not belong to the surface owner, the penetration of that stratum will be a trespass, which can prima facie be restrained by injunction. The developer will therefore have to do a deal with the mine owner, who will hold out for a cut of the development profit. This may raise in an acute form the question – "Is it a mineral?".

Directional drilling:

If I drill from my land into my neighbour's at whatever depth, that is a trespass. This was established by the Supreme Court in Bocardo v Star Energy [2011] 1 AC 380. That posed an insuperable problem for fracking and resulted in sections 43 to 48 of the Infrastructure Act 2015, which gives a person a right to use deep level land (at least 300 metres below the surface) for exploiting petroleum[3] or deep geothermal energy.

Who owns the hole?

It is well settled that a mine owner owns the space created by the underground extraction of minerals. But suppose he was entitled to work and has worked minerals from the surface by quarrying, leaving a pit? Who owns the pit? Is it the surface owner, because the surface is now the bottom of the pit and he owns the air space above it? Or is it the mine owner because he owns the space from which the minerals have been extracted and, until the hole is filled, there is no surface? Or do both have an interest in the hole?

Minerals in solution

There is no property in underground water flowing in undefined channels. A person may therefore sink a well in his own land and extract as much water as he likes, even if that leads to subsidence of his neighbour's land, or drains it, or deprives it of a source of water. Likewise he cannot object if his neighbour sinks a well in his land and subjects him to the same consequences.[4]

If a person sinks a well in his own land and extracts brine which contains salt or some other valuable mineral, the same rule applies. It does not matter if the brine flows from beneath his neighbour's land or contains in solution a mineral which, before it was dissolved, belonged to his neighbour.[5]

It would probably be otherwise if the landowner were to pump down water in order to dissolve and extract mineral deposits existing under his neighbour's land. That would probably amount to trespass both to land and goods.[6]

[1] Sections 77 to 85 of the Railway Clauses Consolidation Act 1845 as amended by the substitution of sections 78 to 85E by Part II of the Mines (Working Facilities and Support) Act 1923.
[2] LPA 1922, Schedule 12, para (5).
[3] Defined to include natural gas.
[4] *Gale on Easements*, 20th Ed, para 6 27; **Chasemore v Richards** (1859) 7 HLC 376; **Stephens v Anglia Water Authority** [1987] 1 WLR 1381 (CA) where the Court of Appeal stated: *"As the law stands, the right of the landowner to extract subterranean water flowing in undefined channels beneath his land established by **Chasemore v Richards** and **Bradford Corporation v Pickles** [1895] AC 507 appears to us … to be exercisable regardless of the consequences, whether physical or pecuniary to his neighbours."*
[5] **The Salt Union Limited v Brunner, Mond and Co** [1906] 2 KB 822.
[6] See **The Salt Union** case at page 831.

Trespassers and Human Rights – Where are we now?

by Gavin Bennison

Those who act for private sector landlords in residential possession proceedings will be familiar with the decision of the Supreme Court in *McDonald v McDonald* [2017] AC 273, which was argued successfully by Stephen Jourdan QC and Ciara Fairley of Falcon Chambers. In *McDonald*, the Supreme Court was asked to decide whether a tenant in summary possession proceedings could require the court to consider the proportionality of making a possession order, having regard to Article 8 of the European Convention on Human Rights (ECHR): the well-known right to respect for private and family life. In particular, the Court was required to decide whether a private landlord's mandatory right to possession of her property under section 21 of the Housing Act 1988 could be curtailed or defeated entirely by invoking Article 8.

The Supreme Court held that it could not. Though the Court considered that Article 8 of the ECHR might be *engaged* when a judge made an order for possession of a tenant's home in a claim brought by a private sector landlord, it held that it was not open to the tenant to contend that Article 8 could justify a different order from that which the parties' contractual relationship mandated, at least where such a relationship was entered into against a backdrop of statutory provisions which Parliament had decided properly balanced the competing interests of private sector landlords and residential tenants: see [40]. Any other conclusion would have involved the ECHR having "horizontal effect" between private parties, contrary to the scheme of the Human Rights Act 1998 ("HRA"), under which only "public authorities" (as defined in sections 6(3) and 6(5) of the HRA) are required to act compatibly with the Convention rights of others.

Since *McDonald*, there has been a tendency to cite the Supreme Court's decision as establishing a somewhat broader principle: that whenever possession proceedings are commenced by someone other than a "public authority", there can be no scope for a defendant's Convention rights under the ECHR to affect the claimant's right to an order for possession. *McDonald* has, for instance, in the author's experience been deployed in possession claim against trespassers as authority that defendants in trespasser proceedings simply cannot invoke the ECHR to prevent an order for possession being made.

Unfortunately, however, the position is not as simple as this. In a trespasser case, a landowner seeks an order for possession of land not pursuant to a statutory or contractual right to possession, but rather as a remedy for a common law tort. At paragraph 46 of the judgment in *McDonald*, the Supreme Court distinguished cases in which a claimant's cause of action arose from a contractual arrangement between two private parties from *"tortious or quasi-tortious relationships, where the legislature has expressly, impliedly or through inaction, left it to the courts to carry out the balancing exercise."* The *ratio* of *McDonald* was carefully circumscribed: the Supreme Court appeared to suggest, albeit *obiter*, that civil proceedings between two private parties founded solely upon a common law cause of action, such as trespass, might require the Court to consider the question of the proportionality of any interference with the tortfeasor's Convention rights when determining the dispute.

Though it did not say so explicitly, the Court was concerned here with what is sometimes called the "indirect horizonal effect" of the Human Rights Act: the court's duty *as a public authority* under section 6(1) of the HRA (by reason of s.6(3)(a)) to *itself* act compatibly with litigants' Convention rights when determining civil disputes. The scope of the indirect horizontal effect of the HRA remains very ill-defined. It is tolerably clear that when an appellate court is asked to determine an appeal raising a point of law in relation to a common law tort, the court is required to test the content of the common law – considered in the abstract somewhat divorced from the facts of the case in question – against the *"values"* encapsulated in the Convention rights, and to *"absorb the rights protected"* by the Convention into the common law cause of action if necessary. The most well-known example is the House of Lords' development of the tort of breach of confidence into a cause of action for invasion of privacy in *Campbell v Mirror Group Newspapers* [2004] 2 AC 457, where the court's duty under section 6(1) was described in this manner: see [17], per Lord Nicholls. This is the cause of action to which the Supreme Court made reference in *McDonald* at [46].

It has thus been said that the appellate courts must "have regard" to the requirements of the ECHR when developing common law causes of action: see *Flood v Times Newspapers* [2012] 2 AC 23 at [46], per Lord Phillips (concerning the common law of defamation). In doing so, the English courts must take as their starting point domestic legal principles rather than the judgments of the European Court of Human Rights: *Osborn v Parole Board* [2013] UKSC 61 at [57]-[63], per Lord Reed. So it seems clear that a substantial degree of latitude is afforded to the domestic court as to if, and how, it ought to modify the common law in order to bring it into a more harmonious relationship with the ECHR. Whether the courts' duty under section 6(1) extends beyond that, or indeed is of any application in proceedings before a court incapable of creating binding precedent, such as the County Court, remains unknown. The duty on the court under section 6(1) therefore remains a nebulous one, its nature and ambit little explored and understood.

Trespassers and Human Rights – Where are we now?

continued

It is interesting that the English courts have made no qualification to the common law doctrine of trespass since the entry into force of the HRA. A private landowner remains entitled[1] to refuse to grant or to revoke a licence to occupy land within her ownership without needing to provide reasons or justification. In *CIN Properties Ltd v Rawlins* (Court of Appeal, 1 February 1995), the Court of Appeal rejected the call of a Justice of the Supreme Court of Canada to develop the law of trespass so to provide a *"new legal framework for new social facts"* in an era of mass privatisation of public space. The law remains unchanged since then.

Moreover, notwithstanding the *dicta* in *McDonald*, there remains no binding authority determining that, in a possession claim against trespassers, the Court is entitled or required to consider whether granting the landowner a possession order would amount to a disproportionate interference with any of the trespassers' Convention rights. In all reported High Court cases concerning a 'horizontal' dispute between a landowner and trespassers, the Court has either failed to consider whether the trespassers' Convention rights were in fact engaged, or else has simply assumed the position one way or the other without deciding the question, usually on the basis that any balancing exercise would invariably come down in the landowner's favour.[2] The recent decision in *Europa v Persons Unknown* [2017] EWHC 403 (Ch), concerning trespass by protestors opposed to exploratory drilling for shale gas, is an example; the issue was skirted by Chief Master Marsh at [16]-[17].

In a number of these cases, the High Court has made reference to the jurisprudence of the European Court of Human Rights in Strasbourg, which has recognised only a very limited positive obligation on the state to protect the exercise of individuals' rights under Article 10 of the ECHR (freedom of expression) in this context. In *Appleby v United Kingdom* (2003) 37 EHRR 38, Strasbourg decided that the right to freedom of expression did not bestow any freedom of forum for the exercise of that right. The state would only be required to protect trespassers' access to private property in circumstances where where a denial of access would prevent any effective exercise of the right to freedom of expression or where the essence of the right would thereby be destroyed. The example of a corporate town, where the entire municipality was controlled by a private body, was offered as an example. The English courts have, on a number of occasions, taken the view that where this threshold is not met, it is inevitable that any question of the proportionality of the interference with trespassers' Convention rights will be resolved in the landowner's favour.[3]

In the author's view, it remains open to private landowners to argue that trespassers simply cannot put human rights in issue in trespasser possession proceedings, save before an appellate court where the trespasser asks the tribunal to modify the entire doctrine of trespass at common law so as to make it compliant with the ECHR. Alternatively, landowners might argue that only where the "Appleby threshold" is met is the court entitled to intervene in a horizontal dispute to determine that trespassers' Article 10 and 11 rights can take priority over a landowner's right to peaceful enjoyment of her possessions under Article 1 of the First Protocol to the ECHR. But merely citing *McDonald v McDonald* as authority for either proposition will not suffice.

The practical reality is that claimants have little incentive to pursue these lines of argument, given that the courts almost invariably conclude that even if a proportionality assessment were required, it would be resolved in the landowner's favour. This is particularly in cases where the trespassers' conduct is violent or dangerous: the recent decision in *INEOS Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch), in which I acted, is but one such example.

The take home point is that private landowners and those acting for them should not blithely assume that trespasser possession proceedings brought by a private sector landowner cannot be defended on human rights grounds. Unless and until a higher court fills in the gaps left by *McDonald v McDonald*, or clarifies the extent of the courts' duty under section 6(1) of the HRA when determining civil disputes between private parties, these claims remain potentially susceptible to such arguments being made, and landowners should be prepared for the fight.

[1] Absent the existence of an estoppel or in other very narrow circumstances where a private landowner enjoying a natural monopoly in the provision of utilities or public services invites the public at large onto the land. These exceptions are beyond the scope of this article.

[2] See *School of Oriental and African Studies v Persons Unknown* [2010] EWHC 3977 (Ch) at [27], per Henderson J; *Sun Street Property Ltd v Persons Unknown* [2011] EWHC 3432 (Ch) at [28], per Roth J; *University of Sussex v Persons Unknown* [2013] EWHC 862 (Ch) at [11]-[14], per Sales J; *Jones v Persons Unknown* [2014] EWHC 4691 (Ch) at [17], per HHJ Hodge QC; Manchester Ship Canal Developments Ltd v Persons Unknown [2014] EWHC 646 (Ch) at [34], per HHJ Pelling QC; *Dutton v Persons Unknown* [2015] [EWHC 3988 (Ch) at [33], per Judge Hodge QC; and *RMC LH Co Ltd v Persons Unknown* [2015] EWHC 4274 (Ch) at [24]-[31], per Carr J.

[3] See *School of Oriental and African Studies v Persons Unknown* (above) at [21]-[25], per Henderson J; *Sun Street Property Ltd v Persons Unknown* (above) at [29]-[33], per Roth J; *University of Sussex v Persons Unknown* [2013] EWHC 862 (Ch) at [11]-[19], per Sales J; and *Manchester Ship Canal Developments Ltd v Persons Unknown* (above) at [29]-[34], per HHJ Pelling QC.

Interim Injunctions and Receivers

by Stephanie Tozer and Cecily Crampin

There have been a surprising number of cases in the past 6 months or so in which the Court has had to grapple with the question of whether interim injunctions should be granted to or against fixed charge receivers seeking to carry out their mandate. In none of these cases have the receivers lost. In this article, Stephanie Tozer and Cecily Crampin explain why that is so.

Interim Injunctions: the Basics

As is well-known, any applicant for an interim injunction must get over a series of hurdles. He must show that:

(1) There is a serious question to be tried (i.e. a claim which is not frivolous or vexatious and has a real prospect of success).

(2) Damages would not be an adequate remedy for the applicant if an injunction were refused.

(3) If an injunction were granted, the applicant's cross-undertaking in damages would protect the respondent if it turns out that the injunction was wrongly granted; and

(4) The balance of convenience favours the grant of an injunction. Typically, this requires the Court to consider which course of action will give rise to the least harm if it turns out to have been wrong.

The recent receivership cases illustrate the Court's approach to these hurdles in practice.

Receivers: the Basics

Most fixed charges give lenders the ability to appoint a receiver when certain preconditions are met. Typically, the preconditions require the borrower to be in default. A receiver almost always has the power to collect income arising from the property, and will very frequently have additional powers set out in the mortgage, such as the power to sell the property. The receiver may, depending on the mortgage conditions, also have the power to run a business, grant tenancies, take possession, and so on. The receiver's primary duty is to the lender, to pay off the debt. However, he owes complementary duties to the borrower, for example to take reasonable care to obtain the best price reasonably possible if he decides to exercise a power of sale. A receiver is entitled to remuneration in accordance with the mortgage terms, but will often also have an indemnity from the lender.

Frequently, borrowers complain that the appointment of the receiver was invalid for one reason or another, so the receiver should be restrained from exercising any of his powers, in particular any power of sale.

A serious question to be tried

The outcome of 2 recent cases suggests that the Court will take a robust view towards a borrower's claims that there is a serious question to be tried about the receiver's entitlement to act:

- In *SS Agri Power Ltd v Dorins and Privilege Project Finance Ltd* [2017] EWHC 3563 (Ch), the Court considered whether the borrower could restrain the receiver from running the business. The borrower asserted that the receiver had been appointed in breach of an agreement with the lender not to enforce. Snowden J concluded, on the evidence, that there was no serious question to be tried about whether a binding agreement had come into existence or whether a promissory estoppel arose. The borrower also asserted that the receiver was proposing to act beyond his powers. The judge considered the terms of the mortgage and what was proposed, and concluded that there was no serious question to be tried about that either.
- In *Sinha v Saluja* [2018] EWHC 707 (Ch), the receiver had taken possession of the charged property. The borrower sought to get back in. Barling J discharged a without notice injunction made against the lender requiring him to procure that the borrower be re-admitted, on the basis that the borrower's argument that the appointment was invalid because there was no outstanding debt did not raise a serious question to be tried. He summarily rejected the applicant's explanation for previous admissions.

Balance of convenience

Where the borrower is the applicant

In some cases, such as *SS Agri Power* (above), the borrower will not find it easy to demonstrate that it will suffer any loss if an injunction is refused. In that case, the Court was not satisfied that the receiver's acts in running the business would expose the borrower to any liability to third parties. In other cases, however, potential loss might be easier to show: where there is a sale in prospect which might well be at an undervalue, or where the receiver's actions would cause the borrower to breach a contract to a third party.

In general, there is no difficulty in the receiver demonstrating that he would be able to meet any damages award (because he will be insured and/or have an indemnity from the lender), but in cases where it is alleged that the receiver is acting outside his powers and fraudulently, the receiver's personal ability to meet any damages awarded will be relevant.

If the receiver is good for the money, it seems that little weight will be given to an assertion that the borrower may have a more than monetary attachment to the property or business in question, so that financial recompense is inadequate. In *Lederer v Allsop LLP* (unrep, 13 March 2018, Ch Div) the Judge held that the borrowers had raised a serious question to be tried but nonetheless refused them an injunction preventing the receiver

Interim Injunctions and Receivers

continued

from selling the property. The Judge held that the following factors militated against the grant of an interim injunction in the circumstances:

(1) The borrowers did not have any other assets and the Court was not confident that they would be able to make good any liability under their cross-undertaking, or repay the lending company. That is likely to be a common theme in applications for interim injunctions against a receiver since the likely factual matrix leading to the receiver's appointment is that the borrower is in arrears under the mortgage, and hence that he is low on funds. A curiosity in cases where interim injunctions are sought against receivers is that, often, the receiver himself will not suffer any loss (save perhaps a relatively modest loss of fees, which plainly could be compensated by the borrower if it had means to do so). The real loss is the lender's: it will, potentially, lose the ability to manage and/or sell the property at the optimum time. To what extent ought the lender's potential loss to be taken into account when considering the balance of convenience? *Lederer* suggests that even if the lender is not a party to the litigation, the Court will take the lender's loss into account when assessing the balance of convenience, and if the lender's loss will be substantial if the injunction is not granted, and the borrower cannot fortify its cross-undertaking, this is likely to be a powerful factor against the grant of an interim injunction. The prudent course, in such a situation, is to require the borrower's cross-undertaking to extend to the lender's losses as well as the receiver's own losses, and consider to what extent the borrower could meet it.

(2) The Property would deteriorate if left vacant and unsold pending trial, and presented a risk to trespassers.

(3) There would be ongoing holding costs.

Had those factors not been present, it is thought that greater weight might have been given to the borrower's wish to retain the property.

In passing, it should be noted that the naming of the receiver's firm as the defendant in that case was likely incorrect: *Jumani v Mortgage Express* [2013] EWHC 1571 (Ch) at [16]. Receivers are usually natural persons not companies or firms; if the borrower is a company a body corporate cannot be appointed: Insolvency Act 1986 s 30. The receiver's firm is unlikely to owe any duties to the borrower.

In *SS Agri Power* (above), although the borrower had there offered to fortify its cross-undertaking (and had offered an undertaking extending to the lender's losses), the Court nonetheless indicated that it would have refused the injunction on "balance of convenience" grounds, even if satisfied that there was a serious question to be tried, for the following reasons:

(1) the lender was good for any damages that the borrower would be awarded if it suffered loss as a result of the injunction being refused (presumably, because the lender was a party and/or obliged to indemnify the receiver);

(2) it was unclear whether the borrower had the means to carry out necessary works to the plant to maintain it in operable condition, whereas the lender did have the money to do the works and every incentive to do so.

In both these cases, the outcome suggests that considerable weight is attached to principle that the outcome which does the least harm is to be preferred. The courts tend to see an inevitability to the enforcement of the mortgage, especially where the borrower is not paying the mortgage. Courts are often focussed, when considering the balance of convenience in the sale cases for example, on the likelihood that the property will have to be sold to repay the debt, and a borrower making no realistic proposals as to sale himself is simply delaying the inevitable.

Where the receiver is the applicant

Often the borrower will fail at the first hurdle: i.e. showing that he will be able to meet any damages awarded if an injunction is refused. In a recent Northern Irish case, *Jennings v Quinn* [2017] NICh 21, the Court held that there was a serious issue to be tried, but nonetheless granted an injunction against the borrower because if the injunction were refused, the lender would likely suffer loss (as the injunction would frustrate a sale), and the borrower would not be able to satisfy those damages.

The Court also thought that the receiver's cross-undertaking would protect the borrower. The report does not suggest what cross-undertaking the receivers had offered. Typically, a receiver's cross-undertaking will be limited to meeting any award from the assets in the receivership. Where a sale is proposed, often there need be no concern about whether this is adequate protection for the borrower; in other cases, receivers may have to fortify their cross-undertaking, for example, with an indemnity from the lender, in order to show that the borrower will not be prejudiced if injunction turns out to have been wrongly granted.

Stephanie and Cecily are the authors of a major new work on Mortgage Receivership Law and Practice due for publication in September 2018. Copies can be pre-ordered at https://www.wildy.com/isbn/9780854902521/mortgage-receivership-law-and-practice-hardback-wildy-simmonds-and-hill-publishing

AirBnBeware (Again)

by Mark Sefton QC and James Tipler

Bermondsey Exchange Freeholders Limited v Ninos Koumetto (as Trustee in Bankruptcy of Kevin Geoghegan Conway) – HHJ Luba QC (County Court at Central London)

"Is the owner of a flat at liberty to use it for short term rental or commercial hire to tourists, business travellers and others through use of internet-based websites such as Airbnb"?

So HHJ Luba QC summarised the central issue in this appeal. Mr Conway ("the Defendant") is a long leaseholder of a flat in a high-class central London residential development who had made his flat available for short stays through Airbnb and similar online platforms to paying guests. The Claimant landlord objected to this user, contending it amounted to a breach of one or more of the covenants in the Defendant's lease. As well as detracting from the sense of community enjoyed by the resident tenants, this use caused concern over the increased risks to security and potential for nuisance.

The Claimant succeeded at first instance, and the trial judge granted an injunction prohibiting the use of the flat for paid short lets. The Defendant appealed, arguing that the judge was wrong because (1) the Defendant's lease did not prevent or inhibit such use of the flat, and/or (2) that an injunction ought not to have been granted even if it did.

The primary covenants in the lease relevant to the issue were as follows.

The Defendant is obliged *"not to part with or share possession of the whole of the Demised Premises or permit any company or person to occupy the same save by way of an assignment or underlease of the whole of the Demised Premises"* (Clause 2.10.2); and further "without prejudice to the absolute prohibitions hereinbefore contained not to assign or underlet the whole of the Demised Premises without the prior written consent of the Landlord such consent not to be unreasonably withheld" (Clause 2.10.3).

These provisions are in the nature of restrictions on alienation of the demise. A further covenant, Clause 2.4, is restrictive of user, and provides that the Defendant is *"not to use or permit the user of the Demised Premises or any part thereof otherwise than as a residential flat with the occupation of one family only"*.

The trial judge found that each of these covenants had been breached by the Defendant. The appeal judge agreed.

As regards the alienation covenants, he found that the effect of Clause 2.10.2 was to restrict the granting of both leases *and* licences; and that, on any view, the Defendant's use of the premises necessarily involved *either* parting with possession of the whole demise (if the arrangements amounted in law to creating leases),or permitting others to occupy the same (if the arrangements created only mere licences).

The court was not persuaded by the Defendant's argument that the restriction on permitting occupation in Clause 2.10.2 could not be operated sensibly, on the basis that interpreted literally it would apparently have the surprising effect of preventing a tenant under the lease from (say) letting their partner live with them, or having friends reside in the flat on their own. It was enough simply for the trial judge to have found that Airbnb-user constituted permitting the whole flat to be occupied by third parties in the absence of an approved assignment or underlease at a time when the Defendant was not in occupation.

Although the court considered that it was not necessary to "examine and finally determine whether the particular arrangements that the Defendant was entering into with third parties through online portals, or perhaps arrangements that the Defendant was entering into with the operators of the websites, would be classified in law as tenancies or licences" in order to uphold the trial judge's decision, HHJ Luba QC also went on to endorse the finding by the trial judge that the Defendant's user involved underlettings contrary to the first limb of Clause 2.10(2) and Clause 2.10(3).

Importantly, referring to the decision of the Supreme Court of Victoria in *Swan v Uecker* [2016] VSC 313, and to the *"presumption from Street v Mountford that the provision of exclusive possession of premises to another for a period and for payment for that period constitutes a letting"* he held that:

"neither the short duration of the arrangement, nor any notional provision for "services" (such as leaving the flat stocked with material from which to assemble a breakfast or other meal), nor reservation of a right of re-entry, nor any combination of those features, displace the presumption from applying to an Airbnb-style arrangement".

As for the user covenant, the Defendant argued on appeal that there was no breach, since each occupier under any Airbnb arrangement was still using the property as residential accommodation, notwithstanding the transience of their stays. Reliance was placed on *Westbrook Dolphin Square Limited v Friends Life Limited (No. 2)* [2015] 1 WLR 1713 and related authorities where the expression "residential purposes" was considered in the context of the LRHUDA 1993 and held to cover short stays.

The appeal court "did not find those authorities of assistance", given this was a case concerning residents living "cheek by jowl and only with other residents" in flats let on long leases with common terms. Construing the covenant in that context, he was in entire agreement with the trial judge's conclusion

AirBnBeware (Again)

continued

that the covenant was breached by use of the premises for commercial hire akin to a hotel or bed and breakfast.

In the premises the court concluded that the trial judge – particularly in light of the Defendant's conduct at trial, where every aspect of the Claimant's case (including the very fact of there having been Airbnb-lettings) had been vigorously contested, and given his refusal to give undertakings, and the general breakdown in trust between the parties – had correctly exercised her discretion in granting an injunction.

The case is a further salutary reminder to flat owners that the terms of their leases matter, may be more restrictive than originally appreciated, and may be enforced to prevent Airbnb user. It is always better to seek permission rather than forgiveness; would-be exploiters of the sharing economy should seek advice on the terms of their leases and clarify the stance of their landlords before seeking to let their flats to short-stay guests.

Of particular significance is the ease with which the appeal judge was prepared to endorse the trial judge's finding that there had been lettings of the demise in these circumstances, as opposed merely to the conferral of short licences, following *Swan v Uecker*. In theory, this analysis could lead to the surprise enjoyment of security of tenure under the Housing Act 1988. Though "holiday lettings" are generally excluded from the ambit of the Act's protection by Sch. 1 para 9, and establishing the property is the guest's "only or principal home" under s.1 would seem a stretch, the mere room for argument could see a week's stay converted into months of painful dispute before possession is recovered. More practically, those whose leases prevent or restrict subletting/parting with possession, but not licensing, may be caught out.

Further, the endorsement of the finding that the user covenant – the form of which, or a substantially similar form, is commonly encountered in residential long leases – was breached will likely provide yet further force to landlords' objections to Airbnb user in many cases.

Practitioners – particularly those involved in drafting leases – should also note the court's endorsement of the advantages for landlords of broadly-drafted covenants that control not just subletting, but parting with occupation. Such clauses help to avoid the need to split hairs over the familiar and vexed "lease or licence" question in the short-let scenario when determining the question of breach.

Mark Sefton QC appeared for the successful Claimant (Respondent) on appeal. James Tipler appeared for the successful Claimant (Respondent) at first instance.

Latest News

Silk Appointments

Chambers was delighted by the appointment of Mark Sefton QC to silk in February 2018, and by the appointment of Charles Harpum QC (Hon) as QC Honoris Causa prior to his retirement in April. Charles's appointment was one of only seven such appointments in 2018.

ERMAs

Chambers enjoyed huge success at the tenth annual Enfranchisement and Right to Manage Awards, held in June. Paul Letman won Barrister of the Year and Toby Boncey was the first barrister in the history of the awards to be Highly Commended in the Young Professional category. Chambers was Highly Commended overall.

Chambers and Partners

Chambers was the only set ranked as Band 1 for Real Estate Litigation in the 2018 Chambers and Partners Guide, and was also the only set in Band 1 for Agriculture and Rural Affairs. We are delighted that our clients continue to look to us as the top set in our areas of expertise.

Mr Justice Fancourt

In January 2018 Timothy Fancourt QC was appointed as a High Court Judge, sitting in the Chancery Division. Chambers congratulates Mr Justice Fancourt on his appointment and wishes him a fulfilling and rewarding career on the Bench.

Clerks Room

Chambers continues to strengthen the team in the Clerks Room with the arrival of James Clarke from Selborne Chambers as Second Junior Clerk, and the promotion of Joanne Meah to First Junior Clerk to support John Stannard as Senior Clerk.

Book Publications

2018 will see the publications of three leading texts authored by members of Chambers. In February the 15th edition of Muir Watt & Moss: Agricultural Holdings was published, and the autumn will see two new books: one on the new Electronics Communications Code from a team headed by Guy Fetherstonhaugh QC and Jonathan Karas QC, and another on Mortgage Receivership by Stephanie Tozer and Cecily Crampin.

Falcon Chambers Members

Derek Wood CBE QC
Jonathan Gaunt QC
Kirk Reynolds QC
Guy Fetherstonhaugh QC
Jonathan Karas QC
Jonathan Small QC
Stephen Jourdan QC
Janet Bignell QC
Caroline Shea QC
Mark Sefton QC

Joanne R. Moss
Anthony Radevsky
Wayne Clark
Barry Denyer-Green
Paul Letman
Gary Cowen
Martin Dray
Anthony Tanney
Catherine Taskis
Emily Windsor
Stephanie Tozer
Edward Peters
Adam Rosenthal
Elizabeth Fitzgerald
Greville Healey

Nathaniel Duckworth
Oliver Radley-Gardner
Tamsin Cox
Philip Sissons
Joseph Ollech
Cecily Crampin
Jamie Sutherland
Kester Lees
Ciara Fairley
Toby Boncey
Tricia Hemans
Julia Petrenko
James Tipler
Mark Galtrey
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
clerks@falcon-chambers.com
@FalconChambers1