Falcon Chambers

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: costs of arbitrations in the Upper Tribunal, and two interesting decisions on adverse possession.

Readers may also be interested in this summary[1] of ***R (Annington Properties Limited) v Secretary of State for Defence*** [2023] EWHC 1154 (Admin), 1155 (Ch), a case concerning, among other matters, a number of novel issues under the Leasehold Reform Act 1967 and under the Landlord and Tenant Act 1954.

MAY 2023

A Grantor v A Grantee [2023] UKUT 23 (LC)

Summary

The Upper Tribunal determined that where it acts as an arbitrator in a reference by consent (under s.1(5) of the Lands Tribunal Act 1949), it has no general jurisdiction to award costs.

The claimant was the owner of land through which a pipeline ran, pursuant to a deed of grant of easement of which the respondent had the benefit. The pipeline had been laid consensually, without the exercise of compulsory purchase powers. The deed of grant included a clause providing for compensation to be payable to the claimant if development was prevented by reason of the pipeline, and an arbitration clause providing for a reference to the Upper Tribunal to determine the quantum of that compensation. The deed did not refer to the costs of any such reference. In the course of a such a reference, an issue arose as to whether the Tribunal had jurisdiction to make an award of costs.

The Tribunal determined that it has power to award costs only insofar as rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (as amended) applies, but not under s.61 Arbitration Act 1996.

Why it's important

This case determines an apparently novel point about the Tribunal's jurisdiction, in the context of significant amendments to the rules about awards of costs which took effect in 2013.

The Deputy President's careful judgment traces the interplay of the Tribunal's jurisdictions to award costs and to sit as an arbitrator in a reference by consent, and the relevance of the Arbitration Act 1996. Importantly, the case establishes

[1] Renée, please link: https://www.falcon-chambers.com/news/r-annington-properties-limited-v-secretary-of-state-for-defence-2023

that where the Upper Tribunal sits as an arbitrator in a reference by consent, the 1996 Act does not apply, save for those provisions identified in rule 30 of the 2010 Rules. Section 61, which deals with awards of costs, is not one of those provisions and therefore does not apply.

Rather, the Tribunal's only jurisdiction to award costs is as set out in rule 10 of the 2010 Rules. Significantly, that rule only provides for costs to be payable in particular categories of case. Although the Tribunal accepted that this reference was one concerning 'injurious affection' within rule 10(6)(b), not all disputes will fall within the categories identified. In such a case, a costs award would only be available in the case of unreasonable conduct or where the parties had agreed that costs would be payable in accordance with rule 10(4).

Brown v Atobatele REF/2021/0563

Summary

The First-tier Tribunal (Land Registration Chamber) determined that applicants had been in adverse possession of a property for the requisite time period.

The property was a semi detached house, consisting of a basement flat and upper parts. The whole of the property was let, through a managing agent, to a head tenant under a written agreement; he then sublet the individual rooms. The applicants entered as sublessees: Mr Halstead as occupant of the basement, Mr Brown as occupant of a room in the upper parts. Following complaints about the initial head tenant's failure to pay rent, correspondence suggested that a new written agreement was intended under which Mr Brown take over the role. That arrangement came about in practice, but was not reduced to writing.

The paper owner died abroad in 1989 and the freehold became vested in the public trustee. The managing agent carried on managing the property, including entering into a new written agreement with Mr Halstead. The managing agent died in 1996.

Post-1996, Mr Halstead continued in occupation of the basement flat. Mr Brown took over management of the upper parts, selecting new occupants and collecting their rent. Neither applicant paid any further rent: in Mr Brown's case because following receipt of correspondence from the estate of the paper owner, he was no longer satisfied that the managing agent was entitled to the rent; and in Mr Halstead's case, because payments had been returned after the death of the managing agent.

The applicants made an application for registration in 2020 under schedule 6 of the Land Registration Act 2002, relying on their adverse possession since 2010. The respondent, the daughter of the paper title owner, had no standing to require the application to be dealt with under paragraph 5 of schedule 6, but objected on

the basis that the applicants were required to prove that they had been in adverse possession for the relevant period.

Stephen Jourdan KC, sitting as a judge of the FTT, held that the applicants had been in adverse possession for the relevant period, on the basis that:

1. Neither applicant had occupied during the relevant period under a lease in writing, so time was not precluded from running under s.15 of the Limitation Act 1980;
2. The reasons the applicants had stopped paying rent in 1996 had no bearing on their intention to possess come 2010;
3. Notwithstanding a brief entry by a new freeholder (registered as a result of fraud) in 2007, the applicants had changed the locks and re-asserted possession;
4. Demands for possession made by the administrators of the paper title's estate had not stopped time running.

Why it's important

This decision contains a wealth of discussion about the interaction between the law of adverse possession and other parts of the law. Two particular legal points (both obiter) are worthy of note:

1. The judge expressed a view that paragraph 5 of schedule 1 of Limitation Act 1980 (which deals with when time starts running in the context of unwritten periodic tenancies) applies in the context of a periodic tenancy which cannot be determined by notice to quit due to statutory protection. Had the question arisen on the facts (which in the judge's view it did not, since the tenancy in question was granted by the managing agent after the paper owner's death and was therefore not binding on the estate), Mr Halstead would have been in adverse possession from the time he stopped paying rent in 1996, notwithstanding that his occupation was protected under the Housing Act 1988. (Readers interested in this point may also like to consider another case from this month, ***Healey v Fraine*** [2023] EWCA Civ 549, in which the Court of Appeal concluded that a licensee cannot be in adverse possession.)
2. The judge doubted the correctness of the decision in ***Trustees of Saunders v Ralph*** (1993) 66 P & CR 335, in which it was held that a tenancy could be varied to add a new tenant; that case appeared to have been decided by reference to principles of contract law rather than property law.

No issue was raised with the adverse possession of the two applicants being joint – Mr Brown in possession of the upper parts, Mr Halstead in possession of the basement, and both applicants in possession of the gardens. Possible arguments may arise in this area in a future case.

A copy of the judgment is available here.[2]

Rowlands v Bishop [2023] UKUT 102 (LC)

Summary

The Upper Tribunal allowed an appeal and directed that the appellant should be registered as proprietor of a parcel of land on the basis of adverse possession. Contrary to the finding at first instance, the appellant had believed the land was his, and that belief had been reasonable.

The land in question was enclosed by fences as part of the appellants' garden, although it formed part of the registered title to the respondents' neighbouring land. The appellants had applied to be registered as proprietors on the basis of adverse possession. The respondents required that application to be dealt with under paragraph 5 of schedule 2 to the Land Registration Act 2002. The appellants sought to rely on the boundary condition.

The Upper Tribunal set aside the finding made at first instance that the only one of the two appellants to give evidence had been lying when he said he had believed he owned the land surrounded by the fences; the reasons for making that finding were 'flimsy' and the conclusion was irrational and unfair.

The Upper Tribunal further found that the appellant's belief was a reasonable one. The fact that the boundary agreement on which it was in part based did not have legal effect did not mean that boundary agreement could not support a reasonable belief; in fact, the respondents appeared until recently also to have thought that the land in question belonged to the appellants.

Finally, the Upper Tribunal rejected a submission that the land was not 'in the area of the general boundary', as is required following ***Dowse v Bradford MBC*** [2020] UKUT 202 (LC).

Why it's important

This decision is likely to be of most interest to practitioners for its treatment of the requirement that land be 'in the area of the general boundary'. Although the judge noted that the land in question was much smaller than that in Dowse, the map reproduced in the judgment illustrates that it was much more substantial than the couple of inches which are often at issue on boundary disputes. Nevertheless, the Tribunal appears to have had no difficulty in rejecting the submission that the appeal should fail on this basis. The concept of the general boundary, and what does and does not fall within it, remains a matter open for debate in future cases.

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[2] Renée, we will provide the judgment – can you please upload to the chambers website & insert a link?

This case also provides a useful example of the circumstances in which findings based on an assessment of credibility will be set aside on appeal.

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