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 interplay between possession and insolvency proceedings; issuing a claim without naming a defendant; and how periodic tenancies creating Code rights can be brought to an end.

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Carvill-Biggs v Reading [2024] EWCA Civ 1005

Summary

The Court of Appeal dismissed an application to set aside a stay of a possession order (made on an application by administrators under the Insolvency Act s234) it had imposed pending the outcome of an appeal .

The case concerned a substantial residential property which was owned by a company. The company obtained a loan, secured by a mortgage against the property and a floating charge over the assets and undertaking of the company. The appellant, who was the sole director of the company, lived in the property with his family, notwithstanding that the terms of the mortgage prohibited this and there was no lease or other agreement entitling them to occupy the property.

The company defaulted on the loan. The lender appointed receivers, and issued proceedings seeking possession of the property as mortgagee to enable it to exercise its power of sale. However, the company and the appellant challenged the existence of the security, so the lender then also appointed administrators over the company pursuant to the terms of the floating charge and the administrators issued separate proceedings under s.234(2) Insolvency Act 1986, arguing that the property was 'property to which the company appears to be entitled' for the purposes of that section. At first instance, that claim was successful.

The appellant obtained permission to appeal, on three grounds: that where the company was only entitled to the equity of redemption under a fixed charge, the property is not 'property to which the company appears to be entitled' for the purpose of the statute; that the first instance judge had been wrong to consider that CPR Part 55 did not apply; and that the second set of proceedings was an abuse of process seeking to bypass the first. The appellant also obtained a stay of execution pending appeal.

The administrators sought to persuade the Court of Appeal to discharge the stay, including on the basis that whether or not the judge had been correct to give effect to the Insolvency Act application, the appellant did not maintain that he had any lawful basis to remain present in the property.

The Court of Appeal refused to discharge the order imposing the stay, on the basis that whether or not the appellant had a substantive right to remain in possession, he was entitled to require the correct process to be used, and to remain in possession until it had been, so there was a risk of injustice if the stay were lifted. It did, however, add a condition that the appellant make payments into court in respect of his occupation of a sum he could afford pending the appeal.

Why it's important

This case explores the relationship between on the one hand the provisions of CPR Part 55 and the provisions of the Insolvency Act 1986 on the other, and the respective rights of administrators appointed under a floating charge and receivers appointed under a fixed charge. While final resolution of these points must await the full hearing of the appeal, the decision on the stay application strongly suggests that the Court of Appeal may block the use of the Insolvency Act process to bypass the traditional possession route in this type of case.

This case also highlights the obligation on a respondent who wishes to oppose an application for a stay pending appeal to set out its grounds and any evidence when it files its statement in response to the appellant's notice. The administrators had not done that here, and the Court of Appeal indicated that (had the Appellant taken the point) that in itself might have led to the rejection of their application for the stay to be lifted, since no change in circumstances since the date of the statement had been identified.

Hughes Family Property Co Ltd v No Defendant [2024] EWHC 2288 (Ch)

Summary

The High Court dismissed an application for permission to issue a part 8 claim form without naming a defendant.

The substantive claim was for declarations under s.84(2) Law of Property Act 1925 that the claimant's land was not bound by restrictive covenants which would prevent development. The claim was made on the basis that the covenantee did not own the potential dominant land at the time the covenant was given, so there was no way in which the present owners of that land could have the benefit of the covenants.

The application failed. The evidence did not conclusively demonstrate the truth of the claimants' case: for example, certain conveyances were missing. The landowners might have access to those, and other relevant documents. In any event, the landowners might want to put forward a building scheme argument and the Court should not prejudge that there could be no answer to the claimant's

claim, which would be the effect of granting the application. Thirdly, since those parties would not be bound by the outcome if they were not joined, there would be little point in the claim – and a declaration might not be granted. It was therefore not an appropriate case to grant permission for a claim to be issued without naming a defendant.

Why it's important

This judgment illustrates the approach the court will take to an attempt to pursue a claim without naming a defendant, in the specific context of an application under s84. However, the principles are likely to be applied in all types of case.

On Tower UK Limited v AP Wireless II (UK) Limited LC–2023–000852 and others

Summary

The First-tier Tribunal considered preliminary issues relating to the validity of a number of notices under the Code, including on the basis of jurisdiction to impose an agreement under Part 4 and by reference to alleged defects in the notices.

There was a dispute between the parties as to the basis upon which the operator occupied a number of sites. This was not resolved at this hearing. The First-tier Tribunal proceeded on the assumption that the operator occupied each site as either a periodic tenant or a periodic licensee.

The Tribunal held that:

1. The key question was not whether there was a subsisting agreement (which, absent a written agreement, there was not), but rather whether there was a lease protected by the 1954 Act. Where there was such a lease, including a periodic tenancy arising on the expiry of a contracted out tenancy, the operator could not make use of Part 4 of the Code – even though the operator cannot initiate renewal under the 1954 Act, or access Part 5 of the Code, in those circumstances.
2. If the operator occupied as a tenant at will, without a written tenancy, then it could access Part 4 of the Code. The same is true for unwritten periodic licences.
3. It was necessary to determinate a periodic tenancy before seeking to utilise Part 4 of the Code, but not to determine a periodic licence; imposition of a new agreement under Part 4 would operate as a surrender and regrant.
4. Reliance on a 'stale' notice could be an abuse of process, but relying on a notice served 4 years ago was not, on the particular facts of the instant case.

5. A discrepancy between the terms sought in a notice and the terms sought in the reference was a question to be resolved when considering the terms to be imposed at trial, not an issue of jurisdiction.
6. Minor errors in deletions and strike throughs in the prescribed form of notice did not invalidate the notice.

Why it's important

Although this is a decision of the First-tier Tribunal, and therefore not binding on other courts, it is likely that the First-tier Tribunal will apply the same approach in other cases – unless and until the Upper Tribunal determines that this decision is wrong. Since all applications under the Code must now be issued in the First-tier Tribunal,[1] this will determine the approach to a number of significant legal points relating to the availability of Part 4 unless there is an appeal in this or another case.

Practitioners in this are likely also to be interested in a further decision of the Tribunal this month considering whether various telecommunications agreements constituted leases or licenses; a brief summary and link to the judgment can be found here.

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[1] The First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2024 allocates all Code cases to the First-tier Tribunal, Property Chamber: articles 5A(i) and 12(cc). The Upper Tribunal has recently announced that it will no longer accept new Code references.