CASE LAW KALEIDOSCOPE

by

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Guy Fetherstonhaugh QC is joint head of Falcon Chambers, which specialises in property law. His existence was first noticed by The Lawyer magazine in 1993, which described him as "underrated". The following year his status had improved to "rated". His ranking the year after is not recorded.

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My selection of property cases decided in 2017 ranges across the piste of property litigation, with decisions on the 1954 Act, statutory notices, easements, restrictive covenants, development agreements, injunctions protecting property rights and strata title. So - something there to suit all skiers of property's slopes.

Part II of the Landlord and Tenant Act 1954

S Franses Ltd v Cavendish Hotel (London) Ltd [2018] 1 P & CR 6

S Franses Ltd runs a carpet shop from the ground floor of the Cavendish Hotel in Jermyn Street, under a business tenancy, the renewal of which is opposed by the Cavendish Hotel under paragraph (f) of section 30(1) of the 1954 Act.

The ground of opposition was heard as a preliminary issue in the County Court. On 24 January 2017, HHJ Saggerson held in favour of the landlord, and dismissed the tenant's claim for a new tenancy. The tenant appealed to the High Court, where Jay J allowed the appeal in part, and also granted a certificate for a leapfrog appeal by the tenant to the Supreme Court, certifying that he was satisfied that a point of law of general public importance arises. The Supreme Court has also granted permission to appeal, while the Court of Appeal has in turn granted permission to the landlord for its own appeal against those aspects of Jay J's judgment which went against it.

This case therefore comes close to the record for involving a superabundance of Her Majesty's judiciary in the same piece of property litigation. The primary points of interest that arise are:

(a) in the Supreme Court: whether (i) a landlord which intends to carry out works if, and only if, those works are necessary to satisfy ground (f) and which offers an undertaking to carry out those works has the requisite intention for the purposes of s.30(1)(f); and (ii) a landlord whose sole or predominant commercial objective is to undertake works in order to fulfil ground (f) and thereby avoid the grant of a new lease to the tenant and which offers an undertaking to carry out those works has the requisite intention for the purposes of s.30(1)(f).

(b) in the Court of Appeal: (i) what works of construction should be left out of account when considering a landlord's ground of opposition under s.30(1)(f) of the Landlord and Tenant Act 1954; and (ii) whether the landlord could adapt its scheme if and when the matter ever returns to the county court.

The outcome of these appeals is likely to be of considerable importance for business tenants and landlords.

Statutory Notices

Elim Court RTM Co Ltd v Avon Freeholds Ltd [2017] 3 WLR 876

The Claimant applied under section 84(3) of the Commonhold and Leasehold Reform Act 2002 for a determination that it was entitled to acquire the right to manage premises located at Elim Court, Elim Terrace, Plymouth, of which the Defendant was the freeholder.

Before so applying, the Claimant had first to serve two notices:

(a) a notice of invitation to participate complying with section 78(5)(b) of the 2002 Act; and

(b) a claim notice complying with section 79(6) of the 2002 Act.

The Defendant contended that both notices were deficient, in that:

(a) the first notice did not state that the Claimant's articles of association would be available for inspection on a Saturday or Sunday or both; and

(b) the second notice was inadequately signed, and had not been served on an intermediate landlord.

The Defendant succeeded in the LVT and the Upper Tribunal, essentially on the ground that the notice requirements had to be complied with strictly, and in limited respects had not been. The Claimant appealed to the Court of Appeal. Lewison LJ gave judgment (Arden LJ and Proudman J agreeing), commencing with last year's best first sentence:

> "It is a melancholy fact that whenever Parliament lays down a detailed procedure for exercising a statutory right, people get the procedure wrong."

The Court accepted that there had indeed been failures to comply with the statutory requirements in relation to the notices. The only issue, therefore, was what consequences attached to that failure, bearing in mind the use of apparently mandatory language ("must …"; "shall …") in the relevant notice provisions of the 2002 Act and some 2010 amending Regulations.

The Court allowed the appeal, notwithstanding the compliance failures. The judgment of Lewison LJ is instructive in its analysis of the issue whether, in the case of a statute conferring a property right on a private person, non-compliance with a notice procedure invalidates the notice. He makes the point that the issue of non-compliance is to be ascertained in the light of the statutory scheme as a whole:

> "Where the notice or the information which is missing from it is of critical importance in the context of the scheme the non-compliance with the statute will generally result in the invalidity of the notice. Where, on the other hand the information missing from the statutory notice is of secondary importance or merely ancillary, the notice may be held to have been valid".

Pointers towards non-criticality include whether:

(a) the information required is particularised in the statute, as opposed to being required by general provisions of the statute;
(b) whether the information is required by the statute itself (which receives clause-by-clause scrutiny), or by subordinate legislation (which is not subject to any detailed Parliamentary scrutiny);
(c) if the notice is invalid, there is an ability immediately to serve a second notice (which points towards the information being critical).

Applying those points, the Court held that a failure by an RTM company to comply precisely with the requirements for a notice of invitation to participate does not automatically invalidate all subsequent steps; and the particular failure would not have done so in this case. Further, it held that the failure to serve the

claim notice on the intermediate landlord of a single flat with no management responsibilities (as defined) did not invalidate the notice of claim either.

Lewison LJ ended his judgment with this plea:

> "The Government may wish to consider simplifying the procedure further, or to grant the FTT a power to relieve against a failure to comply with the requirements if it is just and equitable to do so. Otherwise I fear that objections based on technical points which are of no significant consequence to the objector will continue to bedevil the acquisition of the right to manage."

Although some of us make a living from failures by parties to comply with notice requirements, I think that we can applaud the sentiment.

Restrictive covenants

Derreb Ltd v Blackheath Cator Estate Residents Ltd (2017) UKUT 209 (LC); (2018) JPL 152 (UT (Lands))

In 1956, a property in Blackheath known as The Huntsman was conveyed to the Applicant's predecessor in title, subject to a restrictive covenant limiting its use to either a sports ground or the erection of detached houses for use as private residences only. By the 21st century, The Huntsman was no longer used as a sports ground, and was overgrown and unused. Its owners proposed to carry out a residential development, consisting of a mixture of 130 dwellings comprising detached houses, semi-detached houses and apartment blocks. The Respondent, which was entitled to the benefit of the restrictive covenant, opposed the Applicant's plans. The Applicant then applied for a modification of the covenant under section 84 of the Law of Property Act 1925.

In the event, the parties resolved most of their differences during the course of the hearing, and outstanding matters turned mainly on facts which are unlikely to be replicated elsewhere. The decision is, however, helpful to those who require an indication of the Upper Tribunal's modern, pragmatic approach to restrictive covenants. It also shows the critical importance of securing expert evidence on relevant points of difference.

Easements

Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2017] Ch 516

As the three members of the Court (the Chancellor, Kitchin and Floyd LJJ) said at the outset of their judgment in this case:

> "This is the first time that the Court of Appeal has had the opportunity to consider the validity of easements of various kinds of recreational facilities. The last case that raised similar questions was the well-known decision in In re Ellenborough Park [1956] Ch 131, now more than 60 years ago. Since then, the culture and expectations of the population of England and Wales have radically changed. This case has to be considered in the light of those changes."

In Ellenborough Park, the owners of a park conveyed plots on the edge of it for building purposes, granting each purchaser "the full enjoyment … at all times hereafter in common with others to whom such easements may be granted of the pleasure ground … but subject to payment …" Both Danckwerts J and the Court of Appeal held that the right created an easement.

In Regency, the similar question that was raised was whether a right granted by a transfer made in 1981 amounted to one or more easements. The right was worded as follows:

> "for the transferee its successors in title its lessees and the occupiers from time to time of the property to use the swimming pool, golf course, squash courts, tennis courts, the ground and basement floor of Broome Park Mansion House, gardens and any other sporting or recreational facilities … on the transferor's adjoining estate".

The Claimants comprised the freehold owner and sundry timeshare owners of a property lying in the middle of the Broome Park Estate, known as Elham House, together with 24 villas in its grounds, and claimed, as successors to the transferee under the 1981 transfer, the benefit of the 1981 rights, contending that they amounted to easements. The Defendants, who owned Broome Park Mansion and its grounds, argued that the rights granted (a) could not amount to easements because the facilities could only be maintained at considerable expense, (b) extended to facilities which were not even contemplated at the

time of the 1981 transfer, and (c) comprised at best a bundle of easements and personal rights.

The Court of Appeal had little hesitation in construing the grant to hold that the rights did (in the main) comprise easements. The focus of their attention was rather on the precise subject matter of the rights. As to this, they held that the rights:

(1) were only those existing in 1981;

(2) can also embrace replacements of the facilities existing in 1981 – but not to any extension or substantial upgrading of those facilities;

(3) could not extend to the restaurant, bar, gym, sunbed and sauna area in the basement of the Mansion House, since these amounted to services and facilities that could not exist without the chattels that make them what they are. To operate them if the Defendants ceased business, the Claimants would need to take possession of them. They could not therefore take effect as easements.

The decision provides welcome clarity in an area of the law that may often seem technical and encumbered by ancient rules.

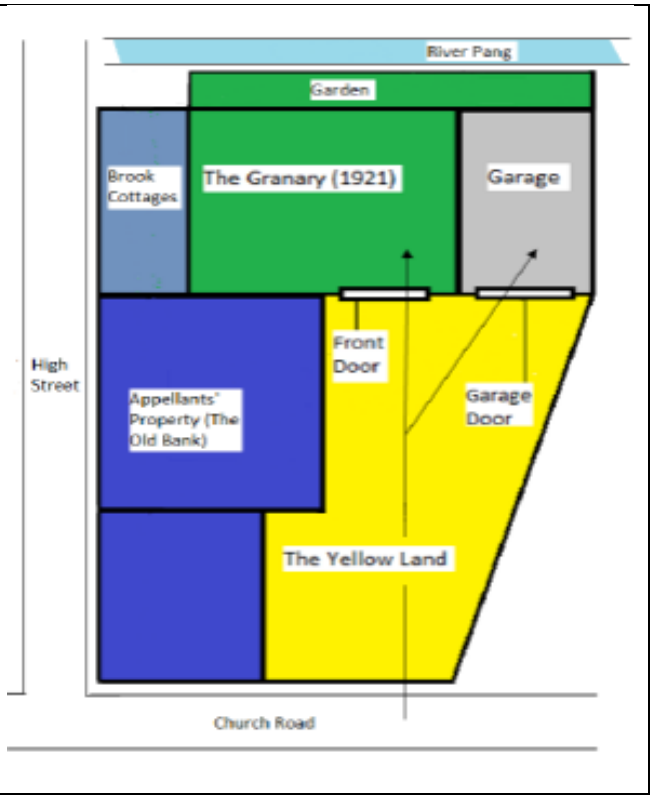
Gore v Naheed [2018] 1 P & CR 1

Facts:

- Mr Gore owns the Granary (shown shaded green), and also owns the Garage (shown shaded grey);
- Mrs Naheed owns the property shown shaded blue and yellow.
- Mr Gore has an express right of way over the yellow land to the Granary.

Issue:

Can Mr Gore use the yellow land to reach the Garage on the grey land and thence to the Granary on the



green land?	

At first sight, applying the conventional Harris v Flower rule with which we have all grown up, the answer would appear to be no: you cannot use your right of way to Close A to access Close B, lying beyond. For a modern expression of the doctrine, dealing with farmers' fields, also in the Court of Appeal, see Giles v Tarry [2012] 2 P&CR 15.

But appearances are deceptive, and the rule is far more nuanced:

(1) The question whether the grant of a right of way across plot A (the servient tenement) to plot B (the dominant tenement) also includes the right to use the way to access land outside the dominant tenement (plot C) either by going via plot B or (as in the present case) by going directly to plot C from the servient tenement depends on the nature and scope of the rights granted or reserved, which is a question of construction of the grant.

(2) The grant of a right of way across plot A to plot B and nowhere else necessarily limits the scope of the grant to direct access to plot B. The use of plot A to obtain direct access to plot C in such a case is simply not within the grant so that any use of plot A for that purpose would amount to a trespass.

(3) However, the grant of a right of way over plot A to plot C may be capable of taking effect as an easement which accommodates plot B if that is reasonably necessary for the proper enjoyment of plot B.

(4) That test is likely to be satisfied where plot C intervenes physically between plot A and plot B, but the principle can operate more widely. The issue is one of construction of the grant, and, when construing the grant, there is no distinction to be made between passing through and passing alongside cases. The alleged right of way in both cases is capable of supporting the dominant tenement if access to the adjacent land operates for the benefit of the dominant tenement.

In this case, the judge had been entitled to find that the use of the Garage was ancillary to the use and enjoyment of the Granary. It was not the case that

parking within the Garage by a resident of the Granary should be treated as the use of the Garage in its own right for a purpose independent of the use of the dominant tenement; although it would have been different if the Garage were let to or used by a third party separately from the occupation of the Granary.

There are perhaps two lessons to draw from this judgment:

(a) always construe the grant carefully: the result in this case depended upon the grant. There is no general principle that ancillary land may always be accessed by the right of way in favour of the principal land; and

(b) do not depend upon expressions of principle extracted from other cases: these easement cases, like much of the property law that sustains us, depend critically upon their own facts.

Development agreements

Minerva (Wandsworth) Ltd v Greenland Ram (London) Ltd [2017] EWHC 1457(Ch)

It is routine for owners of land contracting with developers to whom the land is sold to include a top-up payment ("overage") in the event that the sale price of developed lots exceeds the contractual sale price. It is also routine for developers to seek to avoid liability for overage by relying upon densely drafted provisions in the sale contract which impose terms as to use of reasonable endeavours, duties to consult, and so forth, all of which may arguably be infringed. Such provisions were invoked in earnest in this case, which affords compelling reading for those seeking real-life examples of (ultimately unsuccessful) attempts to avoid liability for overage.

The case involved the development of the Ram Brewery site in Wandsworth to provide a mixed use scheme including a 34 storey residential tower. Having obtained planning permission for the scheme, the Claimant accepted an offer for the sale of the site to the Defendant. The sale contract, made on 20 December 2013, provided for the Defendant to pay the Claimant overage in the event that the Claimant was able before 20 October 2014 to obtain an

enhanced planning permission adding floors to the tower, with the overage calculated at £200 psf of additional saleable space.

The sale contract laid down certain conditions in order for the overage to be payable, including duties to consult the Defendant on plans, to keep the Defendant informed, and to obtain consent. Ultimately, the Claimant succeeded in obtaining planning permission, but the Defendant refused to pay overage. Its reasons were that:

(a) the Claimant's request for the Defendant's consent to the submission of the application for planning permission for the enhanced scheme was not a valid request for approval;
(b) the grounds on which the Defendant relied in refusing the request were reasonable grounds;
(c) alternatively, the Claimant had waived its right to rely on that refusal by making a second request for approval;
(d) the Defendant was entitled to refuse its approval to the second request;
(e) the Defendant had been entitled to enter into a revised 106 Agreement;
(f) the Claimant had failed to use reasonable endeavours to minimise an affordable housing contribution.

Rose J rejected all the Defendant's contentions, holding that it had wrongly prevented the Claimant from earning the overage payable, and was therefore liable to pay damages in that amount, namely £3,786,400 together with interest.

Injunctions protecting property rights

Ineos Upstream v Persons Unknown [2017] EWHC 2945 (Ch)

The Claimants' activities include shale gas exploration in the UK, where they have eight sites, some of which are intended for drilling and hydraulic fracturing ("fracking"). The Defendants were protesters who had taken direct action against other fracking operators and who, on the evidence, would seek to include the Claimants in the future. The action in question included trespass on operators' land; interference with equipment on such land; substantial interference with private rights of way enjoyed by operators by blocking the

route and "slow walking"; and action to prevent operators and third party contractors leaving that land and accessing the highway.

The Claimants applied for the grant of injunctions restraining such activity in relation to their sites. The applications were opposed on the basis that there was no imminent and real risk of harm; and that the grant of injunctions would be disproportionate, and would impede the Defendants' rights to protest.

The judgment of Morgan J is detailed and thorough, and serves as a blueprint both for the kind of evidence that is needed in applications for interim injunctions restraining trespass and nuisance; and for the arguments needed to sustain such applications. Of particular interest is the Judge's rejection of the proposition that the application should await evidence of imminent invasion. He said:

> "To hold that the risk of an infringement of the rights of Ineos is not imminent with the result that the court did not intervene with injunctions at this stage would leave Ineos in a position where the time at which the protesters might take action against it would be left to the free choice of the protesters without Ineos having any protection from an order of the court. I do not consider that Ineos should be told to wait until it suffers harm from unlawful actions and then react at that time.... If protesters were to set up a protest camp on Ineos' land, the evidence shows that it will take a considerable amount of time before Ineos will be able to recover possession of such land."

The Judge also considered the extent to which the right to freedom of expression and the right of assembly under Articles 10 and 11 were relevant, in the context of the infringement of private property law rights:

> "The protection of private rights of ownership is necessary in a democratic society and the grant of an injunction to restrain trespass is proportionate having regard to the fact that the protesters are free to express their opinions and to assemble elsewhere."

The Judge also usefully shed light on the use of the procedural device involved in suing persons unknown to restrain activity, defining a class by reference to persons who had not yet in fact so acted:

> "Proceeding in this way would seem to produce the result that at the time when the court made its order there were no persons within the defined category of Persons Unknown. How then, later, did some persons come within that category and become subject to the court's order?"

Having examined the authorities, the Judge considered that the position had now been reached whereby the procedure adopted by the Claimants was a course which was open to them.

The decision is notable too for the fact that the orders made embraced not merely potential interference with the eight sites, but also interference by the protesters with the Claimants' upstream supply chain.

Finally, Morgan J's examination of the need for clarity and precision in the wording of the orders made is also instructive, and will be of use to practitioners confronting similar situations in the future.

Strata title

O'Connor (Senior) v The Proprietors, Strata Plan No.51 [2017] UKPC 45

This was an appeal to the Privy Council from the Court of Appeal of the Turks and Caicos Islands, concerning the short-term use of units in a residential condominium development. Put like that, it is difficult to see what possible relevance this decision could have to English real property law.

The decision does, however, have important ramifications for strata title, and in particular for the tension that often arises between stipulations prohibiting any restrictions on alienation, on the one hand, and those governing use, on the other. If commonhold finally gains substantial purchase in this realm following the Law Commission's recent call for evidence and eventual recommendation for further legislation action, then this decision will shed important light upon the way in which the commonhold community statement should operate. The case also neatly picks up the line of authority on the permissibility of holiday lets, exemplified by the approach of the Court of Appeal in Caradon District Council v Paton (2001) 33 HLR 34.

The critical by-law in this case, which took effect as a positive and negative freehold covenant, provided:

> "Each proprietor shall not use or permit his residential strata lot to be used other than as a private residence of the Proprietor or for accommodation of the Proprietor's guests and visitors. Notwithstanding the foregoing, the Proprietor may rent out his Residential Strata Lot from time to time provided that in no event shall any individual rental be for a period of less than one (1) month."

The Appellants allowed their unit to be occupied by paying holidaymakers – typically on week-long lets – for periods of less than one month at a time. The Respondent sought an injunction to restrain such use, contending a contravention of the by-law. The Appellants defended the claim. They argued that the by-law was of no effect, alleging that it fell foul of section 20(4) of the relevant Ordinance, which provides:

> "No by-law shall operate to prohibit or restrict the devolution of strata lots or any transfer, lease, mortgage or other dealing therewith …"

The Respondents submitted that the first sentence of the by-law is a very tightly drawn and highly limiting restriction on the use of any lot; essentially, it prohibits commercial exploitation of the residential units. Properly construed, the second sentence of the by-law is not a restriction but, rather, a relaxation of what has gone before; it provides a measure of relief by allowing residential use by others, including exploitation for rental by third parties, provided always that any letting is for at least one month.

Dismissing the appeal, the Privy Council held that the by-law was valid as a legitimate restriction on the use of residential strata lots, and that it did not involve an impermissible restriction on leasing contrary to section 20(4) of the Ordinance. Statutes (such as the Ordinance) prohibiting restrictions on dealing in strata lots do not prevent restrictions on the *use* of the lots, even though such restrictions may inevitably restrict the potential market for the lots.

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