"It was wrongly decided…"

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Introduction

1. The English common law abides by the doctrine of stare decisis: that it is the policy – indeed the duty - of the courts to adhere to principles established by decisions in earlier cases.

2. The hierarchy of decision making dictates that High Court decisions bind the County Court, and are in turn bound by the Court of Appeal, while of course the Supreme Court binds everything (ignoring European Courts, if I may.)

3. There are, however, two further influences at play in this survey of precedent: decisions which have stood for some time acquire their own venerability, which is hard to dislodge. Secondly, and following on from that point, decisions which have been followed many times are even harder to upset.

4. There are, however, a number of (in my humble opinion) obviously wrong decisions that are ripe for judicial disapproval, but which have escaped judicial scrutiny thus far. This paper exposes some of them, shows why they are wrong, and ends with the pious hope that some day soon they may be consigned to the bad law scrap heap.

5. The selection is taken from property litigation cases over the last few decades (and does not attempt to grapple with Victorian jurisprudence, and early unsatisfactory decisions on the cusp between the common law and equitable principles). It is personal, deeply individual, and no doubt ignores other more deserving candidates. But one has to start somewhere.

The top ten wrong cases

6. In chronological order:

Milmo v Carreras [1946] KB 306

Scala House & District Property Co Ltd v Forbes [1974] 1 QB 575

William Skelton & Son Ltd v Harrison & Pinder Ltd [1975] QB 361

Tandon v Trustees of Spurgeons Homes [1982] AC 755

Lynnthorpe Enterprises Ltd v Sidney Smith (Chelsea) Ltd [1990] 2 EGLR 131

Jervis v Harris [1996] Ch 195

Newham LBC v Thomas-Van Staden [2009] L & TR 5

Wood v Waddington [2015] 2 P & CR 11

EMI Group Ltd v O & H Q1 Ltd [2016] Ch 586

Millgate Developments Ltd v Smith [2016] UKUT 515 (LC)

Milmo v Carreras

7. *Facts*: Captain Milmo had a 7 year lease of a flat expiring on 28 November 1944. He entered into an agreement to sub-let the flat to Colonel Carreras for one year from 1 November 1943, and thereafter quarterly until determined by three months notice. The agreement contained the usual undertaking to deliver up at the determination of the term. On 27 April 1945, having been for over five years on active service, Milmo gave Carreras notice to quit the flat on 1 August 1945. Carreras refused to deliver up possession, and Milmo took possession proceedings.

8. *Held*: that where a lessee by a document in the form of a sub-lease divests himself of everything he has got (which he must do if he is transferring to his sub-lessee an estate as great as or purporting to be greater than his own), the relationship of landlord and tenant cannot exist between him and the so-called sub-lessee. Milmo thereby had transferred to Carreras the whole of the term existing under the head lease and he retained no reversion. Accordingly, he had no right to have possession delivered up to him.

9. *Why it's wrong*: Because it depends upon the principle that a landlord must have an interest in land, which is contrary to the relativity of title doctrine sanctioned by the House of Lords in Bruton v London & Quadrant Housing Trust [2000] 1 AC 406: the existence of a tenancy does not depend upon the claimant establishing a proprietary interest binding on third parties.

Scala House & District Property Co Ltd v Forbes

10. *Facts*: a lease contained a covenant by the tenant not to underlet their premises without the landlords' consent. The tenant unwittingly created a subtenancy without landlord's consent. The landlord served a s.146 notice requiring the remedy of the breach and, after 14 days, issued a writ for possession of the premises. At first instance, the judge held that the breach was capable of remedy and, since 14 days between the notice and the issue of the writ was too short a time for the defendants to remedy the breach, he dismissed the action. On appeal:

11. *Held*: allowing the appeal but granting relief from forfeiture, a breach of covenant not to underlet was not a breach capable of remedy and therefore, 14 days was a sufficient time to elapse between the service of the notice under the section and the date of the writ.

12. *Why it's wrong*: It is old fashioned nonsense to treat a subletting as irremediable (on the footing that it creates an interest in land that can be terminated, but can never be undone). The point may be academic (because it matters not if a breach is irremediable if it is relievable) as far as the general law is concerned, but it plays havoc with agricultural tenancies in the context of case D/E notices to quit under the Agricultural Holdings Act 1986 – see for example Troop v Gibson [1986] 1 EGLR 1. It should be consigned to the scrap heap – a view with which Neuberger LJ appeared to sympathise in paragraph 66 of his judgment in Akici v LR Butlin Ltd [2006] 1 WLR 201 ("*such an analysis is over-technical*").

William Skelton & Son Ltd v Harrison & Pinder Ltd

13. *Facts*: In 1949 S granted the plaintiffs a lease of factory premises for a term of 21 years expiring on April 26, 1970. In 1962 S and the plaintiffs agreed to grant the defendants a 21 years' lease of the ground floor of the premises. The plaintiffs granted them an underlease of the ground floor for the remainder of their term less three days, but the underlease was expressed to be for a term expiring three days before May 26, 1970. S agreed to grant the defendants a reversionary lease of the ground floor from the date of expiry of the headlease, expressed to be May 26, 1970, to September 29, 1983. In April 1969 the plaintiffs brought forfeiture proceedings for non-payment of rent under the underlease but the action was compromised on payment of the arrears. On October 15, 1969, the plaintiffs served a notice under section 25 of the Landlord and Tenant Act 1954 purporting to terminate the defendants' tenancy on June 24, 1970. The defendants served a counter notice stating that they were unwilling to surrender possession but they did

not apply for a new lease. Relying on their rights under the reversionary lease they, as landlords under that lease, served on the plaintiffs a notice under section 24 (3) (a) of the Act of 1954, 2 on March 28, 1972, terminating the plaintiffs' tenancy of the ground floor on the ground that, since the plaintiffs were no longer in occupation, the tenancy of that part of the premises had ceased.

On September 3, 1970, the plaintiffs issued a writ claiming possession of the ground floor premises on the ground that the defendants' tenancy had been terminated by the notice under section 25 of the Act of 1954. On August 3, 1972, they issued another writ seeking declarations that the date May 26, 1970, on the underlease should be construed as April 26; and alternatively, that the underlease should be rectified so as to substitute April 26 for May 26. Further, they claimed declarations that the reversionary lease had never taken effect; and alternatively, that the notice served under section 24 (3) (a) was of no effect:-

Held: (by Judge Edgar Fay QC), dismissing the actions, (1) that at the time of the underlease the plaintiffs had a term which, although expressed as a term certain in the headlease, would by the operation of Part II of the Landlord and Tenant Act 1954 continue indefinitely until terminated by notice in accordance with the Act; and that, accordingly, even though the underlease was for a longer term than the headlease it did not operate as an assignment and therefore rectification of the underlease was not required and would not be granted.

(2) That although bringing forfeiture proceedings in April 1969 signified the plaintiffs' intention to determine the tenancy the effect of the settlement was to waive the forfeiture so that the underlease had not been determined otherwise than by effluxion of time on May 26, 1970, and the reversionary lease took effect on that date so that the defendants thereafter became the tenants of S of the ground floor of the premises.

(3) That the reversionary lease severed the reversion expectant on the headlease and section 140 of the Law of Property Act 1925 applied; that even if the headlease was protected by Part II of the Act of 1954 it lost that protection, and the right of re-entry as provided by section 24 (3) (a) of the Act became effective, because section 140 (2) defined a "right of re-entry" to include a right to determine a lease by notice to quit or otherwise and section 140 (1) provided, inter alia, that every right of re-entry should be in force in the like manner as if each severed part had alone originally been comprised in the lease; and that, accordingly, the defendants were entitled to serve a notice under section 24(3)(a) of the Act of 1954 and that notice had effectively terminated the plaintiffs' tenancy in the severed part.

14. *Why it's wrong*: I'm not sure that it is – but it serves as a useful reminder of two counter-intuitive points that bedevil the law of landlord and tenant. First, after severance of a reversion to a tenancy of business premises, the tenant continues to hold under one tenancy and not two – with the result that both owners of the reversion must cooperate in any bid to deal with the tenancy (both under the lease, and in relation to termination under Part II of the Landlord and Tenant Act 1954). Secondly, a tenant from year to year may underlet from year to year or even for a term of years, and will retain a reversion until his own tenancy is determined.

Tandon v Trustees of Spurgeons Homes

15. *Facts*: Leasehold premises consisted of a shop with living accommodation above. The tenant applied to the county court under the Leasehold Reform Act 1967 s.20 for a declaration that he was entitled to acquire the freehold from the landlords. The Court of Appeal allowed an appeal by the landlords on the ground that the premises were not a "house . . . reasonably so called" within the meaning of the Leasehold Reform Act 1967 s.2(1) .

16. *Held*: by the House of Lords (Lords Wilberforce and Fraser dissenting), that as long as a building of mixed use could reasonably be called a "house" it was within the meaning of "house" for the purposes of the Act of 1967 even though it might also reasonably be called something else. Whether it was reasonable to call a building a "house" was a question of law. If a building was designed or adapted for living in, i.e. for occupation as a residence, only exceptional circumstances such that nobody could reasonably call it a "house" would justify a holding that it could not reasonably be so called.

17. *Why it's wrong*: well, because of the reasons given by the minority!

Lynnthorpe Enterprises Ltd v Sidney Smith (Chelsea) Ltd

18. *Facts*: premises were demised "*for a term of 15 years from the date hereof (hereinafter called 'the said term')*". The lease provided for rent reviews on the basis of a letting "*for a term of years equivalent to the said term*". The tenant argued that this drafting meant that the hypothetical term upon review was the residue of the actual term, on the footing that a term equivalent to the length of the actual term but commencing on the review date would not then be equivalent to the length remaining in the real world. The tenant succeeded at first instance. On appeal to the Court of Appeal:

19. *Held*: the presumption in favour of reality which has come to be applied in rent review interpretation meant that the court would be disposed to

construe the rent review clause as requiring the notional letting to be a letting on the same terms (other than as to quantum of rent) as those still subsisting between the parties in the actual existing lease.

20. *Why it's wrong*: because it requires a specific approach to be taken to the interpretation of rent review clauses which has no comparator in other spheres of contractual interpretation, and requires the court to form a view of commercial matters which trumps the meaning of the words used by the parties. Staughton LJ was markedly less inclined to apply the presumption than the other judges in the Court of Appeal, but held that he had no alternative, because that approach "seems to have been uniformly rejected by a number of Chancery judges at first instance" (which chimes with the point in my introduction concerning the difficulty of overruling established lines of authority).

Jervis v Harris

21. *Facts*: a tenant covenanted to maintain premises in good tenantable repair and condition. The lease authorised the landlord to enter the premises to view the state of repair and to give notice in writing to the tenant of any defects or want of repair, which the tenant was required within three months to make good. In default the landlord could do the work and recover the costs and expenses from the tenant. Following inspection and service of notice by the landlord the tenant failed to carry out repairs and refused the landlord or his workmen entry. On the trial of preliminary issues the judge declared that the covenants were enforceable and that a claim by the landlord to recover moneys expended on repair was a claim for a debt and not for damages for breach of a covenant and was therefore enforceable by the landlord without first obtaining the leave of the court under section 1 of the Leasehold Property (Repairs) Act 1938.

22. *Held*: dismissing the appeal, that, where a lease provided by specific covenants for repairs to be carried out by the lessee in default of which the lessor was entitled on notice to enter the property and carry out repairs at the lessee's expense, a claim by the lessor to recover moneys expended in making good a want of repair arising from the lessee's breach of the repairing covenant was a claim for debt and not a claim for damages for breach of covenant; that the doctrine of penalties did not apply to a claim in debt; and that, therefore, the leave of the court under section 1 of the Leasehold Property (Repairs) Act 1938 was not required before the landlord could enforce his claim against the tenant

23. *Why it's wrong*: It is difficult to fault the reasoning of the Court of Appeal. However, the decision has devastating consequences, even if correct.

First, it evades the protection which Parliament saw fit to confer upon tenants held at ransom by unscrupulous landlords threatening to sue for damages for dilapidations when the landlords would suffer no actual loss – see 1.19(1) of the Landlord and Tenant Act and the Leasehold Property Repairs Act 1938.

Secondly, it also legitimises end of term clauses which require the tenant to pay the landlord the estimated loss of remedial works which the landlord may never carry out – see the decision of the Court of Session, Outer House in Sipp Pension TRS v Insight Travel Services Ltd [2015] CSIH 91.

Thirdly, it is of little practical use, since, recognising the arguable unfairness of its application, courts adopt a restrictive construction to clauses allowing entry. Thus, in Amsprop Trading Ltd v Harris Distribution Ltd [1997] 1 WLR 1025, Neuberger J said: "*a provision such [a Jervis v Harris] clause, which gives the landlords substantial powers, and in particular the power to carry out work at the tenant's expense, should be construed narrowly rather than widely*"; while in Hammersmith and Fulham LBC v Creska Ltd [2000] L & TR 288, Jacob J refused to grant an injunction requiring the tenant to allow the landlord access to carry out works under such a clause, even though the landlord had complied with it to the letter.

Newham LBC v Thomas-Van Staden

24. *Facts*: a business tenancy was granted for a term "from and including 1 January 2003 to 28 September 2004 (hereinafter called 'the term' which expression shall include any period of holding over or extension of it whether by statute or at common law or by agreement)", and was purportedly contracted out of the security of tenure provisions of Part II of the Landlord and Tenant Act 1954. The tenant argued that the term was not a term certain, and accordingly that the contracting out order was a nullity, even though the parties had jointly obtained an order of the county court authorising the contracting out, which could only have been premised upon the fact that the tenancy was for a fixed term.

25. *Held*: by the Court of Appeal: the tenancy was not for a term certain, with the result that the order contracting out the tenancy was indeed a nullity.

26. *Why it's wrong*: First, as a matter of ordinary wording, it seems that the parties evidently intended the term to be the expressed calendar fixed term –

hence the dates, and the deliberate contracting out process. What otherwise explains the reference to "it" in the words in parentheses?

Secondly, the judgement overlooks the facts that (i) a term cannot be extended (Friends Provident Life Office v British Railways Board [1996] 1 All ER 336); (ii) a contracted-out tenant cannot 'hold over'; and therefore (iii) any agreement to do either would necessarily take place as a fresh tenancy, and not an extension of the existing tenancy.

Thirdly, the judgment does not mention the wealth of authority concerning attempts by landlords to impose liability upon original tenants and guarantors where assignees holding over after the end of the contractual term have defaulted, which would have explained the function of the words of extension in the Newham lease. Particularly since the decision of the House of Lords in City of London Corporation v Fell [1994] 1 AC 458, (although examples existed before), it has become common for the term to be defined in a way that brings into account any period of holding over (by statute or agreement) after the end of the contractual term. Such devices do not of course extend the term itself, any more than the wording in Newham could have done.

Fourthly, the Court was plainly left without any rationale for the wording that would have supported the landlord's argument. It does not appear to have been taken to the number of precedent books that furnish examples of the words of extension, and explain their purport. Although the incorporation of such wording in the Newham lease was inappropriate (essentially because that lease was contracted out, and because it would have been better to define the term more clearly), that should not have been used as an occasion to give the words an altogether different meaning that they were quite obviously never intended to bear.

Wood v Waddington

27. *Facts*: In 1998, a landowner transferred his property in to lots to the predecessors in title of the parties. The predecessors of the Woods acquired Manor Farm House, a paddock and some traditional buildings including a coaching house with stables, together with some fields. Mr Waddington acquired adjoining land. In due course, the Woods starting operating a livery business, which involved intensive use of a series of tracks on the boundary between the two properties. A dispute began as to the ownership of the tracks and as to the Woods' right to use them. At first instance, the Woods failed in their claim to a right to use the tracks, which they put on a number of different bases. On appeal:

28. *Held*: the Woods were entitled to the rights claimed by virtue of s.62 of the Law of Property Act 1925. This was despite the facts that (a) the dominant and servient tenements had been in the same occupation at the time of the notional grant; and (b) the evidence was that the tracks had only been used once a month

29. *Why it's wrong*: It upsets the long understood rule that negated the need for diversity of occupation in cases under section 62, sidestepping the protection available to landowners under the rule in Wheeldon v Burrows and other cases of implication where necessity must be shown. It also creates an inconsistency regarding the use of the term "continuous". Its reasoning for rejecting the submissions based upon the exclusion of s.62 are also questionable.

EMI Group Ltd v O & H Q1 Ltd

30. *Facts*: a post-Covenants Act lease is granted to HMV UK Ltd, with its parent, EMI Group plc, as guarantor; HMV goes into administration in 2013; EMI asks its landlord, O&H, to permit the lease to be assigned to it; the landlord agrees; a licence to assign is granted (under which EMI covenants with O&H to pay the rents and observe the covenants under the lease); and on the same day in November 2014, the lease is assigned. This happy concord lasts only for 20 days, ending when EMI notifies the landlord that it is not liable to pay the rent, or indeed for any of the tenant's covenants under the lease. When O&H baulks at this shift in stance, EMI issues proceedings seeking a declaration that although the lease has vested in it by assignment, the tenant covenants in the lease are void and cannot be enforced against it. O&H in turn counterclaims for alternative declarations that the covenants can be enforced against EMI, but that, if they cannot, the assignment itself is void.

31. *Held*: the tenant covenants were indeed void, and could not be enforced against it. Unhappily, the appeal against the decision, which was due to be heard this year, has been compromised, so we are stuck for the time being with the decision at first instance.

32. *Why it's wrong*: because it depends upon the obiter reasoning of Neuberger LJ (as he then was) in K/S Victoria Street v House of Fraser (Stores Management) Ltd [2012] Ch 497 to the effect that the 1995 Act (and in particular section 24) does not permit a lease to be assigned by a tenant to its guarantor, even where both parties desire that result. That is wrong: the liability of the guarantor in such circumstances is not a liability that has

continued: it is a fresh liability imposed by section 3 of the Act. It is not therefore rendered void by section 25.

Millgate Developments Ltd v Smith

33. *Facts*: A developer, Millgate, constructed some smart luxury homes in Maidenhead. In order to satisfy its s.106 obligations, it acquired some cheap land - cheap because it was burdened by covenants against building - and built social housing on it. It was well aware of the restrictive covenants, but took a commercial view - and only made a retrospective application for modification under s.84 of the Law of Property Act 1925 after the event.

34. *Held*: ground (aa) was made out - the public interest in the social housing being occupied trumping all other considerations (including the developer's cynical conduct and the fact that local authority would have accepted a 7-figure payment into a social housing fund as an equivalent s.106 contribution). In the process, the Tribunal depended upon the observations by Lord Sumption in Coventry v Lawrence to the effect that the ordinary remedy for interference with property rights was damages, not injunction.

35. *Why it's wrong*: Apart from the social housing factor, the facts were not very different from the recent widely-reported George Wimpey Bristol Ltd v Gloucestershire Housing Association Ltd [2011] UKUT 91 (LC), where modification was refused, and as a result the houses had to be pulled down. If the reasoning in this case is correct, it creates a developer's charter because in most cases the potential profits will far exceed any damages payable, thus making restrictive covenants even more ineffective than they already are. The decision is under appeal.

Conclusions

36. This very short short list illustrates two points. First, the overwhelming majority of the properties concerned were very humble – so look after the little clients – the big ones are litigation averse.

37. Secondly, think twice before asking counsel instructed in a case to advise on prospects of appeal: cognitive dissonance is such that the advice will be heavily influenced in favour of previously expressed views.

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