



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 cover cases about whether time is of the essence for paying a deposit when exercising an option to extend a lease; how to determine what forms part of the ratio of a case in the context of the reasonable belief required to establish adverse possession; and the iniquity exception to legal professional privilege.

Our readers may also be interested in two other cases this month:

- ***Triathlon Homes LLP v Stratford Village Development Partnership*** [2024] UKFTT 26 (PC), the first major case on remediation contribution orders under section 124 of the Building Safety Act 2022. A detailed case note is [here](#).<sup>1</sup>
- ***Messenex Property Ltd v Lanark Square Ltd*** [2024] EWHC 89 (Ch), concerning when it is unreasonable for a landlord to withhold consent to alterations. A brief note can be found [here](#).<sup>2</sup>

## JANUARY 2024

### **IAA Vehicle Services Limited v HBC Limited [2024] EWHC 1 (Ch)**

#### *Summary*

The High Court determined that options had been validly exercised and ordered specific performance of the sale contracts.

The Claimant was the Defendant's tenant under three commercial leases. Each lease contained an option allowing the Claimant to purchase the Defendant's reversionary interest. The Standard Commercial Property Conditions of Sale (2<sup>nd</sup> edn) were incorporated, so the buyer was obliged to pay a deposit "no later than the date of the contract".

The Claimant served notices exercising the options, but did not pay any deposits. It did not ask for the Defendant's bank details to transfer the deposits, nor did the Defendant provide them of its own accord.

After the option period ended, the Defendant asserted that non-payment of the deposits was a repudiatory breach, and purported to accept that breach.

HHJ Hodge KC determined that:

1. As a matter of construction of the options:
  - a. The sale contracts arose when valid option notices were served; and
  - b. The deposits were due on that date.

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<sup>1</sup> <https://www.falcon-chambers.com/publications/articles/triathlon-homes-llp-v-stratford-village-development-partnership-others-2024-ukftt-26-pc>

<sup>2</sup> <https://www.falcon-chambers.com/news/messenex-property-ltd-v-lanark-square-ltd-2024-ewhc-89-ch>



2. It was up to the Claimant to take steps enabling it to perform its obligation to pay the deposits, such as asking for bank details.
3. Ordinarily, in the case of a requirement to pay a deposit, time is of the essence. However, this was not an ordinary case, for two cumulative reasons:
  - a. The leases were a continuing proprietary relationship between the parties. Their existence, and possible statutory continuation, meant that the landlord's ability to deal with the property was unaffected by the exercise of the option – the property was already encumbered. There was no need for time to be of the essence for there to be certainty as to whether the landlord could deal freely with the property.
  - b. The option provisions did provide in terms for particular sums to be paid as a condition of the valid exercise of the options, but not the deposits.
4. Time not being of the essence, the failure to pay the deposits was not a repudiatory breach. Further, on the true construction of the correspondence, there was no repudiatory breach there either: the Claimant had not stated an intention not to perform.

### ***Why it's important***

This is an interesting example of a case which does not fall within the normal rule that where a deposit is to be paid, time is of the essence. Of particular interest is the court's recognition of the commercial reality that, as the purchase prices had been set at the time of the leases, any tenant seeking to exercise its right to purchase was likely to mean business, as it would be acquiring valuable land at an advantageous price.

While this case illustrates that time may not always be of the essence, it is also a salutary reminder of the importance of checking requirements in advance, and ensuring compliance will be possible, such as by procuring bank details.

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## **Brown v Ridley [2024] UKUT 14 (LC)**

### ***Summary***

The Upper Tribunal held that *Zarb v Parry* [2011] EWCA Civ 1306 was binding authority that a person could only succeed in an application for adverse possession which required the third condition in Schedule 6 paragraph 5(5) to be satisfied if he could show that his reasonable belief that the disputed land belonged to him lasted until the date the application was made (or shortly beforehand).

### ***Why it's important***



There have been several First-tier Tribunal decisions (including the first instance decision in this case) suggesting that *Zarb* is not binding, and allowing claims if the reasonable belief can be shown for any 10 year period. This case makes it clear that the practice needs to change: *Zarb* is binding – unless and until the Supreme Court reconsiders the question.

This means that potential claimants need to make an application to Land Registry “promptly” after discovering facts which would change the belief of a reasonable person about the ownership of the land.

The judgment also contains a useful analysis and application of the basis of the doctrine of precedent, which may be of interest to practitioners.

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## **Al Sadeq v Dechert LLP [2024] EWCA Civ 28**

### ***Summary***

The Court of Appeal considered a number of aspects of legal professional privilege, in particular concerning the iniquity exception.

The Claimant is currently in prison in Ras Al Khaimah, where he has been convicted of fraud. He claims to be innocent and to have been subjected to kidnapping, torture and other wrongdoing, as a result of which he provided false evidence and false confessions, all ultimately at the behest of the ruler of Ras Al Khaimah. In this litigation, he seeks compensation from the Defendants for their alleged part in that alleged wrongdoing.

The Defendants gave standard disclosure, and claimed privilege in respect of various documents. The Claimant challenged the claim to privilege: he asserted that the iniquity exception prevented the privilege from arising.

In respect of the iniquity exception, the Court of Appeal held that:

1. The iniquity exception only applies where there is an abuse of the lawyer/client relationship – so it would not apply to a document provided to the lawyers for advice about whether the detention was lawful.
2. The merits threshold for the iniquity exception is a balance of probabilities test: the existence of the iniquity must be more likely than not on the material available.
3. The iniquity exception applies to documents and communications brought into existence as part of or in furtherance of the iniquity. ‘Part of’ includes documents which report on or reveal the iniquity – including, for example, documents prepared in preparation for the iniquity and after it is complete.



4. No distinction should be drawn between cases where the iniquity itself is an issue in the proceedings, and cases where it is not, unless there are exceptional circumstances which could justify a court taking the view that a balance of harm analysis has a part to play.

The Court further held that:

1. Litigation privilege extends to litigation to which the person claiming the privilege is not, and is not contemplated to be, a party.
2. The Three Rivers (no 5) principle (that legal advice privilege only attaches to communications with client representatives specifically authorised to seek and receive the advice) has no application to litigation privilege.
3. Permission to adduce evidence which had become available after the hearing but before judgment was handed down (in this case, an unusually significant amount of time later) ought to have been sought when the evidence became available, not after judgment was given.

***Why it's important***

This case is of significance for all practitioners concerned with disclosure and privilege, both because of the legal framework it establishes for the operation of the principles (in particular relating to the scope of the iniquity exception) and because of the guidance given by the Court when considering the sufficiency of the Claimant's evidence in support of each claim for privilege.

The Court expressly left open the question of whether, in the case of 'non-party litigation privilege', there is additionally a 'sufficient interest' requirement; on the facts of this case, any such requirement, if it exists, would plainly have been met. This may be the subject of further authority in other cases.

Additionally, the Defendants preserved the possibility to argue on any appeal to the Supreme Court that the (much-criticised) Three Rivers (no 5) principle is wrong; should the case proceed further, any such challenge is likely to be the subject of widespread interest.

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