Falcon Chambers

Newsletter

Autumn 2016

IN THIS EDITION:

CHAMBERS UK BAR AWARDS 2015 WINNER

Chambers UK Real Estate Set of the Year 2015

Compiled by

James Tipler

Julia Petrenko

From the editor: Janet Bignell QC

We are delighted that the new edition of Legal 500 again ranks Falcon Chambers as the only set in band 1 for Property Litigation. The editors write: "Falcon Chambers 'remains the obvious choice for any matter involving the law relating to land, where barristers provide a wealth of experience across a myriad of issues'." In this newsletter we include a selection of recent court and tribunal cases which amply demonstrate the breadth of our practice relating to land and the variety and diversity of the legal issues within our expertise. No better examples can be provided than the recent appearances in the Supreme Court of Guy Fetherstonhaugh QC, Philip Sissons and Charles Harpum for the successful appellant in Loose v Lynn Shellfish Ltd concerning the doctrines of accretion and prescription and of Stephen Jourdan QC and Ciara Fairley for the successful respondent in McDonald v McDonald on the question whether a tenant under an assured shorthold tenancy, where the landlord is not a public authority, can rely on a human rights defence to a possession claim. In addition, this summer's 41st series of Blundell lectures saw Timothy Fancourt QC speak on implied terms in property transactions, Elizabeth Fitzgerald talk about penalty clauses and my own lecture on land registration.

In following that trend, this edition of our newsletter contains a series of interesting and informative articles drawn from across the spectrum of matters upon which we advise and arbitrate as well as litigate. Wayne Clark educates us about the new Electronic Communications Code. Kester Lees discusses EMI Group v O & H Q1 Ltd. Caroline Shea QC and Ciara Fairley turn their spotlight on agricultural law and proprietary estoppel. Toby Boncey examines the First Tier Tribunal's jurisdiction to determine boundaries in the light of recent cases and Cecily Crampin, our recent lateral recruit, looks at owner's powers and sections 23 and 24 of the Land Registration Act 2002.

It is also very pleasing to report that our property dispute arbitration service, Falcon Chambers Arbitration, **www.falcon-chambersarbitration.com**, has continued to gather steam throughout 2016. A number of arbitrations have now run through to completion and we have many more on the books. In addition to acting as arbitrators, we continue to act regularly as legal assessors and increasingly as mediators too.

In hot off the press news, we congratulate Wayne Clark and Anthony Radevsky on their respective nominations as Real Estate Junior of the Year in the 2016 Chambers & Partners' Bar Awards. Falcon Chambers was awarded Real Estate Set of the Year 2015 and is nominated again in that category. As of 1 October 2016, we welcome Mark Galtrey as our newest junior tenant on the successful completion of his pupillage.

We would like to thank Julia Petrenko and James Tipler for editing this newsletter. If you have any comments you would like to share with us that we might take into account in future issues, we would be delighted to hear from you.

Case Round Up

McDonald v McDonald [2016] UKSC 28: **Stephen Jourdan QC** and **Ciara Fairley** appeared for the successful respondents before the Supreme Court in this landmark decision, in which it was held that section 6 of the Human Rights Act 1988 and Article 8 of the European Convention on Human Rights do not require the courts to consider the proportionality of evicting an occupier when entertaining a claim for possession that has been brought by a private sector owner – at least where there are legislative provisions which Parliament has decided properly balance the competing interests of private sector landlords and tenants, such as section 21 of the Housing Act 1988.

Lynn Shellfish Limited v Loose [2015] UKSC 72: **Guy Fetherstonhaugh QC, Charles Harpum** and **Philip Sissons** appeared in the Supreme Court for the appellants in this case concerning the nature and extent of private prescriptive fishing rights in an area of the foreshore of the Wash. The appellants successfully established that the geographical extent of any right established by prescription must be established by the historic user, not by attempting to construe a fictional grant. Furthermore, the addition of sandbanks to the foreshore was not a gradual and imperceptible extension of one recognised part of the foreshore but rather the joining to the foreshore of a previously distinct sandbank; accordingly, the doctrine of accretion did not apply so as to expand the size of the fishery.

Bristol Rovers v Sainsbury's Supermarkets Ltd [2016] EWCA Civ 160 The Court of Appeal upheld the judgment of Proudman J deciding that Sainsbury's had lawfully terminated a conditional contract to purchase the ground of Bristol Rovers FC, the Memorial Stadium. **Philip Sissons** appeared as junior counsel for Sainsbury's both at trial and on the appeal.

Winterburn v Bennett [2016] EWCA Civ 482: The Court of Appeal decided that signs on land indicating that a certain activity is prohibited on that land are sufficient to render the subsequent activity contentious (thus preventing the activity maturing into an easement, or perhaps frustrating its registration as a town or village green), even where the sign is wholly ignored for the prescriptive period, and no attempt is made to enforce the landowner's rights. **Jonathan Gaunt QC** and **Caroline Shea QC** of Falcon Chambers appeared for the Appellants. **Guy Fetherstonhaugh QC** appeared for the Respondents.

Davies v Davies [2016] EWCA Civ 463: **Timothy Fancourt QC** and **Elizabeth Fitzgerald** appeared for the successful party in the Court of Appeal in this proprietary estoppel case, widely-reported as the "Cinderella" case. The Court of Appeal considered in detail the rules relating to the quantification of proprietary estoppel claims and the principles applicable to determining how the equity is to be satisfied, and overturned the decision of HHJ Jarman QC to award the claimant daughter £1.3m, being roughly 1/3 of the value of her defendant parents' dairy farm, reducing the financial award to £500,000.

Scandia Care Limited & Rahimian v Ottercroft [2016] EWCA Civ 867: The Court of Appeal refused to interfere with the trial judge's exercise of his discretion to grant a mandatory injunction requiring the alteration or removal of a staircase interfering with the Respondent's right of light, rather than award damages in lieu. The CA considered that would not be oppressive in circumstances where the Appellants' conduct had been high handed, they had tried to steal a march, and the new staircase had been constructed in breach of a contractual undertaken which had been given to the Respondent in order to forestall an application for an interim injunction. **Greville Healey** acted for the successful Claimant at first instance and on the appeal.

Trustees of Sloane Stanley Estate v Mundy & Lagesse; Aaron v Wellcome Trust Ltd [2016] UKUT 223 (LC): On 10 May 2016 the Upper Tribunal delivered judgment in these three test cases which considered the appropriateness of using a statistical model known as the Parthenia Model to calculate relativity under the Leasehold Reform, Housing and Urban Development Act 1993. The cases were presided over by Mr. Justice Morgan because of their importance. **Stephen Jourdan QC** and **Julia Petrenko** represented the Wellcome Trust. **Anthony Radevsky** represented the Sloane Stanley Estate, and **Cecily Crampin** acted for the tenants.

Case Round Up (continued)

Urban Ventures Ltd v Thomas (aka Black Ant Co Ltd (In Administration), Re) [2016] EWCA Civ 30; [2016] 2 P. & C.R. DG2: **Gary Cowen** appeared for the Appellant in the Court of Appeal in this appeal concerning the operation of the anti-tacking provisions of the Land Registration Act 2002, ss.49-50, which limit the priority protection afforded to advances made at the time of a charge and such further advances as the chargee is obliged to make at that time. The central issue was whether a lender had, in issuing new facility letters whilst holding the benefit of a registered first legal charge, made a new contract of loan (which would not be secured by the charge) or had merely varied the existing loan.

Moore v Moore [2016] EWHC 2202 (Ch): **Caroline Shea QC** and **Ciara Fairley** represented the successful claimant in a £5m proprietary estoppel claim. The High Court held that a son who had devoted his life to farming, the fourth generation to do so, had an equity over the whole of his father's half interest in the family farming partnership. His detriment in positioning his whole life around the farm was not displaced by that fact his uncle had some years ago transferred his half share in the partnership to the son, because this was not done in satisfaction of the son's equity over the father's share, but rather in anticipation of the promises to the son being fulfilled in due course.

Publity v Chesterhill [2016] EWHC 1994 (Ch): The Claimant failed to establish that a binding tenancy had arisen, because (1) the parties were not ad idem on commencement date; (2) a dated signature was not the same as a dated agreement, and the latter was required; (3) there had in any event been an intervening counter-offer, so the original offer was no longer capable of acceptance. The Defendant was not entitled to retain monies which the Claimant had initially paid as a deposit, and which the parties had later agreed would be used as advance rent, notwithstanding he had expended those monies in effecting works to the premises at the Claimant's request. **Caroline Shea QC** represented the successful Defendant.

Gladman Developments v Sutton [2016] EWHC 1597 (Ch): The issue was whether a binding agreement had been made between the claimant, a company which promotes land for development, and the defendants, farmers who owned land on the outskirts of Congleton, in Cheshire. The claimant company asserted that an oral agreement had been made at a meeting, or on the telephone shortly after the meeting. If so, then, if the claimant was successful in obtaining planning permission for the development of the land, the defendants would be obliged to sell the land, and the claimant would be entitled to a share of the proceeds, estimated to be over £5 million. The Judge reviewed the contemporaneous documents and the oral evidence, and held that there had been no binding agreement. **Stephen Jourdan QC** acted for the successful defendants.

Vanquish Properties (UK) Limited Partnership v Brook Street (UK) Limited [2016] EWHC 1508 (Ch): **Guy Fetherstonhaugh QC** and **James Tipler** appeared for the successful defendant tenant in this decision on the validity of a break notice served by the claimant limited partnership in respect of the defendant's lease at 108 Fenchurch Street, London EC3 (part of the proposed Leadenhall Triangle development). The defendants successfully argued that the relevant legal estate could not have vested in the claimant, as a limited partnership has no legal personality, so the notice had not been given by the defendant's landlord under its lease. Nor could the notice be saved by application of the Mannai doctrine since the reasonable recipient would have been left in doubt about what was intended.

Sinclair Gardens Investments (Kensington) Ltd v Wisbey [2016] UKUT 0203 (LC): The case concerned the scope of costs recoverable under section 60 of the 1993 Act, and in particular what aspects of a solicitor's work are chargeable to the tenant as part of the enfranchisement process (counter notice costs, costs associated with valuation), and whether and when it is appropriate to effect a discount where work is being undertaken over properties within a single estate. **Oliver Radley-Gardner** appeared for the appellant.

Case Round Up (continued)

Cannon v 38 Lambs Conduit Street LLP [2016] UKUT 0371 (LC): The Upper Tribunal determined the extent of the First Tier Tribunal's jurisdiction to make a determination as to the service charges payable when, as at the date of the FTT hearing, no valid s.47 LTA 1987 notice had been served. The Upper Tribunal accepted the landlord's submissions that the FTT retained jurisdiction to make such a determination in the absence of s.47 demands, albeit that payment of those determined sums would be contingent upon the subsequent service of the s.47(2) notice. The Upper Tribunal also provided further guidance on the construction of costs provisions in long residential leases in relation to the recovery of costs of proceedings before the First Tier Tribunal, and on the extent to which the draftsmen of such leases can be taken to have known of the state of the law at the time of execution. **Kester Lees** acted for the respondent landlord.

Levett-Dunn v NHS Property Services Limited [2016] EWHC 943 (Ch): **Adam Rosenthal** acted for the successful tenants in this recent case, in which it was held that a tenant's break notice was properly served when delivered to premises named in the lease as the address of the landlord, notwithstanding that by the time of service of the break notice, one of the four joint landlords had ceased to be a landlord (the reversion being vested in the three remaining joint landlords) and the remaining landlords were no longer connected with the premises at the stated address. The case considers the meaning of the "last known" place of abode or business under section 196 of the Law of Property Act 1925 (which was incorporated into the service provision in the lease).

Ham v Ham (High Court, 2016 HHJ McCahill QC): **Stephen Jourdan QC** acted for the successful defendants in this family farming partnership dispute. The Claimant had, in 2009, given notice under the partnership agreement with his parents, the Defendants, to purchase his share in the partnership at its "net value". The Court of Appeal had previously ([2013] EWCA Civ 1301) determined that this meant that the assets of the partnership had to be determined on the basis of their market value at the date of retirement. The issue which HHJ McCahill QC had to decide was whether the farm was an asset of the partnership. The Judge decided that it was not, in the absence of any express agreement to that effect, and it not being necessary to imply that land on which crops are grown or animals are grazed is an asset of a farming partnership.

Chetwynd v Tunmore [2016] EWHC 156 (QB); [2016] Env. L.R. 23: **Wayne Clark** and **Joe Ollech** acted for the successful defendants in a claim made against them by neighbouring owners in respect of alleged loss and damages caused to their fishery by the excavation of lakes on the defendants' land, and the abstraction of underground water as a result. The case required consideration of extensive and detailed expert reports on multiple disciplines relating to hyrology and hydro-geology, fisheries management and property valuation. The case is of particular interest because it is the first time the court has considered the nature of the statutory tort created by s.48A of the Water Resources Act 1991 and its scope.

EMI Group Limited v O&H Q1 Limited [2016] EWHC 529 (Ch); [2016] 3 W.L.R. 269: **Kirk Reynolds** appeared for the successful defendant in this case further exploring the liabilities of guarantors on assignments under the Landlord and Tenant (Covenants) Act 1995 further to the Court of Appeal's decision in *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904, [2012] Ch. 497. A purported assignment of a lease by a tenant to its guarantor was void under s.25(1)(a) of the Act because it would have the effect of frustrating s.24(2)(b) of the Act, and could not be saved by s.3(2)(a).

Christopher Moran Holdings Limited v Carrarra-Cagni [2016] UKUT 152 **Philip Sissons** represented the successful appellant in this appeal to the Upper Tribunal, in which it was found that the FTT had erred in holding that the respondent tenant was not liable to contribute to the cost of repairing two conservatories attached to a penthouse flat through the service charge.

Murdoch v Amesbury [2016] UKUT 3 (TCC): The Upper Tribunal decided that the First Tier Tribunal is only empowered, when presented with an application for a determined boundary, pursuant to section 60 of the Land Registration Act 2002 and the Rules made under it to decide whether the proferred boundary is indeed the right one. It is not allowed to determine further, if it decides that the proferred boundary is not the right one, where the correct boundary is. **Nathaniel Duckworth** appeared for the successful Appellant.

Case Round Up (continued)

Linvale Investments Limited v Christopher Eric Walker [2016] EWHC B15 (Ch): **Tamsin Cox** appeared in the Chancery Division in this case concerning the implication of easements on sale of part of a property under s.62 Law of Property Act 1926, *Wheeldon v Burrows* and implication based on common intention. The Claimant claimed a right to use a route over the Defendant's land for emergency purposes, where the two parcels had formerly been owned and used as one and marked fire doors led from a building on the Claimant's land directly onto an apparently purpose-built path on the Defendant's land.

Britel Fund Trustees Limited v B&Q PLC (2016): HH Judge John Mitchell sitting in the County Court at Central London considered how to assess rent under s.34 of the 1954 Act when the new lease is to contain a very early break clause that would deter most prospective tenants in the real world. His judgment also considers two conflicting County Court decisions on whether or not 3-month rent holidays for fitting-out should be devalued under the 1954 Act (*Max Mara v Pearl Assurance* ((1996) unreported) and *HMV UK Ltd v Detail Plus General Partner Ltd* (unreported 11 March 2011) and concludes that the latter should be followed. **Emily Windsor** appeared for the Claimant and **Nathaniel Duckworth** appeared for the Defendant.

Waterstones Booksellers Ltd v Notting Hill Gate KCS Ltd (2016): The County Court at Hammersmith decided that a landlord who opposed renewal under paragraph (f) of s.30(1) of Part II of the 1954 Act but who then agreed with the tenant to withdraw his opposition may subsequently restore his opposition to the renewal. **Wayne Clark** acted for the successful landlord. **Kirk Reynolds QC** acted for the tenant.

Ramesh Kerai v Narinda Sharma, First-Tier Tribunal (LON/00AE/OLR/2015/0750): **Tricia Hemans** appeared for the successful applicant in an application for costs before the First-tier Tribunal pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The Tribunal awarded the applicant its costs in respect of the greater expenditure it incurred further to the respondent's unreasonably defending and conducting proceedings (failure to comply with the Tribunal's directions without plausible explanation or excuse for the failure, and subsequent lack of engagement in the negotiation process).

96b High Street, Colliers Wood, London SW19 2BT (LON/00BA/OLR/2015/1162): **Toby Boncey** successfully argued on behalf of the Respondent that the First-Tier Tribunal had no jurisdiction under s48(1) of the 1993 Act to determine the terms of a new lease where none of the "terms of acquisition" remained in dispute.

National Car Parks Ltd v Hawksworth Securities plc County Court at Cambridge 2016: **Kester Lees** acted for the successful landlord in this unopposed 1954 Act lease renewal in which the court had to consider (i) the date for the assessment of rent under s.34 of the 1954 Act where the term commencement date agreed between the parties was December 2014, (ii) whether to include a turnover rent (as per the original agreements) and (iii) whether a conditional agreement for lease of the same car parks executed by a third party was the best available market evidence or whether a hypothetical profit valuation analysis was to be preferred.

To his detriment

by Caroline Shea QC and Ciara Fairley

Lawyers are rightly wary of advising clients to bring a claim in proprietary estoppel. One reason for that is that there are a number of hurdles to clear in order to be successful; failure in any one of those spells the end of the claim.

One of the hurdles receiving a considerable amount of attention in cases over the years has been the issue of detriment. In order to establish liability in a claim, the claimant must show that, in reliance on representations, he acted "to his detriment". In the absence of the claimant having suffered detriment, there can be no unconscionability in a promisor resiling from his promises, where these have been established. Unconscionability is the cornerstone of a finding of proprietary estoppel. Without it, no claim will succeed.

What constitutes "detriment" has been much debated in the cases, and a set of well-established principles has emerged: the detriment must be causally related to the expectation; establishing detriment does not require a detailed financial exercise; it may be enough that the claimant can show that he positioned his whole life on the basis of the promises and took no steps to create an alternative life for himself. Each case is fact sensitive, and the application of the principles to the facts is something of an art.

The recent High Court case of *Moore v Moore* raised two interesting points concerning detriment. The claimant (S) was the son of a partner (R) in a farming partnership comprising R and R's brother (G). The farm had been gifted to the brothers in the mid 1960s by their father on his retirement (a third brother, who had showed no interest in farming, was not included in the gift). The brothers were the third generation of the Moore family to farm. As the Court found, S had been encouraged by R's representations to believe that S would one day inherit R's half interest in the farm and the partnership. S claimed, and the Court accepted, that S had positioned his whole life on the basis of this expectation, and worked long hours for lower pay than would have been the case had he worked elsewhere. He had taken no steps to acquire secure accommodation believing that he would always have a home at the farm. He did all this in reliance on the promises that had been made to him over the years.

In 2008, G decided to retire, and to sell his share of the partnership at a vastly discounted price (around a tenth of its value) to S. G did this believing that S had been groomed to take over the farm in due course. G also believed (because R had told him so) that R would leave S his share of the farm. G's gift was made specifically to ensure that the farm stayed in the hands of the family, to be passed on to subsequent generations. His own sons had shown no interest in farming, and received no part of G's share. S was at the same time made an equal equity partner with his father.

R's lawyers argued that S had suffered no detriment because (1) S had as a result of his work on the farm received G's half interest in the farm ("the windfall argument"), that share by then worth approximately £5 million; and (2) that having been made an equity partner, S had reaped the rewards of his earlier hard work and was sufficiently compensated in that way.

S, represented by Caroline Shea QC and Ciara Fairley, by contrast argued that the gift of G's share was not attributable to S's work on the farm, but rather to the long held family intention that the farm would stay in the hands of the farming offspring and be passed from generation to generation. It was given not in satisfaction of the promises made by R, but rather was complementary to them, and indeed was predicated on their eventual fulfilment. Had G for one moment believed that R's share of the farm was not going to S, he would not have gifted his share to S.

As to the claim that since 2007 S had been an equity partner, S argued that far from signalling that there had been no detriment, this was merely the beginning of the satisfaction of the equity arising from the promises made over the years by R to S. The evidence was that although profits were allocated to each partner's current account on an annual basis, the reason for doing this was not related to any perceived or agreed earnings on the part of each individual partner. Rather the allocation of profits was determined by reference to the optimum tax position of the partnership as a whole. The current account was not used as a matter of fact by each partner as a repository for cash or accumulated earnings which could then be withdrawn at will. Rather, it represented earnings that the partners intended to be available to the business, and reinvested in it. Drawings from those accounts ran at a very low level, and no individual partner regarded the sum shown in his current account as available to him to withdraw for personal use. Thus although profit had been allocated to S's current account since he became an equity partner, he himself derived no personal benefit from that allocation.

The Court accepted S's submissions. Neither the gift of G's share nor S's status as equity partner operated to negative the earlier detriment suffered by S (as to which no challenge had been made on R's behalf). Rather, they reinforced the nature of the promises that had been made by R, and with which G's acts were consistent. It would be an injustice if the fact that R had started to fulfil the promises he had made over the years operated to preclude S from establishing the equity. In any event, the so called rewards occurred well after the detriment had been incurred and therefore after the point at which the liability in equity arose.

This was an unusual set of facts, where on one view S appeared to have prospered as a result of his commitment to the farm rather than suffering detriment. On close analysis, this conclusion was unjustified. All it signalled was the implementation of the master plan shared by the brothers R and G, and in reliance on which S had spent his whole life contributing to a highly successful farming business. The unconscionability of resiling from the promises was in these circumstances clear, and what appeared to be challenges to detriment in fact operated to underline the existence of the equity.

New Electronic Communications Code

by Wayne Clark

The Digital Economy Bill, Schedule 1, sets out the proposed new Electronic Communications Code ("the New Code"). The New Code runs to some 104 paragraphs, and in addition contains detailed transitional provisions in Schedule 2, and consequential amendments in Schedule 3 to the Bill. It has had its first reading and it is understood that Bill is likely to be enacted sometime in spring 2017. I propose in this short piece to comment on the 1954 Act and the current Code ("the Existing Code") provisions dealing with the right of removal (paragraphs 20 and 21). Of course what is said here is very much subject to alteration given that further readings of the Bill are to be undertaken and no doubt amendments will be made to the wording. Importantly the New Code will apply to subsisting agreements: paragraphs 1 and 2 of Schedule 2 to the Bill.

There is, as is well known, much debate about the exact nature of the relationship between the 1954 Act and the Existing Code, and in particular, the extent to which removal can be initiated by service of a paragraph 20 or 21 notice of the Existing Code prior to the expiry of the contractual term or prior to determination of any 1954 Act opposition to renewal. This is so particularly given the effect of the case management decision in *Crest Nicholson v Arqiva 2015*, where it was held that a person "is for the time being entitled to require the removal of any of the operator's electronic communications apparatus" within paragraph 21, only where there was, in essence, an immediate entitlement to possession (and thus seek removal) at the time of the service of the paragraph 21 notice.

The New Code excludes the operation of the 1954 Act with respect to agreements which confer New Code rights: paragraph 1 of Schedule 3 to the Bill. The New Code borrows from the 1954 Act in providing for code rights to continue as a matter of statute notwithstanding the termination of any fixed term agreement (see para 29 of the New Code).The Bill draws a distinction between three categories of case:

(1) If the primary purpose of the tenancy is to grant Code rights then protection is given by the New Code and the tenancy is not one to which the 1954 Act applies: paragraph 1 to Schedule 3 to the Bill. There is no definition of the meaning of "the primary purpose". The Bill will need to be amended as it currently provides for an amendment to the 1954 Act by way of the insertion of a new subsection (5) to section 23 of the 1954 Act. There already exists such a subsection, having been inserted to accommodate the exclusion of Home Businesses as enacted by the Small Business, Enterprise and Employment Act 2015, s.35.

(2) If the primary purpose of the tenancy is not the grant of code rights, then albeit the tenancy will not have Part 5 New Code rights (provisions dealing with termination of code agreements) in all other respects the tenancy may have New Code protection as well as 1954 Act protection. If the tenancy is one to which the 1954 Act applies (determined by ignoring any exclusion agreement under section 38A of the 1954 Act), the new provisions relating to termination contained in Part 5 of the New Code will not apply. Thus the termination provisions contained in Part 5 do not apply if (1) the primary purpose of the tenancy is one other than to confer New Code rights and (2) is one to which the 1954 Act applies. Albeit Part 5 does not apply there is no exclusion in this scenario of the operation of Part 6 of the New Code dealing with the right to enforce removal of the apparatus (see para 28 of the New Code).

(3) Thus it would appear, having regard to (2) above, that if the primary purpose of the tenancy is not to grant code rights and the tenancy is not one protected by the 1954 Act (ignoring any section 38A agreement), then the tenancy may have full New Code protection including the protection conferred by Parts 5 and 6 of the New Code. It is to be noted that it is no part of the protection of code agreements under Part 2 of the New Code (dealing with code agreements) that an agreement is caught by the New Code only if the primary purpose is to confer code rights.

The New Code applies to a subsisting agreement from the date that the New Code comes into force, subject to transitional provisions. It would appear, considering the terms of the Bill that any subsisting agreement which satisfies paragraph 1 of Schedule 3 to the Bill will cease to have 1954 Act protection, with protection accordingly conferred only by the New Code, if any. Thus, if there are extant 1954 Act proceedings for e.g. opposition to renewal under paragraph (f) of section 30(1) the 1954 Act, it seems that any such proceedings will simply cease to have any relevance.

The New Code introduces what is essentially an extra layer of protection for operators by making provision in Part 5 for the termination of any code agreement and then making further provision for the removal of the equipment in Part 6 (similar in essence to the two stage process under the 1954 Act of termination of the contractual term together with statutory grounds for termination). The entitlement to require removal of the electronic communications equipment in Part 6 is subject to a number of conditions (paragraph 36 of the Bill) and it is clear that the entitlement to require removal first requires the code agreement to have been determined in accordance with Part 5. Paragraph 30 contained in Part 5 is the key provision and provides for service of a notice even in the context of a fixed term agreement, such notice being one of 18 months. The notice is subject to counter notice provisions and court process: paragraphs 31,32 and 33.

New Electronic Communications Code

continued

What of paragraph 20 and 21 notices under the Existing Code? The transitional provisions in Schedule 2 to the Bill currently provide for three different scenarios in connection with a paragraph 21 notice: paragraphs 19-22 of Schedule 2 to the Bill. The position appear to be as follows:

(1) if a paragraph 21 notice has been served at the time of the coming into force of the New Code, and the time for service of the paragraph 21 counter notice ends after the coming into force of the New Code, the landowner may apply to the court for an order requiring removal, the provisions of paragraph 38 (6) and (7) and 39 of the New Code applying;

(2) if a paragraph 21 notice has been served and a counter notice has been given before the New Code comes into force, but no application has been made to the court by the operator, the paragraph 21 counter notice takes effect as a notice under paragraph 19 (2) of the New Code. Paragraph 19 forms part of Part 4 to the New Code, which relates to the powers of the court to impose a code agreement on the landowner (and which replicates much of para 5 of the Existing Code). Essentially the counter notice to the paragraph 21 notice is treated as a notice by the operator requesting a New Code agreement of the landowner. The court will then determine whether or not to impose an agreement. Importantly paragraph 20 (5) of the New Code provides that the court "may not make an order under paragraph 19 if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not really do so if the order [to impose the agreement] were made."

It is to be noted that this provision, treating the paragraph 21 counter notice of the Existing Code as a notice under paragraph 19(2) of the New Code applies only where "no application has been made to the court under that paragraph *by the operator*". Thus, the counter notice under paragraph 21 taking effect as a notice under paragraph 19 (2) of the New Code does not apply where there has been a counter notice and proceedings for removal have been instituted *by the landowner.* Where the landowner has instituted proceedings it would appear that the matter falls within the third category provided for by the transitional provisions.

(3) The third category dealt with by the transitional provisions, is where an application has been made to the court under paragraph 21 of the Existing Code but the matter has yet to be determined by the court. In those circumstances it is provided that "the repeal of the existing code does not affect the operation of paragraph 21 of that code in relation to the application." However, it is provided that any party to the proceedings may apply to the court for an order that the application (under paragraph 21 of the Existing Code) be treated as an application to the court under paragraph 19 of the New Code. Any such application "must" be granted by the court unless it thinks it will be unreasonable in all the circumstances to do so: paragraph 22 (4) of Schedule 2 to the Bill.

The New Code has, as noted above, a two-stage process to enable apparatus to be removed, namely, termination of the Code agreement and an enforcement of the right of removal. There is insufficient room in this short piece to deal in detail with the enforcement of removal, but removal is subject to satisfying one or more of five conditions contained in paragraph 36 of Part 6 of the New Code. An application to court is required to enforce removal. The provisions of the New Code do not, however, remove the *Crest Nicholson v Arqiva* argument entirely. The reason for this is that the terms of paragraphs 19 – 22 of Schedule 2 to the Bill operate by essentially treating paragraph 21 proceedings as a claim for the imposition of a new agreement pursuant to paragraph 19 of the New Code. The terms of paragraph 19 and in particular the important qualification contained in paragraph 20 (5) of the New Code (see above), will apply only if and insofar as the proceedings are properly to be treated as capable of being "transposed" to paragraph 19 New Code proceedings. This is dependent, of course, on their being a valid paragraph 21 Existing Code notice. If no such valid paragraph 21 Existing Code notice has been served then the transitional provisions will not bite. Thus it seems that, at least in relation to paragraph 21 notices served prior to the enactment of the New Code, the *Crest Nicholson v Arqiva* issue may still have some life left in it.

So far as paragraph 20 of the Existing Code is concerned, it is currently provided that "the repeal of the existing code does not affect paragraph 20 of [the Existing Code] as it applies in relation to anything whose installation was completed before the repeal [of the Existing Code] comes into force": paragraph 15 of Schedule 2 to the Bill. Thus it would appear that, as presently drafted, paragraph 20 of the Existing Code continues to apply to a subsisting agreement post the coming into force of the New Code. Although not stated in the transitional provisions it is presumably the case that the terms of Part 6 relating to the rights to require removal and in particular the process of notice and application to the court, and particularly the conditions contained in paragraph 36 of the New Code, do not apply to the right of the landowner to seek removal (by way of "alteration" under the Existing Code) of the apparatus.

The provisions of the New Code are complex. There will no doubt be a number of amendments in its progress through Parliament. As noted the draughtsman has failed to have regard to the Home Business tenancies legislation in providing for a new subsection (5) of section 23 of the 1954 Act. The above simply represents an outline of the proposals but they illustrate that although the 1954 Act is no longer to operate in the context of a straightforward code agreement, there will, undoubtedly be a number of cases upon which one has to continue to advise on the Existing Code in connection with the transitional provisions concerning paragraph 21 notices, and the continuing entitlement to invoke paragraph 20.

EMI Group Ltd v O & H Q1 Ltd: The assignment that never was

By Kester Lees

In *EMI Group Ltd v O & H Q1 Ltd* [2016] 3 W.L.R. 269 the High Court held that a lease cannot be validly assigned by a tenant to its guarantor; the purported assignment was void under the Landlord and Tenant (Covenants) Act 1995 ('the 1995 Act'), s.25(1)(a) because it would have the effect of frustrating s.24(2)(b) of the 1995 Act.

The facts of the case were simple: a 25 year lease was granted in 1996 which was guaranteed by the guarantor under a separate deed of guarantee which provided for liability as principal debtor. Following the tenant entering administration the parties agreed for the tenant to assign the lease to the guarantor. Following the assignment the guarantor, now purportedly as tenant, claimed that the landlord could not enforce the tenant covenants against it by virtue of s.24(2)(b) of the 1995 Act; instead the lease was said to exist in a shell-like state. By contrast, the landlord contended that the assignment was fully effective so that the tenant covenants were enforceable against the new tenant. Alternatively, the landlord argued that if the assignment offended s.24(2)(b) of the 1995 Act then the whole assignment must be void so that the original tenant was never released and, consequently, the guarantor remained qua guarantor.

The Deputy High Court Judge held that: (1) the assignment interfered with the purpose of the legislation so as to release a guarantor to the same extent as the tenant whose performance it guaranteed, but (2) the effect was to render the entire assignment void so that the guarantor remained liable under the original guarantee for the performance of the original tenant in administration.

The learned judge applied the following analysis:

(1) The tenant is released from the tenant covenants of the tenancy, immediately as from the date of the assignment: s.5(2)(a) of the 1995 Act.

(2) Consequently, the guarantor is released from the tenant covenants of the tenancy, immediately as from the release of the tenant: s.24(2) of the 1995 Act.

(3) It is the effect and intention of s.24(2) of the 1995 Act that immediately "as from the release of" the tenant, i.e. upon the assignment to the guarantor in question, the guarantor should be released from its liabilities as guarantor under the lease.

(4) However, as from the assignment to the guarantor (now the purported tenant) the same guarantor becomes bound by the same tenant covenants: s.3(2)(a) of the 1995 Act.

Given that the "whole thrust of the Act" is that there should be no re-assumption or renewal of liabilities, whether on the tenant or the guarantor, the effect of the assignment infringed s.24(2) of the 1995 Act as it *"releases G1 from the tenant covenants of the tenancy but, at the very same moment in time, binds G1 (but now as T2) with the tenant covenants of the tenancy. In practical terms therefore, there is no release at all for G1 in respect of its liabilities under tenant covenants. This is because the liabilities under the tenant covenants are simply re-assumed by the guarantor"* (at [79]). Consequently, the assignment was void pursuant to s.25 of the 1995 Act.

The correctness of the decision is open to some doubt. In particular:

1. The case focuses on the *person* under the liability as opposed to the capacity of that liability.

2. s.24(2)(b) of the 1995 Act provides that the guarantor must be released from 'a covenant of the tenancy imposing any liability' [as guarantor]. The release is not stipulated to be from the tenant covenants themselves; perhaps unsurprisingly given the guarantor has not been subject to those covenants directly.

3. It misses that the [re-]imposition of the tenant covenants arises by virtue of s.3 of the 1995 Act. There is no reason to give prominence to s.24(2) of the 1995 Act over the effect of s.3; especially where Morgan J held in *UK Leasing Brighton Ltd v Topland Neptune* Ltd [2015] 2 P&CR 2 in the analogous case of the effect of s.11 of the 1995 Act that s.3 of the 1995 Act was to be applied equally to that upon re-assignment to the original tenant the guarantor was able to enter into a new guarantee.

That said, the judge correctly rejected the suggestion by the somewhat cynical guarantor/tenant that the avoidance under s.25 of the 1995 Act effected only enforceability; i.e. that the lease remained in existence in a shell-like state where the tenant enjoyed the benefits of the lease but the landlord was unable to enforce the tenant covenants. Having determined that the assignment transgressed s.24(2) of the 1995 Act the judge held that the entire assignment was void pursuant to s.25 of the 1995 Act. Consequently, and entirely morally justifiably, the net result was that the assignment was void so the original tenant was never released and, ultimately, the guarantor remained liable under the original guarantee.

Both parties have sought permission to appeal so it is unlikely that *EMI* will be the last word on the issue. Nonetheless, in the meantime the advice to clients must be that it is impossible to assign a lease to the assignee tenant's guarantor. Further, landlords ought to be aware that their position might well not be as comfortable as for the landlord in *EMI*; for example, what if the lease had been assigned to the guarantor and a 'newco' third party as a joint tenancy? The assignment might be entirely void (ending in the palatable *EMI* result) or it might be held to only be void as against the guarantor, leaving the landlord with a newco tenant only and consequently, no recourse to the guarantor at all. Similarly, what happens if the assigned lease has purportedly been reassigned by the guarantor to a third party?

Therefore, difficult questions remain unanswered but until the appeal is determined this much is certain: landlords ought not to consent to any purported assignment by a tenant to its guarantor; it may turn out to be the assignment that never was.

What's "the matter"? The FTT's jurisdiction to determine boundary lines after Murdoch v Amesbury: a new Lowe?

By Toby Boncey

In *Murdoch v Amesbury* [2016] UKUT 3 (TCC), HHJ Dight in the Upper Tribunal held that the FTT did not have jurisdiction to determine the line of a boundary, having already been required to dismiss the Applicants' application under section 60(3) of the Land Registration Act 2002 since the plan submitted was not within HM Land Registry's required tolerance of 10mm for a determined boundary plan.

Once an objection is made which cannot be determined by agreement, the Registrar must refer "the matter" to the FTT. The FTT's jurisdiction is restricted to "determining matters referred to it under section 73(7)".

According to HHJ Dight, "The subject matter of the reference here was the Appellants' disputed application for a determined boundary, as is apparent from the case summary… which gives by way of details of the objections to that application the Respondents' challenges to the accuracy of the Appellants' plan. The Appellants' application was not for resolution of a general boundary dispute and the Registrar's reference to the Adjudicator did not cast it as such. It therefore seems to me that the matter which was referred to the Adjudicator for determination was the application for a determined boundary, the issue for the Adjudicator being the accuracy of the Appellants' plan… In the instant case the boundary dispute was not referred to the learned Judge to determine, whereas the plan dispute was: the boundary dispute was not part of the "matter" referred."

The Tribunal "may direct the Registrar to give effect to or cancel the original application but nothing else. There is no power for the Tribunal to prefer the objector's position and to direct the Registrar to give effect to that position." HHJ Dight thought that the correct route to resolution of a boundary dispute would be for the Tribunal to direct the parties to refer the dispute to the court under section 110 of the 2002 Act.

This decision surprised many, who had assumed that the FTT could determine the true line of the boundary under applications under s60(3). The FTT had, for many years, purported to exercise just such a jurisdiction.

It was not clear whether, following *Murdoch v Amesbury,* the FTT could never determine a boundary (save in accordance with the line identified on the plan submitted with the application), or whether it could only do so where the issue referred to the FTT was one of title and not one relating to the quality of the plan (insofar as those concepts could sensibly be distinguished).

Following *Murdoch v Amesbury,* it became inadvisable for a party to use an application to HM Land Registry under s60(3) to resolve any boundary dispute. Instead, they would have to apply to the County Court for a declaration as to the boundary location. Following that decision, the successful party could then apply to HM Land Registry (under rule 119(2), the registrar can give effect to an application supported by a court order without giving notice).

The Law Commission was concerned that: "section 60(3) can give rise to disputes which are referred to the Tribunal, but which the Tribunal may not be able substantively to resolve. This is the case even though the Tribunal may have heard all the evidence necessary to make a decision as to the exact location of the boundary. Indeed, an applicant whose application is rejected following a reference to the Tribunal might continue to make further applications (which might in turn be referred to the Tribunal) until his or her application is successful."

In *Bean v Katz* [2016] UKUT 168 (TCC), Judge Cooke attempted to reassure applicants that the Tribunals were open for the business of determining boundaries. She distinguished cases in which the application is dismissed on the basis of rule 119(1)(a) of the Land Registration Rules 2003, i.e. where the plan is technically unsatisfactory, and cases where the application is dismissed on the basis that the applicant has failed to establish that the line of the boundary is as shown on that plan.

Judge Cooke said: "I think it is important that I make clear that the FTT has jurisdiction to dispose of determined boundary references… where the objection is not to the quality of the plan but to what the plan says about the boundary and where therefore it is necessary to look at the title to the properties concerned…"

This depended upon Judge Cooke taking the view, contrary to the apparent view of HHJ Dight, that rule 119(1)(b) was part of a scheme creating a statutory jurisdiction to resolve substantive boundary issues beyond the accuracy of the submitted plan.

As the plan was "technically satisfactory", although it did not precisely identify the true boundary, *Bean v Katz* was not "within the scope of the guiding principle of *Murdoch v Amesbury*". HHJ Dight's remarks suggesting that the focus of any application under s60(3) was not title, but rather accurate identification of the line, were obiter and not binding on the FTT. Judge Cooke held that the FTT could permit the application to succeed in part (i.e. save where the line diverged from that on the plan) and require a further entry on the register to give effect to the true line of the remainder of the boundary.

Following *Bean v Katz*, parties wishing to guarantee a determination of the true line of the boundary may still be better advised to apply to the County Court for three reasons:

What's "the matter"? The FTT's jurisdiction to determine boundary lines after Murdoch v Amesbury: a new Lowe?

continued

(1) It is open to an unsuccessful objector to appeal the FTT's decision and argue that the reasoning in *Murdoch v Amesbury* ought to apply so that the FTT did not have jurisdiction to determine questions of title. Argument was not heard in relation to the jurisdiction issue in *Bean v Katz*, and the Upper Tribunal is not bound by its earlier decisions. The Upper Tribunal might well agree with HHJ Dight's obiter statements since, as explained by the Law Commission: "Section 60(3)… was not designed as a means of resolving boundary disputes, but rather to allow proprietors to determine their boundaries where they have good evidence of the exact location."

(2) An applicant cannot guarantee that an objection will not be taken as to the technical specifications of the plan supplied (although they should endeavour to provide a plan which complies with HM Land Registry's specifications in the first place).

(3) It is not clear that the FTT could determine the true line of the boundary if no part of that boundary matches the line identified on the submitted plan. The FTT's jurisdiction is limited to directing the registrar to give effect to the application made in whole or in part.

Accordingly, it may be necessary to make multiple applications if the Tribunal determines that the boundary does not match the line claimed at all.

In *William Davis Ltd v Lowe* [REF/2014/0573], Mr Max Thorowgood, sitting as Judge of the FTT, has further considered *Murdoch v Amesbury* and *Bean v Katz*. He said: "Judge Cooke… was at pains to distinguish Murdoch… on the ground that the objection in her case was made only on grounds of title and not to the accuracy of the plan; whereas the objectors in Murdoch had raised both grounds. However, she also held that insofar as it might appear to be authority for the proposition that in determining a referred boundary application the Tribunal can never be concerned to determine the true position of the boundary HHJ Dight's remarks were certainly obiter… I respectfully agree with that view but I also do not think that that is what HHJ Dight was saying in Murdoch… His references… to the "focus of the application according to the rules" and to "… the principal criterion in a determined boundary application"… make it clear… that all he was saying was that once it became clear that the plan was defective that was enough to require the Tribunal to direct the Chief Land Registrar to cancel the application so its jurisdiction ceased at that point."

In Lowe, the Applicant claimed that the boundary was the mid-line of a hedge. The objection was formulated not by reference to the accuracy of the plan, but by reference to whether the line claimed matched the boundary line. In cross-examination it was conceded that there was a slight discrepancy (beyond the 10mm tolerance threshold) between the notional centre line of the hedge and the boundary line claimed.

This gave rise to "two starkly opposing submissions". For the Applicant, it was submitted that "the matter" was defined by the scope of the objection, so that since no objection was made to the accuracy of the plan, the Tribunal had no jurisdiction to consider that issue, and had to determine simply whether the boundary was the centre line of the hedge or not. For the Respondent it was submitted that the concession in cross-examination meant that, following Murdoch, the application must fail and no further investigation could be undertaken as to the line of the boundary.

Judge Thorowgood concluded that: "I have jurisdiction and must determine the underlying merits of the claim which provoked this application" including the accuracy of the plan, the accuracy with which the plan identifies the claimed boundary line and the extent to which the boundary line claimed was consistent with the true position of the boundary.

He said: "I find it inconceivable, given the stress laid by the statute and the rules upon the accuracy of the plan in identifying the exact line of the boundary (the statement within the Land Registry's practice guidance that the plan must be accurate to within 10mm is simply its gloss on what is meant by 'exact'), that if it should come to my attention that the plan is inaccurate in some respect I should not bring that to the attention of the Registrar either by imposing a condition in respect of the entry to be made on the Register should I make an order that the application be given effect to or by rejecting the application but I do not consider that that is the whole of the matter which is referred or the only matter which I need to determine."

This was said to be in accordance with the overriding objective. It was also said to be consistent with *Silkstone v Tatnall* [2012] 1 WLR 400. In that case, Rimer LJ said: "A reference to an adjudicator of a "matter" under s73(7) confers jurisdiction upon the adjudicator to decide whether or not the application should succeed, a jurisdiction that includes the determination of the underlying merits of the claim that have provoked the making of the application." Accordingly, the "matter" referred was not limited by the scope of the objection. This approach was consistent with the Tribunal's procedure rules which provide for the filing of Statements of Case, and amendments to those Statements.

The problem is that this approach appears to be inconsistent with the ratio of *Murdoch v Amesbury.* If it is considered that at least part of the matter referred to the Tribunal is a dispute about the accuracy of the plan, and the application should be dismissed because the plan is insufficiently accurate, the FTT should have no further jurisdiction to consider the true line of

What's "the matter"? The FTT's jurisdiction to determine boundary lines after Murdoch v Amesbury: a new Lowe?

continued

the boundary. It should be noted however that, in Lowe, the application was ultimately directed to be cancelled since the claimed line did not match the true boundary, not because of any point about the accuracy of the plan. Accordingly, insofar as Judge Thorowgood's approach was inconsistent with Murdoch, it was obiter.

Bean v Katz and *Lowe* demonstrate that the FTT is still willing to determine boundary lines, in line with its historic practice. However, there is still a significant degree of uncertainty regarding the proper scope of the FTT's jurisdiction on a determined boundary application. In particular, it is far from clear how one determines what "the matter" referred to the Tribunal is.

Lowe suggests that "the matter" might be determined not by the scope of the original objection, nor even necessarily by the contents of the parties' Statements of Case but by reference to the "underlying merits" of the application. It is not clear in exactly what circumstances "the matter" will be regarded as limited, as in Murdoch.

I tentatively suggest that the best way to reconcile the results of these cases is to treat "the matter" referred to the Tribunal as the whole of the application for a determined boundary. The Tribunal should consider whether the plan is technically sufficient. If it is not the application should be directed to be cancelled and the Tribunal's jurisdiction is at an end. The parties may agree, as in *Bean v Katz,* that the plan is acceptable. If the application is not dismissed on that ground, the Tribunal should go on to consider whether the line claimed reflects the true line of the boundary. If it does, the Tribunal may direct that the application be given effect in whole or in part, and possibly subject to conditions.

However, until further authoritative guidance is provided as to what "the matter" is, parties would still be better advised to seek a declaration in the County Court to be sure of obtaining a determination of the true boundary line. Indeed, even were it clear what "the matter" was, this may still be prudent advice in light of the fact that the Tribunal cannot determine where the boundary line is if it does not match any part of the claimed line.

The law is as stated at 3 August 2016.

Skelwith (Leisure) Ltd v Armstrong [2015] EWHC 2830 (Ch)

by Cecily Crampin

Land Registration Act 2002 s23 and 24

When I was at law school, I was taught that the Land Registration Act 2002 was an Act of certainty. What the register said was right. Equitable interests were excluded from the register. A property interest has one owner, to the outside world, and that owner can be identified from the Register. Conveyancing would be clear, and the economic value of property protected.

That description of the Act has always been too purist. The Act itself makes provision to protect the misty world of equitable interests, for example, through Schedule 3. The Act, and its interpretation in case law, has always sought to balance the certainty of the Register against the justice of recognising the misty world of equity.

In part that is simply by necessity, because of the registration gap. Without e-conveyancing, someone buying a property won't have legal title until some time after completion. For this reason at least, it seems, section 23 and 24 of the Act give rights to deal with the property to more than just the registered proprietor or the registered chargeholder. The rights to exercise owner's powers (which rights, under s23 include the powers to make a disposition of any kind permitted by the general law) are given not only to the registered proprietor but any person entitled to be registered as the proprietor (s24). Someone in the registration gap should be able to act as if they have title.

That suggests that more than one person could transfer a registered interest in the property, the registered proprietor, and, for example, someone with the benefit of a specifically performable contract for sale of that interest, or a sole beneficiary under a bare trust who can direct the acts of the legal owner-trustee. This is the suggestion in the judgment of Rimer LJ in *Helman v Keppers and Governors of the School of John Lyon* [2014] EWCA Civ 17, a case about enfranchisement, bankruptcy, and receivership: if the trustee in bankruptcy has not entered a restriction on the bankrupt's title, then, notwithstanding the automatic vesting of the bankrupt's property in the trustee, then "a bankrupt might be able to dispose to a purchaser of the estate vested in his trustee".

A recent case about an equitable owner of a registered charge, has suggested that the effect of s24 is more limited than that first glance suggests. The words of limitation in s23, owner's powers are powers to make a disposition of any kind permitted by the general law, appear from *Skelwith (Leisure) Ltd v Armstrong* [2015] EWHC 2830 (Ch) to limit not just by reference to the kinds of dispositions there could be of the particular property interest, but by reference to the particular interest of the person entitled to be registered.

In *Skelwith*, a legal charge was granted over property. The mortgagee then assigned the charge by deed, but that assignment was not completed by registration. The equitable assignee of the charge contracted to sell the property. The question for Newey J was whether the equitable assignee of the charge had any power to sell. He found they did, but not because that power was given to the assignee under s24 because they were entitled to be registered as chargeholder. It was only because it had that power, as equitable owner of the charge, by reason of the general law. The mortgage debt had been assigned in equity, and hence the equitable assignee could give good receipt for the mortgage money within the meaning of s106(1) of the Law of Property At 1925, so could exercise the power of sale arising under s101, because the mortgage had been made by deed and the money was due.

Some interesting points come out of the *Skelwith* decision:

(i) First, by s23(2), the owner's powers in relation to a registered charge, don't just extend to a power to dispose of that charge. S23(2) defines owner's powers in relation to a registered charge as "power to make a disposition of any kind permitted by the general law in relation to an interest of that description …" "In relation to an interest of that description" includes the power to dispose of the charged property interest, if permitted by the general law, and hence to the power of sale under s101 of the Law of Property Act 1925.

(ii) Secondly, the powers of an equitable owner did not simply equate with those of the registered owner by reason of s24. The equitable owner had to have the relevant power under the general law, in order to be able to exercise it.

The reason for the decision in (ii) was the *North East Property Buyers* litigation. The Court of Appeal in *Mortgage Business plc v O'Shaughnessy* [2012] 1 WLR 1521 reiterated that "a person cannot grant a greater interest than he or she possesses" (nemo dat quod non habet). This part of the argument was not pursued on appeal to the Supreme Court. Thus s24 was not a statutory provision which gave more rights than there were before.

Presumably the point in (ii) would also apply to an equitable assignee of a registered freehold or leasehold interest, so that that assignee could only assign the registered freehold again, under the owner's powers of s23, if he could have done so under the general law. It's not at all obvious that under the general law he would have any such power to execute a TR1 with any effect. He could assign his right under the contract of sale he had, so that his assignee could specifically enforce the original contract, if it remained specifically enforceable. That, however, does not appear to be a registered owner's power.

Skelwith (Leisure) Ltd v Armstrong [2015] EWHC 2830 (Ch)

Continued

If that analysis is right, then it is hard to see what s24 does for the equitable assignee. His rights are whatever he had under the general law, and nothing more. Indeed the rights in Skelton, might well be thought of in this way. The answer in Skelton seems to defeat the intention of filling in the registration gap.

The principle "nemo dat quod non habet" is central to the problem of balancing certainty, and the rights of the unregistered. It seems odd that simply because someone has registered title, they should be able to transfer property free of encumbrances even if they were so encumbered, or even if they had no right to the property at all, bar registration. Yet that is the effect of s58 of the 2002 Act, which deems title is vested in someone as a result of registration even if "the legal estate would not otherwise be vested in him". On the other hand, if one took the principle too seriously, all of the equitable rights that make land ownership so uncertain would have to be considered in any piece of conveyancing. If s24 allowed anyone with a contract for the sale of land to charge it or sell it, and bind the legal title, the certainty and clarity of registration might well be lost.

Perhaps the answer is that "nemo dat quod non habet" is no longer the correct way to understand either legal or equitable title. The answer is priorities. The legal owner of property where the equitable interest is owned entirely by some other, does not own less of the property. It is just that someone else has a series of rights. The exercise of those rights is subject to rules of priority. The legal owner can charge or sell in a way that may postpone the rights in equity. The person entitled to be registered, exercising owner's powers, may do so as if the owner, save that the rights he creates are at risk of losing priority.

Recent News

Council of the Inns of Court has appointed Derek Wood QC as Chair of the Governors of the Inns of Court College of Advocacy

Falcon Chambers is delighted and proud to announce that The Council of the Inns of Court has appointed **Derek Wood CBE QC** as Chair of the Board of Governors of the newly-established Inns of Court College of Advocacy (ICCA). The ICCA will replace the Inns' existing Advocacy Training Council (ATC) in May 2016. It will expand the ATC's current programme of national and international advocacy training, aiming to become a global centre of excellence in teaching the practice and ethics of advocacy in all its forms. It will build links through its website and on-line platforms, conferences and training sessions with advocates practising in common law and civil jurisdictions throughout the world.

In addition to advances in the training of oral advocacy, ground-breaking work which the ATC has previously carried out includes the handling of vulnerable witnesses, improvements in the management of experts, foreign languages in court and the effective use of interpreters and the teaching of professional ethics. The Inns of Court are making significant increases in the resources available to maintain and expand this programme, and it is hoped that ICCA will also play an increasingly prominent role in the education and training of those wishing to qualify at the Bar.

Derek comes to the Chair with immense experience, having made many other contributions to the development of education and training for the Bar, and having been Director of Advocacy in the Middle Temple since 2011.

Mediation

Falcon Chambers are pleased to announce that **Kirk Reynolds QC** and **Janet Bignell QC** are now Accredited Civil & Commercial Mediators.

The Enfranchisement and Right to Manage Awards 2016

Chambers is delighted to announce that **Anthony Radevsk**y was awarded the Outstanding Achievement Award at the 2016 ERMAs. Chambers was Highly Commended in the Chambers of the Year category.

The Second Protocol

Guy Fetherstonhaugh QC and **Jonathan Karas QC** of Falcon Chambers and Nicholas Cheffings and Mathew Ditchburn of Hogan Lovells are delighted to announce the publication of a protocol designed to assist the resolution of applications for consent to carry out alterations. This joins the widely acclaimed alienation protocol, published in 2014. Both protocols, which are a free, downloadable resource, may be found here, along with explanatory notes and industry testimonials. Read all about the second protocol in the Estates Gazette here:

www.falcon-chambers.com/news/index.cfm?id=620

Recent News

Falcon Chambers Announces new tenants

Falcon Chambers is pleased to announce that **Cecily Crampin** has joined as a tenant with effect from Monday 25th April 2016.

Cecily practices in all areas of property and and landlord and tenant law. She has appeared in decisions on service charges *(Country Trade Ltd v Noakes* [2011] UKUT 407; *St John's Wood Leases Ltd v O' Neil* [2012] UKUT 374 (LC)) and recently appeared in the Court of Appeal on the meaning and effect of the Party Walls etc Act 1996 (*Patel & Anor v Peters & Ors* [2014] EWCA Civ 335). She has also recently appeared as junior counsel in the *Kosta* appeal in the Upper Tribunal, on an appeal considering the applicability of the hedonic regression technique to relativity.

She is a contributor to the current edition of The Law and Practice of Party Walls (Property Publishing 2014) and Service Charges & Management: Law & Practice 3rd edition (Sweet & Maxwell 2013). Additionally, she contributes to the Pyramus & Thisbe Club case law update on Party Wall cases. She has written a number of articles on possession proceedings.

Falcon Chambers is also pleased to announce that **Mark Galtrey** has been taken on as a tenant following successful completion of his pupillage. Mark undertook pupillage under the supervision of Philip Sissons, Greville Healey, Stephanie Tozer and Tamsin Cox. As a pupil he gained experience of the full range of Chambers work, including specialist areas such as telecommunications, agricultural holdings, and compulsory purchase. He also assisted Guy Fetherstonhaugh QC in the landmark case of *Lynn Shellfish v Loose* [2016] UKSC 14, now the definitive statement of the law of prescription.

Before coming to the Bar, Mark obtained a first class degree in Natural Sciences from Selwyn College Cambridge, being placed top in the University in the Part II examinations. He went on to complete a PhD in the quantum physics of LEDs before joining the UK Civil Service in the Department for Business, Innovation and Skills. While there, he qualified as a Chartered Management Accountant, twice being placed in the top ten globally in examinations. In the Civil Service, Mark was responsible for valuing complex financial assets, and acted as lead financial negotiator with HM Treasury. He completed his GDL and BPTC at City Law School, being graded Outstanding and winning the prestigious Senior Moot competition.

Please call or email our clerks **(clerks@falcon-chambers.com)** for more information.

The Senior Moot 2016

Chambers is delighted to have sponsored the City University Senior Moot 2016, which took place on Thursday, 5th May 2016 in Court 2 of the Supreme Court. The event proved popular with students, and the final was contested by four semi-finalists:

Esther Drabkin-Reiter (winner), Matthew Mills (second place), Matthew Collins, and Ronan Magee.

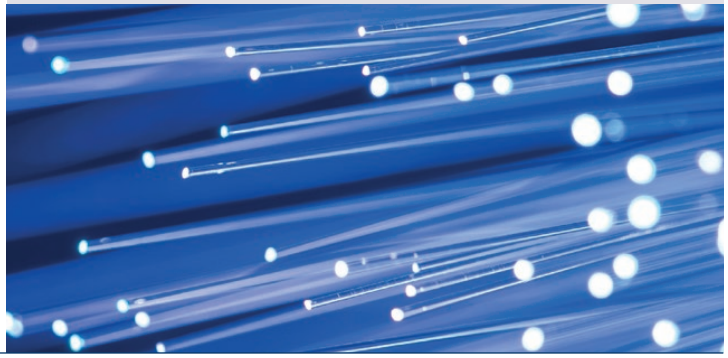
The Judges were Prof Catherine Barnard and Hugh Mercer QC, and the event was co-ordinated by **Joanne Moss** of Falcon Chambers.

Update on the draft new Electronic Communications Code

The Department of Culture, Media and Sport has published its proposals for a new Electronic Communications Code. Based on the code in the Bill before Parliament in January 2015, but which was later withdrawn, the proposals contain two important policy changes. First, the consideration for the grant of rights under the Code will be based on a no-scheme principle, rather than founded on the consensual agreement approach under the present code. Second, the new code, including the revocation provisions, will apply to all new agreements from the relevant commencement date, and Part II of the 1954 Act will be dis-applied. The relevant body for determining the grant of rights and the consideration and compensation entitlements, will be the Upper Tribunal (Lands Chamber).

These significant policy changes will affect all operators and site owners, whether buildings in urban or agricultural land in rural areas.

Barry Denyer-Green, of these chambers, is actively monitoring the proposed legislation with the Compulsory Purchase Association and the Central Association of Agricultural Valuers. The important thing is to ensure that the legislation is clear and workable.



Recent News

The Neighbourhood Planning Bill

The Department for Communities and Local Government, in an unprecedented communication, has written to all professionals drawing attention to clause 22 of the Neighbourhood Planning Bill, now before Parliament. This clause codifies the "no-scheme principle" for assessing compensation for land acquired by compulsion.

New section 6D(3) and (4) introduces the extension to the "no-scheme principle" that would enable regeneration or redevelopment schemes enabled by "relevant transport projects" to include the transport project as part of the scheme to be disregarded in the assessment of compensation. This means that the land will be valued as if the transport project as well as the regeneration scheme had been cancelled on the relevant valuation date.

This would prevent the public sector paying for land at values inflated by previous public investment.

As well as the general conditions and restrictions on what transport projects and regeneration or redevelopment schemes come within the scope of the new provisions (set out in new section 6E), there is a particular safeguard for certain investors. The new rules will not apply to those who have bought land in the vicinity of a relevant transport project between the time the project was announced and 8 September 2016 (the day after the Bill is printed). These people may have bought land at a premium and might then be at risk of being paid less than they had paid for it if it subsequently is subject to compulsory purchase.

The new rules will, however, apply to any land acquired on or after 8 September, so anyone acquiring land from 8 September should take note. Please ensure that your clients and members are aware of this.

Barry Denyer-Green advises that it is essential that clients, contemplating transactions or schemes near existing or future transport projects, are therefore made aware of this very significant change in the rules.

Recent Publications

Falcon Chambers is pleased to announce that the following books are now available for purchase:

Barnsley's Land Options (6th Edition)
by Martin Dray, Adam Rosenthal and Christopher Groves

The Law of the Rights of Light
by Jonathan Karas QC

Fundamental Texts on European Private Law Edited
by Oliver Radley-Gardner et al.

New Website

Look out for our exciting new website, launching during October.

Falcon Chambers Members

Derek Wood QC
Jonathan Gaunt QC
Kirk Reynolds QC
Nicholas Dowding QC
Guy Fetherstonhaugh QC
Timothy Fancourt QC
Jonathan Karas QC
Jonathan Small QC
Stephen Jourdan QC
Janet Bignell QC
Caroline Shea QC

Joanne R. Moss
Anthony Radevsky
Wayne Clark
Barry Denyer-Green
Gary Cowen
Martin Dray
Anthony Tanney
Catherine Taskis
Emily Windsor
Mark Sefton
Stephanie Tozer
Edward Peters
Adam Rosenthal
Charles Harpum
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

Falcon Chambers

Chambers Director: Edith A. Robertson
Senior Clerk: Steven Francis

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