Falcon Chambers

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Newsletter

IN THIS EDITION:

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Happy New Year to all our friends and colleagues.

Members of Falcon Chambers are bracing themselves for a fascinating year. Whatever the fall out from the twin Brexit-Trump shocks of 2016 will be, the disputes we are tackling in the world of real estate and landlord and tenant litigation are as complex and challenging as ever. The latest tricky questions on familiar themes – development agreements, assignment of leases and guarantors, land sale contracts, 1954 Act renewal issues, restrictive covenants, agricultural tenancies, professional negligence and enfranchisement - are all heading towards the higher Courts and senior Tribunals for resolution. In addition, impending legislation in the form of the revised Digital Economy Bill (replacing the Electronic Communications Code), and several adjudications of the first disputes under the Pubs Code 2016, giving the right to tied pub tenants to seek market rent only leases, promise thrills and spills in equal measure. In the agricultural arena we are expecting the post implementation review of the Pigs Order 2011, together with an expected increase in the use of Brexit clauses in long term agreements. The effect of those, and the disputes that may transpire, will be of considerable interest to agricultural landowners and practitioners.

Of major interest, early on this year, will be the ten week trial of *Heron Quays v Jervis*, in which Guy Fetherstonhaugh QC and Kester Lees will go head to head with Timothy Fancourt QC and Phil Sissons. Under the searching gaze of Mrs Justice Rose, they will revisit the thorny question of repudiation of leases, as well as a host of related dilapidations issues.

In this newsletter we are offering a range of topical articles, to help banish any Winter blues, and to provide insight and guidance into some of the more active areas of practice over recent months. Janet Bignell QC and Jamie Sutherland report on the implications of no fewer than four restrictive covenant cases in the Court of Appeal, High Court and Upper Tribunal (Lands Chamber), involving actual or alleged building schemes. Martin Dray and Kester Lees consider the dangers inherent in the registration gap, that vital period of time between transfer and registration, which can have far reaching consequences on for example the validity of notices to quit served during that period. Stephanie Tozer reports on the recent Northern Ireland case of *Smith and Hughes v Black* [2016] NI Ch 16, in which a receiver was held not to be entitled to possession of the mortgaged premises because insufficient evidence had been produced to prove the validity of the power of attorney under which the receiver had been appointed. Additionally, Oliver Radley-Gardner provides an illuminating review of the ubiquitous lease/licence distinction and queries whether the authority of Street v Mountford [1985] 1 AC 809 may now be under threat; and Tricia Hemans brings us news of an eagerly anticipated Upper Tribunal decision in which much needed guidance was given on the principles to be applied when assessing whether a costs order should be made under Rule 13.

We hope you enjoy this rich and varied content, and, from all at Falcon Chambers, we wish you a productive and rewarding 2017.

Case Round Up

Kateb v Howard de Walden Estates Ltd [2016] EWCA Civ 1176
In this decision, the Court of Appeal had to decide an important point of statutory construction in a new lease claim under the Leasehold Reform, Housing and Urban Development Act 1993. They held that the freeholder, as competent landlord, could agree the terms of the new lease with the tenant, including the amount payable to the intermediate landlord, even where the intermediate landlord objected and where she had served a notice of separate representation. The Court rejected the tenant's argument that, once a tribunal application had been made, the power to agree the intermediate landlord's compensation could no longer be exercised by the freeholder. They also decided that there was no breach of the intermediate landlord's human rights to a fair trial and/or to compensation for deprivation of property. The Act provided an aggrieved intermediate landlord with a remedy to make a claim against a freeholder in an appropriate case. **Anthony Radevsky** acted for the successful freeholder.

Ashokkumar Somabhai Patel v Freddy's Limited & others [2017] EWHC 73 (Ch.)
A fraudster impersonated the Claimant and procured the sale of the Claimant's property to the Defendant which was then registered at HM Land Registry. The Claimant, having discovered that he was no longer the registered proprietor of his property, sought rectification of the register to restore himself as the registered proprietor or, alternatively an indemnity from the Land Registry. In this case, the High Court stayed the claim for an indemnity and dealt only with the claim for rectification. As the Defendant was in possession of the property no order for rectification could be made unless the by fraud or lack of proper care caused or substantially contributed to the mistake" or it would for any other reason be unjust for the alteration not to be made in accordance with paragraphs 2 and 3 of Schedule 4 to the Land Registration Act 2002. The Claimant's case was that the Defendant did not take proper care in that it failed properly to check the title of the seller, and failed to make proper inquiries of the occupiers of the property, and that it thereby caused or substantially contributed to the mistake. The claim was, however, rejected. The High Court held that the Defendant did not initiate that registration – that was done by the fraudster – and there was nothing that could be regarded as a cause of the mistake in the sense that but for the failure to take a particular step the fraud would have been revealed. Nor could it be said even that there was a substantial contribution to the mistake in the sense that a step not taken by the Defendant would probably have revealed the fraud. Certainly there were steps not taken. But there is nothing that would probably have revealed the fraud. Accordingly rectification was refused. **Martin Dray** appeared for the Claimant.

Powles v Reeves [2016] EWCA Civ 1375
Jamie Sutherland appeared in this decision which considered the scope of the principle established in *BCT Software Solutions Limited v C Brewer & Sons* [2003] EWCA Civ 939, [2004] C.P. Rep 2: where parties have settled the substantive dispute and asked the judge to decide costs, it is reasonable to expect the parties to accept her decision; an appellate court will not interfere unless it can be shown that the result is manifestly unjust.

The First Defendant in this boundary dispute had sold his property shortly before trial. The purchasers, who were then added as Second and Third Defendants, settled the boundary line with the Claimants along the Claimants' pleaded line, despite the fact that the Claimants and First Defendant's experts had agreed a boundary which was arguably closer to the First Defendant's pleaded line. Immediately before the trial, the Claimants and the First Defendant agreed a Tomlin order, settling the substantive proceedings between them (as the boundary line as between them was now academic). The Tomlin order provided for the judge to decide costs. The judge ordered the First Defendant to pay the Claimants' costs. The First Defendant appealed, arguing that the judge had been wrong to hold the Claimants successful, when the experts' agreed line was closer to the First Defendant's pleaded boundary and that he would have been likely to succeed had that issue been live at trial.

The Court of Appeal applied the principle established in *BCT Software* and dismissed the appeal. It held that there was no manifest injustice: the Claimants could be seen as the successful party, and so entitled to their costs against the First Defendant, even where the substantive settlement had been achieved with a third party.

Vastint UK B.V. v Persons Unknown (Chancery Division, 15 December 2016)
Janet Bignell QC appeared for the successful applicant, a developer which owned a large site comprising of disused industrial plots. An injunction restraining trespassers had been obtained in respect of an adjoining piece of land in 2014 following five extremely serious incidents of trespass involving raves.

Case Round Up (continued)

In 2016 one of the applicant's security guards discovered that some of the perimeter gates surrounding the land had been opened and that trespassers had set up equipment for a rave. The applicant sought an injunction on the same terms as had been granted in 2014 on the basis that there was a serious risk of trespass. The High Court granted the application holding that following *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11, the Court had a discretion to grant an injunction even where enforcement action would not be possible if it would have a real deterrent effect. It was appropriate to exercise the courts discretion to grant an injunction given that the 2014 injunction in respect of the adjoining land had proved effective, and given further that the hazards on the land were extremely serious and including substances that were toxic to humans.

Elmfield Road Ltd v Trillium (Prime) Property GP Ltd [2016] EWHC 3122 (Ch) **Timothy Fancourt QC** represented the successful landlord in this case concerning provisions in lease for the increase of rent with effect from the fifth and tenth anniversaries of the commencement of the term by indexation of the passing rent. The reviewed rent was to be calculated by multiplying the passing rent by the RPI index figure for the month prior to the review date and then dividing it by 193.1. That figure was the RPI index figure for the month falling four and a half years before the commencement of the term. In that month, the rent under an existing lease had been reduced by nearly £200,000 p.a. as part of the transaction by which the reversionary lease was also granted.The Court rejected the tenant's case that, by an obvious mistake, the rent review clause indexed the passing rent under the reversionary lease rather than the amount of the reduced rent payable under the existing lease. Although the rent review provisions were unusual and provided for a greater increase in rent than standard indexation would have produced, it was not possible to say this was irrational or an obvious mistake given the other terms of the transaction as a whole. The judgment also considers the principles on which non-binding heads of terms may be admissible as an aid to interpretation of a lease.

Helix 3D v Dunedin [2016] EWHC 3012 (Ch) A landlord and tenant entered into a side option agreement for the purchase of the freehold for a sum of at least £1.5m. In the first two years of the 5 year option period the purchase price was defined as £1.5m but the price in years 3-5 was to be the greater of £1.5m and the Open Market Value (as determined after the service of an option notice). A 5% deposit was required to be paid as at the date of service of the option notice. The tenant served the notice and paid a deposit of 5% of the £1.5m purchase price stipulated therein. The landlord maintained that the notice was invalid (or could not be known to be valid) as the purchase price may be determined in a sum greater than £1.5m.

In the High Court the Deputy Judge held that the option agreement's machinery could be made to work in a commercially sensible way so as to ensure that the option was capable of certain exercise in the last three years of a five-year option period. Given that the document was infelicitously drafted, the clause concerning the payment of a deposit could be read so that the deposit payable was to be calculated by reference to the purchase price stipulated in the Option Notice as opposed to that which would be determined at a later date. The judge rejected the landlord's contention that the true construction of the agreement was that the tenant was to bid its highest offer, paying a deposit accordingly, as uncommercial as it gave rise to far too great uncertainty. Accordingly, the judge granted the declaratory relief sought. **Kester Lees** acted for the Claimant and **Charles Harpum** acted for the Defendant.

Westhill Endowment v v Birmingham City Council (HHJ Purle QC)
Guy Fetherstonhaugh QC and **Nathaniel Duckworth** appeared for the successful claimant in these proceedings for rectification of the register of town or village greens under section 14(b) of the Commons Registration Act 1965.

The owner's primary reason for saying that the playing field should not have been registered as a town or village green was that, for the majority of the prescriptive period, use by local residents had been contentious *(ie vi)* and not therefore "as of right". That was because there had been a number of signs in situ around the playing field that stated: "The [owner] permits dog walkers on its grounds but expects people to act in a reasonable way" or words to like effect. The owner contended that it was now established, on the authority of *Betterment Properties (Weymouth) Ltd v Dorset* CC [2012] 2 P & CR 3 and *Winterburn v Bennett* [2016] EWCA Civ 482, that signs forbidding public use of the land in question were effective to prevent prescriptive use and that, on their true

Case Round Up (continued)

construction, the owner's signs forbade anyone other than the permitted dog walkers from using the playing field. The Court held that any reasonable reader of the signs in this case would understand that they were permitted to use the playing field for dog walking purposes and forbidden from doing so for any other purposes.

The Court therefore held that the residents' use of the playing field had not been "as of right" and that it should not therefore have been registered as a town or village green.

Dooba Developments Ltd v McLagan Investments Ltd [2016] EWHC 2944 (Ch)
Dooba Developments Ltd and McLagan Investments Ltd (Asda) entered into a £12 million sale and purchase agreement conditional on the satisfaction of four conditions relating to planning permission and consent to undertake highway works in connection with the proposed development of the site for the construction of an Asda Superstore.

Asda purported to exercise a contractual right to rescind the agreement on the ground that Dooba failed to satisfy the four conditions by the Longstop Date (23 July 2014). Dooba brought these proceedings for a declaration that Asda's notice of rescission was invalid and that the agreement has become unconditional. The proceedings raise numerous issues as to whether each of the four conditions has been satisfied. However, Asda applied for summary judgment on the ground that there was no real prospect of Dooba succeeding in establishing that one of the conditions ("the Highway Condition") was satisfied by the Longstop Date and that under the contractual right to rescind, it was sufficient if any of the conditions remained unsatisfied at the Longstop Date.

Asda succeeded before the Master on both points. Dooba appealed against the Master's decision on the second of these questions of construction. David Halpern QC, sitting as a Deputy High Court Judge, accepted Dooba's construction of the provision conferring the right to rescind, namely that the right arose only if all four conditions were undischarged on the Longstop Date.

The case must now go to trial in relation to Asda's arguments in respect of the other three conditions. If any one of them was satisfied by the Longstop Date, on the basis of the Deputy Judge's decision, Asda was not entitled to rescind the agreement. **Nicholas Dowding QC** and **Adam Rosenthal** acted for Dooba, the successful appellants.

Stodday Land Limited, Ripway Properties Limited v Pye [2016] EWHC 2454
Jamie Sutherland appeared for the successful respondent in this appeal which concerned the service of a notice to quit on a tenant by an unregistered purchaser of the freehold estate. The High Court held that the right to serve a notice to quit arose from the nature of the estate granted, and could only be served by the legal owner of the reversion. The unregistered purchaser, although the equitable owner, was not the legal owner and could not serve a valid notice to quit. The case is considered in more detail by **Martin Dray** and **Kester Lees** on page 10.

Heathcliffe Properties Ltd v Dodhia & Anor [2016] EWHC 2628 (Ch)
The High Court reviewed the authorities on contempt of court and reiterated that the purpose of a sentence for contempt was to both punish the offender and secure compliance with court orders. Having considered all the circumstances, it was held that a custodial sentence would not be appropriate but that a substantial fine would be imposed. **Oliver Radley-Gardner** appeared for the defendants.

Couper v Port of London Authority [2017] EWHC 22
Joseph Ollech appeared in the High Court on behalf of the successful Port of London Authority and a High Court Enforcement Officer in obtaining orders for enforcement by way of sale and disposal of a large collection of boats on the River Thames under Taking Control of Goods Regulations 2013, and also for related directions imposing two extended civil restraining orders against the Claimant, and his wife, who had made numerous without merit application on a without notice basis and with the apparent purpose preventing timely enforcement of court orders. Obtaining civil restraining orders in any particular case is necessarily fact sensitive but of interest in this matter is the fact that (a) the court exercised its power to make an extended civil restraining order against a non-party, and (b) the court was prepared to treat the First Claimant and his wife to have been, in effect, acting together in considering the number of totally without merit applications that they had made both separately and together.

Case Round Up (continued)

Shipleys Foodservice Ltd v Hounslow London Borough Council (unreported decision of Nugee J dated 28 November 2016) **Nicholas Dowding QC** successfully resisted an application under section 68 to set aside a rent review arbitrator's award. Nugee J held, in essence, that

(1) a point put forward by the tenant's surveyor in his evidence to the arbitrator that a particular comparable was not to be relied on because it was a letting to a special purchaser, which the arbitrator had not expressly dealt with in his award, was not an "issue" within the meaning of s. 68(2)(d) and so was not an "irregularity".

(2) That there was "real doubt" as to whether even if there had been an irregularity, it had caused or would cause substantial injustice to the applicant.

4-6 Trinity Church Square Freehold Ltd v Corporation of the Trinity House of Deptford Strond [2016] UKUT 484 (LC)
The Upper Tribunal considered Section 1(4)(a) of the Leasehold Reform, Housing and Urban Development Act 1993 which entitled the freeholder to retain freehold title to a garden, which the tenants were entitled to use pursuant to revocable licenses granted in their leases, if it offered in lieu such rights permanent rights as will ensure that thereafter the occupier of the flat … has as nearly as may be the same rights" as those enjoyed when the process of acquisition commenced. The principal issue was whether a revocable license would suffice, or whether only an irrevocable license would satisfy the requirements of section 1(4)(a). The Upper Tribunal considered that it could be inferred that the statute did not intend simply that the tenants were to enjoy the same rights as before, but that they were to enjoy them in perpetuity. In order to comply with section 1(4)(a), the rights offered offered had to be free of any condition for termination. Thus, where the rights originally enjoyed by a qualifying tenant were revocable, the requirement of permanence meant that they had to become irrevocable on completion of the transfer. **Anthony Radevksy** appeared for the respondent.

Sinclair Gardens Investments (Kensington) Ltd v Wisbey [2016] UKUT 0203 (LC)
The Upper Tribunal considered an appeal from the First-Tier Tribunal concerning the costs which could be recovered by a landlord in a lease extension claim. The Upper Tribunal held that the service of a counter notice was a crucial part of the extension process, and the costs of obtaining solicitor's advice, including costs of instructing a valuer and considering the valuation report, were properly recoverable provided they were reasonable in amount. However, there was evidence before the tribunal that the transaction involved the grant of a new lease of a flat in a development where there had already been at least one previous such grant and where there was the prospect of numerous further such grants. n a case where there was a clear opportunity to seek to negotiate a quantum discount/fixed fee arrangement, the tribunal was entitled to conclude that that burden had not been discharged where there was no evidence that a negotiation for a quantum discount/fixed fee had even been attempted. Accordingly, a 20% discount was applied. **Oliver Radley Gardner** appeared for the appellants.

Re Rae's Application [2016] UKUT 0552 (LC)
The Upper Tribunal was asked to modify a set of covenants under ground (as) to permit the construction of a property on the edge of a housing estate. The objecting neighbours who held the benefit of the covenants asserted that the existence of a development scheme which had to be maintained. The Upper Tribunal held that it was immaterial whether or not a scheme existed, and held that the "thin edge of the wedge" argument did not apply given the physical features of the land. Accordingly, a variation of the covenant was ordered. **Oliver Radley-Gardner** appeared on behalf of the Applicants

Hewitt & Gould v Barakat (Brighton County Court)
Toby Boncey represented the successful claimants Court in their claim against the defendant developer in relation to interference over the course of several months with the vehicular right of way leading to their home. The claimants were awarded, inter alia, substantial negotiating damages, aggravated and exemplary damages.

Case Round Up (continued)

Bermondsey Exchange Freeholders Ltd v Kevin Conway (County Court at Lambeth)
James Tipler appeared for the successful landlord in this claim for an injunction to restrain a tenant under a long lease of a flat in a high-end residential development from using the flat for the provision of accommodation to guests arranged via Airbnb and similar online platforms.

The Court found that such use amounted to a breach of multiple covenants in the lease, including a user covenant requiring the premises to be used as a residential flat for one family only, and covenants against subletting, parting with or sharing possession or allowing others to occupy the premises save by way of assignment or sublet authorised by the claimant landlord

Aroma Entertainment Limited v Peer Securities Limited (Croydon County Court 30 November 2016)
The parties had entered into a consent order providing for the tenant to be relieved from forfeiture on compliance with certain conditions by March 2016. **Toby Boncey** appeared for the successful tenant in its application of November 2016 to extend time for compliance with the order, the tenant having failed to remedy two of the items in the schedule to the order to the Court's satisfaction by the deadline.

Restrictive Covenants And Building Schemes Just Like Buses …

by Janet Bignell QC and Jamie Sutherland

During 2016 there were no fewer than 4 reported restrictive covenant cases in the Court of Appeal, High Court and Upper Tribunal (Lands Chamber) involving actual and alleged building schemes. These decisions serve as a valuable reminder of the importance of considering the oft-overlooked issue whether such a scheme exists when a title is subject to restrictive covenants. They also provide useful guidance as to the legal, evidential and practical issues which parties must consider in cases which (potentially) involve building schemes.

The impact of a building scheme

By way of reminder, any owner wishing to enforce a restrictive covenant must show that his land enjoys the benefit of the covenant. Where a common vendor has sold off individual plots on an estate, taking covenants from each purchaser for the benefit of the vendor's unsold land, the covenants given by later purchasers will not, without more, benefit earlier purchasers (or their successors): the earlier purchasers' plots were no longer part of the unsold land by the time the later purchasers gave their covenants. Building schemes alter this state of affairs. They make covenants mutually enforceable by and against the owners of every single plot on an estate regardless of the date of their respective sale and purchase.

The criteria to establish a building scheme

It is long established that even if a purchaser is shown an estate plan prior to his purchase, and gives covenants affecting his own plot, he cannot assume that the estate will be subject to a building scheme. See, for example, *Tucker v Vowles* [1893] 1 Ch 195, where no building scheme was held to exist.

The basic criteria for establishing a building scheme are those authoritatively stated by *Parker J in Elliston v Reacher* [1908] 2 Ch 374 at 384:

(1) the parties derive title from a common vendor;

(2) prior to any sales off, the vendor had laid out a defined estate for sale in lots, subject to restrictions to be imposed on each lot;

(3) the restrictions were intended by the vendor to be, and were, for the benefit of all the lots; and

(4) each purchaser bought understanding that the covenants would enure for the benefit of each lot.

In *Elliston* itself, the relevant conveyances all obliged the purchasers from the common vendor to comply with the covenants in an 1861 indenture and the indenture showed the extent of the estate. As the estate and the mutual covenants could therefore be identified from the document and its plans, the criteria identified by the court were held to be satisfied: a building scheme existed.

A plan has not always been held to be necessary though. In *Re Dolphin's Conveyance* [1970] Ch 564, Stamp J admitted extrinsic evidence to identify the Selly Hill Estate, referred to in the conveyances, and found a building scheme to exist. In reaching this conclusion, Stamp J. emphasised, on the facts before him, the "existence of the common interest and the common intention" underlying the building scheme was "actually expressed in the conveyances themselves".

In Birdlip Limited v Hunter [2016] EWCA Civ 603, drawing these strands together, the Court of Appeal followed the Privy Council's decision in *Jamaica Mutual Life Assurance Society v Hillsborough Limited* [1989] 1 WLR 1101, endorsing the distillation of the two essential pre-requisites which the Privy Council considered to be at the heart of the Elliston criteria. Firstly, that the land to which the scheme relates must have been clearly identified. Secondly, that each purchaser must have accepted that the covenants would be reciprocally enforceable.

Reviewing the case law in relation to the first requirement, Lewison LJ was clear, at [25], that:

> "in almost all the cases… where a [building] scheme… was found to exist, the area… to which the scheme applied was ascertainable from the terms of the conveyance or other transactional documents".

If the criteria for a building scheme are not clearly and quickly shown to be satisfied in this way, a scheme is unlikely to exist. It is noteworthy that Lewison LJ warned, at [25]:

> "one would have thought… that intention [of a building scheme] would be readily ascertainable without having to undertake laborious research in dusty archives for ephemera more than a century old."

Restrictive Covenants And Building Schemes Just Like Buses …

continued

The application of the criteria

On the facts, the parties' conveyances in Birdlip, dating from 1909 and 1910, made no verbal reference to an estate; and the conveyance plans only showed the property conveyed, without making reference to any estate plan. Later conveyances from 1914 were in the same form. While the claimants' solicitors had obtained copies of earlier conveyances from 1908 which did include estate plans, and while the purchasers in 1909 and 1910 may have had sight of these, the Court of Appeal held that it could not be assumed that purchasers under later conveyances, up to 1914, were aware of the extent of the estate. Given mutual enforceability among all plots is required, the evidence was insufficient to demonstrate that a building scheme had been established.

The fact that a building scheme should be readily ascertainable on the evidence placed before the court is exemplified by the judgment given by Master Clark in *San Juan v Allen* [2016] EWHC 1502 (Ch). The Master granted the claimants summary judgment for a declaration that the defendants' proposed development breached covenants in a building scheme. The conveyances clearly identified the affected estate by reference to a plan which showed the 36 component plots. They also made clear that the covenants, which limited use of each plot to a dwelling house occupied by one family, would be mutually enforceable. The requirements of a building scheme were clearly met. The covenant had been registered against each property on the development, including the defendants'.

Against this background, the Master rejected the defendants' argument that it was premature for the claimants to seek a declaration based upon the building scheme that was in place. The defendants contended that their intention to build four houses on their plot had not been established, such that the declaration as to breach was sought on hypothetical facts. Rejecting this submission, the Master considered it sufficient that the defendants had already obtained planning permission for a development that would breach the covenant and that they had not given an undertaking to the claimants not to develop in accordance with that permission. The defendants had merely indicated that they would not build until the restrictive covenant issue had been resolved. The Master also rejected the defendants' application for a stay to allow an application to the Upper Tribunal under section 84(1) of the Law of Property Act 1925 for modification or discharge of the restrictive covenant. While they had mooted such an application for months, they could still not indicate by the hearing when such application would be made.

Applications for modification under section 84(1) Law of Property Act 1925

Turning to section 84 of the Law of Property Act 1925, two recent Upper Tribunal decisions, *Re Hussain's Application* [2016] UKUT 297 (LC) and *Re Sunita's Application* [2016] UKUT 368 (LC), illustrate the refusal and grant of applications for modification of a restrictive covenant under the ground at section 84(1)(aa), in cases where a building scheme exists. Specifically, they illustrate the role that such a scheme plays.

Ground (aa) is that, in a case falling within section 84(1A), the continued existence of the restriction would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such a user. Section 84(1A) authorises the discharge or modification in any case in which the Upper Tribunal is satisfied that the restriction either does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them or is contrary to the public interest, and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

In *Re Hussain's Application*, a homeowner's application to modify restrictive covenants such that she could build a third-storey extension to her two-storey house was refused. The homeowner lived on an estate comprising a building scheme under which all the purchasers had covenanted not to extend their properties without the consent of the residents' association and the owners of the contiguous properties. The estate had remained largely unaltered for 25 years.

Applying the Court of Appeal's decision in *Dobbin v Redpath* [2007] EWCA Civ 570, the Tribunal held that the existence of the building scheme was a contextual matter which had to be taken into account under section 84(1B). That is, that in determining whether a case is one falling within section 84(1A), and in determining whether a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan, any declared or ascertainable pattern for the grant or refusal of planning permission, as well as the period at which "and the context in which the restriction was created or imposed and any other material circumstances". The building scheme was a matter upon which weight could be placed. The estate's distinctive character and ethos had been established through the building scheme and, on the evidence, the covenant secured practical benefits of substantial advantage.

Restrictive Covenants And Building Schemes Just Like Buses …

continued

In contrast, on the facts before the Tribunal in *Re Sunita's Application*, the applicant's application to modify restrictive covenants relating to a parcel of land adjoining her house was allowed such that she could construct two houses. The application land was part of a substantial residential estate laid out and made subject to a scheme of mutual covenants by its original owner between 1934 and 1952. It was also part of a sub-estate subject to its own scheme of covenants. When the estate was laid out and the building scheme imposed the application land was intended to be preserved from development and retained and maintained by the estate company as land over which estate residents were to have access for recreation. Despite that, the application land had not been used for such purpose for more than 60 years and, since its sale into private ownership (repeating the same scheme of covenants), the land had been enclosed and used exclusively for the enjoyment of the owners of a neighbouring property since 1952 and then by the owners of the applicant's property since 1962.

The Tribunal said the context in which the question under ground (aa) must be considered was that of a well-established building scheme. As such, the relevant issue was whether by preventing the proposed development of the application land the covenants secured, as a substantial practical benefit, the integrity of the building scheme and the protection of the application land, and other similar land, as undeveloped land. This raised the so-called "thin end of the wedge" argument, that it was essential to prohibit the proposed development of the application land in order to maintain the utility of the scheme of covenants as a whole. As the Deputy President put it, the argument was that "if the defences of the Estate are allowed to be breached, they are liable to be overwhelmed".

Whilst recognising that the grant of the application may appear to weaken the covenants as they applied to other land, and despite giving that factor weight in the context of the long-established scheme, the Tribunal found, at [78], that the overall integrity of the building scheme would not be further jeopardised on the evidence. It was the sale of the land designated for communal use into private ownership by the estate company which had destabilised the system of covenants:

"That break from the original conception of community use inevitably created greater scope for the consideration on their individual merits of proposals by the new owners of the burdened land and their successors."

This point was previously considered by the Tribunal in *Re Voss's* Application LP/11/1973 (unreported).

Some lessons to take forward

Those advising in restrictive covenant cases should always consider whether a building scheme may exist. That involves looking carefully not only at the potential claimants and defendants' titles, but also searching other neighbouring titles at Land Registry. Such a search should determine the order of sales-off by a likely common vendor (which will be relevant if there is no building scheme) and the identity of those entitled to enforce. Whether or not there is a building scheme should, generally, be clear from the title and conveyancing documents.

Whether or not there is a scheme, those seeking to enforce restrictive covenants should generally not delay in doing so and should protect their position, just as the claimants did when their rights were challenged in the *San Juan* case. Equally, those whose development plans will potentially place them in breach of the restrictions, and their advisers, should consider their position early and take steps accordingly. This includes considering the potential for, and merits of, any application under section 84(1) of the Law of Property Act 1925, including the impact which any building scheme may have on the application.

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A short practice note by the authors on this topic was published in the Solicitors Journal last year, "Enforcing Restrictive Covenants in Building Schemes", (2016) S.J. 160(40), 31.

Land Registration and the Service of Notices: mind the gap

by Martin Dray & Kester Lees

"Mind the gap" is a refrain familiar to users of the London Underground. Few may readily associate it with status and entitlement in connection with real property. As this article shows, perhaps more should – certainly in cases involving assignments of registered land where, left unchecked, a "gap" can cause particular problems for assignee landlords and tenants, especially in relation to the giving of notices to quit and other statutory notices (e.g. under the Landlord and Tenant Act 1954).

The "gap" in question, for real estate purposes, is the "registration gap", namely the period between (i) the completion of a registrable disposition between vendor and purchaser of a registered estate and (ii) the completion of such disposition by registration at HM Land Registry. As the case of *Pye v Stodday Land Ltd* [2016] 4 WLR 168 shows, the significance of this temporal interval can all too easily be overlooked.

This article concerns the impact of the "registration gap" and the ability of an unregistered purchaser to give a valid notice to quit in relation to a subsisting periodic tenancy. Other means of termination of tenancies – such as by forfeiture – are outside its scope.

The Registration Gap

In the landlord and tenant context, most reversionary estates will nowadays be registered estates (either freeholds or registered long leaseholds). Further, given the reduction (to 7 years) in the length of registrable leases brought about by the Land Registration Act 2002 ("the 2002 Act"), many leases will themselves be registered estates. Accordingly, where an assignment occurs, the "registration gap" is likely to beset not only landlords but also tenants in many cases.

A transfer of registered land is the most common of a number of dispositions which are required to be completed by registration: 2002 Act, s.27(2). The importance attached to registration is underscored by the fact that s.27(1) provides that:

> "If a disposition of a registered estate … is required to be completed by registration, it does not operate at law until the relevant registration requirements are met."

What is required is for the disposition "to be completed by registration": s.27(2). That entails "the transferee being entered in the register as the proprietor": Sch.2, para.2(1). This means that an unregistered transfer carries with it only the equitable title. Unless and until registration occurs, the legal title remains vested with the outgoing owner.

The consequence of this is that the incoming owner's ownership is, pending completion of registration, although not illusory, less than complete. The purchaser, acquiring merely beneficial title, must wait until registration before assuming the mantle of legal owner. Despite the antecedent instrument of transfer, the legal title does not pass until the point of registration. It is this which creates the "gap".

The significance of the Registration Gap

Why does this matter? It matters because when it comes to dealing with the land, particularly in relation to the termination of tenancies by notice to quit, the common law steadfastly dictates that, as between landlord and tenant, what is relevant are legal, not equitable, rights. It is the relationship and dealings between the legal owners or reversion and term respectively which count; the actions of beneficial owners are nothing to the point.

By way of illustration, in *Smith v Express Dairy Ltd* [1954] JPL 45 a freehold reversion was assigned (transferred) but the transaction was not registered. The transferee (who thus held only a beneficial interest) served a notice to quit on a tenant. Since the law has regard only to legal (not equitable) relationships, the notice was bad. Prior to registration only the outgoing owner could serve a valid notice.

To like effect is *Brown & Root Technology Ltd v Sun Alliance* [2001] Ch 733, CA, a case involving a break notice given by a tenant. An original tenant had a personal break right which would cease on assignment of the lease. It transferred the lease but the assignee did not register the disposition. The original tenant later sought to exercise the break clause. In litigation against the landlord it was successful on the ground that in the circumstances it remained (at law) the tenant under the lease. As between landlord and tenant, what mattered was the assignment of the legal estate. Prior to registration of the disposition, it was the transferor who was still the legal owner of the relevant estate and hence, in Brown & Root, empowered to exercise the option to determine.

Owner's Powers no answer

It is often conceived that the common law requirement that notice to quit must be given by (and to) the person entitled to the relevant legal estate (e.g. the person in whom the reversionary estate or, as the case may be, the residue of the term of years is then vested) has been effectively reversed or at least very much ameliorated in favour of the disponee under a completed (albeit unregistered) transfer in "registration gap" cases – courtesy of ss.23 & 24 of the 2002 Act. This very argument was advanced in *Pye v Stodday Land*.

The facts of *Pye v Stodday Land*, so far as germane, are simple. An agricultural tenancy had been granted. The freeholder landlord (whose estate was registered) transferred part of the reversion, retaining the remainder. Before applying for registration, the assignee of part served on the tenant a purported notice to quit in relation to the part acquired by the assignee. (This was coupled with separate notice given by the assignor in relation to the remainder of the holding.) The tenant challenged the notices. One basis for attacking

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that given by the assignee was that, since it had predated registration of the transfer, the person who was then the legal owner of the reversion had not given the assignee's notice.

The assignee contested this, relying on ss.23 & 24. The assignee's argument proceeded as follows:

(1) s.24 provides that "a person is entitled to exercise owner's powers in relation to a registered estate … if he is … entitled to be registered as the proprietor."

(2) Hence a purchaser under a completed transfer is, even before registration, entitled to exercise owner's powers.

(3) In turn, s.23 provides that "owner's powers … consist of … power to make a disposition of any kind permitted by the general law in relation to an interest of that description …".

(4) A notice to quit is a dealing which an owner can make and so, by dint of the statutory provisions, a person who is yet, but who is entitled, to be registered as proprietor can also effectively give a notice to quit.

The argument was rejected, as Norris J held that s.24 does not support the proposition that a person entitled to be registered as proprietor can undertake transactions that will be effective at law even before he is registered, observing that to give s.24 such reach would to be render s.27 nugatory. As put by the Law Commission in its recent Consultation Paper, *Updating the Land Registration Act 2002*, Law Comm No.227, para.5.82, "[Owner's powers] are not intended to confer all the … powers of a legal owner on a person who is entitled to be registered. Otherwise, there would be no significance in legal title passing only on registration".

Norris J essentially considered that assignee's argument begged the question what powers the general law would permit an equitable owner to exercise. He endorsed the approach taken by *Newey J in Skelwith (Leisure) Ltd v Armstrong* [2016] Ch 345, namely to ask "whether an equitable owner would be 'permitted under the general law' to make disposition of the relevant kind".

Moreover, Norris J concluded that ss.23 & 24 could not avail the assignee in relation to the notice to quit it had served. As a matter of "the general law" the power to serve a notice to quit is exclusively vested in the legal, not equitable, owner. That position is not displaced by the 2002 Act.

Processing Gap

It may be noted that in *Pye v Stodday Land* the question did not distinctly arise as to the status of a notice to quit served in what might be termed the "processing gap", i.e. the period (itself a component part of the "registration gap") between (i) submission of the application for registration to HM Land Registry and (ii) the completion of such application by the land registry. This is because on the facts of the case the notice to quit was served prior to the application for registration even being lodged.

Would the result be any different in a "processing gap" case? At first blush, s.74 of the 2002 Act might suggest it possibly would. S.74 provides:

"an entry made in the register in pursuance of … an application for registration … has effect from the time of the making of the application."

In other words, registration is backdated to the date of application. Surely, if this backdating is to have meaningful consequence, acts carried out in the "processing gap" by the person who is ultimately registered as proprietor must be validated.

Yet such analysis, although seemingly faithful to the terms of s.74, presents its own difficulties. When it comes to assessing the validity or otherwise of actions such as notices to quit given by or to a purchaser of a registered estate, common sense dictates that the assessment must be made (and answered with a binary 'valid' or 'invalid') at the very point in time that the activity under review occurs. The notion that a notice is conditionally valid, i.e. valid if – but only if – later events show it to be so (i.e. if a pending application registration is completed) is startling and impractical. If someone (whether giver or recipient of a notice) cannot know for sure where the person stands at the time the notice is given, uncertainty reigns. Can a recipient safely rely on the notice? Must, or should, they act on it (e.g. by serving a counter-notice or vacating the premises, as the case may be)? A state of affairs in which the final position is unknown until subsequently is manifestly unsatisfactory.

To this one may add: (a) neither the applicant for registration nor the other party to the notice will know if the application will ultimately be successful and completed by HM Land Registry with attendant retrospectivity (it may be rejected for substantive or procedural reasons); (b) the other party will not necessarily be aware of the nature of any disposition which is the subject of an application for registration: the Day List maintained by the land registry offers only a very broad description, e.g. "dealing in relation to the whole" without identifying the same; (c) during the "processing gap" it is not possible to get a 'real time' register: the register is effectively frozen and an request for an official copy in the interim will be met with the response that there is a pending application and that the person making the request has the choice between (i) obtaining a copy of the register as it stood historically immediately before the application was made (and entered in the Day List) or (ii) holding fire and receiving later in the piece a copy of the register when updated in the light of the

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continued

processed application (which updated register will show the entry in the register backdated in accordance with s.74); (d) if the date of application is taken as the operative date in the event that the registration is completed, the possibility exists of manipulation of events by an applicant for registration – who could seek the withdrawal or cancellation of a pending application if it suited its purposes (whether to undermine or, as the case might be, give effect to a previously served notice); (e) how long the "processing gap" is depends on matters (i) outside either party's control (e.g. the workload of HM Land Registry at the time) and (ii) which are certainly outside the other party's control (for they depend on how efficiently the applicant for registration deals with requisitions raised by the land registry).

Furthermore, until the application is completed by registration the outgoing owner remains the registered proprietor and so retains (at least vis-à-vis a third party) the entitlement to give a valid notice to quit. If the incoming owner is, by dint of its entitlement to be registered, also so empowered during the "processing gap", the result is that two separate persons are seemingly simultaneously entitled to serve (potentially conflicting) notices. Or, if the purchaser's conditional status is retrospectively confirmed by registration, is not the corollary that the vendor's status is retrospectively removed, its proprietorship being divested with backdated effect, such that any dealing by it during the "processing gap" will later on transpire to have been of no effect?

It is submitted that all these considerations tend to support the conclusion that s.74 should not affect the outcome even in a "processing gap" case. s.74 can properly be limited to regulating the effective date of priority as between the various entries in the register itself. It need not have the consequence of creating a parallel universe which does not mirror the actuality. A person must be able to rely on the entries in the register visible at the time the notice is served; otherwise, the conclusive of the register of title would be undermined. The validity of a notice is properly to be judged in the light of the position prevailing at the moment it is given. This is in line with the county court decision in *Renshaw v Magnet Properties South East LLP* [2008] 1 EGLR 42 (a case concerned with asserted retrospective validation of a counter-notice on the registration of a purchaser landlord's title).

Our analysis also squares with the view of the Law Commission in its Consultation Paper. No distinction is drawn between the status and entitlement of an unregistered transferee pending registration in either the first or second phase of the "registration gap" (i.e. before or after the submission of the application for registration). The limited rights of such person in either scenario are viewed as identical (para.5.83).

Practical Protection

The moral of the *Pye v Stodday Land* story is that a mere transfer of registered land is not everything. It is only registration of title, whereupon the transferee's equitable title is elevated to a legal title, that unlocks the owner's ability to give a notice to quit.

That said, on a practical note it is important to realise that it is fairly easy for a purchaser to limit and work around the difficulties caused by the "registration gap" – if appropriate measures are taken. If service of a specific and imminent notice to quit is in mind, the contract between vendor and purchaser can provide for the vendor to serve the notice immediately before completion. More generally, the documentation can be drafted to constitute the transferee the agent of the transferor (whether by grant of a power of attorney or otherwise) in respect of matters concerning the transferred estate (such as the service of notices and the taking of other appropriate steps) pending registration of the disposition. Alternatively, the transferor can in that period be required to act at the direction of transferee in relation to such matters, possibly coupled with an appropriate indemnity. And, of course, it behoves a purchaser to make a timely application for registration in order to reduce the "registration gap" interval so far as possible.

All in all, it is essential that those involved in sales of leasehold reversions (especially those acting for purchasers desirous of serving notices) "mind the gap" but, if they do, they can take comfort from the fact that the gap is easily bridged; suitable steps for dealing with and managing registered estates during the "registration gap" can be put in place. But the price of inadvertence is that a purchaser may acquire (pending registration) less than it thought it had bargained for. As always, forewarned is forearmed.

Jamie Sutherland *appeared for the successful respondent.*

Receivers' rights – and wrongs... a salutary reminder from Northern Ireland

by Stephanie Tozer

In November 2016, the Chancery Division of the High Court of Justice in Northern Ireland delivered a judgment (in *Smith and Hughes v Black* [2016] NICh 16) which provides a warning to us all. The background is not unusual: the borrower ("the Company") borrowed money from and granted a mortgage to a lender ("the Lender"). The Company defaulted. The Lender appointed receivers ("the Receivers"). The sole director of the Company ("the Director") claimed to have a fixed term tenancy (at a very low rent) granted by the Company before the Receivers were appointed.

The Receivers issued possession proceedings against the Director.

Having heard the evidence, the Court dismissed the claim that there was a tenancy which predated the appointment of the Receivers. No doubt the Receivers' representatives were feeling very pleased with themselves for exposing the Director's (and his mother's) lies in cross-examination.

But, that pleasure would have been short-lived. There was a catch. The Court nonetheless declined to make a possession order in the Receivers' favour. Why?

The issue was not whether the Receivers were entitled to take possession proceedings against a squatter. In England and Wales that issue appears to have been laid to rest by the Court of Appeal in *McDonald v McDonald* [2014] EWCA Civ 1049, a case in which **Stephen Jourdan QC** appeared in the Court of Appeal and in the Supreme Court (with **Ciara Fairley**). It is now clear that where the mortgage confers on the receivers the right to take possession, receivers can, in their own name, issue and serve any necessary contractual or statutory notices to bring a tenancy to an end, and can issue and conduct possession proceedings, at least against parties other than the borrower. The prospect of arguing that there is some relevant distinction to be drawn between possession proceedings against tenants and possession proceedings against squatters such that receivers have the power to bring the former but not the latter appears negligible.

The Director took a different point. He put in issue whether the Receivers had been validly appointed. The Receivers' case was that they had been appointed by a Wilson Nesbitt, who had been given Power of Attorney to appoint receivers on behalf of the Lender. The judge said that, in order to succeed, the Receivers therefore had to prove that:

(a) The Lender was the mortgagee.

(b) A valid Power of Attorney had been given by the Lender to Wilson Nesbitt which entitled him to appoint receivers;

(c) Wilson Nesbitt exercised that power and appointed the Receivers as receivers in relation to this property.

The Receivers lost the case because they did not produce adequate evidence of the validity of the Power of Attorney. They produced the Power of Attorney itself, which, on its face, looked like a valid deed. But, they failed to produce any evidence as to who had executed the document on behalf of the Lender and whether those persons were indeed officers of the Lender.

As the judge pointed out, this would (presumably) have been easy enough to do. But, the failure to adduce evidence on each of the elements necessary to prove the Receivers' title was fatal to their claim.

Receivers should therefore be prepared to prove the following in possession proceedings (unless the validity of their appointment is admitted):

(1) The appointor is registered as proprietor of a registered charge. (If this is not the case, the Receivers may nonetheless be validly appointed, but it will be more complex to investigate if this is so, and to prove it).

(2) The preconditions were met. Preconditions may derive from Law of Property Act 1925 s 101 which stipulates that the mortgage money must be due), and/or from the contractual terms of the mortgage. Note that this means that the mortgage terms need to be proved, so a copy of the applicable mortgage conditions is essential.

(3) If the statutory power (in Law of Property Act 1925 s 109) is relied on, that the appointment was made "by writing under his [the appointor's] own hand". A company lender must have either:

(a) Validly executed a Power of Attorney by deed entitling one or more named attorneys to appoint receivers on its behalf, and the attorney must have made the appointment as such; or

(b) Executed the appointment itself in accordance with the formalities in Companies Act 2006 s 44.

(4) Any other formalities stipulated in the statute or mortgage deed were complied with.

(5) Notice of the appointment was served on the receiver, and the receiver accepted the appointment. If the borrower is a company, the acceptance must have taken place before close of business on the business day following the day on which the instrument of appointment was received by the receiver or on his behalf.

Of course, the warning delivered by the case is not limited to receivers' claims – in **any type of case**, the claimants' representatives must check that evidence to prove all the essential elements of the cause of action is produced to the Court.

Forks & Spades; Leases & Licences; Possession & Occupation

by Oliver Radley-Gardner

The manufacture of a five pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.
(Lord Templeman, *Street v Mountford* [1985] 1 A.C. 809, 819)

Street is authority for the proposition that an agreement relating to land granting exclusive possession for a term certain will result in the creation of a lease.[1] It does not then matter what the parties choose to call their arrangement. It is what it is.[2]

So far, so good – but three observations need to be made. First, *Street* was of course decided under the Rent Acts, and the Courts were astute to uncover attempts to avoid tenant protection, particularly ones as obvious as simply using the label "licence". Secondly, inequality of bargaining power is an intrinsic factual aspect of those cases, and construction contra proferentem is the result. Thirdly, the formalism of *Street* is not totally iron-clad: Lord Templeman was prepared to accept that there might be cases where all the hallmarks of a lease were present, but no lease would exist. These exceptions fall into two broad categories: first, where the background relationship means no lease ought to be found (such as in the context of a family relationship or as the result of an act of charity), or secondly, where the relationship is referable to some other legal right. A consequence of falling into category one is either that there is no enforceable legal right at all (because there is no intention to create legal relations in the first place), or that the right is something less than a lease. It is to be noted that this is the outcome even if the terms of the agreement under review would otherwise confer exclusive possession. It is tempting to think category one simply embraces cases where the finding of a lease would simply be "unfair" for extraneous reasons.

Intentions In The Commercial Context

The lease/licence distinction is of course not just of interest to private residential tenants like Helen Mountford. The issue can also arise in the business context, in particular in relation to agreements allowing a business to install machinery or equipment in a particular area. Agreements with electronic communications operators, for example, appear in manifold forms, and the draftsman does not always obviously have a landlord and tenant relationship in mind. In those circumstances, it can be very difficult to determine whether what has been granted is a mere licence or a property interest in the form of a lease. Fine distinctions can determine whether the arrangement is protected by the *Landlord and Tenant Act 1954*, Part II, and also whether successors are bound (though under the current Electronic Communications Code, if the agreement is within the code, it will bind automatically under paragraph 2).

One development which one might discern in the commercial context is a greater readiness, whilst paying lip-service of *Street* formalism, to have regard to the parties intentions as expressed in the terms of the contract. Unlike the residential context, bargaining inequality is not presumed, and it would appear that there is a greater chance that the parties will be taken to mean what they say.

Two examples may be cited as authority for that proposition. *The first is National Car Parks Ltd, R (on the application of) v Trinity Development Company (Banbury) Ltd* [2002] 2 P & CR 18. There, Lady Justice Arden explained her approach to Street in a case where the contract expressly provided that it should only be a licence:

> [28] […] The court must, of course, look at the substance but, as I see it, it does not follow from that that what the parties have said is totally irrelevant and to be disregarded. For my part […] some attention must be given to the terms which the parties have agreed. On the other hand it must be approached with healthy scepticism, particularly, for instance, if the parties' bargaining positions are asymmetrical.
>
> […]
>
> [29] While [declaration that an agreement is to be a licence] is not, of course, determinative, as I have explained, the court, it seems to me, must proceed on the basis that where two commercial parties have entered into an agreement of this nature, calling it a licence, they have received appropriate advice, they were aware of the importance of the term and they were intending to enter into such an agreement with an appreciation of its significance […].

Secondly, in *Clear Channel UK Ltd v Manchester City Council* [2005] EWCA Civ 1304 , Lord Justice Jonathan Parker was faced with an argument that an agreement referring to itself as a "licence" was in fact a lease. He had the following to say about that argument, having considered other aspects of the case (at paragraphs [28] and [29]):

> [28] I venture to make one additional comment, however. I find it surprising and (if I may say so) unedifying that a substantial and reputable commercial organisation […] having (no doubt with full legal assistance) negotiated a contract with the intention expressed in the contract […] that the contract should not create a tenancy, should then invite the Court to conclude that it did.
>
> [29] […] Nor, of course, do I intend to cast any doubt whatever on the principles established in *Street v. Mountford*. On the other hand the fact remains that this was a contract negotiated between two substantial parties of equal bargaining power and with the benefit

[1] Lord Templeman identified a third requirement, rent. This is not a mandatory requirement in the case of a term of years exceeding three years: see sections 52, 54 and 205 of the Law of Property Act 1925

[2] Mr Street was not very happy about the outcome, and wrote about it in the Conveyancer: R Street, "Coach and Horses Trip Cancelled: Rent Act Avoidance After *Street v Mountford*" [1985] Conv 328. Mrs Mountford's reaction is lost to history.

Forks & Spades; Leases & Licences; Possession & Occupation

continued

> of full legal advice. Where the contract so negotiated contains not merely a label but a clause which sets out in unequivocal terms the parties' intention as to its legal effect, I would in any event have taken some persuading that its true effect was directly contrary to that expressed intention. In the event, however, as the judge so clearly demonstrated, the case admits of only one result.

Whilst it cannot be said that *Street* has no application to the commercial context, it does appear clear that, at least absent bargaining inequality, if the parties have decided to contract on the express basis that there is a licence, then they will be held to that bargain.

Intentions In the Residential Context

The Court of Appeal have had to consider a similar question in the residential context, but with a twist. In *Watts v Stewart* [2016] EWCA Civ 1247, Mrs Watts, following a letter of appointment by her "landlord" – a charitable trust – was given a "tenancy" of an almshouse. "Rent" was paid. A right of entry was reserved to the "landlord". She appeared to enjoy exclusivity. There was a term. So far, so Street. The charitable trust wanted to evict her and brought possession proceedings, arguing she was a licensee.

On the other hand, in a case called *Gray v Taylor* [1998] 1 WLR 1093, the Court of Appeal had previously held that the beneficiary of such a charitable trust was given an occupation right as licensee, and not as tenant. That case was based on *Errington v. Errington and Woods* [1952] 1 K.B. 290 , 298, where Denning L.J. said: "Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only." That passage was approved in *Street*. The document in *Gray* was expressly not a tenancy, but a license. The position in *Watts* was the opposite.

As in *Gray*, however, the constitutional instrument of the charity in Watts forbade the trustees from parting with possession, so that a lease would have been ultra vires their powers as trustees. However, it is to be noted that an ultra vires disposal by a trustee is not null and void – it is legally effective, subject to personal liability on the part of the trustee for breach of trust.

Despite the terminology of Mrs Watts' agreement, the Court of Appeal found that she was a mere licensee. The reasoning was as follows: First, adopting *Street* (though this time to find that a document labelled lease was a licence, and not the other way round), what parties chose to call a document was immaterial. Secondly, a distinction had to be drawn between what the Court called "legal exclusive possession" on the one hand, and "exclusive occupation" on the other. A tenant has both – that is, the legal right to control possession which, when exercised, amounts to factual exclusive occupation. A licensee might only have the latter, though might have less than that, depending on the terms of the license. It is to be noted at this point that it is established that, although exclusive occupation is not enough to elevate the status of licensee to tenant, it is enough to allow the licensee to maintain an action for possession under CPR Part 55.[3]

The question that *Watts* raises is, when is one dealing with a clause conferring a right to land, how does one tell whether the clause merely confers exclusive occupation as opposed to exclusive possession? The answer appears to be different from the commercial context. The terms of an agreement insofar as they are labels are to be ignored. Agreement terms which describe the rights of the parties are relevant to identify what "package" of rights have been conferred, and to see whether, cumulatively, they amount to exclusive possession. Interestingly, in Watts, it does not appear that any of the clauses which pointed against a lease were particularly strong, the best being a provision that an almshouse occupier could be relocated. What appears to have carried the day was that fact that the trustees cannot possibly have intended to grant a lease as that was a breach of their trust instrument. It is therefore possible that, after *Watts*, the Courts might be receptive to an argument that, when construing a clause which might confer mere occupation but equally might confer exclusive possession, that the background to the transaction is relevant.

Street: A Leading Case Under Threat?

How does the clear dictum that "[…] the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred [...]" stand up? Absent a reducing, small number of residual tenancies, the Rent Acts no longer hold sway. The policies that formed part of the background to *Street* are no longer as strong as they were. It is suggested that we can discern a divergence of approach between commercial and residential cases. In commercial cases, arguments based on *Street* formalism are likely to be met with some judicial resistance - at least where there is no question of exploitation of a dominant position. In the residential setting, *Watts* nudges the door opened by the secure tenancy cases ending in *Westminster CC v Clarke* [1992] 2 AC 288 wider still, and opens the prospect that arguments that *Street* formalism can be headed off by adducing evidence of circumstances and background to show that, whatever the parties may have written down, they cannot possibly have intended there to be a lease. Sometimes, the fork can be a spade after all.

[3] *Manchester Airport Plc v Dutton* [2000] Q.B. 133; whether the correct level of control is vested in the Licensee is a matter of construction of the licence: *Countryside Residential (North Thames) Ltd v T* (2001) 81 P.&C.R. 2. English law has departed from the notion that the only person with standing to bring a claim for possession (previously ejectment) was a person in possession of an estate in land: *Mayor of London v Hall* [2011] 1 W.L.R. 504.

Recovering Costs in the First-tier Tribunal (Property Chamber)

by Tricia Hemans

Willow Court Management Company (1985) Limited v Mrs Ratna Alexander (2016) UKUT 0290 LC

It is often said that civility costs nothing. Vindicating one's rights though proceedings in the First-tier Tribunal ("FTT") however, will often cost more than a little something, with only a small possibility that those costs could ever be recovered. Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "2013 Rules"), is often deployed by hopeful litigants seeking to recover the costs incurred in tribunal proceedings before the Property Chamber of the FTT. The decision in *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander* (2016) UKUT 0290 LC has provided some helpful and much needed guidance as to how Rule 13 is likely to be applied in the future.

The predecessor of the FTT Property Chamber was the Leasehold Valuation Tribunal ("LVT"). This was set up to determine various residential leasehold property disputes in a fair and informal way with the noble aim of facilitating greater access to justice for litigants. It had jurisdiction over a wide range of matters including leasehold enfranchisement and service charge disputes. The LVT was successful in that it was a viable alternative to the court system for many litigants, offering a less formal and less intimating way of dispute resolution for landlords and tenants who usually appeared before the LVT without any legal representation. One of the key ways by which the LVT achieved this accessibility related to costs. The LVT was, at its inception known as a 'cost-free' or 'no-costs' jurisdiction. The well-known presumption of costs shifting which applies in the civil courts i.e. the general positon that the loser pays the winner's costs of the action (CPR 44.2(a)) did not apply. In the LVT the looser simply did not pay. That was until the Commonhold and Leasehold Reform Act 2002 (the "2002 Act") came into force. Sch. 12, Para 10 modified the LVT's jurisdiction as to costs so that it was empowered to award up to £500 where an application was dismissed and the applicant was considered to have "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings."

However, the £500 limit was not an effective way of dealing with the offending party in high value cases where significant costs are usually incurred in instructing professional valuers, solicitors and counsel. That said, the tenant was potentially at risk of the costs of the proceedings being recovered by the landlord through well drafted service charge or administration charge provisions contained in the lease. The risk of cost recovery by the back door however, could be limited through the Tribunal's powers as set out in section 20C Landlord and Tenant Act 1985 (in relation to service charges) and under Sch. 11, 5(1) of the 2002 Act (in relation to administration charges).

While one can appreciate the policy arguments underpinning the decision to create a no-cost forum for the determination of leasehold disputes, it often led to great unfairness. A party to LVT proceedings could often incur large costs in connection with proceedings through no fault of their own. Take for example, a situation in which proceedings are brought against a landlord by their typically unrepresented tenant with limited to no understanding of procedure and practice. The landlord could often incur significant costs in defending the proceedings by investigating the unmeritorious aspects of the claim sometimes going back several years, preparing and responding to often lengthy witness statements and instructing legal representatives to present the case at the hearing which could go on for a lengthy period of time. The problems are often exacerbated by the tenant's lack of legal assistance which can stifle legitimate attempts to settle the dispute. This is sometimes accompanied by unwarranted last minute applications for an adjournment and in some cases, an unreasonable failure to comply with directions.

The sea change came with the introduction of the FTT and the new Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, which came into force on 1 July 2013. The former £500 maximum which governed the LVT's power to award costs now no longer applies. In addition, the rule that such costs would only be awarded where a party's conduct is frivolous or vexatious or otherwise an abuse of process has been abolished. Given the difficulties highlighted above, the change comes from a recognition that in at least some cases a party ought to be able to recover the costs which it has had to incur in connection with the proceedings beyond the arbitrary £500 limit. The risk of an adverse costs order being made will impact the decision to take proceedings and will also have a bearing on how parties conduct their respective cases. However, the threat of cost sanctions ought not to be prohibitive. The general aims of the FTT are akin to those which applied to the LVT before it. As such, the principles which fall to be considered by the FFT are not as wide ranging as those which apply in the courts. There is for example, still no principle that the loser pays and costs do not follow the event.

The FTT's power to award costs is governed by the Tribunals, Courts and Enforcement Act 2007 (the "2007 Act"). Section 29(1) of the 2007 Act provides:

"The costs of and incidental to—

(a) all proceedings in the First-tier Tribunal; and

(b) all proceedings in the Upper Tribunal,

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continued

shall be in the discretion of the Tribunal in which the proceedings take place."

By section 29(2) the relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid. Section 29(4) makes provision for the Tribunal to make a wasted costs award and section 29(3) provides that subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

Different costs regimes apply across the tribunal chambers and in different types of cases. The 2013 Rules are bespoke rules which apply to proceedings before the Property Chamber of the FTT. They were modelled on a generic set of rules applied across a number of chambers of the First-tier Tribunal in order to provide some level of uniformity of approach and practice. Rule 13 of the 2013 Rules deals with costs. It provides the following:

"(1) The Tribunal may make an order in respect of costs only –

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –

(i) an agricultural land and drainage case

(ii) a residential property case or

(iii) a leasehold case; or

(c) in a land registration case."

It is clear that under rule 13(1)(a) and (b) the rule is only applicable where an award of costs of a penal nature is to be made. Rule 13(1)(a) applies where a wasted cost order (as defined in section 29(5) of the 2007 Act) is sought against a professional representative and rule 13(1)(b) applies where a party is considered to have acted unreasonably. This can be contrasted with rule 13(1)(c) which grants the FTT an essentially unrestricted power to award costs.

Limited assistance on how the rule is to operate can be found in the overriding objective of the 2013 Rules: i.e. to enable the Tribunal to deal with cases fairly and justly. Under rule 3(2) this includes dealing with the case proportionately to its importance, its complexity, the resources of the parties and the Tribunal as well as the anticipated costs. However, in the absence of any guidance from the Upper Tribunal as to how these rules were to apply in practice, FTT Tribunal judges often differed in their approach to rule 13 cost applications. In some cases, judges took the view that an award of costs under rule 13 was only to be made in exceptional circumstances and where a party had clearly behaved unreasonably. This was predicated on the view that the transition of jurisdictions from the LVT to the FTT was not intended to bring about a major shift in the approach to costs arising in the determination of residential leasehold cases and that, in essence, the tribunal would continue to be a 'no costs' jurisdiction (*Ghodse v Howard De Walden Estates Limited* (First-tier Tribunal (Property Chamber), 11 March 2015). Thus, the bar was set quite high. In other cases however, the Tribunal took on a more relaxed approach, awarding costs on a more liberal construction of the principles set out in rule 13. A further disparity was the treatment of questions of causation. In some cases, the costs awarded were directly linked to the unreasonable conduct proven, the rationale being that such conduct had increased the amount of costs incurred by the other party. In other cases, the costs awarded were assessed by reference to whether they were reasonably incurred and reasonable in amount.

The Upper Tribunal finally provided guidance on the principles to be applied by the FTT when assessing whether to make a rule 13 cost order in *Willow Court*. The decision followed the hearing of three conjoined appeals, all of which concerned disputes over service charges between leaseholder and management companies, in which the FTT at first instance awarded rule 13 costs. The Upper Tribunal considered the FTT's power to award costs under s.29 of the 2007 Act and rule 13 of the 2013 Rules, before laying down general guidance. In relation to proceedings to which rule 13(1)(b) applies, that is, an agricultural land and drainage case, a residential property case or a leasehold case, it was stated that unreasonable conduct is an essential pre-condition of the power to order costs under the rule. Once established, its exercise was held to be a matter of discretion. A three-stage approach was advocated.

At paragraph 28 of the judgment it was stated that:

"At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be."

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continued

In determining unreasonable conduct, a value judgment was to be made on which views might differ. However, the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. Tribunals ought not to be over-zealous in detecting unreasonable conduct after the event. In discussing the position of unrepresented parties, the Upper Tribunal accepted that there is only one set of rules which applied to both represented and to unrepresented parties. The fact that a party was unrepresented was said to be relevant to the first stage of the inquiry. One must consider objectively, whether a reasonable person in the circumstances in which the party in question found themselves would have acted in the way which that party acted. The lack of legal advice was also said to be relevant, albeit to a lesser extent, to the second and third stages of the inquiry. At paragraph 33 it was said that "When exercising the discretion conferred by rule 13(1)(b) the tribunal should have regard to all of the relevant facts known to it, including any mitigating circumstances, but without either "excessive indulgence" or allowing the absence of representation to become an excuse for unreasonable conduct."

The tribunal at the second and third stages are to have regard to all the circumstances. The nature, seriousness and effect of the unreasonable conduct will of course be important factors to be considered. At the third stage of the process questions of causation arise. The Upper Tribunal in *Willow Court* discussed the leading authority on wasted costs, *Ridehalgh v Horsefield* [1994] Ch 205. In that case the Court of Appeal examined the origin and exercise of the jurisdiction conferred on civil courts by section 51(7) of the Senior Courts Act 1981 which contains similar provisions to those set out in section 29(5) of the 2007 Act. In *Ridehalgh* at page 237E it was held that for the wasted costs jurisdiction to be engaged, the demonstration of a causal link is essential. Where the improper, unreasonable or negligent conduct complained of is proved but no waste of costs is shown to have resulted, the jurisdiction was not engaged. In *Willow Court* however, a distinction was made. It was held that there was no such causal connection apparent from the language of rule 13(1)(b). While unreasonable conduct is a condition of the FTT's power to order the payment of costs by a party, "once that condition has been satisfied the exercise of the power is not constrained by the need to establish a causal nexus between the costs incurred and the behaviour to be sanctioned" (paragraph 40).

While the clarity which the decision in *Willow Court* provides is to be welcomed, it cannot be taken to have opened the floodgates to a never-ending stream of successful rule 13 applications. A word of caution was offered at paragraph 43 of the decision which emphasised the fact that such applications should not be regarded as routine nor should it be abused to discourage access to the tribunal. The burden is on the party claiming costs to demonstrate that the other party's conduct has been unreasonable and the decision emphasises the fact that rule 13(1)(a) and (b) orders should be reserved for the "clearest cases". *Willow Court* has recently been applied in *Cannon v 38 Lambs Conduit LLP* [2016] UKUT 371 (LC) (in which Kester Lees appeared for the Respondent), which involved an appeal against an order refusing to award costs under rule 13. Relying on *Willow Court* (paragraph 62) it was stated that:

"By rule 13(1), the FTT has power to make a costs order in a residential property case such as this, but only against a person who has acted unreasonably in bringing, defending or conducting the proceedings. That is clearly intended to provide a significant hurdle or threshold for a costs applicant to overcome. The point has been made time and again that the FTT's residential property jurisdiction is essentially a no costs jurisdiction, or to put it another way, 'a costs shifting jurisdiction by exception only and parties must usually expect to bear their own costs'.

That said, it has now been firmly established that there need not be any causal link between the unreasonable conduct and costs awarded under rule 13(1)(b). It may well be that in those limited cases where unreasonable conduct is established, the FTT may be more generous in the awards given.

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