# CASE LAW KALEIDOSCOPE – A REVIEW OF SOME OF THE YEAR'S SIGNIFICANT CASES

(A Paper given at the Property Litigation Association Annual Conference, March 2006)

***by***

***Nicholas Dowding QC***

**Nicholas Dowding QC** practises at Falcon Chambers, specialising in the law of landlord and tenant, and he is regarded as one of the ablest and most sought-after silks in this field. Secretary of State for Environment, Food and Rural Affairs v. Feakins, Cadogan v. Escada and Kilmartin SCI (Hulton House) v. Safeway Stores are three of the most recent of his many notable cases. He is an editor of *Woodfall on Landlord & Tenant* and general editor of *The Landlord & Tenant Reports*. He is the joint author of *Dilapidations – The Modern Law and Practice (3rd edition 2004)*, and he is a corresponding member of RICS Dilapidations Practice Panel.

We live in a saturation culture in which new cases are brought to our attention on a daily, sometimes hourly, basis. However, the newest case is not always the most important: recent developments need to be set in context – does the case really decide something new, or is it merely an application of well established principles?

It is not possible in the time available to look at every single property case decided in the last year, or even all the significant ones. Instead, this paper examines an across the board selection of some of the more important or interesting (mostly landlord and tenant) – but it does not pretend to be definitive even in relation to those.

**RENT**

**Edlington Properties v. J H Fenner & Co.** [2006] PLSCS 71 (Court of Appeal, 22nd March 2006)
L1 entered into an agreement for lease with T in which L1 agreed to construct a factory and T agreed to lease it. Following the grant of the lease L1 assigned its reversion to L2. L2 sued T for arrears of rent falling due after the assignment. T sought to set off a claim for damages against L1 for defective construction of the factory.

The Court of Appeal dismissed T's claim to set off on the ground that (i) a set off is personal in nature, so that (ii) where the reversion is transferred, a tenant cannot set off a claim for damages for breach of covenant by the transferor against rent falling due after the transfer unless the lease specifically so provides. In so holding, the court overruled the previous decision of Lightman J in **Lotteryking v. AMEC Properties** [1995] 2 E.G.L.R. 13.

NOTE: In **Muscat v. Smith** [2004] 1 W.L.R. 2853 the Court of Appeal held that a tenant can set off a claim for damages for breach of covenant by the transferor of the reversion against the transferee's claim for arrears of rent falling due before the transfer which have been assigned to the transferee or passed to him under s. 141 of the Law of Property Act 1925. Accordingly, as regards a tenant's right to set off a claim for damages for breach of covenant by the transferor of the reversion against a claim for rent by the transferee, the relevant distinction is between (1) the new landlord's claim for arrears of rent falling due after the transfer (no set off possible) and (2) the new landlord's claim for arrears falling due before the transfer (set off possible because the new landlord takes the claim subject to the same equities which bound the transferor).

## RENT REVIEW

**Lancecrest v. Asiwaju** [2005] 1 E.G.L.R. 40

A rent review clause provided for the service by the landlord, by a specified time, of a notice stating the proposed rent. It then provided that: "If the Tenant [does not] give Notice (Counter Notice) to the Landlords within two months after the review notice is given (in respect of which counter-notice time is of the essence) *informing the Landlords that the Tenant [does] not accept the annual amount proposed by the Landlords* the new basic rent shall apply from the review date …." [emphasis added]. The landlord served a notice out of time. The tenant replied within the two month period in a letter headed "Rent Increase!". He referred to the landlord's notice "which demanded and or notify [sic] of the rent increase from 05-02-2001 at £30,000 per annum", and continued: "Your notice or demand is invalid. The terms of the lease are very clear. It requires one year notice of any rent review. Until you serve me with a valid one-year notice about future rent review I will not enter into any arbitration ….".

The Court of Appeal held that time was not of the essence for the service of the landlord's notice. The majority (Clarke and Neuberger LJJ) held that that the tenant had served a valid counter notice on the ground that a reasonable landlord would have understood the tenant as indicating that it did not accept the proposed rent. Brooke LJ dissented on the ground that it was impossible to interpret the tenant's letter as a notice

informing the landlord that the tenant did not accept the proposed rent. His judgment included the following plea:

> "Despite the heroic efforts of the Law Commission, our law of landlord and tenant is still unnecessarily complicated, and complicated law provides lawyers and judges with expensive working tools. In my judgment, this court would be doing nobody any service by making the law still more complicated just because Dr Asiwaju did not seek advice from a lawyer on the meaning of a simple lease before he responded to his landlord's notice. It is trite to say that hard cases make bad law, but, according to my philosophy of the proper role of an appellate court, we simply cannot afford to make bad law in a context like this."

**Watergate Properties (Ellesmere) v. Securicor Cash Services** [2005] All E.R. (D) 109

A lease granted in 1973 provided for the tenant to pay to the landlord "a supplementary rent …. during the first fifteen years of the term hereby demised such supplementary rent not to be subject to the reviews referred to ….". The arbitrator appointed in relation to the 2003 review (by which time the obligation to pay the supplementary rent had ceased) held that the hypothetical lease contained the obligation to pay the supplementary rent. He therefore deducted it from his assessment of rental value. Lewison J held that he was obviously wrong, granted permission to appeal under s. 69 of the Arbitration Act 1996 and allowed the appeal.

## ALIENATION

**NCR v. Riverland Portfolio No. 1 (No. 2)** [2005] 2 E.G.L.R. 42

A lease of office premises for 25 years expiring on 24th December 2009 at a rent of £710,000 per annum contained a covenant not to underlet unless (among other things) "prior to the grant thereof …..(iv) the Landlord's licence for such underlease has been given under seal (such licence to be subject to prior compliance with the foregoing provisions not to be unreasonably withheld)". On 30th June 2003 the tenant applied for the landlord's consent to an underletting of the premises. Negotiations then took place with regard to the grant of consent. On 17th July 2003 the landlord requested further

information which was provided by a letter dated 28th July 2003. This stated that the undertenant's holding company would stand as guarantor for its obligations under the underlease and that the undertenant would provide a six months' rent deposit. On 20th August 2003 the landlord refused consent on the grounds that (a) the rent payable by the undertenant did not conform with the terms of the lease, and (b) the covenant strength of the proposed undertenant was insufficient. In relation to (b), the landlord called expert evidence at trial to the effect that there would be a difference in the value of the landlord's reversion of some of £0.5m with and without the proposed subletting. That difference was attributable to the possibility that if the underletting went ahead, the undertenant (which was of weak covenant strength) would be entitled under the Landlord and Tenant Act 1954 to a new lease of the whole, whereas if the underletting did not go ahead, the building could then be let in parts at a higher aggregate rent.

At first instance the judge held that the landlord was in breach of its duties under the Landlord and Tenant Act 1988 in that (i) it had failed to give consent within a reasonable time ( a reasonable time in the circumstances being 2 weeks from 28th July 2003) and (ii) it had refused consent on unreasonable grounds. Among other things, since the tenant would remain liable on its covenants, the covenant strength of the undertenant was not of great significance, and if the tenant became insolvent, the landlord would have the holding company's guarantee and the rent deposit. He dismissed the evidence of the landlord's expert as remote and speculative.

The Court of Appeal allowed the landlord's appeal. As to (i), the judge had been right to treat the letter of 28th July 2003 as the point at which time began to run, but whatever earlier discussions there had been, the landlord was entitled to a reasonable time following receipt of the completed application to consider the serious financial and legal implications of a refusal with its advisers and if necessary report to the relevant board. In the absence of special circumstances, a period of less than three weeks was not unreasonable. As to (ii), the judge had been right to hold that ground (a) was not a reasonable ground for refusing consent, but he had been wrong in relation to ground (b). A reasonable landlord could be expected to take account of the position at the end of the lease and of the fact that the undertenant would be entitled to seek an new

tenancy. The evidence of the landlord's expert was admissible to show how a reasonable landlord might evaluate that uncertainty. The question for the judge was not whether such evidence was right but whether it helped to show that the landlord's concerns were reasonable. It could not be said that the landlord's concerns were unfounded.

**Crestfort v. Tesco Stores** [2005] 3 E.G.L.R. 25

A lease of a large warehouse and office building contained covenants by the tenant (i) to repair and decorate the premises; (ii) not to underlet without the landlord's consent such consent not to be unreasonably withheld; and (iii) that any permitted underlease was to be subject to like covenants and conditions as the lease, except as to rent and length of term. In January 2004 the tenant sought the landlord's consent to an underletting. In February 2004 the landlords provided a draft licence permitting the underletting subject to confirmation of various matters, including the carrying out of outstanding repairs. On 14th June 2004 the tenant granted the underlease. The underlease differed from the lease in that (among other things) it limited the undertenant's repairing liability to a schedule of condition. The undertenant knew that the landlord's consent to the underletting had not been obtained.

Lightman J. held that (i) the condition that the underlease had to be on the same terms as the lease had to be satisfied if the tenant was to have the right to request consent for an underletting; (ii) the underlease was not on the same repairing terms as the lease because it excluded liability for existing disrepair by the tenant; (iii) the landlords therefore had no obligation to consider the tenant's application for consent and s. 1 of the Landlord and Tenant Act 1988 did not apply; (iv) the underletting was therefore in breach of covenant; (v) in any event, it had been reasonable for the landlords to withhold consent until the matter of outstanding repairs had been resolved; (vi) the undertenant had not breached a restrictive covenant not to underlet because the covenant could not bind it before it took the underlease; (vii) but by agreeing to accept and accepting the underlease, the undertenant had committed the tort of wrongful interference with a contract; and (viii) the landlords were entitled to a mandatory order requiring the undertenant to surrender the underlease.

**Akici v. L R Butlin** [2006] 07 E.G. 136

A lease of business premises contained a covenant by the tenant not to "assign equitably assign underlet or part with possession of a part of the demised premises …. nor to share possession of the whole or any part of the demised premises nor to part with possession of the whole of the demised premises …. all of which are expressly prohibited". A third party began to trade from the premises. The landlord served a s. 146 notice alleging that the lease had been broken by the "assignment or alternatively subletting or alternatively parting with possession of the premises without the landlord's consent".

At first instance the judge held that (i) there had been no assignment, subletting or parting with possession; (ii) there had been a sharing of occupation which amounted to a breach of the covenant against the sharing of possession; (iii) the landlord was entitled to rely on the s. 146 notice even though it did not specify sharing of possession as a breach of covenant; (iv) the breach was incapable of remedy; and (v) relief from forfeiture should be refused.

The Court of Appeal allowed the tenant's appeal. It held that (i) "possession" was to be given its strict legal meaning as not including occupation falling short of legal possession, so that (overruling Tulapam Properties v. De Almeida [1981] 2 E.G.L.R. 55) the covenant against sharing possession did not prevent a parting with or sharing of occupation: its purpose was different, namely, to prevent the tenant from letting another into possession so that both are in joint possession; (ii) it was open to the judge to conclude on the evidence that the tenant had shared possession with the third party; (iii) the s. 146 notice was invalid because it failed to specify the right breach; (iv) a breach of a covenant against parting with or sharing possession is capable of remedy; and (v) the judge had been entitled to come to the conclusion that relief should be refused.

It is to be noted that the court only awarded the tenant three quarters of its costs of the appeal on the ground that the landlord had succeeded on the some of the points argued.

## USER COVENANTS

**Joint London Holdings v. Mount Cook Land** [2005] 3 E.G.L.R. 119

A lease granted on 18th September 1950 for 150 years contained a covenant by the tenant not to use the premises for (among other things) the trade business or calling of a "Victualler" or "Coffee House Keeper". The tenant proposed to sublet the premises to Pret A Manger for use as one of its typical outlets selling pre-prepared food and hot/cold drinks primarily for consumption off the premises but also to some extent for consumption on the premises.

At first instance Blackburne J. held that the proposed business would not be that of a "Victualler" (which term would have been understood in 1950 as meaning a licensed victualler or publican) but would be that of a "Coffee House Keeper" (which was apt to include a café or snack bar). He therefore declared that (i) the use of the premises as a shop for the sale of pre-prepared sandwiches, croissants, hot and cold non-alcoholic drinks and ancillary products exclusively for consumption off the premises would not constitute a breach of covenant, but (ii) that such use for consumption on the premises would be a breach. The landlord appealed against (i) and the tenant cross-appealed against (ii).

The Court of Appeal allowed the landlord's appeal and dismissed the tenant's cross-appeal. What was relevant was what the relevant words meant in 1950, and unless the context indicated otherwise, the starting point was their ordinary meaning at that time. As to the landlord's appeal, "Victualler" bore its wide meaning of a person who supplies food and drink. That was enough to dispose of the tenant's cross-appeal, but in any event, although "Coffee House Keeper" might originally have meant the type of coffee house introduced in the middle part of the seventeenth century, by 1950 the term had come to mean a place where coffee and light refreshments were served, so that the

judge had been right to hold that the sale of food and drink for consumption on the premises was a breach of that part of the covenant.

## FORFEITURE

**Shirayama Shokosan Co. v. Danovo** [2005] 44 E.G. 134 (CS)

A lease of an art gallery at County Hall contained a tenant's covenant that every visitor, other than those entitled to concessions, had to be charged a minimum amount for entry. The landlord commenced forfeiture proceedings for breach of that covenant and damages for trespassing on communal areas. Rattee J. held that the tenant had committed breaches of covenant and trespass. He refused relief from forfeiture having regard to the tenant's conduct which included continuing to breach its obligations and making, and then abandoning, serious allegations against the landlord without any attempt to justify or give sensible reasons for those allegations.

## BREAK CLAUSES

**Fitzroy House Epworth Street (No. 1) v. The Financial Times** [2005] EWHC 2391 (TCC) [2006] 02 E.G. 112

A lease for 16 years contained a tenant's break clause under which the tenant was entitled to terminate the lease upon thirteen months' notice provided that it had *"materially complied with all its obligations under this Lease down to the date for which notice of termination has been given*" [emphasis added]. The tenant served notice and then undertook substantial works of renovation and repair to comply with its repairing covenants. The landlord contended that the tenant had failed materially to comply with its repairing obligations as at the break date.

HHJ Thornton QC found in favour of the tenant. He rejected the landlord's argument that "materially" was intended to only to exclude trivial breaches of covenant. He accepted HHJ Rich QC's approach in Commercial Union Life Assurance Co. v. Label Ink [2001] L. & T. R. 29 to the effect that a breach was material:

> "if, but only if, having regard to all the circumstances, and to the proper efforts of the tenant to comply with is covenants, as well as the adverse effect on the landlord of any failure to do so, it will be fair and reasonable to refuse the tenant the privilege which the lease otherwise grants. The extent of any breach, the practicality of quantifying the damage arising out of it, the efforts made by the tenant to avoid it, the genuine interest which a landlord had in strict compliance are, in my judgment, all material factors in determining materiality."

It followed that "material" did not mean "all but insignificant or minor" but "in context and taking all relevant considerations into account".

The judge held that the condition was satisfied for the following reasons:

> "1. The number, nature and value of the outstanding defects was insubstantial.
>
> 2. The Financial Times had taken all reasonable steps to put and keep the premises into repair, had spent almost £1m for that purpose and had followed professional advice as to what was required.
>
> 3. The Financial Times made all reasonable efforts to secure the agreement of Fitzroy as to what was needed to ensure compliance, and it is clear that it would have incorporated any reasonable requirement of Fitzroy into its remedial programme if asked.
>
> 4. Fitzroy unreasonably declined to involve themselves in the Financial Times's attempts to agree a remedial programme, and adopted an attitude of waiting and seeing whether they could catch the Financial Times out on a technicality so as to prevent it from determining the lease because the market was so soft.
>
> 5. The outstanding defects had no effect upon the ability of Fitzroy to obtain a further tenant nor upon any terms that they could reasonably expect to negotiate. In particular, these defects would not have deterred prospective tenants nor have led to a longer rent-free period or to a lower rent being agreed.
>
> 6. It would be most unreasonable to the Financial Times if it were unable to determine the lease and it would also be most unreasonable if Fitzroy, given their behaviour, were able to prevent such a determination from occurring."

NOTE: the landlord's appeal was heard by the Court of Appeal on 21st March 2006 and judgment is awaited.

**Littman v. Aspen Oil (Broking)** [2005] EWCA Civ 1579

A lease of commercial premises for five years provided that either party could terminate the lease at the end of the third year of the term by giving not less than six months' notice in writing provided that up to the termination date "in the case of a notice given by the landlord" the tenant had paid the rent and duly observed and performed the tenant's covenants. The tenant served a break notice. The landlord argued that the notice was ineffective to terminate the lease because the tenant was in breach of its obligations under the lease as at the termination date, the words "in the case of a notice given by the landlord" being an obvious mistake for "in the case of a notice given by the tenant" or "in the case of a notice given to the landlord".

At first instance Hart J held that (i) the word "landlord" in the proviso should be read as "tenant", and (ii) alternatively, if that were wrong, the proviso should be rectified to that effect.

On appeal the tenant argued that although a drafting error had clearly been made, it was not possible to say with certainty what it was, so that either the clause was to be read as it stood or the relevant words were void for uncertainty. The Court of Appeal dismissed these arguments, holding that “landlord” was an obvious mistake for “tenant”. Although it was not necessary to decide the rectification issue, the majority (May and Jacob LJJ) thought that the conditions for the rectification of a unilateral mistake were established, the necessary inequity arising from the tenant’s solicitor’s decision deliberately to take advantage of the error. Longmore LJ expressed no opinion on rectification, but pointed out that the decision would, given the view of the majority, be “the first time that this court has held (as a matter of ratio) that a written document can be rectified for unilateral mistake when there was no antecedent agreement about the content of the clause sought to be rectified”.

**Ben Cleuch Estates v. Scottish Enterprise** [2006] PLSCS 57

A lease entitled the tenant to terminate it by giving written notice to the landlord. The landlord company (A) was a subsidiary of a joint venture holding company (B). Rent invoices were sent to the tenant by managers stated to be "acting as agents for B". The tenant sent a break notice addressed to B. The notice reached A in time. A contended that the notice was invalid because it had not been given to the landlord.

The Outer House of the Court of Session found against the tenant. The requirement that the notice be given to the landlord was not a mere technicality but a condition precedent that had to be strictly complied with. The tenant could not be said to have given notice to the landlord by sending to the landlord's registered office a notice addressed to a third party, and it was not sufficient that the notice had reached an individual who was the "directing mind" of the landlord. Nor did the rent invoices help, as no reasonable person would have relied on these in deciding upon whom the notice should be served.

## LEASE/LICENCE

**Clear Channel UK v. Manchester CC** [2005] 1 E.G.L.R. 128

A company which carried on the business of constructing and maintain advertising displays erected thirteen displays pursuant to a written agreement with the landowner. Each display consisted of a substantial superstructure in the shape of a large 'M' which was fixed to a rectangular concrete base embedded in the ground. The agreement recited (among other things) that it was to constitute a licence and conferred no tenancy on the company. The company contended that it had a tenancy of the land upon which the displays had been erected.

At first instance the judge held that the company had only a licence. The Court of Appeal dismissed the company's appeal. It was of the essence of a right of exclusive possession, and therefore of a tenancy, that the area or areas of land over which the right was said to exist should be capable of precise identification at the date when the right is said to be created. The agreement on its true construction did not sufficiently identify the land in respect of which a tenancy was said to be created in that the land to

which it referred was not the areas of the concrete bases of the displays but larger undefined areas of land owned by the landowner under and surrounding the displays.

Interestingly, Jonathan Parker LJ said:

> "I find it surprising and (if I may say so) unedifying that a substantial and reputable commercial organisation like Clear Channel, having (no doubt with full legal assistance) negotiated a contract with the intention *expressed in the contract* (see clause 14.1, quoted above) that the contract should *not* create a tenancy, should then invite the court to conclude that it did.29. In making that comment I intend no criticism whatever of [counsel], who sought valiantly to make bricks without straw. Nor, of course, do I intend to cast any doubt whatever upon 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 of full legal advice. Where the contract so negotiated contains not merely a label but a clause that 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."

## LANDLORD AND TENANT (COVENANTS) ACT 1995

**Avonridge Property Co. v. Mashru** [2005] UKHL 70; [2006] 01 E.G. 100

Avonridge acquired a 99 year lease of seven shops. It then granted sub-leases for long terms at substantial premiums and peppercorn rents. Each sublease contained a landlord's covenant for quiet enjoyment and for the payment of rent reserved by the headlease but qualified as follows:

> "The Landlord covenants with the Tenant as follows *(but not, in the case of Avonridge Property Company Limited only, so as to be liable after the Landlord has disposed of its interest in the Property)*…" [emphasis added]

Avonridge then assigned the headlease to a man of straw who disappeared leaving the rent under the headlease due. The head lessor commenced forfeiture proceedings and the sub-lessees were granted relief on condition of their paying the rent arrears and an annual rent of approximately £2,400. The sub-tenants brought proceedings against Avonridge for damages for breach of the covenant for quiet enjoyment. Avonridge relied on the qualification.

Both the county court judge and the Court of Appeal found in favour of the sub-tenants on the basis that the qualification was avoided by the anti-avoidance provisions in section 25(1) of the Act. The House of Lords allowed Avonridge's appeal. The mischief at which the 1995 Act was aimed was the absence of an exit route for landlord and tenants from their contractual liabilities following an assignment. It was not intended to close any other exit route already open to the parties.

## BUSINESS TENANCIES

**Wessex Reserve Forces & Cadets Association v. White** [2005] EWCA Civ 1744 [2005] 49 E.G. 89 (CS)

The landlord opposed the grant of a new tenancy on ground (f). With the exception of a stone stall, all the structures on the demised land had been erected by the tenant who was obliged under the terms of the lease to remove them on termination. The judge at first instance held that ground (f) was not satisfied.

The Court of Appeal dismissed the tenant's appeal on the grounds that (i) the landlord's intention had to be tested on the hypothesis that, when the current tenancy ended, there would be no new tenancy; (ii) in that event, there would be no buildings on the land (other than the stone stall) because the tenant would have complied with its obligation to remove them (not only because as an organ of the Ministry of Defence, it could be expected to comply with its obligations and to be in a position to do so, but also because the buildings had a value so that it was in its interest to do so); (iii) accordingly, there would, on the termination of the tenancy, be no buildings (other than the stone stall) which the landlords could have an intention to demolish; and (iv) in relation to the stone stall, (among other things) the tenant was entitled to rely on s. 31A.

**Dogan v. Semali** [2005] 3 E.G.L.R. 51

The landlord opposed the grant of a new tenancy under ground (f). In order to carry out the intended development it needed planning permission. At trial the landlord called as planning expert whose evidence was that it was likely that the planning authority would

grant permission. No planning expert was called on behalf of the tenant. The judge held that the landlord had failed to establish that it had a reasonable prospect of obtaining planning permission. By the time the appeal came on for hearing, planning permission had been granted. The Court of Appeal allowed the landlord's appeal on the grounds that (1) the only conclusion at which the judge could properly have arrived on the evidence before him was that there was a reasonable prospect that the landlord would obtain planning permission, and (2) account could be taken on appeal of the fact that planning permission had actually been granted. In his judgment Mance LJ said that "reasonable prospect" is a low threshold, not to be equated with probability.

## RESTRICTIVE COVENANTS

**Mahon v. Sims** [2005] 3 E.G.L.R. 67

Mr and Mrs Houghton (who were defined as "the Transferors") sold an area of garden to Mr and Mrs Martin subject to a covenant by the latter not to use the land other than as a private garden and not to erect on it any building other than a greenhouse, shed or domestic garage in accordance with plans previously approved in writing by "the Transferors". The covenant was expressed to be for the benefit and protection of "the Transferors property known as number 1 Wharf House Barton Turns". Mr and Mrs Martin wanted to put up a double garage. Mr and Mrs Houghton had no objection but their successors in title to the benefited land did object. The judge held that (1) Mr and Mrs Martin needed the consent of Mr and Mrs Houghton's successors in title and (2) there was no implied term that consent could not be unreasonably withheld.

On appal Hart J. held that (1) whilst the literal meaning of "the Transferors" was Mr and Mrs Houghton, the judge had been correct to hold that the requisite consent was that of their successors in title because (i) that was the effect of s. 78 of the Law of Property Act 1925l; (ii) the express words of annexation made it clear that the benefit was intended to run with the land; and (iii) unlike the position where land is sold by a common vendor under a building scheme, there was no reason why Mr and Mrs Houghton should have wanted to retain control of development; and (2) there was an

implied term that consent could not be unreasonably withheld (but it was only where no reasonable neighbour could object to the proposal that the court could override a decision by the covenantee to refuse approval).

**Sugarman v. Porter** [2006] EWHC 331 (Ch.) [2006] 11 E.G. 195 (CS)

Part of a parcel of land in common ownership was sold subject to various restrictive covenant by the buyer "for the benefit and protection of the Vendor's said adjoining property or any part of such property hereafter remaining unsold and any part of such property hereafter sold with the benefit of this present covenant". The claimant was a successor in title to the buyer. The conveyance under which the defendant derived title did not include any assignment of the benefit of the covenant.

Peter Smith J. held that (1) the benefit of the covenant was annexed to the retained land only for such period as it remained unsold; (2) the express words of annexation displaced s. 78 of the Law of Property Act 1925, there being no reason why a covenantor could not, by express words, limit the scope of the obligation it was undertaking, nor why a covenantee could not accept a covenant for its own benefit on terms that the benefit did not automatically pass on a sale; (3) in the event of a sale of the retained land, the benefit of the covenant would only pass if it were expressly assigned; (4) the benefit of the covenant did not run under s. 63 of the Law of Property Act 1925 because either (i) the relevant time for considering whether it constituted a proprietary interest so as to pass under that section was the date of the sale and by that time the covenant had ceased to be an interest in the land or alternatively (ii) the wording of the covenant amounted to a "contrary intention" for the purposes of the section; so that (5) the defendant's claim to enforce the covenant failed.

## TRANSACTION AT AN UNDERVALUE

**Secretary of State for Environment, Food and Rural Affairs v. Feakins** [2005] PLSCS 226

The freehold owner of a farm conducted his farming business by means of a limited company to which he had granted an agricultural tenancy. The farm was worth

approximately £1m with vacant possession but was subject to a charge in favour of a bank and a charging order in favour of the Intervention Board for Agricultural Produce. The owner arranged for the bank to sell the farm to his fiancée for £450,000 (which was its value subject to the tenancy) on the footing that the company would then surrender the tenancy to her. The money was used to redeem the bank's charge but there was nothing left to pay off the IAB's whose charge was overreached. The tenancy was then surrendered, thereby releasing the full vacant possession value to the owner's fiancée.

At first instance Hart J held that the owner had entered into a transaction at an undervalue within s. 423 of the Insolvency Act 1986. The relevant transaction consisted of an arrangement whereby the owner agreed to introduce the fiancée to the bank as a prospective buyer but with his commitment in advance to procure a surrender of the tenancy. He ordered that the fiancée's interest should be subject to the IAB charge but refused to order reinstatement of the tenancy. The Court of Appeal dismissed the owner's appeal. The word "transaction" as used in s. 423 included an arrangement that encompassed an agreement or understanding between parties, whether formal or informal and whether written or oral. However, the court made an order reinstating the tenancy on the basis that the judge's order had put the IAB into a better position than it could have been in had the transaction not been entered into.

## RICS CODE OF MEASURING PRACTICE

**Kilmartin SCI (Hulton House) v. Safeway Stores** [2006] 09 E.G. 184

An agreement for lease of proposed supermarket premises entitled the tenant to determine the agreement if the "net internal area of the Premises measured in accordance with the Fifth Edition of the RICS Code of Measuring Practice" was below 1,857.7 square metres. NIA is defined in the Code as *"the usable area within a building measured to the internal face of the perimeter walls at each floor level"* subject to certain express inclusions and exclusions.

Warren J rejected the tenant's arguments that (a) an area was only "usable" if it could properly be called a floor, and (b) "usable" meant that the relevant area must be

capable of use for any of the purposes contemplated by the agreement and lease. An area is usable if it can be used for any sensible purpose in connection with the purposes for which the premises are to be used, whether not it is “floor”. He went on to hold that a goods and disabled lift were to be excluded from NIA (even though they had been constructed by the landlord at the tenant’s request) as was a delivery area, but that three other areas were to be included. The result was that the landlord succeeded by just under 3 sq. metres.