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: the Upper Tribunal's jurisdiction to set aside an order purportedly modifying leasehold covenants; the Court of Appeal on whether a joint tenancy or tenancy in common is to be presumed when land is bought for business purposes; and the Upper Tribunal on 2 aspects of the Electronic Communications Code, which casts doubt on the position adopted in some texts about the 1954 Act.

FEBRUARY 2024

Blackhorse Investments (Borough) Limited v The Mayor and Burgesses of the London Borough of Southwark [2024] UKUT 33 (LC)

Summary

The Upper Tribunal considered various challenges to an order under s.84(1) Law of Property Act 1925 relating to discharge or modification of covenants in a long lease, and upheld some of them.

The applicant tenant wanted to implement a planning permission for redevelopment of a former public house, but could not do so under the terms of its lease. Unable to achieve consensual resolution with its landlord, the tenant applied to the Tribunal for modification or discharge of various covenants, including restrictions on assignment and underletting, covenants relating to the making of alterations without consent, and a keep open covenant.

The tenant delivered a copy of the application to the landlord's offices, but it was overlooked by the landlord, which filed no notice of objection and was consequently not joined as a party to the proceedings. The Tribunal made an order on the papers, which was not sent to the landlord (and accordingly, time had not run for the making of an application to set aside). Some time later, the order came to the landlord's attention, and the landlord applied to the Tribunal for it to be set aside.

The Tribunal dismissed a number of the landlord's arguments, including those based on service of the original application, but set aside all of the purported modifications (other than those relating to alterations) owing to the Tribunal's lack of jurisdiction to make them. The Tribunal confirmed that its jurisdiction to modify leasehold covenants is limited to covenants which are restrictions as to the user of land. On the true construction of the particular covenants in question, the keep open covenant and associated covenants (regarding matters such as obtaining relevant licences) were primarily positive covenants; although some

limited modification would have been possible, the Tribunal's order had purported to go beyond that. As for the covenant restricting assignment, it was not a restriction 'as to the user' of the land.

Why it's important

While it is well known that the Tribunal's jurisdiction under s.84 extends only to covenants 'as to the user' of land, and only to restrictions rather than to positive obligations, this decision illustrates the care which must be taken to when considering particular forms of wording and whether they fall into those categories.

The decision also includes a detailed consideration of in what circumstances the Tribunal has jurisdiction to set aside its own final orders, and the factors it will take into account in doing so, which do not necessarily duplicate authorities under the CPR.

Williams v Williams [2024] EWCA Civ 42

Summary

The Court of Appeal found that a farm had been acquired by three parties as tenants in common without the right of survivorship, rather than as beneficial joint tenants, because there was a presumption against survivorship where property was acquired for business purposes. The fact that there was a mortgage did not mean that the property had to be held as beneficial joint tenants.

Why it's important

This case is of particular interest for Nugee LJ's careful analysis (with which King and Asplin LJJ agreed) of the methodology for determining beneficial interests where property is held in joint names. While the 'starting point' is that the onus is on a party seeking to demonstrate that the beneficial interest is held otherwise than the legal interest (i.e. as joint tenants), in a commercial case, the court will 'easily and normally' find that to be displaced by a presumption in favour of a tenancy in common without a right of survivorship.

The judgment also confirms that the evidence of the parties' subjective intention or understanding is admissible and highly relevant when determining the beneficial interests.

This case concerned a farm which was both the family home and the premises from which a partnership ran a farming business. It was of significance that it was purchased in the name of a couple and their son, rather than a couple alone. The decision that the property was purchased for business purposes by the 3 individuals and not as an asset of the partnership is likely to be of interest to

practitioners dealing with any other dispute which arises against the background of parties with mixed business, family and partnership relationships.

On Tower UK Limited v British Telecommunications PLC [2024] UKUT 51 (LC)

Summary

The Upper Tribunal determined that the Claimant had a code agreement and that a paragraph 31 notice had been validly given.

The case concerned telecommunications apparatus owned by the Claimant, On Tower, installed on the roof of a telephone exchange owned by the Respondent, BT. BT asserted that On Tower could not acquire code rights over the telephone exchange as it was itself electronic communications apparatus, and served a break notice under the lease; and, although it contended it was not necessary, also a notice under paragraph 31 of the Code.

The Upper Tribunal determined that:

1. The telephone exchange was not a building whose 'sole purpose' was to enclose other apparatus; accordingly, the building was 'land', and the lease was a code agreement which required termination under the Code.
2. Although BT had served a valid break notice, it was not necessary for it to have done so. A paragraph 31 notice alone would suffice, so long as the date specified was after a date on which the landlord could have brought the lease to an end, notwithstanding no actual break notice having been served.

Why it's important

This case is the first occasion on which the Tribunal has grappled with the question of when a building will or will not be 'land' under the Code by reason of its sole purpose being to contain other electronic communications apparatus. The Tribunal's conclusion that the telephone exchange was not such a building, due to the presence of welfare facilities, suggests that perhaps few buildings will meet this requirement.

As the Tribunal noted in its judgment, the conclusion that it is not necessary to serve a break notice as well as a paragraph 31 notice will also be of significance to many parties: the Tribunal high-lighted the parallels with the general business tenancy regime, and intimated that text books which suggested that a break notice should be served in addition to a notice under paragraph 25 of the Landlord and Tenant Act 1954 might not be right..

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