



In this series of articles, we aim to highlight 3 of the most interesting cases in our field decided in the past month. This month: abusive attempts to subvert possession proceedings, challenges to the register of common land, and numerous issues arising from an injunction excluding a landlord from a property.

## **JUNE 2023**

### **Lewis v “the West Brom”, and others [2023] EWHC 1361 (KB)**

#### ***Summary***

The High Court provided written reasons for striking out a number of claims.

The claims were all brought in the High Court under the Part 8 procedure. Although the precise facts of each case varied, all were claims brought by borrowers who were defendants to possession claims in the County Court, having defaulted on loans secured against their properties. All of the claims bore the hallmarks of an ‘unidentified guiding hand’, being phrased in pseudo-legal language and consisting of a series of assertions and rhetorical questions amounting to a basic assertion that the mortgages had been released and the lenders in fact owed the borrowers. The claims were all untenable and based on ‘legalistic whimsy’.

Master Thornett’s judgment describes how the many similar claims had been subject to a stay, pending the filing of a claim form which identified a recognisable cause of action. Owing to the number of similar claims and the enquiries being received from the County Court, however, the court had determined to list a number of the matters for hearing on the same occasion, at which all of the claims were struck out.

#### ***Why it’s important***

This judgment clearly identifies the aim of the various High Court proceedings, namely, to subvert the various sets of County Court possession proceedings. It contains warnings in strong terms about the wisdom of pursuing such a strategy, which is abusive, and notes the lamentable waste of time, cost and resources that these claims have caused.

It is apparent from the schedule appended to the judgment that numerous claims of this type appear to have been issued. The judgment is likely to be of assistance to other lenders faced with this strategy to undermine possession proceedings.

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**Avondale Park Limited v Miss Delaney’s Nursery Schools Limited [2023] EWCA Civ 641**



## ***Summary***

The Court of Appeal dismissed an appeal against continuation of an injunction excluding a landlord from a property, in a dispute arising about the existence and terms of a lease.

The appellant was a head lessee. A sublease had been granted which was contracted out of the protection of the Landlord and Tenant Act 1954. The tenant intended to run a nursery from the premises. The nursery use was contrary to the terms of the headlease. The sublease made provision for a deed of variation of the headlease to be obtained, and for the sublease to terminate if it was not within 3 months.

No satisfactory deed was obtained, but the tenant nonetheless went into occupation and ran a nursery business for some years. The landlord purported to forfeit for non-payment of rent. The tenant asserted the forfeiture was invalid for waiver, and that the sublease had determined years earlier owing to the non-provision of the deed of variation, such that a periodic tenancy had arisen which was within the 1954 Act. The tenant obtained an interim injunction excluding the landlord from the premises.

The Court of Appeal upheld the injunction:

1. The provision that the sublease would terminate if the deed of variation were not obtained was for the benefit of both parties. Accordingly, this case was not governed by the line of authorities about whether one party can rely on its own breach of condition. Contrary to the landlord's argument, there was no need for an election by either party to terminate the lease following non-provision of the deed of variation. The provision was a condition, and its consequence was that lease terminated automatically at the guillotine date.
2. Contrary to the landlord's submission, it was not overwhelmingly clear that there was an estoppel by convention preventing the tenant from asserting it occupied on the basis of anything other than the written lease. Indeed, there was an issue as to whether such an estoppel, which could have the effect of preventing the tenant from relying on its 1954 Act protection and thus outflanking the statute, could operate at all.
3. The judge had been correct to apply the test in *American Cyanamid* – but even if he had applied a higher threshold, the matter would still have had to go to trial.

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

This case provides modern confirmation that there is no conceptual bar to a lease which determines on the happening of a particular event. It is also a useful illustration of the application of a number of legal principles in the context of an interim injunction. Practitioners may also find the court's consideration (in the context of whether there could be an estoppel preventing the tenant from asserting



a periodic tenancy) of what appeared to be a number of terms of the parties' agreement, and the extent to which the court considered them compatible or otherwise with a periodic tenancy, to be helpful reading, given the frequently with which basis of occupation is disputed in practice.

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## **Rushmer v Central Bedfordshire Council [2023] EWHC 1341 (Ch)**

### ***Summary***

The High Court considered the extent to which the register of common land is susceptible to challenge in the High Court.

The Claimants owned properties adjoining a common. In the course of correspondence with the Defendant, the commons registration authority for the area, they became concerned that there was a lack of clarity about the relationship between their land and the common. They brought Part 8 proceedings seeking various declarations about the register and, if necessary, an order for its rectification. The Defendant argued that the proceedings should be struck out for lack of jurisdiction.

Mr Nicholas Thompsell, sitting as a Deputy Judge of the High Court, determined that the court had jurisdiction to make a declaration about which map identified the extent of the common land, and did so.

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

This case raised apparently novel issues, and will be essential reading for any practitioner considering bringing court proceedings challenging the register of common land. The decision establishes that the court does have jurisdiction to identify the contents of the register, hence its ability to declare which map showed the true record. However, other than in the limited circumstances provided for under the Commons Registration Act 1965 and the Commons Act 2006, it cannot correct, clarify or rectify the register, including clarification arising from the inherent inaccuracy of large-scale mapping.

The decision also establishes that the definition of 'common' in s.1 Commons Act 1899 should be taken as referring to what is a common from time to time, not only what was common land at the time of the adoption of the 1899 Act.

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