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 Court of Appeal have been busy and we were spoilt for choice! We've selected cases on concurrent leases under the telecoms Code, receivership, and the ability to challenge a decision by the Upper Tribunal to refuse permission to appeal from the First-tier Tribunal.

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Vodafone Ltd v Potting Shed Bar and Gardens Ltd and AP Wireless II (UK) Ltd [2023] EWCA Civ 825

Summary

The Court of Appeal overturned the Upper Tribunal's decision that, where a concurrent lease had been granted, the correct respondent to an operator's application to renew a code agreement was the freeholder. The Court of Appeal held that the concurrent lessee was 'a party to the agreement' within the meaning of paragraph 33(1) of the Code.

It agreed that the concurrent lessee was not 'a successor in title' within the meaning of paragraph 10 of the Code. However, the Court of Appeal determined that paragraph 10 was not exhaustive: applying the approach to statutory construction advocated by the Supreme Court in *Compton Beauchamp,* it must have been intended that parties other than those named in paragraph 10 should be bound in the event of a dealing with the term or the reversion

Why it's important

APW holds a significant number of telecoms sites around the country on concurrent leases; many other such sites may exist on land with complex title structures, including development land. The clarification about how an operator with a lease should go about renewing its code agreements for these sites, and how site providers may seek to terminate them, is welcome. (The question of whether the Code would work in the same way if the operator had a mere licence or wayleave was left open).

The decision also confirms that the Code is not a 'sui generis' statutory right, to be construed in a vacuum. Where a lease of a telecoms site is granted, ordinary principles of landlord and tenant law apply.

The Court of Appeal also suggested that the Upper Tribunal had interpreted comments made by the Supreme Court in *Compton Beauchamp* about the ability

to use Part 4 of the Code to seek a new code agreement where a renewal under Part 5 was not available too widely: the Court of Appeal high-lighted that Lady Rose had said that Part 4 should not apply where a lease is continuing under Part 5, not where the lease could be renewed under Part 5.

Alma Property Management Ltd v Crompton and Cookson [2023] EWCA Civ 849

Summary

The Respondents were receivers who had taken a head lease of the common parts of a mixed use building, in their own names, in the course of their duties as receivers of the freehold. Due to an oversight, when the mortgage was redeemed, the head lease was not transferred by the receivers to an associated company of the borrower. The Court of Appeal upheld Fancourt J's decision and held that:

1. The receivers were acting within their powers in taking the head lease, so had taken it as agents for the freeholder; as a result they were entitled to an indemnity from the freeholder in respect of the tenant covenants in the head lease; therefore
2. specific performance of repairing obligations in the head lease should not be granted because the freeholder could just do the works itself; and
3. the freeholder's request for an AGA amounted to an unreasonable withholding of consent to an assignment of the head lease, because the receivers would not have any indemnity against the covenants in the AGA.
4. It was too late for the freeholders to argue that there was a separate justification for refusing consent to the assignment, namely that they were entitled to call for the lease themselves as beneficial owners.

Why it's important

The Court of Appeal confirmed that receivers' powers are to be construed broadly, and expressed doubt (although did not need to resolve) that there was an implied term that the receivers' powers were only exercisable if the receivers had a reasonable basis for concluding that a particular exercise would be conducive to a sale of the charged property.

More importantly, the decision highlights that property acquired by receivers in the exercise of their duties is acquired by them as agents for the borrower and is held on trust for the borrower. Accordingly, the borrower has the beneficial interest in the property, even if taken in the receiver's own name; and the receivers are entitled to an indemnity from the borrower in relation to that property.

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Plescan v Secretary of State for Work and Pensions [2023] EWCA Civ 870

Summary

Where the Upper Tribunal has refused permission to appeal an order made by the First-tier Tribunal, a would-be applicant can apply to the Upper Tribunal under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 for that decision to be set aside if one of the specified conditions is met – and the Upper Tribunal's decision not to set aside its original decision to refuse permission to appeal can itself be appealed to the Court of Appeal.

Why it's important

A significant amount of property work is now done in the First-tier and Upper Tribunals. Understanding the circumstances in which the Court of Appeal will engage with applications for permission to appeal is of obvious importance to practitioners. This case highlights what some might view as an anomaly: the Court of Appeal cannot review a decision to refuse permission to appeal per se, but it can hear an appeal against a decision not to set aside a decision to refuse permission to appeal.

STEPHANIE TOZER K.C

FERN SCHOFIELD