PROPERTY LAW UPDATE

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LANDLORD AND TENANT ACT 1954 UPDATE

There have been a few new cases on the 1954 Act, with litigation in that area increasing again as the economy recovers from the slump of a few years ago. I'm reaching back slightly further than we have in other topics in order to give myself a slightly self-interested opportunity to explain the decision in *Boots v Goldpine* [2014] EWCA Civ 1565 on interim rents, before looking at a couple of very recent decisions dealing variously with the restoration of previously-withdrawn grounds of opposition in a lease renewal claim and rent valuation for a new lease with a very early break clause.

i) *Boots UK Ltd v Goldpine Estates Ltd* [2014] EWCA Civ 1565

As you've probably guessed, this case is one of mine, and I refer to it here not only for the purposes of shameless self-promotion but also because I'm on something of a crusade to explain that, contrary to some of the articles that followed publication of the judgement, it doesn't actually say anything particularly controversial if you understand the basis of the decision properly, though it does provide very useful clarification.

The decision provided useful guidance on two important aspects of the 1954 Act which are often overlooked in practice. The main thrust of the dispute between the parties was as to the proper approach to determination of an interim rent. The statute doesn't specify when the interim rent should be determined, though it allows for an application to be made at any time

between service of the initial notice and six months after the termination of the original tenancy, whether by the start of a new one or otherwise: s 24A. In Boots, the landlord sought to avoid a determination of interim rent in line with the rent under an apparently agreed new lease pursuant to s 24C (which applies where the landlord grants a new tenancy) by refusing to finalise that new lease until interim rent had been determined, essentially because the market was falling and section 24C would have required it to repay substantial overpayments of rent during the 'interim' period. Although the lease renewal was unopposed, it said that determining the interim rent before any new lease had been finally agreed or ordered took matters outside s 24C to the more flexible (and in this case favourable to the landlord) s 24D (which applies where s 24C does not).

On a second appeal, the Court of Appeal confirmed (the landlord having changed counsel and eventually conceded the point in the middle of the third hearing) that it was not possible to know which interim rent approach applied until the lease renewal proceedings had been decided. The main proceedings and interim rent application were interdependent and therefore remitted to be heard together, it being apparent that s 24C would apply once terms were finalised and the lease granted.

The other aspect of the case, which has (probably correctly) received more attention though it was not the main focus of submissions, was as to the question of what is required for parties to be said to have 'agreed' the terms of a new lease for the purposes of the 1954 Act. Obviously 'agreement' cannot require a contractually binding deal compliant with s 2 of the Law of Property (Miscellaneous Provisions) Act 1989, since it is possible to 'agree' certain aspects of a lease renewal (eg the property to be leased, or the length of term) whilst leaving others to be determined by the court (typically rent), and such an agreement could not be s 2 compliant, and in any event s 28 of the 1954 Act disapplies the Act entirely if a contractually binding (s 2 compliant) agreement is reached.

So what is an 'agreement' on some but not all aspects? The Court of Appeal approved the comments made by Oliver J in *Derby v ITC* [1977] 2 All ER 890, confirming that a

contractually binding agreement is not necessary in order for a party to be bound by an 'agreement' made for the purposes of the 1954 Act, but emphasising that an 'agreement' did need to be 'final' and not subject to any suspensory conditions. Although in this case the parties had both confirmed to the Court, both in writing and at a hearing, that they had reached agreement on all the lease terms, the use of the phrase 'subject to contract' in some of the relevant correspondence was sufficient to allow either party to resile from that agreement.

Those points of guidance are important, and they do help to highlight fairly fundamental aspects of the renewal process which are often neglected in practice. Perhaps the most surprising aspect of the Boots case, however, was that following the second appeal to the Court of Appeal, the landlord failed to comply with directions, so that its defence was struck out and the final hearing was therefore conducted entirely on the tenant's terms, and ultimately led to settlement before judgment could be given. This was something of a damp squib ending to over four years of bitterly contested litigation.

ii) *Britel Fund Trustees v B&Q Plc*, Central London County Court, 11th March 2016

This is yet another case of ours, I'm afraid – this was Nat Duckworth vs Emily Windsor. This was an unopposed lease renewal where all lease terms had been agreed before trial save for rent and interim rent. The parties were nearly half a million pounds apart on the rent which should be payable for a warehouse-style B&Q outlet.

The complexity came from the fact that the landlord had development proposals in the pipeline, and therefore the parties had agreed a rolling break exercisable on six months' notice at any time after 30th June 2018, and were in agreement that that would have a depreciatory effect on the rent to be determined under section 34.

The two issues in the case were:

a) Whether the court should give allowance for a three-month rent holiday, on the basis that in the real world tenants received such a 'holiday' to allow for non-trading during fitting out (on which there are conflicting county court decisions); and

b) What was the proper rent, taking the break clause into account?

On the first issue, the Court noted that recent cases have tended to allow for a rent holiday, on the basis that the artificial exercise required by section 34 is premised on a person taking the lease who is not already in occupation. If a comparable property would be let with such a holiday, the same should be applied under section 34. Accordingly, the Court applied a 2.5% discount off the rent over the whole term (10 years) in order to reflect a three-month fitting out period.

On the second issue, the evidence was that only a discount retailer would take such a lease, so that valuing as a DIY store was entirely artificial, but the valuers had proceeded with a two-stage process of valuing for the actual use and then applying a discount because of the break clause. The Judge therefore decided to adopt the same process, first as a DIY store, then as a discount store, and then to compare the two results.

The Judge approached the break clause on the basis that it was likely to be operated within 2.5 years, and that the tenant would therefore have only a brief trading period between fitting out and stripping out to leave, which would cost some £2.5m. On the other hand, it would be entitled to nearly £800k compensation on leaving. In light of the nature of B&Q's trade, and in particular its hope to retain customers, the Judge found that a 25% discount off the rent was appropriate to reflect the break clause if, which it was accepted would not happen, a DIY retailer took the very short lease.

Carrying out the same calculation in the context of the (realistic) occupation of a discount retailer, the Judge found a lower rent rate but a smaller discount to take account of the rolling break, at 20%, on the basis that a discount retailer is more likely to be content with a shorter trading period.

Importantly, the psf rate came out slightly higher for a DIY retailer than for a discount retailer. Rather than split the difference, however, the Judge concluded that he was obliged to consider the actual hypothetical tenant who might take the unit on the terms offered, and therefore adopted the lower rate applicable to a discount retailer, even though it would in fact be a DIY store at the premises.

The interim rent was then fixed at the calculated rate for a discount retailer, but without the further 2.5% adjustment taking account of the notional fit-out rent holiday.

iii) *Waterstones Booksellers Ltd v Notting Hill Gate KCS Ltd*, Hammersmith County Court, 2015

Finally, on the 1954 Act, yet another Chambers case – this time Kirk Reynolds QC vs Wayne Clark. The question for the Court was whether a landlord who opposes renewal under paragraph (f) of section 30(1) of the Act (intended redevelopment) but who then withdraws his opposition can subsequently resurrect it and oppose the renewal? In *Waterstones*, the landlord withdrew its opposition on the basis that it was not confident that it would be able to proceed with its development proposals. Accordingly, although the section 25 notice had opposed renewal and the proceedings had begun as opposed proceedings, directions were given by consent for them to continue as an unopposed renewal claim. Over the course of the following year, however, no substantive steps were taken in the proceedings by either side. The landlord then sought to restore its reliance on ground (f), relying on CPR 17 (amendment of pleadings) and CPR 14.1 (withdrawal of an admission). The County Court found that the correct balance between the respective prejudice to the two parties favoured permitting the landlord amend and revert to its original position.

I suppose the lesson on this one is that the tenant, having got the windfall of the landlord's initial admission, ought to have pursued the proceedings vigorously rather than waiting around for the position to (one might say inevitably) change again.

FORFEITURE UPDATE

As we all know, the Law Commission looked into reforming the landlord's remedy of forfeiture. An increasingly complex amalgam of statutory and common law rules, fine distinctions with apparently pointless consequences (remedial and irremediable breach,

anyone? waiver?) there are serious questions as to whether this remedy is fit for purpose in modern times. In addition to the statutory overlay, the judicial attitude to forfeiture needs to be borne in mind. It is famously said that the Courts lean against forfeiture, a specific manifestation of Equity's general antipathy to forfeiture clauses and penalties in general. Famously, forfeiture for non-payment of rent has been said to be little more than a (very clumsy) form of security for the debt: *Chandless-Chandless v Nicholson* [1942] 2 KB 321. We are told in *Bilson v Residential Apartments* [1992] A.C. 494 by Lord Templeman that "*[t]he forfeiture of any lease, however short, may unjustly enrich the landlord at the expense of the tenant*", and that the need for relief is "*manifest*".[1] A pair of recent Court of Appeal cases should give any landlord pause for thought before embarking down the road of forfeiture. The pot of gold beckoning at the end of the process - vacant possession - may well turn out to be a mirage, with much money spent along the way trying to reach it.

Safin v Badrig [2015] EWCA Civ 739: *How Many Bites of the Cherry Can You Get?*

The tenant of a residential flat died. Since his death, arrears of service charge and rent had accrued, and the landlord commenced proceedings for forfeiture in 2012, the estate of the deceased tenant being represented by his son. These proceedings were compromised by a consent order. The consent order required the payment of various sums, and time was expressly of the essence for such payment to be made by the estate. The order provided that a failure to pay would result in the right to relief being lost. Guess what happened next? Correct. There was then a failure to comply with those strict requirements by the specified time. The defendant did, however, make an application to extend time under the order before the expiry of the specified date.

Following that application, and some months later, the stipulated conditions were then ultimately complied with. This was against a background of prior, inefficient conduct by the estate acting via the deceased's son. Unsurprisingly, the landlord, who wished to have finality, sought to enforce the terms of the consent order, which represented the terms of the deal done, which terms had been breached. The Court of Appeal allowed the extension of

[1] See also, e.g., *Hyman v Rose* [1912] AC 623; *Magnic v Ul-Hassan* [2015] EWCA 224. Even in cases of immoral user, the Courts have adopted a decidedly less Victorian attitude: *Patel & Anor v K&J Restaurants Ltd & Anor* [2010] EWCA Civ 1211.

time, notwithstanding that it allowed the Defendant to bypass the terms of what had been agreed. The Court of Appeal (following *Pannone LLP v Aardvark Digital Limited* [2011] EWCA Civ 803) considered that the Court retained a jurisdiction to extend time under a consent order (though the answer may be different again under a Tomlin Order) pursuant to both the overriding objective and CPR r. 3.2, and for those purposes there was no basis for distinguishing between, on the one hand, a purely procedural order and on the other, a consent order disposing of a substantive claim.

Furthermore, the Court of Appeal considered how the jurisdiction should be exercised where the consent order related to forfeiture. The procedural decision to extend time under a consent order should be exercised "sparingly", and no doubt the Court would look less favourably on a tenant who wished to take a second or third bite of the cherry. Nonetheless, it would appear that all forfeiture cases have certain inherent features which make it likely in principle that extensions of time will be granted to a tenant. These were identified by the Chancellor as follows:

(1) At paragraph [73]: "*It is well established that the court regards a condition of re-entry under a lease as merely being security for the rent. That is why, where the court has granted relief from forfeiture on condition of payment of arrears of rent or other action by the tenant by a specified date, the court will grant further time if it would be just and equitable to do so."*

(2) At paragraph [74]: following *Chandless-Chandless*, "*[a] tenant who obtained relief on conditions has to show good grounds to get further indulgence and […] tenants must not think that they are entitled to be slack or casual about the performance of terms of the order*". That said, however, "*[…] in a case where on all equitable grounds a period limitation ought in fairness to be extended and its extension will do no more than apply the principle that the condition of re-entry is nothing more than security for the rent, there is no reason why equity should not lend its aid notwithstanding the original order.*"

(3) At paragraph [75]: "*in relation to the jurisdiction of the court to vary an order granting an extension of time by granting a further extension, no distinction is to be drawn between cases of relief against forfeiture for non-payment of rent and other cases where the relief against forfeiture is sought".*

The Chancellor derived further support from *Starside Properties Limited v Mustapha* [1974] 1 WLR 816, a case concerning an application for an extension of time by an occupying purchaser to raise the contract price to buy the house, where Edmund-Davies LJ said as follows (at 824):

"*The common feature in all these cases is that a penal provision is involved and the court grants relief against the forfeiture which would otherwise follow from it in such circumstances as justice requires, and it grants relief on such terms as are equitable in those circumstances. If it should later appear that the relief by way of an extension of time first granted ought to be extended, and that in fairness to the other party that can be done, I see no difficulty in holding that the court has the jurisdiction to do that which the justice of the case is seen to require. Naturally enough, the court will scrutinise with particular care an application for further relief and will be more reluctant to grant it than in the case of a first application, but that goes to the likelihood of the later application succeeding and not to the court's jurisdiction to entertain it.*"

Against that background, the Chancellor identified as "critical facts" that "*the application for the extension was made before expiry of the time limits; all the conditions in the Consent Order had been satisfied by the time the application was heard; and the forfeiture was in respect of a long lease of residential premises, the value of which was almost £1m more than the £90,000 or so due to Safin.*". As a result of those facts, it was right to extend time, and to give the estate a further bite of the cherry. The fact of a windfall is invariably inherent in forfeiture proceedings with leases with a capital value. A timely application for extension – even, as in *Badrig*, the day before - and satisfaction of the breached conditions at a later date, will put the doubly defaulting tenant in the strongest possible position. Quite what the effect of this decision on a retrospective application for extension of time might be, remains to be puzzled out in the post-*Jackson* era.

Freifeld v West Kensington Court Ltd [2015] EWCA Civ 806: *Forgive Us Our Trespasses*

A tenant who deliberately breaches the terms of his lease is usually told he can expect an uphill struggle in the Court. Nobody likes a promise-breaker. But is there in fact such a rule, and how strictly is it applied?

In *Freifeld*, a head tenant had sub-let to a restaurant tenant, which had caused all kinds of problems to other occupiers. The freeholder had a list of legitimate concerns. The head tenant had then – deliberately – granted a future lease to the restaurant tenant, thereby bypassing the landlord's right to withhold consent or impose conditions on future conduct. The grant of a sub-lease in breach of the tenancy potentially[2] saddles the landlord with an undesirable occupier. Would the tenant be denied relief from forfeiture if he committed a subletting breach deliberately?

At first instance the head tenant in Freifeld was denied relief, though that was overturned on appeal. The Court of Appeal decided that, contrary to the approach at first instance, in cases of deliberate breach, relief should not be limited to exceptional cases: "the relevant question was whether the damage sustained by the landlord as a result of the breach was proportionate to the advantage that he would obtain if relief were not granted" (at paragraph [41], following *Southern Depot Co Ltd v British Railways Board* [1990] 2 EGLR 39). The value of the lease to be forfeited was part of that proportionality balancing exercise: *Magnic Ltd v Mahmood Ul-Hassan* (cited above), at paragraph [50]. However the conduct of the tenant was another part of that exercise (*ibid.*, at [41]), and doubtless any enduring detriment (or "stigma") afflicting the reversionary interest of the landlord is a third aspect of it, along with innumerable other relevant factors that the facts of individual cases might throw up (*Freifeld*, at [47]). The Court of Appeal rejected the suggestion that an unlawful subletting meant that the defaulting tenant's application for relief started from the point that he faced a vertiginous climb, especially where the underletting had been undone by a subsequent consensual surrender. Instead, the sins of the defaulting tenant, if not capable of being expiated, could at least avoided by an appropriately termed order for relief. Reinstatement of the tenancy so that it

[2] Depending, of course, on the nature and terms of the sub-lease, particularly as to termination.

could be sold within a proper period was the correct order: it ensured that the landlord was rid of his troubling tenant, but equally made sure that the tenant did not thereby suffer a penalty in the form of a loss of an asset which was, approximately, valued at £1-2 million in this case, but for the forfeiture.

Again, one is led to the conclusion that the Court of Appeal in *Freifeld*, whilst treating the avoidance of a windfall as only one of a number of factors, in many ways considered it the most important. The deliberately defaulting tenant, guilty of a chain of conduct that shows a cavalier approach to the terms of the lease, might find that the Court does not allow him to continue as tenant of that particular landlord, however it will not penalise him by stripping him of a valuable asset, the residue of his lease. The Court of Appeal's order in *Freifeld* shows how that circle can be squared.

What Is Forfeiture For?

As we can see from the above, it will require very strong facts to deprive a tenant of his tenancy when a forfeitable breach has been committed. A breach of a carefully-drafted consent order, which is subsequently complied with, albeit late, or a deliberate breach of a lease following a chain of undesirable conduct, may simply not do to secure possession from the defaulting tenant. However, we can also see that each case will very much turn on its own facts. This goes to show that the bar for a landlord who is seeking to reclaim vacant possession by forfeiture of a lease of a unit with a substantial remaining capital value is a very high one.

Whilst in a case like *Freifeld* forfeiture can reach parts that other remedies cannot – namely the forced sale of the lease so as to sever what has become an unhappy landlord and tenant relationship – in many ordinary forfeiture cases, a simple claim in debt, or a damages claim, or an injunction (including, in subletting cases, an injunction of the kind used in *Crestfort Ltd. & Ors v Tesco Stores Ltd & Anor* [2005] EWHC 805 (Ch)) might do the trick equally well, with more certainty of outcome and at lower cost. Furthermore, it is clear that, by its very nature, forfeiture, by proceedings or re-entry, ushering in a twilight period and potentially followed by relief applications (the latter potentially at some uncertain future date), can create

a great deal of uncertainty and cost for landlords and tenants alike until the matter is finally resolved, perhaps only on appeal.

The proposals of the Law Commission in relation to *Termination of Tenancies for Tenant Default* (Law Com 303, published 31st October 2006) have been taken up once more 2014; as the Courts continue to debate and refine the true purpose, intricacies and limits of the ancient doctrine of forfeiture and relief, the time has surely come that a clear, modern remedy is on the statute books.

LANDLORD AND TENANT (COVENANTS) ACT 1995 UPDATE

There have been three recent decisions considering the endlessly complex, misunderstood and commercially frustrating 1995 Act over the last 18 months, all dealing with the position of guarantors on assignments by the tenants on whose behalf they have given guarantees. As you will be amazed to discover, they all involved members of Chambers, past and present, the latter in the form of Kirk Reynolds QC and Tim Fancourt QC, and the former because the issues considered in them arose out of an obiter remark made by Lord Neuberger when he was in the Court of Appeal, and because one of the new cases was heard at first instance by Morgan J. Unfortunately, the issues are not straightforward, but I'll try to explain why the decisions are important without drowning you all in too much technicality.

In order to understand the decisions at all, however, it is necessary to have a basic grasp of the relevant provisions of the 1995 Act. For present purposes, we can limit the relevant sections to only five.

They provide, in summary, as follows:

a) Section 5 provides that on an assignment of the whole of the premises demised to it under a 'new' lease, the tenant ceases to be liable under the lease as from the assignment;
b) Section 11 provides, however, that there is no such release if the relevant assignment is made in breach of a covenant, so unlawful assignments do not release the tenant;

c) Section 3(2) provides that, on an assignment, the assignee becomes bound by the tenant covenants of the lease assigned to him;
d) By section 24(2), where a tenant is released on an assignment, any other party who was bound by the tenant covenants (which would include a guarantor) is also released from them to the same extent; and
e) Section 25 is a comprehensive anti-avoidance provision, stating among other matters that, 'Any agreement relating to a tenancy is void to the extent that… it would apart from this section have effect to exclude, modify or otherwise frustrate the operation of this Act…'

These provisions were previously considered in *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2012] Ch 497, in a well-known judgement given by Neuberger LJ (as he then was) in the Court of Appeal, which forms the background to the discussion below. That decision was helpfully summarised by Morgan J in one of the new cases (*UK Leasing Brighton Ltd v Topland Neptune Ltd* [2015] EWHC 53 (Ch), at paragraph 19) as follows:

> *"(1) a term of the lease, or of an agreement relating to the lease, which stipulates in advance that a tenant's guarantor must re-assume the liability of a guarantor in relation to the assignee, as a term of an assignment by the tenant, would "frustrate" the operation of the statutory provision (s.24(2)) which would otherwise serve to release the guarantor and is therefore void under s.25(1)(a) : [20]–[24] and [34];*
>
> *(2) the first instance decision in Good Harvest was correct;*
>
> *(3) the correct interpretation of the Good Harvest decision was (subject to a later qualification) that s.25(1) invalidated any agreement which involved a guarantor of the assignor guaranteeing the assignor's assignee: [34] and [44];*
>
> *(4) this interpretation gave the 1995 Act an unattractively limiting and commercially unrealistic effect but was nonetheless the law: [36]; ***43***
>
> *(5) there was no distinction between a guarantee freely offered by the guarantor and a guarantee insisted upon by the landlord: [40]–[43];*
>
> *(6) there was no distinction as to the effect of the 1995 Act on an agreement to give a guarantee and a guarantee actually given: [43];*

> *(7) the qualification referred to in (3) above was that if the assignor gave an AGA in relation to the assignee, the guarantor of the assignor (whilst it was the tenant) could also give a guarantee in relation to the assignor's liability under that AGA: [46]–[48];*
>
> *(8) if a tenant assigns and the tenant and the tenant's guarantor are thereupon released, there is nothing to stop that guarantor becoming a guarantor again on a subsequent assignment: [51];*
>
> *(9) the proposition in (8) above applies not only where the subsequent assignee is a new party but also where the subsequent assignee is an earlier tenant whose liabilities were guaranteed by that guarantor: [51].”*

Notably, the parties to the new decisions seized on a particular *obiter* comment made by Neuberger LJ at paragraph 37 of that decision, where he said, ‘It would also appear to mean that the lease could not be assigned to the guarantor, even where both tenant and guarantor wanted it.’

That was the issue which lay at the crux of the three new decisions.

i) *Tindall Cobham 1 v Adda Hotels* [2014] EWCA Civ 1215 and *UK Leasing Brighton v Topland Neptune* [2015] EWHC 53 (Ch)

These two cases had very similar facts indeed, though only the first of them went to the Court of Appeal.

In *Tindall*, an alienation covenant in a lease prohibited assignments without consent, but also provided that assignments from the tenant to its group companies were permitted but only on condition that the assignor’s guarantor also guaranteed the liability of the assignee. The lease therefore required that the guarantor of the first tenant should still be the guarantor for the new tenant in such circumstances.

The fundamental concern was that the requirement for the original guarantor to continue to be guarantor after the assignment was contrary to the express release of that guarantor required

under section 24, and consequently fell foul of the anti-avoidance provisions in section 25, which thus rendered the requirement void.

The tenant suggested that the requirement to retain the guarantor could be excised, but the effect of that would be to allow the tenant to assign to group companies with virtually no protection for the landlord. Instead, the Court found that the entire provision relating to assignments to group companies without consent was rendered void by the Act, and therefore if the tenant wished to assign to a group company it would have to seek permission under the terms of the lease relating to general assignments.

In *UK Leasing*, the consequences of the decision in *Tindall* had to be considered more deeply. In that case, the first tenant, T1, had assigned to a new tenant, T2, in breach of covenant. Therefore, although T2 became liable on the covenants under section 3 of the Act, neither T1 nor its guarantor were released under section 5 because of section 11. None of the parties wished that situation to remain. The landlord wished T2 to re-assign to T1, and for the guarantor to give a new guarantee of T1's obligations. The tenants took the view, however, that the new guarantee would frustrate the release of the guarantor and consequently that it would be void. They wished T2 to assign to a new company established for the purpose, which assignment would release all existing liability, and then for the new company to assign back to T1, with the guarantor stepping back in, lawfully, on the second assignment. The parties agreed that that would work under the Act, but the landlord didn't trust the tenants to take all the steps outlined, and therefore wished to have a binding contract requiring all those steps to be taken first. However, the tenants were concerned that that agreement would itself fall foul of the Act. The parties therefore approached the Court for declaratory relief.

Morgan J, with some particularly elegant reasoning, concluded that the direct assignment proposed by the landlord would work within the Act. He looked at the transaction as a two-stage process, where, first, the lawful assignment had effect to release T2 from its obligations as tenant under section 5, T1 from its obligations under section 11, and therefore the guarantor from its obligations under section 24. Thereafter, T1 would become liable on the same covenants but under section 3, which was a novation rather than a continuance of its liability. The guarantor would thus also have been released as required by section 24, but

could then voluntarily assume new obligations by a new guarantee. The Judge concluded that such a proposal did not fall foul of section 25.

The alternative suggestion, however, whereby the guarantor would agree before its release to enter into a new guarantee, was held to be void under the Act.

Refreshingly, the result was a commercially-sensible solution which allowed the parties to return to the position which they were in prior to the unlawful assignment. But the case illustrates the difficulties which the 1995 Act presents even where the parties all desire the same outcome.

ii) *EMI Group Ltd v O&H Q1 Ltd* [2016] EWHC 529

It was in this context that the rather controversial decision in *EMI* was made in March of this year.

The facts were, very briefly, as follows. A post-Act lease was granted to HMV UK Ltd, with its parent company, EMI, as guarantor. HMV then went into administration, as you'll no doubt remember, in 2013. EMI asked the landlord to permit the lease to be assigned to it, notwithstanding its position as guarantor. The landlord agreed. A licence to assign was granted, and a lawful assignment took place in November 2014. The licence included an express covenant given by EMI that it would:

> *"…at all times after the completion of the Assignment throughout the residue of the Term or until it is released from its covenants pursuant to the 1995 Act to pay the rents and all other sums payable under the Lease and to observe and perform all the covenants and conditions on the lessee's part contained in the Lease."*

For a full twenty days, everyone proceeded happily. However, EMI then notified the landlord that the effect of the 1995 Act on the transaction, in its view, was to vest the lease in it in a 'shell' form, but to render all the covenants in the lease void and unenforceable against it. It suggested that this rather extraordinary proposition was not objectionable since the landlord

would still be entitled to forfeit, but as the Judge pointed out, if there were no binding covenants there could be no breach to give rise to a right to forfeit.

Understandably, the landlord objected to that analysis. EMI therefore sought declaratory relief confirming its stated position, and the landlord counterclaimed for a declaration that the covenants were enforceable against EMI or, if they were not, that the assignment by the tenant to its own guarantor, which is what Neuberger LJ had tentatively suggested in *K/S Victoria Street* couldn't work, was void.

After a careful analysis of the legislation and the authorities set out above, the Judge concluded that the transaction was indeed entirely void as a result of section 25, leaving the HMV as tenant (though in fact by that stage the lease had been disclaimed) and EMI as guarantor. This was because as guarantor EMI effectively had the same liabilities as the tenant under the lease, and if it also assumed those liabilities on an assignment, as here, and indeed agreed to do so in the licence granted first, then that transaction necessarily frustrated the Act by preventing the required release of EMI from those same obligations. The Judge expressly rejected the 'two-step' analysis premised on section 3 which was the basis of the decision in *UK Leasing*, because there is only one transaction and therefore no *scintilla temporis* in which the guarantor could be said to have been released from its obligations.

Notably, before the *EMI* case had concluded, Morgan J gave a talk to the Property Bar Association about the issues in *Tindall* and *UK Leasing*, which talk was referred to in submissions and in the judgment in *EMI*. He said:

> *"71. In my judgment, I left open the question of whether Lord Neuberger had been right to suggest that where the lease was vested in T and T's obligations were guaranteed by G, then the lease could not be assigned to G even where T and G wanted that to happen. Let me know consider that proposition. The argument is that the Act is intended to produce the result that G is released under section 24(2) on an assignment by T1. If G becomes the assignee, it will be bound by the tenant covenants and so will not be released. Therefore, the assignment to G has effect to frustrate the operation of the Act.*

> *72. What this argument misses is that the reason the assignment to G makes G liable on the tenant covenants is that section 3(2)(a) so provides. So the Act operates in two different ways. On the assignment, section 24(2) operates to release G from its earlier guarantee and section 3(2)(a) operates to impose the burden of the tenant covenants on G as assignee. So the Act operates in two consecutive ways. Why should it not operate to the full in both of these ways? The operation on one way does not frustrate the operation of the Act in the other way. The release under section 24(2) does not frustrate the operation of section 3(2)(a). The imposition of the burden of the covenants under section 3(2)(a) does not frustrate the release under section 24(2).*
>
> *73. This reasoning was essentially the reasoning that appealed to me when I decided what the position would be when the term was assigned by T2 to T1. Although I did not need to say so in the case I decided, in truth, the same logic ought to dispose of Lord Neuberger's tentative suggestion also. There is no conceivable policy reason not to give effect to this logic."*

That reasoning is, in my view, preferable. It leads to a commercially-sensible result and avoids a world of problems, including the issues which arise where such a transaction is registered. It also avoids the absurdity that the parties could lawfully achieve the same result by surrendering the lease and granting a new one to the guarantor. But that would require the positive involvement of the landlord. That being so, it rather begs the question why the landlord should have the final choice as to whether such a transaction should take place, without any requirement of reasonableness imposed. As I've said above, Morgan J's speech was expressly cited in *EMI* but the reasoning was rejected by the Judge in that case. Effectively the difference is as to whether one breaks the transaction down into constituent elements or looks at the effect of the whole. The Judge in *EMI* considered that the former was impermissible, and her decision accords with the comments in *K/S Victoria Street*, and indeed the tenor of the Law Commission documents relating to the 1995 Act.

In any event, since *UK Leasing* was not dealing with an assignment by a tenant to a guarantor, as matters stand, such an assignment is now void, which is obviously a matter which must be carefully borne in mind when carrying out due diligence. Further, as far as I've been able to establish, there are no plans at present for an appeal in *EMI* (perhaps unsurprising given the rather unattractive position adopted by the Claimant).

Helpfully, on 31st March the Law Commission published its consultation paper 'Updating the Land Registration Act 2002', which states, in paragraph 12.45, '…we are aware of widespread dissatisfaction with a number of aspects of the 1995 Act' and invites comments. I'm sorry to say that that's to be found approximately half-way through the consultation paper, at page 240. If you can bear to dig through that far, though, this is at present your best chance to be heard and restore some commercial sense to this area of the law. The consultation is open until 30th June. Please, please have a look at it.

MORTGAGES UPDATE

Lord MacNaghten famously stated in his judgment in *Samuel v Jarrah Timber* that "no one, I am sure, by the light of nature ever understood an English mortgage". A bit like the law of forfeiture, the law of mortgages has evolved from its roots and been subjected to a similarly dizzying raft of statutory overlay and equitable intervention, again to relieve against the "nuclear option" of the loss of one's property by reason of default in repayment, but also to prevent the mortgagee from taking unfair advantage of the mortgagor by extracting collateral benefits as part of the deal (the "clogs and fetters" rule). We are delivering this talk too soon to be able to discuss the important decision of *McDonald v McDonald*, which is yet to be decided by the Supreme Court, though argument has been heard. If you keep an eye on our Chambers twitter feed, you will be first to know when it comes out, and we will provide the usual case digest. That case, if you have not heard of it, concerns proceedings brought by receivers under a legal charge for possession of a buy-to-let property, and although the case below had a bit to say about receivership, the main point of the case is the extent to which Article 8 rights under the ECHR can be invoked in proceedings between private individuals, probably the major human rights issue of the moment for property lawyers, who are advancing or fending off such defences almost as a matter of daily routine. At the moment all we can say is watch this space.

Out of Acorn Mighty Litigation Did Grow

Amongst other angles, residential mortgage cases can often have a regulatory angle. This is because mortgage lending on homes can be a "regulated activity" under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, Art. 25A. It becomes a regulated activity if (in simple terms) it falls within the definition of a "regulated mortgage contract". A mortgage will, under article 61(3), become

> *a "regulated mortgage contract" if, at the time it is entered into, the following conditions are met—*
> *[*
> *(i) the contract is one under which a person ("the lender") provides credit to an individual or to trustees ("the borrower");*
> *(ii) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land in the EEA;*[3]
> *(iii) at least 40% of that land is used, or is intended to be used—*
> *(aa) in the case of credit provided to an individual, as or in connection with a dwelling; or*
> *(bb) in the case of credit provided to a trustee which is not an individual, as or in connection with a dwelling by an individual who is a beneficiary of the trust*

Any property lawyer can already conjure with the "at least 40%" provision. Unless the mortgagee is an authorised or exempt person, he is prohibited from engaging in that activity (section 19 of the FSMA). Breaches can result in criminal sanctions and civil actions under a bespoke statutory tort, but for our purposes, section 26 is of interest:

> ***26.— Agreements made by unauthorised persons.***
> *(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.*
> *(2) The other party is entitled to recover–*
> *(a) any money or other property paid or transferred by him under the agreement; and*

[3] The requirement that the mortgage be a first legal charge has been removed

(b) compensation for any loss sustained by him as a result of having parted with it.
(3) "Agreement" means an agreement–
(a) made after this section comes into force; and
(b) the making or performance of which constitutes, or is part of, the regulated activity in question.

So, anyone who lends on the basis of a security in breach of the section 19 general prohibition is in a lot of trouble. There is, however, a get-out which you should also be aware of, under section 28:

28.— Agreements made unenforceable by section 26 or 27 [: general cases] [1] **.**
(1) This section applies to an agreement which is unenforceable because of section 26 or 27 [, other than an agreement entered into in the course of carrying on a credit-related regulated activity] [2].
(2) The amount of compensation recoverable as a result of that section is–
(a) the amount agreed by the parties; or
(b) on the application of either party, the amount determined by the court.
(3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow–
(a) the agreement to be enforced; or
(b) money and property paid or transferred under the agreement to be retained.
(4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the court must–
(a) if the case arises as a result of section 26, have regard to the issue mentioned in subsection (5); […]
(5) The issue is whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement […]
(7) If the person against whom the agreement is unenforceable–
(a) elects not to perform the agreement, or
(b) as a result of this section, recovers money paid or other property transferred by him under the agreement,
he must repay any money and return any other property received by him under the agreement.
(8) If property transferred under the agreement has passed to a third party, a reference in section 26 or 27 or this section to that property is to be read as a

> *reference to its value at the time of its transfer under the agreement.*
> *(9) The commission of an authorisation offence does not make the agreement concerned illegal or invalid to any greater extent than is provided by section 26 or 27.*

FSMA came into play in *Dickinson & Anor v UK Acorn Finance Ltd* [2015] EWCA Civ 1194, albeit a little obliquely. A short term loan was provided which the borrowers defaulted on. The loan was secured against the borrower's dwelling, a farm with a garden and a paddock. Proceedings had never been defended on the basis that the activity was regulated and that the lender was barred from enforcing the loans under FSMA. A possession order was made, whereupon a new claim was issued, in the High Court, that the loan and mortgage were rendered void by FSMA. The lender asked for the proceedings to be struck out as an abuse of process (the *Henderson v Henderson* principle) or cause of action or issue estoppel: the point should have been taken in the earlier proceedings. The point in the Court of Appeal was whether or not the borrowers could not be prevented from invoking FSMA as they had not mentioned it before. Their argument was that this principle should be used to get around a statutory prohibition on enforcing regulated agreements - FSMA was a trump card that could be played at any time, even after a possession order is made. The lender argued that in fact FSMA was not a trump card as it did not impose a blanket ban on lending (as had been the case in a decision of the Privy Council, *Kok Hoong v Leong Cheong Mines Ltd* [1964] AC 993, a case about issue estoppel and cause of action estoppel), when the Court was considering, not the technical rules of procedural estoppels but rather the broad merits-based abuse principle in *Henderson v Henderson.* The Court of Appeal determined that, under *Henderson*, the Court could look at the matter in the round, and noted that, contrary to the borrowers' submissions, the prohibition under FSMA was not absolute, but could be dispensed with by the Court, or dealt with under a section 28(7) election.

Cross-Securitisation

If a bank has separate mortgages over separate securities, and enforces each of those separately with possession proceedings and consequent possession orders, to what extent can it rely on a cross-securitisation provision? This was considered in the decision in *Commercial First Business Ltd v Munday & Anor* [2014] EWCA Civ 1296.

The borrowers under two separate mortgages of agricultural property contended that there was an estoppel by convention or alternatively a procedural estoppel which precluded the mortgagee from relying on a cross-security provision, contained in both mortgages, at the enforcement stage (i.e. upon execution of the obtained warrants). The borrowers argued that that was so because the mortgagee had obtained separate possession orders and separate judgments in 2007, in each case without reference to its security over the other property, and had not sought to reassert its right of cross-security until 2012, when it applied for a warrant for possession.

The Court of Appeal held that the estoppel by convention had not been made out on the facts, but agreed with the borrowers that the mortgagee's right of cross-security in respect of the 2007 judgment sum had merged with the judgment obtained and such that it was now no longer available to it. Only the interest accruing post judgment remained secured against both properties. The decision will be of interest to lenders generally who will now need to exercise care to ensure that their rights under an 'all monies' charge are not lost when enforcement action is taken against some, but not all, of the relevant security.

SuperSub(rogation)

The Supreme Court in *Bank of Cyprus v Menelaou* [2015] UKSC 66 has given us something new to think about in the context of subrogation. We all know about subrogation – the process by which a chargee, who gets something less than what he thought he was going to get – is able to revive an earlier interest in property in order to furnish the protection that he is lacking.

The appellant was M. M's parents owned a property called "the Hall". BoC was secured against the Hall, subject to a legal charge against the property under which the borrowers were M's parents. The Hall was to be sold, and M was to get a property, Oak Court, in her sole name (on trust for herself and her siblings). BoC agreed, subject to the repayment of part of the debt and a legal charge against Oak Court for the other part, to release its charge over the Hall to allow the transaction to proceed. Funds were then released, but BoC only released

its charge over the Hall a month later. The trial judge (whom the Court of Appeal reversed) held that BoC had no subrogation claim. At the date at which the money was transferred, they still had a charge over the Hall. The charge over the Hall – and hence the detriment – was only in fact released a month later, and it could not therefore be said, as a matter of timing, that the receipt of the money by M was at the expense of BoC, as BoC only suffered the detriment after the money had been transferred. In other words, there was a technical causation problem.

A charge was entered into over Oak Court. However, M didn't sign the legal charge over Oak Court, though someone did sign it in her name. On discovering the charge, M successfully got it removed from the register. BoC however counterclaimed for an equitable charge by way of a revival of the unpaid vendor's lien over Oak Court. Not unreasonably, BoC was of the view that, instead of the balance of the mortgage debt being transferred over to the new property and then re-secured with a new legal charge, M had instead received that money apparently (and in both senses of the phrase) free-of-charge.

The starting point was to formulate some cause of action, which was advanced by BoC on the basis of a claim in unjust enrichment. The simple basis of such a claim is that set out in *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938, where "the Supreme Court recognised that it is now well established that the court must ask itself four questions Page 7 when faced with a claim for unjust enrichment. They are these: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?" – the questions are, however, expository only and do not have the force of statute (paragraphs [18] and [19], *per* Lord Clarke).

It seemed incontrovertible that M had been enriched, as she had been discharged of her obligation to pay the purchase price to discharge the unpaid vendor's lien which a vendor has over the sale property until the purchase price is paid in full. The answer to question (1) was yes. The answer to question (3) was also "yes": "the unjust factor or ground for restitution is usually identified in subrogation cases as being, either (1) that the lender was acting pursuant to the mistaken assumption that it would obtain security which it failed to obtain: see eg Banque Financière per Lord Hoffmann at p 234H, or (2) failure of consideration: see the

fourth and fifth points made by Neuberger LJ in *Cheltenham & Gloucester plc v Appleyard* ("C&G") [2004] EWCA Civ 291, paras 35 and 36; [2004] 13 EG 127 (CS)". There was no question of any defence being open to M, so question (4) was answered in the negative.

The all-important question was question (2): "On the facts here the Bank expected to have a first legal charge over Great Oak Court securing the debts of the appellant's parents and their companies but, as events turned out, it did not have that security interest. The critical question is therefore whether Melissa was enriched at the expense of the Bank." Thi is what is known to restitution lawyers as the "remote recipient" problem. As to that question, Lord Clarke said

> *"In my opinion the answer to the question whether Melissa was unjustly enriched at the expense of the Bank is plainly yes. The Bank was central to the scheme from start to finish. It had two charges on Rush Green Hall which secured indebtedness of about £2.2m. It agreed to release £785,000 for the purchase of Great Oak Court in return for a charge on Great Oak Court. It was thus thanks to the Bank that Melissa became owner of Great Oak Court, but only subject to the charge. Unfortunately the charge was void for the reasons set out above. In the result Melissa became the owner of Great Oak Court unencumbered by the charge. She was therefore enriched at the expense of the Bank because the value of the property to Melissa was considerably greater than it would have been but for the avoidance of the charge and the Bank was left without the security which was central to the whole arrangement."*

The argument for M appeared to be simply that the issue was between the bank and her parents, and was nothing to do with her. However, the majority of the Supreme Court was astute to look through this formalistic argument – ultimately, M received an economic benefit, and the only reason why she received that economic benefit was that the burden that appeared on one side of the equation – that there was a debt secured by mortgage – had, by reason of something going wrong, been converted into something that was a pure benefit – namely, free money. The causation point only arose due a snarl-up in the execution of document.

The Supreme Court majority endorsed what was said by Henderson J in *Investment Trust Companies v Revenue and Customs Comrs* [2012] EWCH 458 (Ch), [2012] STC 1150

> *"67. I must now draw the threads together, and state my conclusions on this difficult question. In the first place, I agree with Mr Rabinowitz that there can be no room for a bright line requirement which would automatically rule out all restitutionary claims against indirect recipients. Indeed, Mr Swift accepted as much in his closing submissions. In my judgment the infinite variety of possible factual circumstances is such that an absolute rule of this nature would be unsustainable. Secondly, however, the limited guidance to be found in the English authorities, and above all the clear statements by all three members of the Court of Appeal in Kleinwort Benson Ltd v Birmingham City Council [1996] 4 All ER 733, [1997] QB 380, suggest to me that it is preferable to think in terms of a general requirement of direct enrichment, to which there are limited exceptions, rather than to adopt Professor Birks' view that the rule and the exceptions should in effect swap places (see 'At the expense of the claimant': direct and indirect enrichment in English law in Unjustified Enrichment: Key Issues in Comparative Perspective, edited by David Johnston and Reinhard Zimmermann, Cambridge (2002), p 494). In my judgment the obiter dicta of May LJ in Filby and the line of subrogation cases relied on by Professor Birks, provide too flimsy a foundation for such a reformulation, whatever its theoretical attractions may be, quite apart from the Page 10 difficulty in framing the general rule in acceptable terms if it is not confined to direct recipients."*

Henderson J went on to state

> *"The real question, therefore, is whether claims of the present type should be treated as exceptions to the general rule. So far as I am aware, no exhaustive list of criteria for the recognition of exceptions has yet been put forward by proponents of the general rule, and I think it is safe to assume that the usual preference of English law for development in a*

> *pragmatic and step-by-step fashion will prevail. Nevertheless, in the search for principle a number of relevant considerations have been identified, including (in no particular order): (a) the need for a close causal connection between the payment by the claimant and the enrichment of the indirect recipient; (b) the need to avoid any risk of double recovery, often coupled with a suggested requirement that the claimant should first be required to exhaust his remedies against the direct recipient; (c) the need to avoid any conflict with contracts between the parties, and in particular to prevent 'leapfrogging' over an immediate contractual counterparty in a way which would undermine the contract; and (d) the need to confine the remedy to disgorgement of undue enrichment, and not to allow it to encroach into the territory of compensation or damages."*

Following that approach the Supreme Court was able to get past the technicality of the transaction to get at the commercial reality of the situation, which was that M has made a windfall that she should never have received.

BOUNDARIES UPDATE

Three recent decisions have shed new light on the endlessly vexed issue of boundary disputes. As we all know, these almost always involve personal animosities, and therefore reaching settlements can be particularly tricky. Clients seem to experience extraordinary levels of loss aversion when it appears that a neighbour is claiming ownership of even the smallest part of what they believe to be their land. Accordingly, any guidance from the Courts on how these disputes are likely to be resolved in proceedings is welcome, since it allows us to give robust advice early on.

Two new decisions shed light on the jurisdiction of the First Tier Tribunal in relation to determined boundary applications, which are of course not intended to be directly adversarial, and can therefore be a more straightforward option if there is unlikely to be any serious opposition. I'll talk about those shortly. But first I want to say a few words about the decision in *Adam Stoddart Page v Convoy Investments Limited* [2015] EWCA Civ 1061, a more standard boundary-and-interference-with-easements dispute which provides some

useful pointers in relation to evidence of boundaries (and in which two members of Chambers, Phil Sissons and Charles Harpum, appeared against each other).

i) *Adam Stoddart Page v Convoy Investments Limited* [2015] EWCA Civ 1061

The matter related to two parcels of agricultural land which were sold at auction by a Mr. McLeod to Mr. Page in 2000, both forming part of Mr. McLeod's larger farm holding. Both parcels enjoyed the benefit of a right of way over a metalled roadway which ran along the north-western edge of one of them, 'Lot 1'. Convoy Investments was Mr. McLeod's successor in title to the remainder of his land, including the roadway.

The sale to Mr. Page of Lot 1 was subject to an exception and reservation in the following terms:

> *"13.4 There is excepted and reserved out of the Property unto the Transferor or other the owner or owners or occupiers for the time being of Bybrooke Hall and its adjoining land abutting the north-western boundary of the property... the whole of the boundary structure shown on the annexed plan and marked "T" outwards on the north-western boundary of the Property (so far as the same is co-extensive with the said adjoining land) together with full rights of entry on the Property... for the purposes of maintaining repairing or renewing such boundary structure..."*

Unfortunately, no 'T' marks appeared anywhere on the relevant plan. However, at the time of the conveyance there was a white metal fence along part, but not all, of the north-western boundary. After the purchase, Mr. Page had removed part of the fence in order to obtain access to Lot 1 from the part of the roadway nearest the public highway.

The main issues between the parties were as to interference with Mr. Page's enjoyment of his right of way, because Convoy had put up new electric gates across it and, which is the relevant issue here, what the boundary was between Lot 1 and the roadway. It was common ground that if the boundary was the edge of the roadway Mr. Page could enter onto Lot 1 from any point along its length, but if the reservation of the boundary feature to Mr. McLeod (and thus Convoy) had been effective, he would not be entitled to remove any part of the

fence and thus to access Lot 1 from any part of the roadway where the fence had stood in 2000.

Mr. Page relied on the decision in *Ali v Lane* [2006] EWCA Civ 1532 in the context of construction of an ambiguous conveyance, and in particular on the decision of Carnwath LJ who said (at paragraphs 36 and 37):

> *"36. … In the context of a conveyance of land, where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent conduct, subject always to that evidence being of probative value in determining what the parties intended.*
>
> *37. The qualification is crucial. When one speaks of "probative value" it is important to be clear what needs to be proved. In this case the issue concerns the line of a boundary which was fixed not later than 1947. Evidence of physical features which were in existence in the 1970s is of no relevance to that unless there is some reason to think that they were in existence in 1947, or they are replacements of, or otherwise related, to physical features which were in existence in 1947. Similarly, evidence of Mr Attridge Senior's understanding of the position of the boundary, or actions by him apparently relating to that boundary, is of limited probative value, even if admissible. Such evidence begs the questions whether his understanding of the boundary was well-founded, and if so how strict he was in observing it, particularly having regard to the disused state of the disputed land during that period. "*

Mr. Page suggested that the absence of evidence of an objection by Mr. McLeod to his removal of part of the fence shortly after his initial purchase fell within this rule. The Court of Appeal found, however, that that could not be said to be of any 'probative value' within the meaning of *Ali v Lane*.

Mr. Page then suggested that, since no boundary 'structure' was shown on the plan to the conveyance, nor was any boundary marked with 'T' marks, the exception in the conveyance was of no effect, though it was accepted that the only boundary feature in existence at the time was the white fence, albeit that did not extend to the whole length of the boundary. The Court of Appeal found, however, as a matter of construction, that the fact that the fence was not shown separately from edge of the roadway on the plan was not critical – had there been 'T' marks, there would have been no doubt to what they referred. The absence of 'T' marks was an obvious error which could easily be corrected, since it was clear where the marks

should appear. Accordingly, the conveyance should be read as though there were such marks, with the result that the fence had been reserved to Mr. McLeod and should be reinstated to its position in 2000. Beyond the end of the fence, the boundary was necessarily the edge of the metalled roadway.

In many ways, this was an obvious conclusion, since it was necessary to give any effect to the exception in the conveyance, and there was only one way in which the error could be remedied so very little doubt. But the decision emphasises the importance of the position on the ground in boundary dispute cases, and the necessity for clear evidence if one wishes to rely on matters after the date of a conveyance as in *Ali v Lane*.

ii) *Murdoch v Amesbury* [2016] UKUT 3 (TCC) and *Bean v Katz* [2016] UKUT 168 (TCC)

The first of these is a decision from January of this year of His Honour Judge Dight, (in another case in which a member of Chambers, Nat Duckworth, appeared). The Murdochs had made an application pursuant to section 60(3) of the Land Registration Act 2002 for the determination of the exact boundary line between their property and that of their neighbours, the Amesburys, who objected first on the basis that the plan submitted by the Murdochs did not comply with the Land Registration Rules in that the measurements were not accurate to within +/- 10mm (though, notably, that requirement appears only in a Land Registry Practice Guide and not in the legislation) and secondly, on the basis that the correct boundary lay elsewhere. The matter was heard by the FTT in a two day trial involving a site visit and several witnesses of fact and law. The Judge in the FTT considered that the plan was deficient and rejected the boundary line asserted by the Murdochs, ordering the Land Registry to cancel their application for a determined boundary. She then went on to make findings, based on the evidence given by the parties' experts and observations made at a site visit, as to the true legal boundary, which she found was in a different position from that shown on the plan.

The Murdochs appealed to the Upper Tribunal. They did not seek to challenge the final order by the Judge in the FTT cancelling their determined boundary application, rather they submitted that the Judge had no jurisdiction to make a finding as to the legal boundary. His

Honour Judge Dight considered that the starting point was to recognise that the FTT was a statutory body with no inherent jurisdiction and that the scope of its powers was therefore a question of statutory construction. Judge Dight considered the relevant provisions of the Land Registration Act 2002 and of the Land Registration Rules 2003, and concluded that it was plain that the Parliamentary intention was for the FTT to have only a binary power, either to direct the Registrar to give effect to the application or to cancel the application. There was however, no power to direct the Registrar to prefer the position of the objector or to give a direction requiring the Registrar to give effect to other findings. Judge Dight held that once the Judge in the FTT concluded that the plan did not comply with the required rules, she had no jurisdiction to go on to make other findings.

The effect of that decision appeared to be that the section 60 procedure was of very little use if there is any serious doubt as to the proper position of the relevant boundary, and proceedings in court will be needed in such circumstances.

However, some three months later Judge Cooke handed down her decision in *Bean v Katz* which raised similar issues to *Murdoch v Amesbury* but which differed in one crucial respect, namely that the plan submitted in *Bean v Katz* complied with all the necessary technical requirements. The FTT in this case held that the line submitted by the applicants was accurate, save for one small section in relation to which the FTT prescribed a different line. In the appeal to the Upper Tribunal Judge Cooke considered the effect of *Murdoch v Amesbury*. She considered that that case was distinguishable on the basis that its ratio was limited to applications involving deficient plans, and that it was not a precedent for any other, broader proposition. All other comments relating to the jurisdiction of the FTT were *obiter*. Judge Cooke noted that the appellants might have sought to rely on these *obiter* paragraphs to argue that the FTT had no jurisdiction to prescribe a different line for part of the boundary but stated that they were correct not to do so. According to Judge Cooke, the scheme of the Land Registry Rules envisaged that the FTT should consider not only the accuracy of any plan submitted but also whether the line on any such plan was the boundary line, the latter being a question of title. In deciding whether the line was the boundary or not, Judge Cooke considered that the FTT would inevitably make findings about the true position of the boundary in order to give reasons for its conclusions as to whether or not the application

should succeed. Thereafter, it was entitled to proceed as it had in many previous cases by giving directions to the Land Registrar to give effect to its decision (and, importantly, Rule 40 of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2014 includes provision for the Tribunal to order the registrar to make a 'specified entry' on the Register, which was held to include an order determining the boundary as the Tribunal found it to be.

The result, thankfully, is that the decision in *Murdoch v Amesbury*, which caused great concern when it first appeared, has been hugely mollified. That entails that the section 60 procedure is still of use where the position of at least most of the boundary can be clearly shown (if the whole boundary is wrong, the application is likely simply to be cancelled) since it employs a specialist tribunal and is usually a more cost-effective option.

EASEMENTS UPDATE

It has been a bumper year for easements cases. Prescriptive and implied easements and profits have proven to be the source of a number of recent high-level appellate cases. We will start with a Court of Appeal decision that is yet to come out.

"*Get Off My Land"*: *Nec Vi and Unfriendly Signage*

On 3 March, the Court of Appeal heard argument in the appeal from the decision in *Winterburn v Bennett* [2015] UKUT 59. The Upper Tribunal's decision (given by HH Judge Purle QC, sitting as a Judge of the High Court) was concerned with two issues. The first was whether use of the servient tenement by customers of the dominant tenement, in circumstances where such use was neither expressly condoned nor controlled by the dominant owner, was user on which the dominant owner could rely to establish prescriptive rights in favour of the dominant land. The Judge determined this point against the Appellants. The second issue was whether a clearly visible sign to the effect that the car park was private, which had been displayed throughout the prescriptive period, but which had not been enforced in anything other than an occasional and desultory way, was sufficient to render the use contentious, such that the dominant owner was unable to say that it was use as of right. The Judge allowed the appeal on this point, albeit giving permission to appeal to the Court of

Appeal. The judgment of the Court of Appeal, which was reserved, is likely to cast useful light upon the question whether signs on land indicating that a certain activity is prohibited on that land are sufficient to render the subsequent activity contentious (thus preventing the activity maturing into an easement, or perhaps frustrating its registration as a town or village green), even where the sign is wholly ignored for the prescriptive period, and no attempt is made to enforce the landowner's rights: watch this space!

Implied Easements: A Way Through The Woods?

In *Wood & Anr v Waddington* [2015] EWCA Civ 538, the Court of Appeal considered the circumstances in which a dominant owner was entitled to acquire two rights of way under section 62 of the Law of Property Act 1925. Under a provision under a transfer, the Property acquired by the Woods was "sold subject to and with the benefit of all liberties privileges and advantages of a continuous nature now used or enjoyed by or over the Property". The issue was whether the right of way claimed was "continuous".

Lewison LJ decided that, as a matter of technical law, a right of way –depending, as it does, on human agency to exercise it, was not a "continuous easement" in the technical sense of term: "continuous easements are those that are enjoyed without any human activity; such as rights of light, rights of support, rights of drainage and so on". It was accepted, however, that under the rule in *Wheeldon v Burrows*, a right of way could be "continuous and apparent", this was because "continuous" was effectively surplus verbiage under that rule.

Of wider importance was the the appellants' alternative argument based on section 62 of the Law of Property Act 1925, was successful. As was discussed in *Alford v Hannaford* [2011] EWCA Civ 1099, where there is no prior diversity of occupation (that is, predating the sale) of what would be the dominant and servient tenements, then section 62 will only impliedly grant rights in the manner of easements insofar as they are "continuous and apparent". By way of a refresher, it will be recalled that the usual "domain" of section 62 is where the person claiming to have acquired an easement by implied right is already in occupation of the quasi-dominant tenement (as in the case of a licensee who acquires the freehold of the licensed land, or the tenant who acquires his reversionary interest), whereas *Wheeldon* was thought to apply where the owner of both the quasi- dominant and the quasi-servient land is

also in occupation of each, and then sells the quasi-dominant land. In such a case, if the rights exercised in favour of the quasi-dominant land were continuous and apparent and reasonably necessary to enjoy the dominant land, he will, by implication, be deemed to have granted them to the purchaser of the dominant tenement. On one view, therefore, the *Alford* approach to section 62 sweeps away the rule in *Wheeldon*.

What, then, does "*continuous and apparent*" mean? Lewison LJ stated that the critical question "is the extent to which there are visible signs of a track or road". Morgan J had found that there was a potholed track, and a sign indicating a turning, which were visible signs that the track which was the subject of the first claimed right had been used for the benefit of the conveyed land, since the obvious inference was that vehicles would continue down the track conveyed to the predecessors in title to Mr and Mrs Wood. In relation to the second claimed route, there were also visible signs of vehicular use. These visible signs were sufficient to render each route continuous and apparent for the purposes of the rule in *Wheeldon v Burrows*. Use once a month was also sufficiently apparent use.

The Court rejected the argument that the fact that some rights had been granted meant that other, implied rights were implicitly ousted: "The grant in the written terms of a conveyance of a limited right will not exclude the operation of section 62 to confer a greater right than that which is contained in the terms of the conveyance itself."

What is important about *Wood v Waddington* is that it apparently renders *Wheeldon v Burrows* surplus to requirements. Now that there is no need for prior diversity of occupation, and now that we are told that the mere fact that "continuous and apparent" means the same as it does under *Wheeldon*, there will be little need to have recourse to *Wheeldon*, particularly as it imports and additional test of necessity which section 62 does not. *Wheeldon* may only be of use when either section 62 (but not *Wheeldon*) is excluded by a transfer, or where one is dealing with an equitable disposal of land, as this does not amount to a conveyance under which section 62 is implied.

Loose: Cockles and Prescription: The Missed Opportunity to Make a Nec Clam Joke

In *Lynn Shellfish Ltd v Loose* [2015] UKSC 72, the Supreme Court had to deal with the difficulties created by prescriptive rights over an area that was moving. The Appellants are cockle fishermen who extract their catch from tidal waters, where the public has a right to fish. One day, they did that in an area of the Wash. The Respondents said that this was a trespass, because that area, they said, belonged to them. It belonged to them because they asserted that they had acquired a right to a private fishery by prescription, dating back to before Magna Carta. This had been established in the Court of Appeal in a case called *Loose v Castleton*, decided in 1978. The not entirely meritorious argument for the Respondent was that sandbanks which had previously been part of the public fishery had been added to the private fishery as channels which has previously separated them from the foreshore had become silted up. The result of this was an "ambulatory" profit a prendre, creeping out to see with every century of coastal accretion. The High Court and the Court of Appeal thought that this was the consequence of the silting process, either because one should infer an intention that this be so from the (already hypothetical) original fictional grant, or by accretion.

The Appellants argued that this was to accord too much reality to the fictitious underlying grant in prescription cases. The notional grant is little more than a device to explain the creation of a property right like and easement or a profit. In truth, what prescription is, is the acquisition of a right by a suitable long period of use *nec clam nec vi nec precario*. It is physical use that determines the scope of the right acquired, and it is not appropriate to attach further rights to the fictional grant which go beyond the conduct giving rise to it. The Supreme Court agreed. It also agreed that accretion was a gradual, imperceptible process whereby land was added to by the natural action of (in this case) the sea. What accretion could not do is create, perhaps imperceptibly, a land bridge to a sand bank, only for that sand bank – hitherto subject to a public right – thereby to have "accreted" to the servient tenement.

One issue that is important that is discussed in this case is the *unum quid* principle – if I use a part of land, when will I be treated as the owner of the whole? The principle is well-established in Scotland, but is also a slightly overlooked part of the English law and was

considered as such in *Loose*. It is worth looking at this discussion for anyone who deals with adverse possession cases as well as easement cases.[4]

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[4] The case law is set out in Jourdan QC and Radley-Gardner on Adverse Possession at page 245.