CASE LAW KALEIDOSCOPE

by

Nicholas Dowding QC
Falcon Chambers

Nicholas Dowding QC practises at Falcon Chambers, specialising in the law of landlord and tenant, and he is regarded as one of the ablest and most sought-after silks in this field. He won the Chambers Bar Award for Real Estate Silk of the Year in 2005 and again in 2009. Somerfield Stores v Spring (Sutton Coldfield) [2010] EWHC 2084 (Ch) [2010] 47 EG 142, London Tara Hotel v Kensington Close Hotel [2010] EWHC 2749 (Ch), Crest Nicholson (Londinium) v Akaria Investments [2010] EWCA Civ 1331, The Bridgwater Canal Co v Geo Networks [2010] EWCA Civ 2048 and Daejan Investments v Benson [2011] EWCA Civ 38 are five of the most recent of his many notable cases. He is a past editor of the *Handbook of Rent Review*, a current editor of *Woodfall on Landlord & Tenant* and the General Editor of *The Landlord & Tenant Reports*. He is the joint author of *Dilapidations – The Modern Law and Practice (4th edition 2008).* He is an Honorary Member of the Royal Institution of Chartered Surveyors and a corresponding member of RICS Dilapidations Practice Panel.

FALCON CHAMBERS

Falcon Court
London EC4Y 1AA

Tel: 020 7353 2484
Fax: 020 7353 1261
Email: dowding@falcon-chambers.com

My brief this year (as in previous years) is to pick the top ten or so property law cases decided in the previous twelve months. As always, the task of selecting them has not been an easy one. The last year has seen a large number of significant cases in different areas of property law, and I have had to omit many decisions of importance that I would otherwise have included had time permitted. Nonetheless, I have done my best to choose a selection of cases which seem to me to be of general interest. I have not included any dilapidations cases given that these have been dealt with in an earlier paper this afternoon.

Agreement for lease

Mexfield Housing Co-Operative v Berrisford [2010] EWCA Civ 811 [2010] 2 E.G.L.R. 137

In 1993 Mexfield and Ms Berrisford entered into an "occupancy agreement" under which Mexfield "let" and Ms Berrisford "took" a property in Barnet at a "rent" of £89 per week (adjustable each year in the light of inflation) from 13 December 1993 "and thereafter from month to month until determined as provided in this Agreement". By clause 6 Mexfield could determine the agreement only in certain specified circumstances, which included the rent being unpaid for 21 days after becoming due.

The primary issue on the appeal concerned the effect of the contractual restriction on termination. Mexfield argued that (i) on its proper construction, the occupancy agreement (which gave Ms Berrisford exclusive possession of a defined property at a periodic rent) was a lease and not a contractual licence: (ii) but the effect of clause 6 was that the term of the lease was uncertain; (iii) therefore, following the decision of the House of Lords in Prudential Assurance Co. v London Residuary Body [1992] A.C. 86, the lease purportedly created by the agreement was void; and (iv) in its place there was to be implied (by the periodic payment of rent) a monthly periodic tenancy, which Mexfield was entitled to determine by notice to quit irrespective of whether any of the circumstances in clause 6 existed.

It was argued on behalf of Ms Berrisford that (i) the occupancy agreement had two aspects: it was a contract by which Mexfield agreed that Ms Berrisford should have exclusive occupancy of the premises at a rent and subject to clause 6; and it gave her some kind of interest or right concerning the occupation of the premises which was enforceable by equitable remedy; (ii) whatever might be the position regarding the grant of the interest, the *contract* and its terms could not be impugned; (iii) the courts exercising their equitable jurisdiction would enforce the contract by injunction if necessary, although the modern remedy would be a declaration of Ms Berrisford's right to retain possession on the basis of the contract; (iv) alternatively, the occupancy agreement on its true construction was a contractual licence not a tenancy.

The Court of Appeal by a majority (Mummery and Aikens LJJ, Wilson LJ dissenting) found in favour of Mexfield. Where a contract that purports to grant a lease fails to grant one because the term of the lease is uncertain, such contract cannot survive independently of the failed lease so as to be enforceable as between the original parties. The cases did not support the proposition that equity would specifically enforce a contract which purported to grant a lease for an uncertain term. In the absence of particular circumstances affecting conscience (such as facts that would support the existence of a trust or estoppel) which would engage equity's role of preventing insistence on the inequitable use of legal rights, equity would follow the law. Nor could the occupancy agreement be construed as taking effect as a contractual licence. The intention was to create a tenancy and nothing else. If it was bad as a tenancy, there was no justification for treating the contract as something different from what the parties intended.

Note 1: Both Mummery and Aikens LJJ clearly thought the result unsatisfactory but regarded themselves as driven to it by the current state of the law. The former concluded his judgment as follows:

> "I must add that I do not reach this conclusion with enthusiasm. It is clear what the parties intended to contract and it is equally clear that because of the old rule about "uncertainty of term" in a lease the parties' contractual intentions cannot be fulfilled in this case. As Mr David Neuberger QC (as he then was) argued in Prudential: "It is undesirable that parties should not be bound by bargains they had freely entered into. In the general law of contract there is no reason why an agreement cannot be of an indefinite duration or perpetual": see p388G of the

> report. The law has held for centuries that this cannot be done with tenancy agreements. It is time that this rule was re–examined by parliament."

Note 2: An appeal to the Supreme Court is pending.

Assignment

K/S Victoria Street v House of Fraser (Stores Management) [2010] EWHC 3006 (Ch) and [2010] EWHC 3344 (Ch)

An agreement for a sale and leaseback provided for Beatties Department Store in Wolverhampton to be sold by House of Fraser (Stores Management) ("Stores Management") to K/S Victoria Street ("K") and leased back to Stores Management with its parent company (House of Fraser Plc ("PLC")) acting as surety. Another company in the House of Fraser Group ("Stores") was also a party to the agreement. At the time of the agreement, Stores Management was a worthless shelf company, but Stores and PLC were both in good financial shape.

Clause 3.5 of the agreement provided as follows:

> "[Stores Management] agrees to assign the Lease to an assignee (being a Group Company of [PLC] being of equal or greater covenant strength to James Beattie Limited and if a company is not chosen by 20 April 2006 then the assignee shall be Stores and Stores agrees to take that assignment) by no later than 26 April 2006 and [PLC] agrees to enter into a deed of guarantee of that assignee's liability as Surety in the form set out in Schedule 3 of the Lease"

Clause 3.15 of the lease contained a number of restrictions on assignment. These included (i) an obligation not to assign unless either the tenant demonstrated that the assignee's net profits for the preceding three years were greater than three times the principal yearly rent, or it entered into an AGA with the landlord and any surety guaranteed its obligations under such AGA, and (ii) a further obligation not to assign to a group company unless such company was of the same or better financial standing than the tenant or had offered a guarantor or guarantors which when considered with the group company were of the same or better financial standing than the tenant and surety taken together.

Clause 3.15(F) provided:

> "Notwithstanding the provisions of this clause where the Tenant is [Stores Management] or any other Group Company of [PLC] consent shall not be required to an assignment of the whole to another Group Company of [PLC] provided [PLC] acts as surety to the assignee Group Company."

No other assignee company was chosen by 26 April 2006. Stores Management therefore became obliged to assign to Stores. The effect of the credit crunch was that PLC was no longer a valuable company but Stores' covenant remained valuable.

K sought specific performance of clause 3.5 of the agreement against Stores Management, Stores and PLC.

The first hearing concerned (among other things) whether PLC's obligation under clause 3.5 of the agreement to guarantee Stores' obligations was void by virtue of s. 25 of the Landlord and Tenant (Covenants) Act 1995. The judge (Mr John Randall QC, sitting as a deputy High Court judge) held, following Good Harvest Partnership v Centaur Services [2010] EWHC 330 (Ch)) that it was. However, he went on to hold that this did not render void the entirety of clause 3.5, because the requirement to provide a guarantee could be severed, leaving the remainder intact.

The second hearing related to the proper construction of the alienation covenant in the lease. The defendants contended that specific performance would be pointless because Stores could and would immediately reassign the lease back to Stores Management.

K contended that the provisions of clause 3.15 were cumulative, so that a reassignment would still have to comply with the other provisions of that clause if it were to be lawful. It would be unlawful because (among other things) it would not be an assignment to a company with equal financial standing even when coupled with PLC's guarantee. The defendants argued that clause 3.15(F) was the only provision which had to be fulfilled to make the assignment lawful. There were no additional requirements. Clause 3.15(F) was to be construed as a standalone provision which provided a discrete regime for House of Fraser companies, and that regime was unaffected by the remainder of clause 3.15.

Mann J found in favour of K. On the proper construction of the lease, an assignment to a group company was not exempted from the remaining requirements of clause 3.15. In the context of the lease alone, neither construction produced a result which was clearly more commercially sensible or rational than the other. There was therefore no reason to depart from the proper meaning of the words used, which was that "consent" in clause 3.15(F) meant "consent" and did not mean that "the foregoing restrictions on assignment shall not apply". But if there was any doubt about that, the purpose of clause 3.5 of the agreement was to ensure that the lease ended up in the hands of a financially sound tenant. A construction which enabled the lease, at the whim of the House of Fraser group, to end up back with Stores Management as long as PLC guaranteed it was contrary to that purpose and would effectively neuter clause 3.5.

Note: In directing himself as to the applicable principles, Mann J quoted the following passage from the judgment of Neuberger LJ in Skanska Rashleigh Weatherfoil v Somerfield Stores [2006] EWCA Civ 1732 which is worth recalling on the general issue of the correct approach to construction:

> "21. As already mentioned, the interpretation of the provision in the commercial contract is not to be assessed purely by reference to the words the parties have used within the four corners of the contract, but must be construed also by reference to the factual circumstances of commercial common sense. However, it seems to me right to emphasise that the surrounding circumstances and commercial common sense do not represent a licence to the court to re–write a contract merely because its terms seem somewhat unexpected, a little unreasonable, or not commercially very wise. The contract will contain the words which the parties have chosen to use in order to identify their contractual rights and obligations. At least between them, they have control over the words they use and what they agree, and in that respect the words of the written contract are different from the surrounding circumstances or commercial common sense which the parties cannot control, at least to the same extent.
>
> 22. Particularly in these circumstances, it seems to me that the court must be careful before departing from the natural meaning of the provision in the contract merely because it may conflict with its notions of commercial common sense of what the parties may must or should have thought or intended. Judges are not always the most commercially–minded, let alone the most commercially experienced, of people, and should, I think, avoid arrogating to themselves overconfidently the role of arbiter of commercial reasonableness or likelihood. Of course, in many cases, the commercial common sense of a particular interpretation, either because of the peculiar circumstances of the case or because of more general considerations, is clear. Furthermore, sometimes it is plainly justified to depart from the primary meaning of words and given them what might, on the face of it, appear to be a strained meaning, for instance

> where the primary meaning of the words leads to a plainly ridiculous or unreasonable result."

Service charges

Daejan Investments v Benson [2011] EWCA Civ 38

The effect of section 20 of the Landlord and Tenant Act 1985 is that the liability of residential tenants to contribute to qualifying works is limited to £250 each unless the requirements of the Service Charges (Consultation Requirements) (England) Regulations 2003 have been either complied with in relation to the works or dispensed with by or an appeal from an LVT. Section 20ZA(1) empowers the LVT to dispense with all or any of the requirements if satisfied that it is reasonable to do so.

The landlord of a block of flats carried out major works. Five lessees (whose service charge contributions between them totaled £270,000) contested liability on the ground that the landlord had failed to comply with the consultation requirements. The landlord had served a valid stage 1 notice of intention to carry out qualifying works but had then made various errors in relation to its stage 2 notice. Firstly, the notice did not contain a summary of the observations made by the tenants in response to the stage 1 notice. Secondly, the notice failed in terms to specify the place and hours at which the estimates could be inspected. Thirdly, the notice did not in terms invite the making of written observations. Fourthly, although the notice stated that subject to any observations that might be received, the landlord intended to instruct a named contractor to proceed with the works but that such instructions would not be given before 31st August 2006, the landlord stated at a pre-trial review hearing on 8th August 2006 that the contractor had already been awarded the contract. The LVT concluded that as a result, the consultation process was for all practical purposes curtailed; that the lessees had reasonably concluded that further representations were futile; and that as a result, the landlord did not have regard to observations in respect of the estimates which the lessees may have made had they had the opportunity to do so. It refused to dispense with the requirements.

The landlord appealed to the Lands Tribunal, which likewise refused to grant dispensation. The landlord then appealed to the Court of Appeal.

The first issue was whether, as the landlord contended, the financial effect of the grant

or refusal of dispensation (in the sense of the size of the sum at stake) was a relevant consideration. The Court of Appeal agreed with the LT that as a matter both of context and the wording of the statute, the answer was no. The statutory power was to dispense with the consultation requirements, not the consequences of non-compliance. The legislative focus on the consultation requirements highlighted that a proper consultation process comprised the substance of the scheme, so that prima facie a curtailment of consultation (at least unless de minimis) involved substantial non-compliance with the consultation requirements. Some examples of when dispensation might be granted were (i) the need to undertake emergency works; (ii) the availability, realistically, of a single specialist contractor; and (iii) a minor breach of procedure, causing no prejudice to the tenants. None of these undermined the integrity or importance of the consultation process. But the financial effects of refusing dispensation were not relevant.

The second issue was whether the nature of the landlord was relevant to the grant or refusal of dispensation. The LT had held that dispensation had to be considered having regard to the particular facts of each case, including the nature of the parties and their relationship, so that for example, the tribunal might reasonably take a more rigorous approach to non–compliance by a local authority or commercial landlord than to a case where the landlord was simply a group of lessees in another form, and when deciding whether it would be right to speculate on the likely response to a stage 2 consultation, it might be appropriate to differentiate between a case involving a large group of lessees, only some of whom were represented by a negotiating group, and a much smaller group of tenants, jointly represented by an active tenants' association and closely involved in the discussions from the start. The Court of Appeal interpreted this as meaning no more than "context is everything", on which basis the LT's observations were unexceptionable. If it was necessary to go further, cases could be envisaged where a less rigorous approach might be justified in respect of lessee owned/controlled landlords. So where the lessees are their own landlord, the consultation requirements may have to be considered against the background that they are spending their own money, and in such a situation there may be a greater likelihood of canvassing the relevant information by way of informal or extra-statutory consultation.

The third issue concerned the correct approach to the question of prejudice allegedly suffered by the tenants in consequence of the landlord's failure to comply with the

consultation requirements. The Court of Appeal accepted that "significant prejudice to the tenants is a consideration of the first importance in exercising the dispensatory discretion". But a proper consultation process was of the essence of the statutory scheme, and the LVT and LT were right to treat the curtailment of the consultation process as a serious failing. There was no error of law no error of law or misdirection in the LVT's refusal to speculate as to what might have been the outcome had the consultation been allowed to run its proper course. Indeed, given the seriousness of non–compliance, the LVT was right to treat the tenants' loss of opportunity (to make further representations and have them considered) as itself amounting to significant prejudice. On any view, that was a conclusion to which the LVT was entitled to come. If the position were otherwise:

> "In many cases, a landlord could readily assert that further consultation would have made no difference. Disproving such assertions would inevitably give rise to an invidious exercise in speculation, quite apart from difficulties of proof (if and insofar as a burden rests on the tenants in this regard – see below). While there will no doubt be some instances where a landlord may demonstrate that a failure to comply with the consultation requirements was, on the facts, such as to make no difference and to give rise to no prejudice to the tenants, arguments of this nature need careful scrutiny; there would otherwise be a risk of undermining the purpose of the statutory scheme or, as Pitchford LJ remarked in argument, a "premium on recalcitrance". Suffice to say that on the facts of this case, involving a serious failing on [the landlord's] part, I am not at all attracted to the argument."

Fourthly, the Court agreed with the LVT and the LT that the landlord's offer of a £50,000 reduction off the price of the works did not provide a ground for the grant of dispensation. It inclined to the view that the statutory scheme did not provide for such an alternative, but even if it did, the only offer on the table did not suffice.

Lastly, the Court was not prepared to express a concluded view on the burden of proof. However, Sedley LJ emphasised that it will only be rarely that tribunals will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out and ought not to be astute to do so: the burden of proof is a last, not a first, resort.

User

Roadside Group v Zara Commercial [2010] EWHC 1950 (Ch)

A lease of a petrol station, car showroom, service garage and hardstanding contained the following user covenant:

> "Not to use the demised premises or any part thereof for the sale of motor vehicles by auction or for the parking of motor vehicles for sale on any forecourt or for the erection or maintenance thereon of temporary building huts caravans or moveable dwellinghouse or for the sale of ale beer wine spirits or other intoxicating liquors or for a club where intoxicating liquors are permitted to be consumed or distributed and further not to use the said piece of land otherwise than for a petrol and oil filling station service garage with showroom and residential accommodation therefor"

The tenant sublet the car showroom and service garage (but not the petrol station or hardstanding) to a subtenant which parked cars for sale in certain areas around the perimeter of the site. The landlord contended that (i) such areas were part of the forecourt within the meaning of the user covenant, and (ii) the tenant was liable for the activities of its subtenant. At first instance it succeeded on both points. The tenant appealed.

On the first issue, the tenant relied on the proposition in *Woodfall* that a covenant not to do something is generally not broken if the prohibited thing is not done by the covenantor but by a third party, and also on the contrast in language between the user covenant and various other covenants in the lease not to do various acts or permit them to be done.

The landlord contended that the tenant's construction made a nonsense of the user covenant. It was clear that the original landlord regarded as objectionable the parking of cars for sale on any forecourt and that the original lessee must have known this. Yet, on the tenant's construction, the original lessee could, a day or two after the grant of the lease, have avoided the covenant by simply subletting the premises without imposing a corresponding negative covenant on the subtenant. The landlord also relied on s. 79 of the Law of Property Act 1925, under which "a covenant relating to any land of the covenantor …. shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself, his successors in title and the persons deriving

title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed".

Kitchin J found in favour of the tenant. The distinction between a covenant expressed in the active voice, such as "not to use", and a covenant expressed in the passive voice, such as "shall not be used", was well established (see Berton v Alliance Economic Investment Co [1922] 1 KB 742 at 759). The user covenant was in the active voice. Moreover, there was a clear distinction between the words of the user covenant and other covenants in which the tenant covenanted not to do something or permit others to do the same. The contrast suggested that the user covenant was intended to be *narrower* than the other covenants, but if the landlord's interpretation was correct, it would be a good deal *broader* because it would be, in effect, a covenant meaning "shall not be used". Nor did s. 79 help the landlord, because the section only applies "unless a contrary intention is expressed", and the lease when read as a whole expressed an intention to limit the scope of the user covenant to the acts of the tenant itself.

On the second issue, Kitchin J agreed with the first instance judge that the area in question was part of the forecourt for the purposes of the user covenant.

Note 1: See also, on the first issue, Mackusick v Carmichael [1917] 2 KB 581, in which it was held that the grant of a sub-underlease by a subtenant was not a breach of the head tenant's covenant not to underlet without the landlord's consent.

Note 2: The landlord's claim was against the head tenant for forfeiture. But the judge's finding did not leave the landlord without remedy, because (as the judge pointed out) the user covenant was binding on the subtenant in equity, so that the landlord would have been entitled to take injunctive proceedings against him directly.

Break clause

Aviva Life & Pensions UK v Linpac Mouldings [2010] EWCA Civ 395

Two leases of industrial units granted in 1972 were assigned pursuant to licences to assign to a company called Linpac Mouldings Ltd. ("Linpac"). Each licence contained a tenant's break clause entitling "the Assignee (meaning Linpac Mouldings Ltd. only)" to terminate the term by notice. The two leases could only be broken if it were possible to

determine at the same time a lease of an adjoining unit granted to Linpac in 2005. The latter 2005 lease also contained a break clause entitling "the Tenant" to determine the lease by notice, and the expression "the Tenant" was defined as "Linpac Mouldings Limited as original tenant or any company forming part of the same group of companies".

In 2005 Linpac assigned the 1972 leases and the 2005 lease to Ecomold Limited ("Ecomold"). Ecomold went into administration. It sought the landlord's consent to the re-assignment of the three leases to Linpac. The landlord refused consent in relation to the 1972 leases but granted consent in respect of the 2005 lease subject to certain conditions. Ecomold nonetheless transferred all three leases to Linpac and Linpac purported to give notice terminating the leases.

Two issues arose for decision: first, whether the landlord had unreasonably refused consent to the re-assignment of the 1972 leases; and secondly, whether Linpac was entitled to exercise the break clauses either after assignment of the 1972 and 2005 leases to Ecomold but before it re-acquired them or after it re-acquired the leases through re-assignment.

On the first issue, Lewison J held that the landlord's consent had been reasonably withheld, and there was no appeal against his decision. On the second issue, he held that the rights to break perished on the assignment to Ecomold. Linpac appealed.

The Court of Appeal dismissed the appeal. As regards the 2005 lease, the words "as original tenant" meant that Linpac could only determine the lease whilst it remained the tenant and not after it had ceased to be the tenant. It followed that Linpac had lost the right to determine the 2005 lease, and therefore that it could not determine the 1972 leases either because it could not satisfy the requirement in the licenses that the 2005 lease had to be determined at the same time. In any event, the words "if the Assignee (meaning Linpac Mouldings Ltd. only)" in the two licences were to be interpreted, consistently with the decision in Max Factor v Wesleyan Assurance Society [1976] 75 P&CR 8, as meaning that the break clauses in the licences could not be operated by Linpac once it had assigned the 1972 leases.

Business tenancies

Somerfield Stores v Spring (Sutton Coldfield) [2010] EWHC 2084 (Ch) [2010] 47 EG 142

In 2006 the landlord acquired a site for redevelopment. It included a supermarket let to Somerfield Stores under three leases. In 2007 Somerfield served on the landlord s. 26 notices requesting new tenancies. The landlord served counternotices stating that it would oppose any applications for new tenancies on ground (f). Somerfield applied for new tenancies, and an order was made for the trial of ground (f) as a preliminary issue. In February 2009 the landlord went into administration. In June 2009 Somerfield obtained the court's permission under the Insolvency Act 1986 to carry on with its applications. Directions for the trial of the preliminary issue were made with an anticipated trial date between March and May 2010, but in July 2009 Somerfield applied for summary judgment on the preliminary issue under CPR Pt 24. Its application was dismissed by a DJ in October 2009. It appealed.

The principal issue on the appeal concerned the date on which the landlord's intention to redevelop must be shown to exist on a tenant's application for summary judgment.

In Bettys Cafes v Phillips Furnishing Stores [1959] A.C. 20 the House of Lords held that the relevant date for the purposes of ground (f) is the date of "the hearing". In Dutch Oven v Egham Estate & Investment Co. [1968] 1 W.L.R. 1483 Megarry J, in ordering the trial of the landlord's ground of opposition as a preliminary issue, held that the relevant hearing for the purposes of the Bettys Cafes principle was the date of the hearing of the preliminary issue, and that it would not be open to the landlord, if unsuccessful, to have a second bite of the cherry at any later hearing to determine the terms of the new tenancy.

Somerfield argued that the relevant date on a summary judgment application is the date of the hearing of such application. It was therefore entitled to summary judgment if it could show that the landlord had no real prospect of establishing the relevant intention as at that date. The landlord contended that the relevant date was the anticipated date of the trial of the preliminary issue, so that all it needed to show in order to defeat Somerfield's application for summary judgment was that it had a real prospect of being

able to establish the necessary intention as at that future date.

HHJ David Cooke (sitting as a judge of the Chancery Division) found in favour of the landlord. Somerfield's case ran contrary to the essential nature of the summary judgment jurisdiction, which was to determine whether a party has a real prospect of establishing its case at a future trial date. If Somerfield were right, the substantive issue would change simply by virtue of the making of a summary judgment application. What was envisaged in Bettys Cafes was a substantive trial at which evidence is tested and facts are found for the purpose of a final determination either way of the landlord's ground of opposition. The hearing of a summary judgment application is not such a trial. Further, if Somerfield were right, the court would have to consider the application for summary judgment on the footing that the s. 64 date would occur 3 months and 21 days after the date of the hearing of the application, but the landlord would never be in a position to commence work on that date because even if summary judgment were refused, it would still have to establish ground (f) at a (necessarily later) hearing. Moreover, the interpretation contended for by Somerfield would

> "introduce an unnecessary opportunity for the adoption of artificial tactics in an area of litigation that is, in my experience, already regarded by commercial parties as a costly tactical adjunct to their negotiations. It may be said that the present regime in which the landlord has all the time up to the final hearing to formulate and put in place his plans is somewhat favourable to the landlord, but that is what is determined by the decision of the House of Lords in *Betty's Cafes* to have been the intention of Parliament. If it were open to the tenant to bring forward the date at which the intention must be formed by the simple expedient of putting on a summary judgment application, I have no doubt that the application would be made in virtually every case. This would either result in a transformation of the present balance to one which was strongly in favour of the tenant (which no doubt some may regard as desirable, but would be a wholly unintended consequence of the procedural changes introduced by the CPR) or it would lead to increased costs with the parties fighting such applications, only in many cases, to have to conduct essentially the same fight all over again at the final hearing. In my view, if the tenant has concerns that the landlord is unreasonably dragging things out in the hope of being able to put together a workable development proposal by the date of the final trial, the remedy is to proceed expeditiously with the directions timetable fixed by the court, and make any applications necessary to hold the landlord to it so that the trial comes on in good time."

Prescription

London Tara Hotel v Kensington Close Hotel [2010] EWHC 2749 (Ch)

The claimant and the defendant owned adjacent hotels. The claimant's land included a private service road (the Tara Ring Road ("TRR")) which went around the main building of its hotel. Where the TRR abutted the defendant's land, there were two service gates between it and the defendant's internal service road. In 1973 the then owner of the claimant's hotel granted the then owner of the defendant's hotel (Kensington Close Limited ("KCL")) a personal licence to use the TRR in consideration of £1 a year if demanded. It was common ground that the licence was personal to KCH, and that it did not permit the use of the TRR by its successors in title.

On 31 October 1978 KCL ceased trading and its business was transferred to Trusthouse Forte Hotels Ltd. The hotel itself was similarly transferred in May 1980. In May 1985 Trusthouse Forte Hotels Ltd transferred the hotel to Trusthouse Forte (UK) Ltd. In early 1996 Granada acquired Trusthouse Forte, and in September 1996 the hotel was transferred to Post Houses Ltd. In September 2002 it was acquired by the defendant. None of the senior managers of the claimant were aware of the various intra-group transfers until the 1996 transfer following the Granada takeover.

Prior to and after May 1980 the TRR was used for servicing the defendant's hotel and also by coaches picking up or dropping off guests. That use continued until 2007, at which time the claimant asserted that the defendant had no rights over the TRR and that the defendant's use constituted a trespass. The claimant sought an injunction restraining the defendant from trespassing on the TRR, together with damages. The defendant argued that it had acquired an easement by prescription over the TRR, either under the Prescription Act 1832 or by lost modern grant based on at least 20 years' continuous use beginning in May 1980.

Roth J. held that a right of way had been acquired by prescription over the TRR for commercial vehicles and coaches (but not private cars, taxies or minicabs carrying guests, there being no evidence of any such use during the relevant period). The relevant principle was that open use, in the way in which someone who had the right to do so would exercise that right, will constitute use "as of right" provided that it is nec vi,

nec clam, nec precario. The TRR had been used since May 1980 in the manner that a person rightfully entitled would have used it. Such use had not been by force. The issues were therefore whether it was precario and/or clam.

As to precario, the claimant contended that the character of the use was a continuation of that which subsisted under the 1973 licence. There was nothing to suggest to the claimant that the identity of the owner had changed, so that the claimant had no reason to resist or object to the continued user. But user was either by permission or it was not. Following R (Beresford) v Sunderland CC [2003] UKHL 60, permission requires some unequivocal, overt act: mere tolerance or inactivity is not enough. A mistaken belief that the use was governed by an express licence when in fact it was not could not constitute permission. That conclusion involved no hardship for the claimant, because the 1973 licence was expressly framed as a personal licence, and if the claimant had been concerned to protect the permissive character of the use it could have asked for the £1 provided for by the licence (which would have established an implied licence), or it could have asked the management of the defendant's hotel once every 20 years about the identity of the owning company.

As to clam, the concept of clam was not limited to the physical character of the use, but could in principle extend to the identity of the person exercising the right. But enjoyment will not be clam if it is of "such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment" (Union Lighterage Co v London Graving Dock Co [1902] 2 Ch. 557 per Romer LJ at 570). Not only was there nothing surreptitious in the fact that ownership of the hotel had passed out of the hands of KCH, but (on the evidence) a corporate transfer within a 20 year period was something that should reasonably have been in the contemplation of the claimant. All it needed to do was to make inquiry every 20 years. It had a copy of the 1973 licence in its possession and had every opportunity to look at it and take advice. Had it done so, it would have appreciated that the licence was personal to KCH and that use of the TRR could not be pursuant to the licence. The fact that through inadvertence or indifference that was not done until much later could not affect the position.

In the alternative, a right of way had been acquired for the use of the TRR by coaches and (over part of it) small vans. The 1973 licence did not on its true construction authorise such use, which had been manifestly open use with no question of clam. The claimant's argument that use by coaches did not accommodate the dominant tenement because it was the product of the independent decision of the drivers and not on the instruction of the hotel management or authorised by them was incorrect. Such use was for the direct benefit of the hotel. There was no requirement that use must be by the occupier of the dominant land or his agents: it is enough if it benefits the dominant tenement in the sense of being closely connected with the normal enjoyment of the dominant land. Nor had the breach of the licence consisting of the use of the TRR by small vans been waived by the claimant. Accordingly, had it been necessary, the court would have held that the defendant had a right to use the TRR for coaches and small vans, and it would have declined to grant an injunction restraining the use by other commercial vehicles serving the hotel because once coaches could use the whole of the TRR and small vans could use part of it, the hardship to the defendant by prohibiting use of the whole by other commercial vehicles would far outweigh any additional hardship to the claimant by such further use.

Note: An appeal to the Court of Appeal is pending.

Injunction/self help

Ashdale Land & Property Co v Maiorello [2010] EWHC 3296 (Ch)

The claimant owned one of a number of cottages in Ripley, Surrey, which lay on one side of an unmade–up access road, which the claimant also owned. The road led to an area of land that the claimant had sold in 1995 with the benefit of a right of way over the road "for agricultural purposes only", and which had subsequently been sold off in plots. At the relevant time, the 12th defendant (Mr Cash) owned that part of the land which was accessed immediately off the access road. The plots lying behind it (which were accessed via a track over Mr Cash's land) were owned by the remaining defendants, who were gypsies and used their plots for the stationing of gypsy caravans.

In June 2009 the local authority issued enforcement notices ordering the use as a caravan site to cease. In September 2009 an application was made for retrospective planning permission for the use of the plots as a private gypsy and traveller site

comprising eight pitches, each with an amenity building and hardstanding. Such application was refused in February 2010. In the meantime, in November 2009 Mr Cash had brought in large quantities of hardcore by lorry and used it to lay a road across his land and to form hardstanding for eight caravan plots. In December 2009 the local authority issued a temporary stop notice ordering the work to cease immediately, but the work continued. Various injunctions were granted but they were ignored. The road continued to be used by lorries, trailers, vans, caravans and construction equipment day and night.

The problem with committal proceedings for breach of the injunctions lay in giving 14 days notice and in naming the many individuals involved. The claimant therefore decided to take self help measures, and after consulting the police, fire and ambulance services, laid four large concrete blocks at the end of the road where it abutted Mr Cash's land so as to prevent vehicular (but not pedestrian) access to the site.

The occupiers of the caravans then began to park vehicles along the road. In March 2010 a further enforcement notice was issued ordering the caravan site use to cease, the caravans and mobile homes to be removed and the hard surfaces and resulting materials to be removed. In June 2010 the local authority obtained an injunction against Mr Cash and persons unknown who were occupiers or owners of the land restraining them from occupying the land for residential purposes or using it for the stationing of caravans or mobile homes. At the date of the hearing, some caravans had left the site but five remained.

The claimant contended that the only effective permanent way of preventing repeated acts of trespass on the road was for the claimant to obstruct all access to Mr Cash's land and the land beyond. The usual remedy of injunctive relief had been tried and found wanting. The court's orders had been repeatedly ignored, and it was not practical to enforce those orders by committal proceedings.

Field J. agreed. The usual remedy for excessive user of a right of way is not the obstruction of the user altogether but an injunction to restrain use other than that permitted by the easement. But where it is impossible to sever the good user from the excessive user, the servient owner may prevent any use (see Cawkwell v Russell (1856) LR 22 LJ Ex 34). Where an injunction restraining excessive user would be an

effective remedy, the court would not grant a declaration preventing any user of the right. But where such injunction would not be an effective remedy, such a declaration might be granted if, having regard to the interests of all those affected by the steps proposed to be taken, such relief were proportionate, just and appropriate.

The case was an exceptional one, in which (among other things) Mr Cash had taken a calculated risk in buying his land in the hope of obtaining planning permission for caravan site use enabling him to sell it on to gypsies in smaller plots; he had no genuine intention to use the land for agricultural purposes; the remaining defendants had purchased their land for use as a gypsy site, and they had all been complicit in the repeated breach of the orders; and if there were vehicular access to the land, gypsies would return in large numbers to live there in caravans, and there would be physical damage to the road and a significant depreciation in the value of the claimant's cottage and adjacent paddock. Anything less than complete obstruction of all access would be ineffective in preventing future acts of trespass. In the circumstances, the claimant's interests should prevail. The court would make a declaration that the claimant was entitled to obstruct all access to the site from the road, but liberty to apply would be given to allow for modification of the order if this should be justified by subsequent events.

Sale of land

Eminence Property Developments v Heaney [2010] EWCA Civ 1168

On 10 December 2007 Mr Heaney, a property developer, contracted to buy long leases of 13 flats in a block being constructed by Eminence. The 13 sale contracts all incorporated the standard conditions of sale (4th ed). The contractual completion date fell to be determined by reference to the date on which the relevant flat was ready for occupation, which in the event was 4 December 2008. By that date the property market had suffered a significant downturn. Mr Heaney did not complete on the contractual completion date. On 5 December 2008 Eminence served notices to complete under standard condition 6.8, drawing attention to the consequences prescribed by standard condition 7.5 should Mr Heaney fail to complete within 10 working days. A covering letter stated that Eminence had calculated the final date for completion as being 15 December 2008. That was incorrect, because the 10 working days in fact expired on 19 December. Mr Heaney took no step towards completion. On 17 December, Eminence

served notices to rescind the contracts and forfeit the deposits under standard condition 7.5. Those notices were premature because of the mistake over the expiry date of the notice to complete. Mr Heaney contended that the premature rescission notices amounted to a repudiatory breach of contract, which he accepted, thereby discharging him from further performance of the contracts and entitling him to the return of his deposit.

At first instance the recorder held in favour of Mr Heaney that Eminence had repudiated the contracts because they "comprised a clear case of refusal by Eminence to perform their future obligations under the contract, those obligations going to the very root of the contract". Eminence appealed.

The Court of Appeal allowed the appeal. The legal test was whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. All the circumstances must be taken into account insofar as they bear on the objective assessment of the intention of the contract breaker. So motive, whilst irrelevant if relied on solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such reasonable person.

On the facts Eminence's notices did not constitute a repudiatory breach of the contracts. It would have been obvious to a reasonable person in the position of Mr Heaney that the covering letters embodied an obviously mistaken application of the contractual provisions, and that the premature service of the rescission notices was due to that same obvious mistake which, had it been pointed out, would have been acknowledged by Eminence and the notices treated as ineffective. It was impossible to find on the facts an intention by Eminence to abandon and altogether refuse to perform the contracts. On the contrary, the obvious inference was that Eminence very much wanted to enforce the contracts, either by completing them or by rescinding them and exercising the other remedies conferred by them, in either case in accordance with the

contractual terms. The recorder's concentration on the notices without taking into account all the circumstances resulted in a lack of reality.

Note: The above decision was followed and applied by a differently constituted Court of Appeal in Oates v Hooper [2010] EWCA Civ 1346, in which it was likewise held that a premature notice of rescission did not amount to a repudiatory breach of contract in circumstances where it would have been obvious to a reasonable person that mistakes had been made. Interestingly, Thomas LJ (with whom the others agreed) said that "first and foremost" among the matters to be taken into account:

> "…. are the terms of the notice itself. In certain circumstances a statement by one of the parties to the contract that he is seeking to perform the contract at the same time as he gives notice claiming to be entitled to determine it under its provisions will not be treated as a statement that he is intending to perform the contract. For example, if he is putting forward an interpretation of the contract that is simply wrong and offering to perform it only on that basis, the fact that he states he intends to perform the contract may mean he is in fact objectively refusing to perform it. It is necessary to look at all the circumstances."

Leasehold enfranchisement

Hosebay v Day/Lexgorge v Howard de Walden Estates [2010] EWCA Civ 748

The issue in both these appeals was whether the demised premises were a "house" for the purposes of the Leasehold Reform Act 1967. Section 2(1) of that Act provides (so far as relevant) that "house":

> "…. includes any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats and maisonettes …."

Hosebay concerned three terraced properties in South Kensington, which were originally constructed, and first occupied, as large houses. Two were let in 1966 for some 55 years on terms which provided that the premises be used only "as 16 residential flatlets" with a resident caretaker and that the external appearance should be that of "a private dwellinghouse". The third was let in 1971 for some 60 years on terms restricting its use to that of "a single family residence" or "a high class furnished property" for up to 20 occupiers, with a resident caretaker. A company acquired all three

leases in 1996. It used the three properties to provide short–term accommodation for tourists and other visitors to London. The accommodation took the form of individual rooms with self-catering facilities.

Lexgorge concerned a property in Marylebone, that had been built in 1760 as a house and formed part of a terrace of substantial houses. It was for many years occupied as a residence. In 1952 it was let for a term of some 109 years on terms which restricted its use to "self contained flats or maisonettes" on the upper two floors and professional offices on the first and ground floors, with the basement restricted to storage and lavatory in connection with the other parts of the premises. From 1961 onwards all four floors were used as offices, but the office use of the upper two floors ceased after the tenant had served its notice to enfranchise.

The Court of Appeal identified the relevant principles as follows: (i) (although it was not necessary to decide the point) the fact that a building has been designed for living in is not enough if it has subsequently been adapted away from residential use; (ii) in deciding whether a building has been adapted for living in, it is necessary to look at the most recent works of adaptation (not furnishings or furniture) that altered the actual building and assess objectively whether they resulted in the property being adapted for living in; (iii) the subjective intention of the person responsible for the works, so far as the intended use is concerned, will rarely if ever be of any relevance: the question is how the building was adapted, not why; (iv) however, the actual or intended use of the building may sometimes be of relevance (for example, the fact that the building was intended to be and was used for living in after completion of the works may help to undermine the argument that it was not adapted for living in); (v) in deciding whether a building was a house reasonably so-called, Lord Roskill's observation in Tandon v Trustees of Spurgeons Homes [1982] A.C. 755 that the circumstances "would have to be such that nobody could reasonably call the building a house" remained sound, notwithstanding the fact that it was made at a time when the residence test had not been abolished, so that by definition any building to which it referred would have been occupied by the tenant as his only or main residence; (vi) the question whether a building is a house reasonably so-called is to be determined essentially by reference to its external and internal physical character and appearance; and (vii) the Court of Appeal decision in Prospect Estates v Grosvenor Estate Belgravia [2009] 1 W.L.R. 1313

(in which the court focused on the user covenant in the lease and the actual use) should be treated as confined to a case where residential use is either prohibited entirely or restricted to a very small part of the building, and the actual use accords with that.

Applying the above approach, the three properties in Hosebay (i) were adapted for living in, each room being a self-contained unit of accommodation, and (ii) constituted a house reasonably so-called. The building in Lexgorge was a house reasonably so-called notwithstanding the fact that it was wholly used for office purposes (it was conceded that it was designed or adapted for living in).

The Master of the Rolls' final observations are of note:

> "56. Like Judge Marshall in Hosebay, I reach my conclusion with no particular enthusiasm. The 1967 Act was originally intended to assist residential tenants occupying their houses as their only or main residence to acquire their freeholds. Partly to extend its reach, and partly to defeat the device of company lettings, the legislature ditched the residence requirement, as a result of which the extension of the Act may well have gone further than the legislature intended or anticipated. It now applies to empty and substantially commercial buildings, even if nobody recently lived there or is even intending to live there (provided they satisfy section 2(1)) as Boss Holdings [2008] 1 W.L.R. 289 shows, and it is open to tenants to enfranchise many properties at the same time, even if they do not live in any of those properties, as Aggio [2009] 1 A.C. 39 shows. If I am right on these appeals, it can extend to buildings exclusively used for business purposes.
>
> 57. I rather doubt that the amendments made to section 1 in 2002, and in particular the removal of the residence requirement, were intended by the legislature to have this sort of effect. Significant amendments to statutes often provide good instances of the law of unintended consequences, and this may well be an example. However, the issue we have to decide is not what we think the legislature would have said if it had fully appreciated the consequences of the primary amendment it made to the 1967 Act (removal of the residence requirement), but what we think that the Act means in the light of that amendment."

Note 1: An appeal to the Supreme Court is pending.

Postscript

Since I dealt last year with Bocardo SA v Star Energy UK Onshore, it is perhaps appropriate to finish by mentioning that the decision of the Court of Appeal has now been upheld by the Supreme Court ([2010] 3 W.L.R. 654).