Falcon Chambers

Newsletter

Spring 2019

IN THIS EDITION:

TOP RANKED Chambers UK BAR 2019 FALCON CHAMBERS

The LEGAL 500 UNITED KINGDOM TOP TIER SET 2019

From the editor: Jonathan Gaunt QC

The end of last year saw a number of important decisions and it is pleasing to see that the members of Falcon Chambers remain at the forefront of developments across all areas of property law, whether it be large commercial disputes, small residential matters or anything in-between.

In this edition of our newsletter, Kirk Reynolds QC explores the impact of the recent Supreme Court decision in *S Franses v Cavendish Hotel (London) Ltd* (Guy Fetherstonhaugh QC having appeared for the Respondent) which re-defined the nature of the "intention" required when a landlord seeks to terminate a business tenancy on "ground (f)" in the Landlord and Tenant Act 1954. Having rejected the sufficiency of a 'conditional' intention, the Supreme Court's decision is bound to keep property practitioners busy as the courts begin to apply the new test at first instance.

Gary Cowen then considers the recent decision in *Colegate v GJB Estates Limited* (unreported), the first ever decision on s.12B(5) of the Landlord and Tenant Act 1987. As Gary explains, a seemingly harmless phrase buried away in statute can not only provide fertile ground for hard-fought litigation but can also have important and long-term practical consequences for the exercise of tenants' rights of first refusal.

Finally, Janet Bignell QC and Julia Petrenko reflect on developments in the law governing the service of notices, with a particular focus on issues of indirect service and electronic communication. Whilst this may be a topic with which practitioners feel familiar, Janet and Julia explain how the recent Supreme Court decision in *UKI (Kingsway) Ltd v Westminster City Council* required important practical issues to be reassessed in the light of technological developments.

Chambers is always delighted to celebrate its professional successes. At a ceremony earlier in March, we were pleased to mark Stephanie Tozer's appointment as Queen's Counsel. We are also thrilled that Barry Denyer-Green has been appointed an honorary member of the Compulsory Purchase Association, a body which he has served for a considerable number of years. At the junior end, Chambers would like to welcome Thomas Rothwell and Imogen Dodds as our most recent tenants following the successful completion of their pupillages, as well as Camilla Chorfi (2008 call), who joined us from Selborne Chambers in August last year. It is good to see that Chambers retains its strength and depth at all levels of seniority.

We warmly invite all our readers to attend the 44th Annual Series of Blundell Lectures, which will take place between 3 June and 1 July 2019 at the London School of Economics. Our well-known speakers will bring their expertise to bear on cutting edge developments in property law. Further details can be found on the final page of this Newsletter.

We hope that you enjoy this edition of the Newsletter and that you will find it of interest.

Compiled by

Gavin Bennison

Thomas Rothwell

Case Round Up

CDS (Superstores International) Ltd v Place Road Properties Ltd (Bristol County Court, 6 July 2018)
This was a rare case in which the Court was persuaded to rectify a long lease of a retail unit on the grounds of both common mistake and unilateral mistake, due to the way in which the defendant's solicitor had interacted with his opponent prior to completion. The defendant's solicitor had made a substantive change to the draft lease but had consciously omitted to draw this to the claimant's solicitors attention when taking him through the changes over the telephone, at the claimant's solicitor's request, when the latter was driving. **Stephanie Tozer** acted for the successful claimant.

Whitehall Court London Limited v The Crown Estate Commissioners [2018] EWCA Civ 1704
In this appeal, the Court of Appeal decided that the "no-Act assumption" on lease extensions extends to the block containing the flat, not just the flat, confirming the previous assumption of many. In order to value the loss in value to the freehold and headlease resulting from the grant of a new lease of the subject flat in this case, the valuers needed to know if they were to treat as certain that the rents of all the other flats in the building would double in 2029, or would diminish due to future 1993 Act lease extensions. **Stephen Jourdan QC** and **Cecily Crampin** appeared for the respondent and **Anthony Radevsky** and **Paul Letman** for the appellant.

Royal Brompton & Harefield Hospitals Charity v Roupell [2018 EWHC 1873 (Ch)
The claimant was the successor in title to the Board of Governors of the Royal Brompton Hospital. It argued that two of its residential tenants had never enjoyed the protection of the Rent Acts because, when the NHS was created, the endowment properties of the hospital came to be held on trust for the Minister of Health, and that this meant there had been Crown immunity from the Rent Acts. The court held that the endowments were not nationalised, and did not transfer to the Minister of Health, but instead came to be held on a charitable purposes trust. Therefore Crown immunity did not apply. The claimant would in any event have been estopped from treating the defendants as if they were not Rent Act tenants. **Mark Sefton QC** acted for the successful defendants.

Villarosa v Ryan [2018] EWHC 1914 (Ch)
The High Court held on appeal that the executors of a deceased lessee were allowed to serve a s.42 notice under the Leasehold Reform, Housing and Urban Development Act 1993 more than two years after probate was granted (the time limit in s.42(4A)) in cases where the executors were not relying on the deceased lessee's period of ownership under s.39(3A) as conferring on them the right to a lease extension. Looking at the purpose of the statutory amendments, including by admitting a ministerial statement under Pepper v Hart [1993] AC 593, it was clear that they were not intended to limit the right of personal representatives who were relying on their own period of two years ownership of the lease under s.39(2) of the 1993 Act. **Anthony Radevsky** acted for the successful Appellant.

H Company 2 Ltd v Spitalfields Small Business Association Ltd [2018] EWHC 2065 (Ch)
This High Court appeal concerned a point of rent review construction. The essential issue was whether the word "underlet" in the relevant clause of the lease referred to any underletting of the premises, whether or not the tenant was a party to it. Marcus Smith J held that it did. **Guy Fetherstonhaugh QC** acted for the successful appellant.

Loose v Lynn Shellfish Ltd and others [2018] EWHC 1959 (Ch)
The High Court applied the principles laid down by the Supreme Court in Loose v Lynn Shellfish Ltd & Ors [2016] 2 WLR 1126 to fix the boundary of a private fishery in the Wash. **Guy Fetherstonhaugh QC** and **Philip Sissons** again represented the fishermen who succeeded in limiting the seaward expansion of the fishery.

Bannerman Town v Eleuthera Properties Ltd [2018] UKPC 27
This appeal to the Privy Council concerned a quieting of title petition under the Bahamian Quieting Titles Act 1959. In the original proceedings, the respondent applied for its paper title to be quieted and the appellant filed an adverse claim, with others, claiming adverse possession. Hepburn J upheld the respondent's paper title. The Court of Appeal reversed the first instance decision and found that the respondent had title by adverse possession, rejecting the appellant's claim for title by adverse possession. The Privy Council decided that neither the respondent nor the appellant had any title at all, and so the land was left without any title. **Stephen Jourdan QC** and **Oliver Radley-Gardner** appeared for the appellants.

Case Round Up (continued)

M&P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd [2018] EWHC 2665 (Ch)
A judge had refused to granted a new tenancy to a commercial tenant under the 1954 Act on grounds (a) (breach of covenant to repair) and (c) (other substantial breaches). The tenant appealed on the basis that the judge had shown apparent actual or apparent bias towards the tenant at trial, in particular in the form of disparaging remarks and frequent intervention in cross-examination, and that a fair trial had not been possible. Hildyard J held although some of the trial judge's criticisms could and should have been expressed more moderately, the reasonable and informed observer would not conclude that the judge had prejudged the issues. Nor was the tenant's defence prevented from being properly explored at trial, as the tenant's legal team did the very best that was possible. **Caroline Shea QC** appeared for the respondent. **Kirk Reynolds QC** and **Emily Windsor** appeared for the appellant.

Phoenix GRP Limited v Spirit Pub Company (Leased) Limited (Guildford County Court)
This was a claim for wrongful forfeiture or relief from forfeiture brought by a tenant of pub premises. The landlord had forfeit the tenant's lease by peaceable re-entry following the tenant's liquidation. It had not served a section 146 notice before doing so and relied upon s.146(9) of the Law of Property Act 1925, which provided that section 146 did not apply for forfeiture of a lease of a public house. In addition to making other findings as to the non-retrospective effect of the set aside of a winding up order, the judge agreed that section 146(9) applied, that the forfeiture was lawful and that there was no jurisdiction to grant relief from forfeiture under s.146(2). **Joe Ollech** appeared for the successful landlord.

Pollock v Oldfield [2018] EWHC 2743 (Ch)
This was a High Court appeal against the lower court's determination of a boundary dispute. The trial judge had been required to identify the location of the parties' common boundary by making findings as to the presence or absence of a fence in a field at the date of the operative conveyance in 1928. There was no direct evidence and the court had to proceed by process of inference. Arnold J rejected the convention that this had been an "evaluative exercise" rather than a finding of primary fact, and overturned the trial judge's finding on the basis that his analysis of historic correspondence and photographic evidence had been suspect. The location of the boundary was resolved in the claimant's favour. **Nathaniel Duckworth** acted for the successful Appellant.

VEEE Ltd v Barnard [2018] UKUT 379 (LC)
A property developer applied to the Upper Tribunal under s.84 of the Law of Property Act 1925 to discharge or modify restrictive covenants impeding the proposed development. The first covenant required the approval of plans by the original developer of the estate. That covenant was discharged on ground (a) (obsolescence) as the original developer had been dissolved. A second covenant, permitting use of the plot as a dwelling house in the occupation of one family only, was modified on ground (aa) to permit the construction of an additional dwelling house. The Tribunal rejected the objectors' case that the covenant secured practical benefits to them of substantial value or advantage. **Toby Boncey** appeared on behalf of the successful applicant.

Fitzwilliam Land Co v Cheesman [2018] EWHC 3139 (QB)
The applicant landowner sought an interim injunction, partly on a quia timet basis, to restrain trespass on land on which they hunted. The respondents were both named and unknown hunt saboteurs. Orders were made restraining the saboteurs from trespassing on the hunt's land, first by Charles Bourne QC sitting as a Deputy High Court Judge, and then by Freedman J at the return date, until trial or further order. A trial is listed for March 2019. **Greville Healey** acted for the successful applicants.

Moore v Moore [2018] EWCA Civ 2669
The Court of Appeal rejected an appeal by a father against a finding that his son had an equity based on proprietary estoppel over the entirety of the father's interest in the family farming partnership. The fact that the son had in 2008 received his uncle's half of the farm did not mean that his equity had already been satisfied, because his expectation was to receive his father's share of the farm. The question of the satisfaction of the equity was, however, remitted to the first instance court. The Court gave guidelines indicating that there should be lump sum paid to the mother, allowing a clean break between her and the son, and taking into account inter alia the tax consequences of the transfer of land to the son. **Caroline Shea QC** and **Ciara Fairley** appeared for the respondents.

Case Round Up (continued)

Alexander Devine Children's Cancer Trust v (1) Millgate Developments Ltd [2018] EWCA Civ 2679
The Court of Appeal reversed a decision of the Upper Tribunal which had the retrospective modification of restrictive covenants under the public interest limb of ground (aa) of section 84 of the Law of Property Act 1925 so as to facilitate a social housing development. The developer in question had constructed the housing in knowing breach of restrictive covenants benefitting an adjoining landowner, the trustees of a children's hospice. The Court held that the Upper Tribunal had, inter alia, failed to have due regard to the developer's failure to make a prospective s.84 application, without excuse, and had failed to take account of the fact that the affordable housing which was built could have been construed elsewhere to the local authority's satisfaction. In light of the developer's high-handed conduct, its section 84 application was refused. **Emily Windsor** acted for the successful appellant.

Adams v Sherwood & Ors [2018] UKUT 0411 (LC)
In this application for the modification or discharge of restrictive covenants impeding residential development under section 84 of the Law of Property Act 1984, the applicants successfully secured the discharge of a covenant under ground (a) (obsolescence), on the basis that it was intended to secure a pattern of access to the benefitted land which was no longer possible and no longer observed. Further the applicants obtained the modification of a separate covenant under ground (aa) (absence of practical benefits of real value of advantage) on the basis that part of the envisaged development could be carried out anyway and the additional effect of the construction impeded by the covenant would be small. **Paul Letman** appeared for the successful applicants.

Re London Bridge Entertainment Partners LLP (in Administration) [2018] EWHC 3200 (Ch)
This was the trial of preliminary issues concerning the construction of a clause in a rent deposit deed which provided for the landlord to be entitled to recover proper losses incidental to and consequent upon a forfeiture of the lease. The landlord claimed to be entitled to recover sums representing an unlimited period for marketing the property following the forfeiture together with a sum equivalent to any rent-free period which would be granted to an incoming tenant. **Gary Cowen,** appearing for the administrators of the tenant company, successfully argued that on the true construction of the rent deposit deed, the landlord was not entitled to recover either sum.

Rashid v Rashid [2018] EWCA Civ 2685
This appeal concerned the ability of a person to claim adverse possession of land of which they are the registered freehold proprietor. In 1989, the appellant's father had forged a transfer of the respondent's house and then transferred the land to the appellant. The respondent had initially tried to convince solicitors to act for him in recovering the property but was turned away. Many years later, he later brought a claim for rectification of the register and won in the FTT and Upper Tribunal. The Court of Appeal reversed that decision, holding that the decision in *Parshall v Hackney* [2013] EWCA Civ was wrong: the appellant had been in adverse possession of the property throughout, notwithstanding that he was also the registered proprietor, and so could demonstrate "exceptional circumstances" justifying the refusal of rectification. Further, the doctrine of illegality was of no application. **Stephanie Tozer** and **Tricia Hemans** acted for the respondent.

Antoine v Barclays Bank [2018] EWCA Civ 2846
A bank had been granted a charge by someone who had used forged documents to procure a court order requiring his registration as proprietor of the Appellant's property. The Appellant sought rectification of the register to remove the bank's charge on the grounds that the registration of its charge was either a mistake, or a consequences of one for the purposes of the LRA 2002, Sch. 4. The bank successfully resisted rectification as the Court of Appeal held that registration on the basis of a court order, which remained valid until set aside, was akin to the position in relation to a voidable transaction, rather than a void one. The Land Registry had made no mistake in registering the charge. **Guy Fetherstonhaugh QC** and **Greville Healey** acted for the successful first respondent.

S Franses Limited v The Cavendish Hotel (London) Ltd [2018] UKSC 62
This landmark decision of the Supreme Court held, as readers will be well aware, that a landlord will only have the requisite "intention" to carry out works to a tenant's holding for the purpose of section 30(1)(f) of the Landlord and Tenant Act 1954 if the works would

Case Round Up (continued)

still be undertaken if the tenant were to leave voluntarily. An intention which is "conditional" on whether the tenant chooses to assert and pursue his claim for a new tenancy will not suffice. The Supreme Court nonetheless affirmed that the landlord's purpose or motive are irrelevant save as material for testing whether a firm and settled intention exists. **Guy Fetherstonhaugh QC** acted for the respondent.

Colegate v GJB Estates (Unreported) 10 December 2018 County Court at Bournemouth and Poole
This claim concerned whether, under s.12B(5) of the Landlord and Tenant Act 1987, the sale of the freehold interest in a property subject to tenants' rights of first refusal should be taken free of an incumbrance: a long lease of one of the flats in the block which had, at the time of the relevant disposal, been held with the freehold interest. The lease of the flat was granted by the freehold owner of the block to two of its directors. In the first decision of its kind, the judge answered in the negative. He held that the primary purpose of the 1987 Act was to allow lessees of blocks of flats to acquire the freehold of their blocks and not to permit them to acquire vacant flats. **Gary Cowen** appeared for the claimants. See the article in this issue.

Aldford House Freehold Ltd v Grosvenor (Mayfair) Estate and K Group [2018] EWHC 3430 (Ch)
The dispute concerned a collective enfranchisement claim relating to a large block of flats on Park Lane. The number of flats in the building was a decisive issue. This turned on the interpretation and application of the statutory definition of "flat". Fancourt J held that once there is a separate set of premises, which is constructed for the purpose of being used as a dwelling, it is a "flat" even though it has not yet been fitted out so as to be capable of being lived in. **Stephen Jourdan QC,** leading **Tom Jefferies,** appeared for the successful second defendant.

Parker v Roberts [2019] EWCA Civ 121
This appeal arose from a dispute between neighbours as to the existence of a right of way. The respondent had obtained planning permission to build a large house on part of his garden. In order to access the house, he needed to use a private road over which he had a right of way. The appellants, the owners of the road, argued that although he had a right of way in respect of part of the land which now comprised the house and garden, the dominant tenement was limited and did not extend to the proposed building plot. Considering questions of construction of the relevant conveyance, the rule in Harris v Flower, the law on implied easements and the doctrine of correction of mistakes in instruments by the process of construction, the Court of Appeal found for the appellants, for whom **Adam Rosenthal** successfully acted.

Fearn v The Board of Trustees of the Tate Gallery [2019] EWHC 246 (Ch)
This claim was brought against Tate Gallery by the owners of four apartments in the adjacent Neo Bankside development, who claimed that Tate's use of its public viewing platform at Tate Modern interfered with their Article 8 rights and constituted a nuisance. Mann J found that Tate was not a public authority and the flat owners therefore had no direct privacy claim under the Human Rights Act. He held that law of nuisance was capable, in an appropriate case, of operating to protect the privacy of a home against another landowner, but that there was no actionable nuisance in this case. **Guy Fetherstonhaugh QC** and **Elizabeth Fitzgerald** appeared for the successful defendant.

The Franses Case: What Did It Decide?

by Kirk Reynolds QC

In this Article I do not express my own opinion as to whether *S. Franses Limited v The Cavendish Hotel (London) Limited* [2018] UKSC 62 was rightly decided. My opinion on that is not relevant: by definition it was rightly decided.

It was a unanimous decision of the Supreme Court in which two fully reasoned judgments were delivered, one by Lord Sumption, the other by Lord Briggs, after exhaustive argument presented by specialist Counsel who cited all relevant authorities. The *Franses* case will therefore in the future be followed and applied by all Judges who have to grapple with the question of how the landlord's professed "intention" to demolish or reconstruct the holding can be established under ground (f) of section 30(1) of the Landlord and Tenant Act 1954.

Rather, it is the purpose of this Article to explain what the case decides, the extent to which it confirms the relevant principles as previously understood and the extent to which it establishes a new approach to the question.

The Facts

As Lord Sumption pointed out: "the facts are unusually stark". This does not, in my view, allow us to water down the impact of the decision on the ground that "hard cases make bad law"; on the contrary, the clarity of the factual basis upon which the decision fell to be made enabled the Supreme Court to decide the relevant issues as matters of principle.

The landlord put forward in the course of proceedings several successive schemes said to represent the works which it intended to carry out. Lord Sumption quoted the finding by the trial Judge that the proposed scheme of works was "designed with the material intention of undertaking works that would lead to the eviction of the tenant regardless of the works' commercial or practical utility and irrespective of the expense". Accordingly, in designing those works, the landlords made sure that they would be (i) sufficiently "substantial" to qualify under ground (f); (ii) too substantial and disruptive to be carried out by exercising a right of entry under the lease while the tenant remained in possession; and (iii) avoid the need for planning permission (in case that enabled the tenant to argue that the likely refusal of permission would make the project impossible to implement). The result was, as Lord Sumption noted, that it was common ground between the parties that the proposed works had no practical utility. This was because, although the works themselves had been designed so that they could be carried out without planning permission, the landlord would not be able to make any use of them at all (as reconstructed) without planning permission for change of use, which the Landlord did not intend to seek. As Lord Sumption again emphasised: "the sole purpose of the works was to obtain vacant possession". To establish the fixity of its intention, the Landlord gave the customary undertaking to the Court that, if a new tenancy was refused and vacant possession was obtained, the works would be done. On the evidence before him, the trial Judge found that the landlord genuinely intended to carry out the works, and he went on to hold that, on the authorities which were binding on him, the landlord had made out the intention required to satisfy ground (f). He accordingly refused the grant of a new tenancy. His decision was upheld on appeal to the High Court, but the High Court Judge, recognising that the position was governed by existing authorities which could only be overruled or modified by the Supreme Court, facilitated a "leap frog appeal".

Approach of Supreme Court

The Supreme Court examined exhaustively the numerous authorities governing the question. Helpfully, this led them to consider, one by one certain rules or principles which had been laid down by the Court of Appeal or, in many cases, the House of Lords, and to state the extent to which the principles enunciated by those cases were still good law. It was only after this comprehensive review that the Supreme Court directly addressed the distinct issue which arose on the stark facts of the case before them.

Principles which the Supreme Court confirmed

(i) *The relevant intention of the landlord is his intention at the date of the hearing.* This point is of vital importance, for the obvious reason that intentions are likely to be change from time to time, and to be held with a greater or lesser degree of firmness as circumstances change.

(ii) *In general, motive is irrelevant, provided there is a genuine intention to demolish or reconstruct.* The reaffirmation of this point is also important, because the attack in the *Franses* case was, to some extent, based upon the suggestion that the landlord's professed intention was vitiated by its underlying motive.

(iii) *It is for the landlord to decide what works he wishes to carry out and where. If his intention is genuine, it cannot matter whether it is reasonable, or whether reasonable changes to the scheme would make it consistent with the tenant's continued possession of the demised premises.* In affirming this principle, Lord Sumption was applying a statement made in an earlier case by Lady Hale, who, as President of the Supreme Court was one of the Judges deciding the *Franses* case. The point being emphasised is *that the test is one of intention, not reasonableness.*

(iv) *The touchstone of ground (f) is a firm and settled intention to carry out the works. The landlord's purpose or motive are irrelevant save as material for testing which such a firm and settled intention exists.* Although this formulation is, to some extent, a reformulation by Lord Sumption of the points already accepted as remaining good law, the change of emphasis from the "genuineness" of the intention to

The Franses Case: What Did It Decide?

continued

considering whether it is "firm and settled" is significant, as is the acceptance that the landlord's purpose or motive is relevant as part of the material for testing whether the firm and settled intention exists.

(v) *The 1954 Act confers no more than a qualified security on the tenant.* Lord Sumption accepted a submission that "as a statutory interference with the landlord's proprietary rights, the protection conferred by the Act should be carried no further than the statutory language and purpose require". Focusing more particularly on ground (f) Lord Sumption went on say that "certain interests of the landlord override whatever security it was intended to confer on the tenant, and one of them is the right to demolish or reconstruct his property in whatever way he chooses at the expiry of the term".

The New Test of Intention

Having confirmed all of the above principles as still representing the law, it might have been thought that the Supreme Court would have dismissed the appeal. It did not do so because, as Lord Sumption put it, the appeal did not "turn on the landlord's motive or purpose, nor on the objective reasonableness of its proposals" but that rather "it turns on the nature or quality of the intention that ground (f) requires". The reason given by Lord Sumption for deciding that the landlord's intention did not have the required "nature or quality" was because "the landlord's intention to carry out the works was conditional. It intended to carry them out only conditionally on their being necessary to get the tenant out, and not, for example, if he left voluntarily or if the Judge was persuaded that the works could be done by exercising a right of entry". Disagreeing with the decision of the Courts below that this conditionality did not matter because, at the date of the trial, it was by then clear that the tenant would not in fact leave voluntarily and that the works could not be done by way of a right of entry while he remained in possession, Lord Sumption went on to say that "the problem is not the mere conditionality of the landlord's intention, but the nature of the condition". He noted that ground (f) assumes that the landlord's intention to demolish or reconstruct the premises is being obstructed by the tenant's occupation. Lord Sumption stated that "the landlord's intention to demolish or reconstruct the premises must exist independently of the tenant's statutory claim to a tenancy, so that the tenant's right of occupation under a new lease would serve to obstruct it. The landlord's intention to carry out the works cannot therefore be conditional on whether the tenant chooses to assert his claim to a new tenancy and to persist in that claim. The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily. On the facts found by the trial judge, the tenant's possession of the premises did not obstruct the landlord's intended works, for if the tenant gave up possession the landlord had no intention of carrying them out. Likewise, the landlord did not intend to carry them out if the tenant persuaded the Court that the works could reasonably be carried out while it remained in possession. Lord Sumption concluded that "a conditional intention of this kind is not the fixed and settled intention that ground (f) requires. The answer would be the same if what the tenant proposed was a demolition, conditionally on its being necessary to obtain possession from the Court".

Lord Sumption then went on to consider the "more complex issues" which would arise "if the landlord intended to carry out some substantial part of the proposed works whether or not it was necessary to do so in order to obtain vacant possession from the Court, and part of them only if it was necessary in order to gain possession". In describing the circumstances where this issue might become relevant, the judgment is particularly interesting, because it refers to a situation which often arises in practice. Lord Sumption said:

"This might arise if, for example, the unconditional part of the landlord's plan was insufficiently substantial or disruptive to warrant the refusal of a new tenancy, so that spurious additional works had to be added for the sole purpose of obtaining possession. In a situation like that, the answer is likely to depend on the precise facts. If, however, it is established that, at the time of the trial, were the tenant hypothetically to leave voluntarily, the landlord would not carry out the spurious additional works, then the tenant's claim to a new tenancy would normally fall to be resolved by reference only to the works which the landlord conditionally intended."

Lord Sumption then returned to the limited relevance of motive and purpose. He said that "although the statutory test does not depend on the objective utility of the works, a lack of utility may be evidence from which the conditional character of the landlord's intention may be inferred". He also considered a suggestion that the new approach would encourage landlords to "disguise their intentions more effectively than the landlord [in Franses] had done". He admitted that "it would be unworldly for this Court to ignore that possibility", but insisted that "we cannot decide an issue of statutory construction on the assumption that the landlord will withhold the truth from the Court on an application for a new tenancy. We have to proceed on the footing litigants are honest or, if they are not, that they will be found out by the experienced Judges who hear these cases".

Having explained in this Article what *Franses* decided, I will in a further Article go on to consider the practical effects which the decision will have for landlords and the lawyers and surveyors and other professionals who advise them where "intention" must be proved, and business tenants and their advisers who will need to understand and apply *Franses* in devising new stratagems to defeat their landlord's attempt to deny, on grounds of proposed redevelopment, a renewal of the tenancy of their business premises.

The "Magnificent" Seven

by Gary Cowen

Seven relatively innocuous words hidden in the intricacies of the Landlord and Tenant Act 1987 might not sound like enough to get the pulses racing but as we all know, it only takes a single word and two lawyers to create a dispute so it should be little surprise that the words "unless the court by order directs otherwise" in s.12B(5) of the 1987 Act have the power to create fiercely contested litigation.

The 1987 Act provides that, subject to various exceptions, the lessees of buildings containing residential flats should, when the freehold owner comes to dispose of an interest in the block, have the right of first refusal to purchase that interest. In broad terms, the lessees have the opportunity to purchase the interest which is to be sold by the landlord for the price and upon the terms upon which the purchaser is set to buy that interest. The lessees are given that opportunity by the service of notice in advance of the sale of the interest.

It is not uncommon, however, for the landlord to dispose of an interest, whether accidentally or not, without first serving the requisite notices under the 1987 Act. The Act provides a remedy for the lessees, enabling them to serve notice under one of ss.12A to 12C depending on the circumstances of the original disposal. Section 12B applies where the original disposal did not consist of entering into a contract. The section provides that the requisite majority of qualifying lessees can serve a purchase notice on the purchaser of the interest requiring the purchaser to transfer the interest to a nominee appointed by the lessees.

That purchase notice might, in some circumstances, not be served on the purchaser for some time following the initial disposal. What happens if, in the meantime, the purchaser has created incumbrances over the interest which he purchased?

Section 12B(5) provides the answer. Where the incumbrance is a charge over the interest, the further transfer of the interest pursuant to the purchase notice will have the effect of discharging the charge. Where it is some other incumbrance, "the property shall be so disposed of subject to the incumbrance but with a reduction in the consideration payable to the purchaser corresponding to the amount by which the existence of the incumbrance reduces the value of the property". But all of that is subject to those seven little words because the default positions set out in s.12B(5) apply "unless the court by order directs otherwise".

The Act gives no further guidance as to the circumstances in which the court should "direct otherwise". Indeed, until very recently, the only guidance came from Sir Thomas Bingham MR in *Belvedere Court Management v Frogmore Developments* [1997] QB 858, a case decided on the former s.12 of the 1987 Act. In discussing s.12(4), the equivalent provision, he remarked that "The circumstances in which a court could properly order that property should be disposed of not subject to an incumbrance would be very rare, since the court would never be willing to expropriate a bona fide third party purchaser for value".

But what about the position where the purchaser is not a bona fide third party purchaser for value? In the recent case of *Colegate v GJB Estates Limited* (Unreported) 10 December 2018 HHJ Berkley the Judge had to consider an unusual and difficult situation.

The Colegate family between them owned and controlled three of the five flats in a residential development in Bournemouth. A fourth flat was demised on a long lease to a third party and the fifth was held by the freeholder and let on a Rent Act protected tenancy. In December 2014, the freehold interest in the block was held by BGL whose directors were Paul and Gordon Brodie. As part of a reorganisation of the family's finances and for tax planning purposes, the freehold was transferred to another company, GJB Estates Limited, owned and controlled by Gordon Brodie for a consideration of £100,000. Gordon Brodie's wife was also a director of that company. That disposal was a relevant disposal for the purposes of the 1987 Act but no notices were served pursuant to s.5 of the 1987 Act. Nor were any notices served under s.3A of the Landlord and Tenant Act 1985 which would have alerted the lessees to their rights under the 1987 Act.

The Colegate family formed a requisite majority of the lessees in the building and, once they became aware of their rights, were able to serve a purchase notice on GJB. A formal notice under s.11A of the 1987 Act seeking information about the initial disposal was served on GJB on 25 May 2017. It was ignored. A purchase notice under s.12B was therefore served on 5 July 2017.

The purchase notice required GJB to transfer the freehold interest in the building to the lessees' nominee for £100,000. However, in the intervening period between the original disposal and the service of the purchase notice, the Rent Act protected tenant had moved elsewhere, leaving a vacant flat which formed part of the freehold interest in the building.

On 19 July 2017, having had sight of the s.11A notice and the purchase notice, GJB granted a 999 year lease of the vacant flat to Gordon Brodie and his wife. The lease was less favourable to the freeholder of the block because (i) it was longer than each of the other leases and effectively deprived

The "Magnificent" Seven

continued

the freehold owner of the possibility of any lease extension premium and (ii) unlike each of the other leases which provided for ground rents with reviews, it was granted at a peppercorn rent, depriving the freehold owner of any income stream from that flat.

The Colegates were told that Mr and Mrs Brodie had paid their company £140,000 for the lease of the flat although it came out in court that the company had loaned them that amount in order to "buy" the lease from it. No date was fixed for repayment.

They contended that this was a case where justice required that the court should therefore "otherwise order". The default position under s.12B(5) is that the incumbrance should remain but, it was contended, that was predicated on the understanding that (i) it would be wrong to deprive an innocent third party who had acquired an interest in the property of that interest and (ii) the lessees would in any event be properly compensated for the difference in value of the interest by reducing the amount which the lessees should pay pursuant to s.12B(5)(b).

Here, the third party was not an innocent third party but an associated party who had taken a lease on beneficial terms designed, it appeared, to disadvantage the lessees when they came to acquire the freehold. What is more, whilst the lessees could rely upon a reduction in the price of £100,000 paid on the initial disposal to reflect the existence of the new long leasehold interest worth £140,000, the greatest reduction in price possible was, logically, £100,000 whereas the lessees were being deprived of the possibility of granting a leasehold interest in the future worth £140,000. The lessees were therefore losing out financially notwithstanding that it was the freeholder which had consistently failed to comply with its obligations under the 1987 Act.

The Judge held, however, that the primary purpose of the 1987 Act was to enable lessees to have control of the reversionary interests to their leases and not to have the windfall of a vacant flat to sell. Moreover, he held that in granting a long lease of the flat, the freeholder had not done anything which it could not legally have done at any time up to the initial sale of the freehold. Even if a s.5 notice had been served and accepted, the landlord could have withdrawn the notice rather than sell the freehold with the benefit of the vacant flat. The lessees were never in a position to force the freeholder to sell without granting a lease of the vacant flat. The Judge therefore refused to order that the sale of the freehold should proceed without the new leasehold interest in place.

This is the first decision specifically relating to this provision. It may be the last; the Judge's decision that by granting the lease, the freeholder was not doing anything it could not have done before the initial transfer will always hold true no matter how unscrupulous the freeholder and no matter how disadvantageous to the other lessees any new leasehold interest might be. In addition, the Act is not merely concerned with the lessees acquiring the reversionary interests to their flats – a lease of common parts or a lease of airspace above the roof is a relevant disposal notwithstanding that the demise is not concerned with the lessees' flats at all. Perhaps if the Rent Act tenant had not moved away resulting in a completely vacant flat, exercising its discretion in favour of the lessees might have been more palatable to the court. As it stands, it may take very stark facts to persuade a court to operate the exception in s.12B(5).

Gary Cowen appeared for the Claimants in *Colegate v GJB Estates Limited* (Unreported) 10 December 2018 HHJ Berkley

Take Proper(ty) Notice: Supreme Court decision on service of notices

by Janet Bignell QC and Julia Petrenko

Many property practitioners will be regularly required to advise on the content and service of notices. The consequences of the server making a mistake can be dramatic, particularly if re-service of another notice is not an option. In UKI (Kingsway) Ltd v Westminster City Council [2018] UKSC 67 the Supreme Court gave helpful general guidance on service of notices, including on issues of indirect service and electronic communication.

Facts

The facts of *UKI v Westminster* concerned the service of a completion notice by the Council which specified a date on which UKI's newly developed building would be brought into the ratings list.

In 2009 UKI began development of an office space ("the Building") in Kingsway. UKI's liability for non-domestic rates depended on entry of the Building in the rating list. Section 46A and Schedule 4A of the Local Government Finance Act 1988 provide that a validly served completion notice has the effect that the building to which it relates is deemed to have been completed on the date in the notice. Paragraph I(I) of Schedule 4A provides that if a billing authority considers that a building is likely to be completed within three months, *"the authority shall serve a [completion] notice … on the owner of the building".* Such a notice must state the date which the authority proposes as the completion date. In the case a of building which is not yet complete, that date must be a date by which the building can reasonably be excepted to be completed and be not later than three months from the day on which the notice is served.

Paragraph 8 of Schedule 4A deals with service and provides:

"Without prejudice to any other mode of service, a completion notice may be served on a person (a) by sending it in a prepaid registered letter, or by the recorded delivery service, addressed to that person at his usual or last known place of abode or, in a case where an address for service has been given by that person, at that address; (b) in the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at their registered or principal office or sending it in a prepaid registered letter or by the recorded delivery service addressed to the secretary or clerk of the company or body at that office; or (c) where the name or address of that person cannot be ascertained after reasonable inquiry, by addressing it to him by the description of owner of the building (describing it) to which the notice relates and by affixing it to some conspicuous part of the building."

In 2012, completion of the Building was approaching. The Council informed UKI's agents, Eco FM, that it intended to specify a completion date of 1 June 2012 and asked Eco to confirm the identity of the owner of the building. Eco declined to do so without instructions. On 5 March 2012 the Council delivered a completion notice by hand to the Building specifying 1 June 2012 as the completion date. The notice was addressed simply to "Owner 1 Kingsway London WC2B 6AN" and was handed to a receptionist employed by Eco, who scanned and emailed a copy to UKI which was received by UKI not later than 12 March 2012. On the Council's case, this meant that, from 1 June 2012, the Building was brought into the ratings list with a ratable value of £2.75m. UKI asked that the entry be deleted on the basis that the notice was not validly served upon it.

The matter was heard initially by the Valuation Tribunal which allowed UKI's appeal. That decision was reversed by the Upper Tribunal, but then reinstated by the Court of Appeal.

It was common ground that the Council had not used reasonable endeavours to ascertain UKI's name and address as owner of the Building, and could not therefore rely on the deeming effects of paragraph 8(c) of Schedule 4A of the Act. Rather, the Council sought to rely on the indirect service of the notice by virtue of it having been scanned and forwarded by Eco's receptionist. Accordingly, the Supreme Court was required to determine whether the notice was validly served on UKI in circumstances where:

(i) it was not directly served on UKI but had passed through the hands of a third party who was not authorised for that purpose by either party; and

(ii) it was not received by UKI in its original form but as an electronic copy.

Lord Carnwarth JSC gave the judgment of the Court.

Take Proper(ty) Notice: Supreme Court decision on service of notices

continued

Is indirect service good enough?

On these facts, on the first issue, the Upper Tribunal considered that, since the notice had reached the hands of the intended recipient, it did not matter that it had done so by an unorthodox route. The Court of Appeal disagreed, holding that such an approach failed to give effect to the wording of the statute which required service *by* "the authority".

In the Supreme Court, Lord Carnwarth explained that the means by which the notice had arrived at its destination were not wholly immaterial. Rather, there needed to be a sufficient causal connection between the authority's actions and receipt of the notice. UKI sought to argue that the chain of causation was broken as Eco's receptionist was not authorised by the Council to serve the notice. This argument was however rejected. On receipt of the notice addressed to the owner Eco's receptionist did no more than would reasonably be expected of a responsible employee in passing the notice on. It was a natural consequence of the Council's action. Similarly a notice correctly addressed, but mistakenly delivered to a neighbouring address and then passed on by the occupant to the intended recipient could be treated as effective service under ordinary principles of causation, even though the friendly neighbour was not under the control of either party.

Electronic Communication?

As to the second issue, the Supreme Court was not referred to any authorities which concerned a scanned notice received by email. However the Council cited *Hastie & Jenkerson & McMahon* [1990] 1 WLR 1575 in which service by fax was accepted as valid. Both parties agreed that no material distinction could be drawn between a fax and a scanned attachment to an email, but UKI sought to rely on the Electronic Communications Act 2000 as having narrowed the common law. This Act empowered ministers to make regulations relating to primary or secondary legislation to enable use of electronic communications. Regulations had been made in relation to some parts of the ratings legislation, but not in relation to the service of completion notices. UKI sought to argue that ministerial intervention was considered necessary to authorise the use of electronic communications, and that this carefully drawn scheme would be otiose if there existed some common law rule permitting the use of electronic service as a generality. The Supreme Court considered however that there was nothing in the 2000 Act which expressly or impliedly restricted the previous law, and that UKI was unable to overcome the general presumption that Parliament did not intend to change the common law.

Lessons for practitioners

This was the second 2018 decision from the Supreme Court concerning service of notices. In *Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood* [2018] UKSC 22, the Supreme Court held, in an employment context, that a notice was not given when it was delivered to a relevant address, but rather if and when it came to the attention of the recipient.

In cases where no mandatory method of service is prescribed, notice servers will no doubt be relieved that in *UKI* the Supreme Court has confirmed that the fact that the notice reaches the recipient indirectly will not necessarily prevent the service from being effective. Confirmation that, all other things being equal, service can be effected by email is also likely to be helpful these days and where, for example, there is no postal address for the recipient.

However, the Supreme Court was clear that the Council's method of service was not ideal and that the safest course would have been to adopt and follow precisely one of the modes of service set out in the statute. The Council was lucky that its failures to do so did not prevent service from having been effected. If, however, the terms of the statute or contract suggest that an original notice is to be served (see, for example, the Leasehold Enfranchisement Housing and Urban Development Act 1993, considered in *Cowthorpe Road v Wahedally* [2017] L & TR 4) or the date of service is crucial, then others who fail to abide by the prescribed mechanisms may not be so lucky.

We wait to see whether contracting parties for whom certainty is paramount (as server or recipient) increasingly now provide for the inclusion of mandatory modes of service in their contract instead.

Latest News

Silk Appointments

Chambers is delighted that Stephanie Tozer will be appointed Queens Counsel at a ceremony in March 2019. We would like to congratulate Stephanie and wish her a fulfilling onward career in silk.

Lateral Recruitment

Chambers would like to welcome Camilla Chorfi (called in 2008) who joined Chambers in August 2018. Camilla is an established junior with a core real estate practice, supplemented by experience in insolvency and professional liability matters.

New Tenants

We were very pleased to welcome two new tenants, Thomas Rothwell and Imogen Dodds, in October last year following the successful completion of their pupillages. Thomas and Imogen undertake work across the broad spectrum of Chambers' practice areas and can be instructed through the clerks room in the usual way.

Clerks Room

Chambers is very pleased to announce the recent arrivals of Sam Kennett and Jacob Watson to the clerks' room. Sam and Jacob will bring further strength to our impressive team and will primarily be working with the junior end of Chambers.

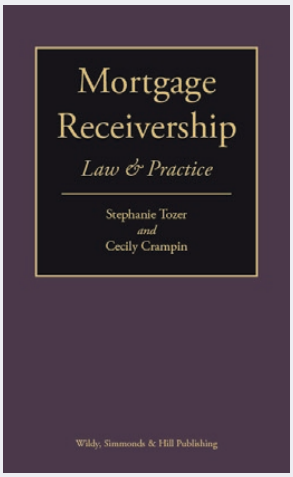
Barry Denyer-Green

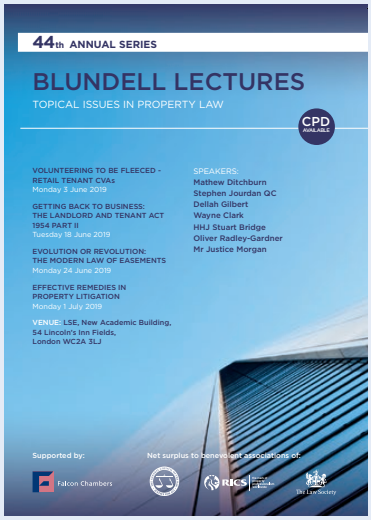
Chambers would like to congratulate Barry Denyer-Green on being made an honorary member of the Compulsory Purchase Association in recognition of his many years' service. Over the last 14 years, Barry has served the Association in numerous ways, including as chairman and on the national committee, and has made a significant contribution to reform in this important area of the law.

Latest News

Book Publications

Stephanie Tozer and Cecily Crampin's new book on Mortgage Receivership is now available Commended for its "focused approach" by the New Law Journal, Mortgage Receivership is heralded as a "key text in every law office"





Blundell Lectures

The 44th Annual Series of Bundell Lectures will take place between 3 June 2019 and 1 July 2019 in the New Academic Building, London School of Economics, continuing Chambers' tradition of hosting this prestigious lecture series. Our speakers include both leading practitioners in the property law world (including members of Chambers) and members of the judiciary. Topics to be addressed this year are: the use of company voluntary arrangements by retail tenants; the current state of play in the law of business tenancies and the law of easements in light of recent landmark Supreme Court decisions in both areas; and a lecture to be delivered by Mr Justice Morgan on effective remedies in property litigation. For further details and to book your attendance, please email **lucinda@quadrilect.co.uk**

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