

## Adverse possession and control

We like being in control. As lawyers, we want to be in control. What is more, sometimes the law requires our clients to be in control. And the law determines if a person is truly in control. In the legal context instances where control may be an issue include the control of companies and the control of vehicles. In the field of property, the concept of control rears its head in connection with adverse possession.

*Pye v Graham* [2003] 1 AC 419, HL @ [43] tells us that: (1) “factual possession”, connotes “a *sufficient* degree of occupation or physical control”; (2) it must be coupled with an “intention to possess” which is “an intention to exercise such custody and control on one’s own behalf and for one’s own benefit.”

But in this context what exactly is control? What does it entail? What is enough?

Here the guidance is limited. In the following paragraph [41] in *Pye*, reference is made to “an *appropriate* degree of physical control”. We have traded “appropriate” for “sufficient”. But that does not really advance matters.

Greater assistance is provided by the statement in relation to factual possession (taken from *Powell v McFarlane* (1977) 38 P&CR 452 @ 470/1), approved in *Pye* @ [41]:

*It must be a single and exclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. ... broadly, I think what must be shown ... is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with and that no-one else has done so.*

Now we know, therefore, that control in this context means that the enjoyment of the land must have been exclusive to the claimant.

What is more, in *Pye* Lord Hutton spoke @ [76] of “*using the land in way in which a full owner would and in such a way that the owner is excluded*”.

Indeed, when one couples this with the fact that:

- (1) The required intention to possess is an “intention, in one’s own name and on one’s own behalf, *to exclude the world at large*, including the owner with the paper title ..., so far as is reasonably practicable and so far as the processes of the law will allow.”: *Pye* @ [43]
- (2) The law obliges a squatter not only to have such intention to possess but also to manifest such intention, i.e. *to signify* it by his actions (so as to make it obvious to a person visiting the land that he intends *to exclude the owner* as best he can): *Lambeth LBC v Blackburn* (2001) 82 P&CR 494, 504, approved in *Pye* @ [79].
- (3) Actions speak louder than words, for in general intent is to be inferred from the acts which have taken place: *Pye* @ [70] & [76],

it appears that, in turn, physical exclusion is seemingly a key to exclusivity and, in turn, to effective and adequate control and so possession.

Now, certainly in the paradigm case of adverse possession of a residential property or, as in *Pye* itself, several acres of agricultural land, it is easy to conceive why there is a direct focus on exclusion as demonstrating the all-important control. Nothing I say should be taken as suggestion that physical exclusion is not a weighty factor. Indeed, it may often be determinative. This reflects: (i) what Cockburn CJ said as long ago as 1877 in *Seddon v Smith* (1877) 36 LT 168, 169: “Enclosure is the strongest possible evidence of adverse possession”; (ii) the attitude of Russell LJ in *George Wimpey v Sohn* [1967] Ch 487, 511 “the most cogent evidence”; and (iii) the views of Slade J in *Powell’s* case: “So too is the locking or blocking of the only means of access.”

Consistent with this, in *Pye* the company was physically excluded by the hedges which surrounded the land and the lack of any key to the padlocked road gate: [8], [10] & [41]. The key was in a tin in the Grahams' kitchen. Hence the Grahams succeeded because they were in occupation of the land which was within their exclusive physical control.

Similarly, Mr Blackburn prevailed over Lambeth because he had broken the council's lock on the flat and replaced it with a new Yale one of his own, actions which unequivocally indicated that he was excluding, and intended to exclude, everyone from the premises: [26], [40], [43-46], [55].

So far, so good. If, in any given scenario, there is complete exclusion, no doubt it is tolerably clear that the claimant is in control and hence possession.

However, I venture to suggest that in some instances the concept of physical exclusion in connection with the control of land has perhaps been (wrongly) elevated to, and treated as, a necessary (as opposed to a sufficient) condition. Put another way, the bar may have been raised from requiring exclusive use to obliging the squatter to demonstrate that his enjoyment has been exclusionary, i.e. to proving not merely *de facto* sole enjoyment but also outright exclusion of the true owner (enjoyment in circumstances and a manner which renders the true owner wholly excluded).

This attitude has arguably been evident in relation to open areas of land which, by their very nature, are less susceptible to full control and complete exclusion than e.g. houses and farms. Examples include:

- (1) *Tecbild v Chamberlain* (1969) 20 P&CR 633, CA. An area of rough grass and scrub, termed waste or idle land, adjacent to the squatter's property was grazed by the squatter's ponies and the squatter's six children played on it. The plot, like others in the district, was incapable of real use short of development. For 30 or so

years it had been put to no use by the paper owner. Yet a claim for adverse possession failed, absent some affirmative evidence consistent with an attempt to exclude the true owner.

- (2) *Ellett-Brown v Tallishire Ltd* (1990) 29/3, CA. A vacant strip of land 4' wide (and 470' long) beside a drive separated two properties. Possibly thousands of daffodils had been planted by the squatter on the strip. Lloyd LJ said that could not be regarded as an unequivocal act of factual possession. He said they had been planted to adorn and beautify the squatter's property. No doubt that was so, but was such use really not precisely of the very type which an owner would make of the land?

There are thus traces of a school of thought that certain so-called 'trivial' activities can never be possessory, whatever the context.

It is arguable, though, that such a view loses sight of the fact that there is no 'one size fits all'. As was said in *Pye*, in a passage (within [41]) not quoted above:

*"The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed."*

There we have it: context is everything.

This reflects the qualification which had been uttered by Cockburn LJ to his dictum mentioned earlier, namely, "but it [enclosure] is not indispensable".

It follows, I suggest, that the correct approach is much more nuanced than is sometimes suggested. Physical exclusion is important but it is not the be-all and end-all. A claim to adverse possession can succeed even without complete exclusion being proved by the squatter.

The point was acknowledged by Chadwick LJ in the little-known case of *Chapman v Godinn Properties Ltd* [2005] EWCA Civ 941. It concerned a claim to adverse possession of a strip of land which comprised two entrances to a private driveway and, between them, a roadside grass verge and bank. The claim was based on *inter alia* acts of cutting, planting, nurturing the land and sweeping leaves. It succeeded. He said:

[22] *It is not land in relation to which the owner, or the person in possession, could be expected to do more than tidy up and to maintain the two entrances.* Keeping the land tidy involves mowing the grass and cutting back the shrubs from time to time. Maintaining the entrances no doubt involves filling in the holes and some maintenance work.

He thus recognised the importance of context. Given its nature, the land had realistically been the subject of only limited activity by the squatter.

Chadwick LJ continued:

[27] We were referred to the observations of Slade LJ in *Buckinghamshire County Council v Moran*, in particular to the passage at page 642, where he said this:

“If the defendant had stopped short of placing a new lock and chain on the gate, I might perhaps have felt able to accept these submissions.”

The submissions made on that appeal were that the defendant was, in effect, doing nothing which would have indicated to the world an intention to exclude land for which the paper owner, the County Council, had no current use. On the facts of that case, it might well have been that, but for the placing of a new lock and chain on the gate, the decision would have gone the other way. *But Slade LJ did not say that that would have been the result.* As often happens on an appeal, where this court identifies a determinative fact, the court will decide the point before it on the basis of that fact; without deciding what it would have done if the fact had not been established. *The court's decision is no guide as to what would have happened if the court had been deciding the appeal on different facts* which did not include that determinative fact.

[28] *But each case must turn on its own facts. In a case of this nature, the court must ask itself what it is that would be expected of somebody in possession of land of this kind. What would such a person be expected to be doing in order to demonstrate his intention to exclude the world at large.* The judge held that these claimants, Mr and Mrs Chapman, were doing all that they could be expected to do, in relation to this land, to make their intentions unambiguously clear to the world at large ...

This passage makes clear that enclosure and total exclusion is not an inexorable prerequisite and that what matters fundamentally is how someone would ordinarily use land of the nature in question.

This brings me conveniently to the comparatively recent case of *Gayadeen v A-G of Trinidad and Tobago* [2014] UKPC 16. Being a Privy Council decision, it may perhaps not be on everyone's radar.

In brief, the facts were that a Mr and Rambaran (the first appellant's parents) had created a car park by laying down compacted gravel. They had later concreted it. They and the appellants had sought to restrict parking in the car park to customers of their business, although sometimes others used the space to park their vehicles. They asked non-customers to move their vehicles, and there was a sign on their garage doors that parking was for customers only. In evidence Mrs Gayadeen conceded that she could not speak of the control over the car park when she was at school, when she and her husband lived in Canada for a 5-year period, and at other times when she was not present. [22]

Therefore, while the appellants had undoubtedly had considerable enjoyment of the land, they had not had it completely all their way. They had certainly dealt with the land in a material way, but not alone: not being physically denied access, third parties had entered onto the land and had used it periodically for their own ends.

It follows that the appellants' control, although fairly to be regarded as substantial, was not exclusive: it did not bring about total exclusion of all-comers.

Was this nevertheless sufficient and appropriate control? Yes, it was.

The appellants won their adverse possession claim. Lord Hodge said:

The other requirement is factual possession which connotes a sufficient degree of physical control ... What constitutes an appropriate degree of physical control must depend on the circumstances. *In this case the Rambarans and the appellants would have wished members of the public to have access to their car park ... in order to provide custom to their business. There could have been no question of fencing off the car park if they were to attract such custom. They dealt with the car park as an occupying owner might have been expected to deal with it. No one who parked there temporarily without their consent dealt with the car park in that way. Such ephemeral use of part of the car park by a driver of a vehicle did not amount to factual possession and did not manifest any intention to possess.*

The decision provides welcome confirmation that:

- (1) One must always look to the realities of the position. Whereas, in the case of a dwelling, one would readily expect, and likely insist on, total exclusion of the world at large if a conclusion of due control and possession is to be reached, the same will not inevitably be so in materially different factual scenarios.
- (2) Allied to that, the mere fact that a claimant has not achieved a state of total exclusion of all others from the land is not necessarily an insuperable bar to an adverse possession claim, provided always that activities of any others on the ground are not themselves sufficient to amount to possession in their own right (for there cannot be two rival candidates in possession at the same time).

While every case will turn on its own facts, *Gayadeen* is, I suggest, a recent reminder, in line with *Chapman*, that total control and exclusivity is not always essential.

For further modern examples that it is important to have particular regard to the nature of the land in question, and that even open areas of land can be adversely possessed, one can usefully refer to:

- (1) *Greenmanor Limited v Pilford* [2012] EWCA Civ 756, a case of adverse possession of land within a compound in which the Court of Appeal stated in terms that it is not

necessary to establish that the land was completely enclosed preventing anyone from accessing the land: all that is required is to show acts that are sufficient to amount to physical custody and control, bearing in mind the nature of the land. [21 & 27]

- (2) *Dyer v Terry* [2013] EWHC 209 (Ch). A deputy Land Registry adjudicator had been entitled to hold that an adverse possession claim succeeded in respect of two areas of land. One such area was a cultivated flower bed immediately in front of a house. The other was a grassed area, in part laid to hardcore, used for parking. Both abutted a road owned by the paper owner. Despite the absence of full control, as opposed to sole enjoyment, possession was established.
- (3) *Heaney v Kirkby* [2015] UKUT 178 (UT (Tax)). A similar case where the land, a roadside verge, could not reasonably be fenced. This did not matter: fencing is only one way of exercising physical control; it need not be the only way: [40]. In that case the requisite control was demonstrated by a number of activities on the verge such as the creation of hardstanding for parking, the laying of topsoil, the planting of a flower border, looking after the lawn and shrubs. [16, 21 & 47] All in all, these amounted to use and possession as, amongst other things, a garden. [49] What is more, the claim succeeded notwithstanding that the verge had been used by others occasionally for parking, manoeuvring of cars and as a passing place. [48] It was held that this use by others, which had been argued to render the squatter's enjoyment use in common [18], did not prevent Mrs Kirkby from exercising a degree of control that was appropriate in all the circumstances. [49]

All this just goes to show that control is a nebulous concept. We can be in control, even if we are not fully so.



## **Adverse possession – a second bite at the cherry?**

The ‘new’ regime for adverse possession introduced, in relation to registered land, by the Land Registration Act 2002 is now familiar to most, having had an old-style 12 years’ limitation period to bed in.

The central features of the 2002 Act, s.96 & Sch.6 are:

- (1) Time does not run for limitation purposes in the case of registered land (except against chargees). In other words, the passage of years does not, of itself and without more, give rise to possessory title.
- (2) Rather, any claim to adverse possession remains inchoate unless and until an application is made to HMLR after a minimum of 10 years’ possession under Sch.6, para.1 in form ADV1.
- (3) If an application is made, crystallising an accrued claim, the registered proprietor recipient can not only oppose the case (i.e. challenge the underlying assertion of 10 years’ adverse possession) but can also serve a counter-notice (form NAP).
- (4) If a counter-notice is served, the application will be automatically rejected unless the applicant can meet any one of the three special conditions in Sch.6, para.5, of which the most common is that in para.5(4), the ‘reasonable belief’ in ownership of adjoining land condition (which is applicable in cases of unconscious, rather than deliberate, adverse possession).

Now suppose, for instance, that after a contested hearing following service of a counter-notice a registered proprietor has vanquished the applicant who, although having been in adverse possession of the land for 20 years, could not – because he had all along known of his trespass – pass through the Sch.6, para.5 portal. To the victor the spoils: the land remains his. The impudent attempt to claim his land has been put down.

There might though be a sting in the tail for the unwary. The same proprietor who displayed such lack of vigilance which allowed the squatter free use of his land for two decades could conceivably simply rest on his laurels after the decision in his favour and allow the squatter to remain in situ. Job done, after all. There might perhaps be some desultory without prejudice negotiations, coupled with an occasional open letter proclaiming the defeated applicant's unlawful status on the land and threatening repossession but, despite that, no real effective action (be it possession proceedings or actually reaching a concluded agreement with the squatter to regularise the occupation, thereby rendering it permissive). This would be consistent with the previous lackadaisical approach. There is no guarantee that one round of litigation necessarily makes a proprietor keen on a follow-up confrontation.

The sting, as I daresay you all know, lies in Sch.6, para.6. This provides:

(1) Where a person's application under paragraph 1 is rejected, he may make a further application to be registered as the proprietor of the estate if he is in adverse possession of the estate from the date of the application until the last day of the period of two years beginning with the date of its rejection.

There are, as ever, exceptions to this basic entitlement. In summary, a para.6 application cannot be made if there are pending possession proceedings or a judgment for possession in the last two years: para.6(2). However, in a case of continued inaction, these exceptions will not be engaged and so, if two years have passed since the rejection of the Sch.6, para.1 application with no change on the ground, the proprietor will be vulnerable to a para.6 application.

What is more, if validly made, a para.6 application will strike a fatal blow because para.7 stipulates that "if a person makes an application under paragraph 6, he is entitled to be entered in the register as the new proprietor of the estate." The previous success will count for nothing; the landowner will wave goodbye to his land.

This reflects the policy of the 2002 Act, which is that a registered proprietor who has survived a shot across the bows should take active steps to sort things out; he may not sit on his hands indefinitely.

That is probably not news to you. But what is more interesting is the precise reach of Sch.6, para.6. Recall its opening words:

*“Where a person’s application under paragraph 1 is rejected ...”*

That is the central precondition for Sch.6, para.6 to be engaged. But the wholly general statement is not much of a guide. What exactly does “rejected” mean? When is para.6 is play? Is it just in the scenario which I have described? Or could it rear its head more widely?

The only instances of “rejected” and “rejection” in the 2002 Act are those in Sch.6, para.6. So there is little to go on. That said, it is not language redolent of that encountered in the standard judicial process:

- (1) Disputed Sch.6 applications are referred by HMLR to the First-tier Tribunal, Property Chamber (formerly the Adjudicator to HMLR) pursuant to s.73(7) of the 2002 Act for determination. The Tribunal’s procedure rules (SI 2013/1169) envisage that, in the case of a substantive decision by the Tribunal, the registrar will be directed to give effect to or “*cancel*” (as the case may be) the application: r.40(2). The word “reject” does not feature in the Rules, except in r.40(3) which provides that a direction to the registrar may include a direction “to *reject* any future application of a specified kind by a named party to the proceedings”. The use of different language might suggest that: (a) rejection is something effected by HMLR

in some situations, as opposed to dismissal by the Tribunal; (b) rejection occurs upon receipt of an application.

- (2) If the Tribunal instead of deciding the matter itself directs that a party commence court proceedings (under s.110 of the 2002 Act), the resultant court process will, if the case is decided against the squatter, usually entail “dismissal” of the claim. “Reject” is not a standard CPR concept either.

Of course, it may be that “rejected” is not used as a term of art, and is simply intended to bear its ordinary English meaning of “dismissed, declined, refused” etc., shorn of any niceties of process or detail.

Nevertheless, it is at least unfortunate that the 2002 Act does not leave matters clearer. This is especially so when one bears in mind that the notion of “rejection” of applications is embodied in the Land Registration Rules 2003 (made pursuant to the 2002 Act) and therein apparently given a particular connotation – although I acknowledge caution about interpreting the Act by reference to subsequent secondary legislation.

- (1) Rule 16 lays down that if an application to HMLR is not in order the registrar may raise requisitions (r.16(1)) and if not satisfied with the applicant’s response may “cancel” the application (r.16(2)). The rule continues to provide that if an application is regarded as substantively defective, the registrar “*may reject it on delivery or he may cancel it at any time thereafter*”: r.16(3). And in a case where an application is in progress and the fees cheque later bounces, the application may be “*cancelled*”: r.16(4)
- (2) Within the Rules, it is only r.16(3) that uses the word “reject”, except for r.188 which essentially mirrors the terminology of Sch.6 to the 2003 Act and so adds nothing. In contrast, “cancel” is frequently encountered in relation to all sorts of applications and entries on the register.

The phraseology of rule 16(3) suggests, in line with what might be drawn from the Tribunal's procedural rules, that a distinction is to be drawn between rejection and cancellation, with rejection being essentially a refusal by HMLR to entertain an application *in the first place* and, by contrast, cancellation being what can happen to an application which has got off the ground and been accepted into the system but which later fails.

Yet if it be the case that “rejection” in Sch.6, para.6 means (only), or even embraces as one possibility, rejection by the registrar of a purported Sch.6, para.1 application which (per r.16(3)) is substantially defective (e.g. because the wrong form is used or the supporting evidence plainly does not disclose at least 10 years' possession), curious results follow:

- (1) If such rejection is the sole circumstance fitting the Sch.6, para.6 bill, it entails that – contrary to received wisdom – Sch.6, para.6 does not after all provide a gateway for a second application following the dismissal/cancellation of a properly grounded Sch.6, para.1 application (albeit one which could not meet any para.5 condition). That would be most surprising.
- (2) Even if such rejection is but one of several possible types of qualifying “rejection” (with “rejection” in Sch.6, para.6 not being a term of art but bearing its general meaning), it is unlikely that (in the case under discussion) the registered proprietor will ever learn of the original application – since its up-front rejection will surely mean that HMLR will never notify the proprietor of it, in which case he will receive no opportunity to take possession proceedings within the following two years and so may face an unheralded Sch.6, para.6 out of the blue to which he has no answer. That would be most unsatisfactory.

These considerations indicate that, as a matter of policy, “rejection” in Sch.6, para.6 cannot sensibly be given a meaning which is limited to, or for that matter even includes, a peremptory rejection by the registrar.

However, on what basis can this result be reached? And, even if such a purposive restriction is appropriate, quite where is the line to be drawn? What of the following candidates? Which counts for the purposes of Sch.6, para.6?

- (1) An application which is accepted by HMLR but which is subsequently cancelled for technical issues, e.g. for failure to comply with requisitions.
- (2) An application which is accepted by HMLR but thereafter cancelled because the registrar concludes (e.g. following a site survey) that there is no viable claim.
- (3) An application which is accepted and referred to the Tribunal which later directs the registrar to cancel the application because it strikes out the proceedings for procedural default: Tribunal Rules, r.9.
- (4) An application which is accepted and referred to the Tribunal which in turn directs the registrar to cancel the application because the applicant has failed to establish 10 years’ adverse possession.
- (5) An application which is accepted and referred to the Tribunal and which fails not for want of proof of adverse possession but only because of the non-satisfaction of a para.5 condition.

Once one moves away from the specific notion of “rejection” found in the Rules and the Tribunal’s procedural rules to a more general notion of dismissal at large, there is no ready means of discriminating between these possibilities: each can fairly be said to be a case of rejection. How is the choice to be made?

If all of the above scenarios fall within Sch.6, para.6, the consequence is that (as regards the first to fourth cases), a person may be eligible to apply under Sch.6, para.6 despite

only having been gone into adverse possession shortly before the date of the original application (so as to bring himself within the terms of para.6(1) which requires the para.6 applicant to have been in adverse possession “from the date of the application” onwards). One’s basic expectation that at least 12 years’ adverse possession (10 years before the Sch.6, para.1 application plus the 2 years required by Sch.6, para.6), not including the duration of the original application, is envisaged/required is thus upset.

That said, it can be argued that, since the policy of the 2002 Act is to deter proprietors from sleeping on their rights and to prevent possession and ownership being out of kilter (points made in the Law Commission’s Final Report, paras.14-53 to 14-56, before the 2002 Act was introduced), Sch.6, para.6 is rightly engaged in *any* case where the proprietor has, by whatever means, faced down an earlier para.1 application and nonetheless has done nothing to get rid of the squatter in the ensuing two years.

There is no commentary on this point in Ruoff & Roper, Registered Conveyancing. Nor do other leading texts address it. The issue was however considered, albeit briefly, in *Gill v McCarthy* [2016] UKFTT 0019 (PC).

*Gill v McCarthy* was a hard-fought adverse possession claim which saw the dispute travel at an earlier stage of its life to the High Court: *Swan Housing Association Limited v Gill* [2012] EWHC 3129 (QB). Over time no fewer than 4 applications had been submitted to HMLR.

- (1) The first was in June 2011. It was cancelled by HMLR following a site survey. [64]
- (2) The second was in March 2012. It was expressed to be rejected or cancelled (both terms were used at different times) on technical grounds by HMLR, namely that Mr Gill was a defendant in existing possession proceedings. The High Court later held that to be wrong. The proceedings were for an ASBI, not possession. [65-67]

- (3) The third was made in November 2012, hard on the heels of the High Court decision. It was expressed to be cancelled by HMLR on the basis that no claim had been made out on the facts averred in the supporting statutory declarations. [69-71]
- (4) The fourth came in February 2014 and was that before the Tribunal. [3 & 72]

The Tribunal had to decide whether, given that history, the (fourth) application was a Sch.6, para.1 application or a Sch.6, para.6 application. [73.2]

Curiously, although usually it would suit a squatter to assert that the application is a Sch.6, para.6 application (thereby sidestepping the need to fulfil a para.5 condition) and it would be best for the proprietor to bring the case within Sch.6, para.1, the arguments in *Gill* were in fact the other way round. This goes show just how topsy-turvy litigation can be at times! (There is an explanation: because of the ASBI Mr Gill had not been in possession of the land since the rejection of the third application [78].)

The argument in *Gill* was that Sch.6, para.6 prescribes a mandatory different route from Sch.6, para.1 and that, if a para.1 application is lost, any later application can only be a para.6 application. Against that it was contended that para.6 is permissive, not prohibitory; it does not preclude a series of applications under para.1. [79]

The Tribunal determined that para.6 applies in a case where the squatter makes out 10 years' adverse possession but his para.1 application fails because of an inability to satisfy one of the para.5 conditions and in consequence HMLR "formally rejects the application". In that scenario a para.6 application can be made 2 years later. [80]

It is implicit, although not express, in the decision that this is the *only* scenario in which para.6 is potentially engaged. If this be correct, it provides the answer to the conundrum posed above.



However, with respect, the reasoning is both thin and suspect.

The Judge seems to have categorised all 3 previous applications made by Mr Gill as cancelled and not rejected. [81] That may well be a correct use of the recognised terminology on the facts.

But more troubling is the Judge's statement that a para.1 application which fails for want of meeting a para.5 condition is then formally "rejected" by HMLR [80] – so leaving the door open to a future para.6 application. This, at least as it is framed, is questionable. As explained above, "rejection" appears to occur at the outset ("on delivery", to cite r.16(3)) whereas "cancellation" comes later, e.g. pursuant to a Tribunal ruling. It thus seems that the Judge elided or confused "rejection" and "cancellation" in reaching the result he did. He did not fully engage with the issue of categorisation.

Also, the decision appears to contain an internal inconsistency or difficulty. The Judge accepted the submission of counsel for Mr Gill that if HMLR rejected an application on grounds without a formal determination, e.g. for use of the wrong form or non-payment of the fee (i.e. a case of true rejection, rather than cancellation), the squatter would not have to wait 2 years to go again under para.6 but could make a renewed para.1 application.<sup>1</sup> [79 & 80] That may indeed be so: para.6 can be seen as providing an alternative to para.1, with an applicant able to choose which of two potentially available routes he wishes to take (where 2 years has elapsed since the original rejection) (although ordinarily it would be hard to imagine the para.6 course not being followed, if available). However, what is noteworthy is that the Judge did not categorise the "rejection" in the scenario postulated as anything other than just that, a rejection. That

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<sup>1</sup> Para. [79] plainly omits a "not" in the final sentence after the words "the squatter would".

being so, it is hard to see (on his briefly expressed reasoning) that he could properly conclude that para.6 is engaged *only* where a para.1 application is made and then lost on the basis of para.5. In a case of administrative rejection, the para.1 gateway may remain open but it does not follow from that alone that the para.6 gateway is inevitably closed. Rejection (for administrative reasons) was seemingly left on the table; the Judge did not explain why an administrative rejection would not suffice to bring para.6 into play.

The bottom line is that the Judge did not really or clearly engage with what is a rejection for Sch.6, para.6 purposes, beyond indicating that a cancellation does not count. Yet even this generates problems: cancellation is in fact precisely what happens when a para.1 application fails at a substantive Tribunal hearing.

So I am not sure how far the decision (which is not “authority”) really takes us.

My view is that the result is correct but it would be better to base it on the reference in Sch.6, para.6 to a rejected “application under paragraph 1” meaning (construed purposively) only an application which is:

- (a) Validly made.
- (b) Referred to the Tribunal.
- (c) Substantively determined on the merits against the applicant.
- (d) So determined on the basis that, while the applicant could demonstrate 10 years’ adverse possession, the claim fails for non-satisfaction of a para.5 condition.

To my mind, there is a respectable argument that only an application which is competently made and processed all the way through to a decision which upholds the squatter’s claimed 10 years’ adverse possession qualifies as an “application under paragraph 1”. An application in a case where, for instance, the squatter had only been in adverse possession for say 3 years, would not fit the bill. The fundamental qualifying

condition in para.1(1) would not have been met: cf *Baxter v Mannion* [2011] EWCA Civ 120.

If accepted, this analysis avoids the quirks (outlined above) of treating any other forms of “rejection” (in the broadest sense) as Sch.6, para.6 potential triggers.

But you may think differently. And that is the beauty of the law. It is uncertain. And dealing in uncertainty is a litigator’s business. So let us be thankful – at least sometimes – that doubt reigns supreme.

## Easements – apparently?

*Wood v Waddington* [2015] EWCA Civ 538 is an important recent case on easements, particularly in relation to section 62 of the Law of Property Act 1925.

The decision of the Court of Appeal may be not over-heavy on brand new content and learning (although it certainly covers some points of significance) but nonetheless it provides an authoritative, detailed and reasoned review in relation to s.62. It is rare to find so much guidance on so many issues in what is (in modern terms) a condensed judgment (84 paragraphs over 23 pages).

Section 62, you will no doubt be aware, provides:

A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

The great thing about the judgment in *Wood v Waddington* is that it is quite easy to distil a number of easily digestible, bite-sized propositions. They are as follows:

- (1) Where it does operate, section 62 does so by way of express, not implied, grant. [36] & [60]
- (2) Section 62 only applies to advantages etc. “enjoyed with” the land in question at the time of the conveyance (which includes a reasonable period before). [25]
- (3) Diversity of occupation between the would-be dominant and servient tenements helps to distinguish between cases where a common owner is simply making use of

his entire holding as he wishes, and cases where a particular use can be seen as in the nature of an easement (or quasi-easement) enjoyed for the benefit of a particular parcel of the entirety. [25]

- (4) Most cases involving s.62 are where there has been prior diversity of occupation but s.62 can operate even where there has been no such diversity. [25-26] & [35].
- (5) In such a situation, it is necessary to establish that the rights have been “continuous and apparent” in the sense described in *Wheeldon v Burrows* (1879) LR 12 Ch D 31, CA. [35]
- (6) In its strict meaning, a “continuous” easement is one which is enjoyed passively, without any human involvement. [15] Examples are rights to light, rights of support, rights of drainage. [15 & 17]
- (7) A right of way is not a continuous easement. [15] This is because such a right is a right to use the way, not the way itself, and the use of a way (as opposed to the way itself) is, by nature, not continuous (in the sense of constant and uninterrupted); it is enjoyed time from time. [18] & [21]
- (8) However, the word “continuous” is effectively surplusage in the context of the rule in *Wheeldon v Burrows*, and a right of way can be “continuous and apparent” for the purposes of the rule. [15]
- (9) The quality of being “apparent” requires just that. The best example is a made up road. [15] However, a “made” road or “beaten track” is not essential. [33 & 34] All that is required is that there are “sufficient visible signs on the ground for the claimed route to have been continuous and apparent” in the *Wheeldon v Burrows* sense, i.e. to demonstrate that it was enjoyed with the relevant land. [32], [48] & [57]

- (10) Of itself, a claimed right being “continuous and apparent” (one might say ‘or’) is a necessary but not sufficient condition for section 62 to apply. As noted in (2), the right must have been actually “enjoyed with” the land in question within a reasonable period before the date of the conveyance. If there has been no such use, section 62 cannot operate to create an easement. [52]
- (11) However, the extent of use sufficient to trigger section 62 is not great. Use just once a month is both apparent and a regular pattern of use, enough to count as “enjoyment” for the purposes of the statute. [53-55]
- (12) If a quasi-easement is “enjoyed with” the land conveyed, there is no additional requirement that the easement be necessary for the reasonable enjoyment of the land. This means that section 62 is wider (more generous to a claimant) than the rule in *Wheeldon v Burrows*. [36] & [83]
- (13) In a claim based on section 62 (and the same goes for prescriptive claims) a possible issue may arise if there is not a match, or symmetry, between the right claimed and the nature of the rights (i.e. the manner of use had and enjoyed at the relevant time) which is proved on the facts. [69] Pedestrian use only will not confer a vehicular right. However, the greater will include the less. So proof of motor vehicular use will give rise to a right which confers an entitlement also to use on foot, on horseback or on pedal cycles. It will not though admit of the driving of animals. [78]
- (14) Where section 62 is engaged, the conveyance is treated as expressly including the grant of rights enjoyed at the date of the conveyance. This does not of itself limit the right to use for the type of purpose which the use proved actually served, e.g. domestic use. The limit, as noted in (13), is only on the manner of use (on foot

etc.). Thus the mere fact that use changes from e.g. domestic to commercial does not without more constitute use in excess of the grant. This is because (drawing on cases of implied and prescriptive grants) the grant is taken to be the grant of a right for all purposes according to the ordinary and reasonable use to which the dominant tenement might be put at the time of the grant. [79]

- (15) Allied to this, the test for whether a servient owner is entitled to object to use for an altered purpose is that which is applicable in cases of implied and prescriptive easements, i.e. that laid down in *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214. [79] It is only if the dominant land has undergone a radical change in character or identity (as opposed to mere change or intensification of the use) *and* if such changed use would result in a substantial increase or alteration in the burden on the servient land that objection may be sustained. [80] (Thus a change from riding horses for pleasure to riding in conjunction with a livery business was held to be no more than an intensification of use and as such unobjectionable. [81])

- (16) Although section 62 can be excluded by contrary intention (s.62(4)), clear words are required to do so and the express grant in a conveyance of a limited right will not exclude the operation of section 62 to confer a greater right. The *expressio unius exclusio alterius* canon of construction has no role in relation to section 62. Any rebuttal must be express. [62] & [67]

Of the myriad matters covered by *Wood v Waddington* I suggest that the following are the most significant:

- (1) The confirmation that section 62 can apply in cases of continuous and apparent easements even where there has been no prior diversity of occupation. The issue has been contested since *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144, HL. The notion that diversity of occupation is not a

precondition stemmed from *Platt Ltd v Crouch* [2003] EWCA Civ 1110 and was reiterated in *Alford v Broadribb & Hannaford* [2011] EWCA Civ 1099 but the first of those cases was seen as controversial and the remarks in the second were strictly *obiter*. The *ratio* of *Wood v Waddington* seems to put the matter firmly to bed.

- (2) The fact that there is no additional requirement of necessity in relation to section 62 rights. This is likely to mean that there will be no need to resort to the rule in *Wheeldon v Burrows* in most cases involving conveyances. Indeed, *Wood v Waddington* itself presents a good example of a case where there was success under section 62 but where a *Wheeldon v Burrows* claim would probably have failed because the claimed rights were not necessary for the reasonable enjoyment of the land. [83] The standard focus of attention in easement cases now shifts to putting section 62 at the forefront of any analysis. *Wheeldon v Burrow* is relegated and perhaps something of a dead letter.
- (3) The confirmation that for a right to be “apparent” all that is needed is sufficient signs on the ground, indicating that the right is enjoyed with the land before the conveyance. There is no great magic so far as this requirement is concerned. Those buying properties should be astute to ascertain the position on the ground at the time. It may be noted that ‘tell-tale’ signs may include such easily overlooked features as wheel ruts and potholes. [47] Indeed, reasonable inferences as to the route which traffic must have taken may also be drawn. [*ibid.*] A measure of common sense and reality is to be brought to bear in the analysis.
- (4) The determination that the right being “apparent” is necessary but not enough. The right must have been actually used. Therefore, a right cannot arise under s.62 in favour of a new built house on a private estate. [29(iii)] & [52] In other cases, purchasers should seek to amass the appropriate evidential foundation. Their task is



made easier by the fact that the degree of historic use that needs to be proven is pretty limited; occasional use will suffice.

- (5) The confirmation that section 62 is a very much a limpet on conveyances. It can offer a purchaser considerable advantages beyond those appearing on the face of the documentation. It bites unless distinctly excluded. It will not be displaced except in the clearest of terms. Such is the strength of its bond that even a conveyance which specifically grants particular rights in detailed terms, where those rights are markedly narrower than those which would be created by section 62, will not be regarded as inconsistent with, and ousting, section 62. [61] & [66] That was the case in *Wood v Waddington* itself. Section 62 will apply regardless, even though this can be thought to run against the parties' intentions: why bother to agree a circumscribed right when there is to be read into the very conveyance a much wider right which renders the limited right essentially irrelevant? Section 62 is thus a potential trap for transferors. The opportunity to limit its reach was available to the Court of Appeal but it certainly was not taken; on the contrary, a green light was given to its general application.

The moral of all this is: section 62 is a very powerful tool; if you wish to blunt it, do so in unequivocal terms. Otherwise, someone may get more than you bargained for.

## Options to renew – 1922 and all that

It is not only recent cases that merit discussion. Indeed, often topical points are the easiest for practitioners since they are not easily overlooked. Take the break clause case of *Marks and Spencer plc v BNP Paribas Securities Services* [2015] UKSC 72 which concerned whether a term should be implied into a lease that the tenant would be entitled to a refund of rent paid quarterly in advance if it exercised the option to determine (answer: no), and in the process considered whether rent payable in advance is apportionable by time (answer: no) and whether words such as “paid yearly and proportionately for any part of a year by equal quarterly instalments” count for much (answer, in the context of a conditional mid-quarter break at least, again no, or not really).

With the large number of cases on the point running up to *M&S* (think *Quirkco Investments Limited v Aspray Transport Limited* [2011] EWHC 3060 (Ch); *PCE Investors Limited v Cancer Research UK* [2012] EWHC 884 (Ch); *Canonical UK Limited v TST Millbank LLC* [2012] EWHC 3710 (Ch)) and the attendant publicity in the legal media, I doubt that anyone in the business can have been unaware of the issue. No doubt leases for the several years now have been negotiated and drafted with the point firmly in mind. So I am not going to talk about *M&S*. I’m sure you’ve heard all about it already.

Sometimes it is those obscure, long-forgotten matters which come and bite or, depending on your perspective, come as a windfall from the gods.

I propose to deal with a couple of those.

The issues concern options to renew leases. Two points merit attention.

Martin Dray

An example sets the scene.

A 25 year lease contains an option to renew for a like term. The option, if exercised, stipulates that the renewal lease will be granted within, say, 28 days. It will be granted at a premium or at a rent. The option is clearly drafted as a one-off option.

Now the final point entails that the original lease is not perpetually renewable and thus is not converted by LPA 1922, Sch.15 into a lease for a 2,000 year term. That particular elephant trap has been avoided. All well and good? Well, not necessarily.

The point concerns the window within which the option must be exercised. No doubt it will be confined to the term of the existing lease: the tenant must elect to renew, if it so desires, before the lease has come to an end – in order to avoid any hiatus and uncertain transition period. Therefore, it is likely that the drafter will stipulate that notice of exercise must be given not less than x months before the term date.

What, though, may well not be so obvious is the need to provide for the *earliest* point in time that the option may be claimed. In practice it will frequently be that the choice to call for a renewal will be made as the lease expiry approaches but that may not always be the case. The original tenant or an assignee of the lease may decide shortly after the grant that it wishes to avoid any possibility of inadvertently omitting to exercise the option down the line and so may make the claim early on, thereby crystallising its entitlement to a new lease.

Here a potential problem lies. If the drafter has not provided for the earliest (as opposed to latest) time for exercise of the option to renew, that course of action may fall foul of the Law of Property Act 1925, s.149(3).

This reads:

*A term, at a rent or granted in consideration of a fine, limited after the commencement of this Act to take effect more than twenty-one years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void ...*

You see the problem? Immediately on exercise, an option to renew gives rise to a bilateral contract for the grant of the renewal lease. In the scenario under consideration, the relevant contract will be a contract at, say, year 1 to grant a new lease the term of which will run from year 26 through to year 50. It will therefore be an agreement to create a term take effect more than 21 years in the future.

That contract will thus fall foul of s.149(3) and its prohibition on both (i) the grant of reversionary leases where the term starts more than 21 years from the date of the lease and (ii) contracts for such grants.

Does this matter? Indeed, it may:

- (1) It is possible that, having taken the (void) grant of the renewal lease and so ‘banked’ the option, the tenant may not discover the sorry truth until years later (perhaps at the expiry of the original lease), when it is too late to do anything about it. That said, given the requirement to register the renewal lease (Land Registration Act 2002, s.29(2)(b)(ii)), it is fairly likely that HMLR will point out the defect when it is presented for registration.
- (2) Even if the flaw is drawn to the parties’ attention, it is at least debatable whether, if an option has been validly exercised (albeit in circumstances where the resultant contract is void), the same option can subsequently be re-exercised at a time when it will produce an efficacious result. I incline to think that it probably can – but there is no authority on the point.

Therefore, one would wish to avoid any risk of engaging the troublesome s.149(3) in the first place. Consequently, any option of the nature described should be limited so that it may not be exercised until within the last 21 years of the original term. That should get round s.149(3) easily and neatly. But the point (and remedy) can be, and (as I said above) has been, overlooked on occasions.

Now let us proceed on the basis that all those concerned are well up to speed with s.149(3). After all, everyone knows each and every bit of the 1925 Act don't they? Having dodged one bullet, surely we're safe? Well, maybe as regards the above example. But what if we slightly change the facts?

The scenario is exactly as before – except that this time the lease (and in turn the renewal lease) is for 75 years and the option to renew is exercisable only in, say, years 74 & 75 of the term (meeting the s.149(3) point).

All is fine surely? Sorry, but no. Don't shoot the messenger.

This time the culprit is the Law of Property Act 1922, Sch.15. You remember that: paragraph 5 deals with perpetually renewable leases. Unfortunately, although Sch.15 makes for good bedtime reading for insomniacs, some may not get past paragraph 5. That would be unfortunate. For present purposes the irksome provision is paragraph 7. Headed "Future contracts for renewal ...", it reads:

- (1) Any contract entered into after the commencement of this Act, for the grant of a lease, ... with a covenant or obligation for perpetual renewal shall (subject to the express provisions of this Part of this Act) operate as an agreement for a demise for a term of two thousand years ...

This is all a bit familiar, isn't it? I can feel my eyelids closing... But continuing with this page-turner, we come across the following:

- (2) *Any contract entered into after such commencement for the renewal of a lease or underlease for a term exceeding sixty years from the termination of the lease or underlease, and whether or not contained in the lease or underlease, shall (subject to the express provisions of this Part of this Act) be void.*

Hang on a minute: doesn't that say something about not being able to get more than an extra 60 years? Well, yes it does. An option to renew a lease which would see the grant of a new term extending more than 60 years beyond the term date of the original lease is void. Strictly speaking, it is probably the contract resulting from the exercise of the option which is void. But in practical terms that is a distinction without a difference.

So, going back to the example, it is impossible to bolt-on a straight 75 year addition to an initial 75 years. It can't be done.

Now at this point I readily confess that I cannot fathom what Parliament was trying to achieve when it enacted paragraph 7(2). Wolstenholme and Cherry's *Conveyancing Statutes* 13th ed., 1972, contains the following note (@ p.15):

The object of preventing the grant of perpetually renewable leases could, in effect, have been defeated unless a limit had been imposed to the length of the term to be granted by way of a renewal. ...

It may be just me, but I consider that the reasoning does not stack up. Paragraph 7(2) is aimed at *single* renewals, not *perpetual* renewals (which are catered for by para.7(1)): Megarry & Wade, *The Law of Real Property*, 8th ed., 2012, para.17-124. A *single* lease renewal, whatever the length of the original or renewed lease, is not, and could never amount to, a perpetually renewable lease: the (renewed) lease is of finite duration: it will definitely end at some point in time. It is thus difficult to see why allowing a single lease renewal of any length – the very nature of which entails that the maximum overall

duration of the (combined) leases is ascertainable from the outset) – would offend against the object of preventing perpetually renewable leases.

Furthermore, why a period of 60 years was chosen by Parliament is also unclear. Consistency with the effect of paragraph 7(1) (conversion of perpetually renewable leases into 2,000 year terms) might, one would have thought, have permitted a renewal of an original terms up to 1,000 years, i.e. 2,000 years in total. However, in paragraph 7(2) the 60 year period was selected. Apparently, to quote the heading in Megarry & Wade, it's all about preventing "*over-lengthy renewals*", whatever they are.

Anyway, the result is as follows:

- (1) I can grant you a perpetually renewable lease. You get a 2,000 year lease.
- (2) I can grant you a million year lease. You get a million year lease. After all, there is no limit to the length a lease can be granted for.
- (3) Likewise, I can grant you a 150 year lease.
- (4) But if I grant you a 75 year lease with a *single* option to take a straight further 75 years, making the same 150 years in total, you get only the initial 75 years. The rest is a waste of ink.

Para.7(2) has been criticised as unnecessary, absurd and a destroyer of bargains: [2010] Landlord and Tenant Review 165: *In Perpetuity?* (Emma Slessenger). I agree. But there it is. It remains on the statute book. We must cope with it as best we can.

Is there any way round this limitation and outright interference with freedom of contract? Perhaps. Three routes in particular are worthy of consideration.

The first is using not a single renewal but a limited series of successive renewals, each for no more than 60 years, up to the intended aggregated maximum duration. If one

could competently put in place 3 renewals, each of 25 years, the basic result (an extra 75 years) would be achieved, albeit in tranches rather than one go.

Support for that strategy is to be found in Barnsley's *Land Options*, 5<sup>th</sup> ed., 2009, para.7-015. In a piece of shameless advertising, I advise that whether that part of the text will survive into the 6<sup>th</sup> edition – available later this year at all good legal booksellers – will be revealed to those who are savvy enough to buy the book.

Anyway, the argument in the current edition is:

This provision [i.e. paragraph.7(2)] is not to be construed as authorising one renewal only for a period of up to 60 years. The words “from the termination of the lease” refer not to the original lease conferring the original option, but to the actual lease on the expiration of which the new term is to commence. So it is permissible for a landlord to grant a lease for 99 years and an option to renew for a further 60 years, with a provision (suitably worded) that the renewed lease is to contain another (but final) option for a second period of 60 years. This gives the tenant and his successors a right to renew for a maximum period of 120 years, exercisable in two stages, but neither option amounts to a covenant for a term exceeding 60 years from the termination of the immediately preceding lease.

This *may* be right; it is plainly arguable. But to my mind it is far from assured of success. It rests on a rather narrow (and not necessarily the most natural) reading of the words “*from the termination of the lease*” in paragraph 7(2). The premise is that such phrase can and must refer only to the current lease which is immediately being renewed (as opposed to the original lease containing the original option). I do not think that such a construction must inevitably prevail. To my mind, it is perfectly fair to take the expiry of original lease as the governing reference point.

My view is, I believe, supported by the context. Given the apparent statutory intention (insofar as one can make head or tail of it) to preclude over-lengthy renewals, it is not difficult to conclude that the Parliamentary intention is: you may, by renewal, have a further 60 years (all in), but no more.

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That being so, my view is that on a purposive reading of paragraph 7(2) it is readily conceivable that a sequence of consecutive renewals (each piggy-backing on the other) would be regarded as a composite whole (bearing in mind that the entire series would have to be foreshadowed in the terms of the original option in the initial lease) and as, in substance, a contract for the renewal of a lease for a term exceeding 60 years (judged from the termination of the original lease), irrespective of the fact that each individual renewal might be for less than that. There is, in my opinion, a risk that the court would decline to allow form to triumph over substance and to permit through the back door (75 extra years in 25 year increments) that which is undoubtedly denied via the front door (75 extra years in one fell swoop).

Further, if one focuses on a literal interpretation, it must be remembered that by section 6 of the Interpretation Act 1978, in any Act, unless the contrary intention appears, words in the singular include the plural. Hence it may be possible to read para.7(2) in the 1922 Act, Sch.15 as follows:

Any contract [or contracts] ... for the renewal [or renewals] of a lease for a term [or terms] exceeding [I interpose: in total] sixty years from the termination of the lease ... shall be void.

So construed, the legislation can be said to preclude successive renewals just as much, and in the same way, as a single renewal. On this reading what matters is not the number of renewals and not whether any individual renewal is itself for more than 60 years (although, plainly, if that were so, the result would be invalidity) but rather the end result: whether the outcome of the entire renewal process is a term extending more than 60 years after the termination of the initial lease.

To sum up: as I see it, it is very much a moot point whether paragraph 7(2) permits a series of renewals going beyond 60 years in aggregate. That device is untried and untested. Good luck if you choose to give it a go...

The second possible escape from paragraph 7(2) is also untried and untested. But it certainly merits a mention. It concerns the use of an option to extend, rather than an option to renew.

An option to extend is, in my experience, not commonly encountered. Although similar to an option to renew it is subtly different. An option to renew gives rise to a fresh lease. In contrast, an option to extend enlarges the existing term *without any fresh grant*; it keeps the old term in being. See e.g. Barnsley's *Land Options*, para.7-006 & *Baker v Merckel* [1960] 1 QB 657, CA.

In *Baker v Merckel* a lease was granted for 7 years. After 2 years the landlord and original tenant agreed by a supplemental deed that if within the 7 years the tenant gave notice the lease would be read and take effect as if granted for 11 years. The lease was later assigned. The option was then validly exercised in year 7. In year 11 the assignee failed to pay the rent and perform the covenants. The landlord sued the original tenant, relying on privity of contract. This was long before the Landlord and Tenant (Covenants) Act 1995.

The case turned on the effect of the arrangement. Did the exercise of the option in year 7 create a new lease and so work a surrender of the old lease (as the original tenant contended)? If it did, he would not be liable for the defaults of the assignee.

The Court of Appeal sided with the landlord. It held that the supplemental deed supplanted the original lease with a new lease (i.e. worked a surrender and re-grant) at

the date it was entered, i.e. in year 2 of the original lease. The new lease so created was for a term of 7 years with an option for a further four years, i.e. for 7 years or, on the happening of a specified event, for 11 years. What is more, and this is key, when the option was subsequently exercised, there was no new lease at that point: all that occurred was that the exercise of the option had a retrospective effect and caused the lease to be read and construed as though it had always been a lease for 11 years. Hence the original tenant was liable.

In the light of the fundamental conceptual distinction between an option to renew (which results in a fresh lease) and an option to extend (which does not), it is well arguable that use of an option to extend could circumvent paragraph 7(2). Not only does paragraph 7(2) refer to “renewal” (not “extension”), but also it speaks of “a term” (which naturally connotes a new, freestanding term of years) and, what is more, it speaks of that term being more than 60 years “from the termination of the lease”. As to this last point, where one is dealing with an option to renew, the renewed lease will indeed follow the former lease (as envisaged in the statute) but in relation to an option to extend, the extension will not come after the termination of the lease, for the original demise is enlarged without ever coming to an end. There are not two leases, one following the other; there is only ever just one.

It is thus possible that use of an option to extend may circumvent paragraph 7(2). However, there is no guarantee. Judicial scrutiny has never been brought to bear on the scheme and a broad interpretation of the mischief against which paragraph 7(2) was directed could lead to the conclusion that to distinguish between options to renew and extend in this context is artificial and inappropriate.

That leaves the third workaround. It is simple and (as regards the 1922 Act) the good news is that it is safe. But it does not and cannot bring about total equivalence with the intended (but precluded) grant of a 75 year lease with a 75 year renewal option.

The ‘solution’ is simply to grant a lease for not a 75 year term but a 150 year term and to include a break option coincident with what would (in the case of a 75 + 75 year structure) be the renewal point, namely midway through the term. This would broadly mirror what the parties were trying to achieve through a renewal process.

However, the fit is not perfect. There is no getting away from the fact that a 150 year lease with a break option is not the same thing as a 75 year renewable lease. It is a different interest. It is possible that the tenant might overlook the break and so find itself locked into a lease for a longer period than desired – whereas in the renewal scheme its risk would be the opposite, namely the loss of the additional 75 years through a failure to exercise the option to renew. The approximation is just that: an approximation. Additionally, there may perhaps be different tax consequences between the two schemes. That said, this course is sound so far as the 1922 Act is concerned.

As you will now have appreciated, the bottom line is that the 1922 Act needlessly ties one’s hands. No solution can be 100%. But forewarned is forearmed – and I hope you are now both.

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