Falcon Chambers

In this series of articles, we aim to highlight 3 of the most interesting cases in our field decided in the past month. This month, we've selected cases from the Privy Council on adverse possession; the Upper Tribunal on modification of restrictive covenants; and the County Court on the cheque rule.

AUGUST 2023

Sassy Garcia v Arima Door Centre Holding Company Ltd [2023] UKPC 31

Summary

The Privy Council determined that, for the purposes of an adverse possession claim, a right of possession accrued to the owner when the occupier's tenancy ended - even if rent relating to a period of time prior to the termination is paid afterwards and notwithstanding a statutory provision which stated that "the right……shall be deemed to have first accrued….at the last time when any rent payable in respect of such tenancy shall have been received". The Privy Council held that the deeming provision did not apply to extend the period where the tenancy was terminated by a valid notice to quit, so the claimant's action was brought after the end of the limitation period, and the defendant had acquired the property by adverse possession.

Why it's important

Although the running of time no longer extinguishes title in England and Wales as a result of the Land Registration Act 2002, it remains important to know when the owner's right of possession accrued, in order to establish when the squatter can apply to be registered as owner of the land.

The decision confirms that there are cases where time can run from a particular date set by the general law if no deeming provision applies, and even if no dispossession of the owner, or discontinuance of possession by the owner, occurred on that date. The Board relied on, and cited with approval from, *Jourdan and Radley-Gardner on Adverse Possession*. The deeming provisions in Schedule 1 to the Limitation Act 1980 (which include, at paragraph 5, a deeming provision equivalent to that considered here) remain in force, so clarification that these do not oust the general law as to the accrual of the cause of action is helpful.

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Great Jackson Street Estates Ltd v Manchester City Council [2023] UKUT 189 (LC)

Summary

The Upper Tribunal refused to modify leasehold covenants which prevented the applicant from redeveloping 2 warehouses into 1037 flats (for which it had planning permission). It held that none of the grounds relied on by the applicant (grounds (a), (aa) and (c) of Law of Property Act 1925 s 84(1)) were made out.

Why it's important

This is one of 3 decisions under section 84 given by the Upper Tribunal this month. Discharge was ordered in the other two cases. However, this decision shows that the Tribunal will examine such applications closely, and high-lights several matters that need to be considered when considering whether the grounds are made out. In particular:

(a) To succeed on the obsolescence ground, it is necessary to show not only significant changes to the neighbourhood, but also the extent to which those changes make the purpose of the covenant incapable of achievement. Where (as here) a covenant protects the reversioner by giving a degree of control over the future use of the site, the covenant will not be obsolete unless the reversioner is seeking to use it unreasonably / in his own selfish interests.

(b) In determining whether the proposed user is reasonable for the purposes of ground (aa), the sole focus should be on the land use itself; questions of practicability or deliverability are not relevant under this head in England and Wales (though may be relevant on the question of discretion). The Upper Tribunal declined to follow the approach of the Lands Tribunal of Scotland under a different statute.

(c) A restriction can secure practical benefits of substantial advantage to a respondent even where the respondent would be substantially better off in money terms if the modification were allowed. Likewise a respondent can be injured by a proposed modification even where it would be to its financial advantage for the modification to occur.

The Tribunal also commented that it would not have exercised its discretion in the applicant's favour even if the grounds were made out, for 2 reasons:

1. The Tribunal is reluctant to interfere with a respondent local authority seeking to use its private rights to promote a strategic redevelopment plan.

Practitioners seeking to make applications against local authorities need to consider this.

2. The ongoing commercial negotiations between the parties meant that it was not necessary or appropriate for the Tribunal to make an order. The decision contains comment on the evidence that was adduced by the applicant, and shows the importance of working up the scheme that will be presented to the Tribunal at an early stage to avoid the inference that the Tribunal was being used as a pawn to secure advantage in the commercial negotiations.

Richworth Ltd v Billingham, Central London CC, 14 August 2023

Summary

The landlord under an assured shorthold tenancy had taken a deposit from the tenant and, contrary to the Housing Act 2004, had failed to protect it in an approved scheme. Accordingly, the landlord was unable to serve a valid notice under s.21 Housing Act 1988 unless the deposit was 'returned' to the tenant. The landlord relied on the fact that it had delivered a cheque for the deposit amount to the tenant prior to service of the s.21 notice. The cheque had never been cashed, and the landlord had since closed the account on which it was drawn.

HHJ Luba KC said that the District Judge should in those circumstance have ordered a trial to determine the factual issues required to decide whether the deposit had been returned prior to service of the s21 notice, rather than determining the case summarily.

Why it's important

Although only a County Court judgment, and therefore of limited precedent value, the detailed analysis of the cheque rule, as summarised below, is useful:

1. Whether a payment can be made by cheque turns on whether the other party has agreed to accept a cheque.
2. The agreement may be an express or implied term in the tenancy (or other contract); derived from prior conduct (eg payment by cheque in the past); or inferred from a failure to reject the cheque within a reasonable time.
3. No payment is made if the cheque is not honoured on presentation, provided it is presented within a reasonable time.
4. If the cheque is not presented within a reasonable time, and the other party has agreed to accept payment by cheque, payment is made, regardless of whether it could subsequently be honoured.
5. If there is a prior obligation to accept a cheque, the payment date is the date the cheque is delivered, not the date of presentation / the date when a reasonable period of time for presenting expired.

6. Where the agreement to accept a cheque is derived from non-rejection within a reasonable time, the payment date is the date when a reasonable period of time to reject the cheque has passed.

The judgment also gives real insight into the vagaries of conducting litigation in the County Court, detailing a series of unfortunate procedural issues which arose. Readers who do not often battle in the County Courts may find this interesting.

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