The Ups and Downs of Demises

Janet Bignell QC

Falcon Chambers, Barrister; Editorial Board Member

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In the past, it has often been stated that, in the absence of indications to the contrary, a conveyance of land includes not only everything on the surface but everything beneath it down to the centre of the earth and the space directly above: Grigsby v Melville *[1974] 1 W.L.R. 80. However, the stopping point, so far as subterranean property is concerned, has more recently been described as the place where pressure and temperature make concepts of ownership absurd:* Bocardo SA v Star Energy UK Onshore Ltd *[2010] UKSC 35; [2010] 3 All E.R. 975). Different considerations now affect airspace too, the ownership of land carrying with it the right to the airspace above to such height as is necessary for the ordinary use and enjoyment of the land and the structures on it:* Lord Bernstein v Skyviews and General Ltd *[1978] Q.B. 479.*

Whilst this general presumption maps the extent of a freehold owner's ownership, what is the extent of the demise made by the freeholder to a leasehold owner? The answer, as illustrated in two recent cases where one party attempted to capitalise on its asset by granting an airspace lease and the other by excavating a subterranean extension, all depends upon the interpretation of the individual lease, the courts being keen to downplay the role that may be played by the application of common law presumption.

The issue of the leasehold ownership of airspace has been litigated with some regularity over the last few years. This is unsurprising given, at one end of the spectrum, the potential value of a roof, and the airspace above, as a separate income producing asset for landlord and tenant and, at the other, as a readily adaptable extension of a residential tenant's existing living space. What is, perhaps, more surprising, particularly given the publicity surrounding "super basements", is that there has been correspondingly little case law regarding subterranean leasehold ownership. As such, *Gorst v Knight* [[2018] EWHC 613 (Ch); [2018] 2 P. & C.R. 8; [2018] L. & T.R. 14, the second of the two cases discussed below, is of particular interest, not least because of the contextual reasoning set out by the Judge in rejecting the leasehold owner's claim to ownership of the sub-soil in that case.

Air space

Before turning to consider the facts of the first of the recent cases, *Ralph Kline Ltd v Metropolitan and County Holdings Ltd* [2018] EWHC 64 (Ch); [2018] L. & T.R. 19, it is valuable to review some previous decisions regarding the ownership of air space. I place the relevant case law into two broad categories.

The first category of case is where a lease of premises, such as a flat or individual unit, is comprised within a larger building. In broad terms, in such cases, a lease of the top floor of a building which includes the roof may well carry with it the airspace over the building, thereby entitling the tenant to enlarge the premises into the airspace: *Davies v Yadegar* [1990] 1 E.G.L.R.

71; *Haines v Florensa* [1990] 1 E.G.L.R. 73. As Woolf LJ said in *Davies v Yadegar* at 235, where the roof and roof space have been demised the "logical intent" would be that the airspace above was included:

> "Were the position otherwise one can easily see that all sorts of absurd results would follow: if the tenant of the upper flat wished to alter his chimney he would not be in a position to do so; if he wished to erect an aerial on the roof he would not be in a position to do so; if he wished to change the flow on the roof because of changes in building practices he would not be in a position to do so without the consent of the lessor, and the lessor would have a completely unfettered discretion to refuse that consent."

Whilst the tenant is entitled to the enjoyment of such airspace above the roof as is reasonably necessary for the enjoyment of the demise itself (*Dorrington Belgravia v McGlashan* [2010] L. & T.R. 3 ; [2009] 1 E.G.L.R. 27), there is no presumption that a lease of, or including, a roof extends upwards to the full height of the airspace available to the landlord: *Roseberry v Rocklee* [2011] EWHC 2947 (Ch); [2011] L. & T.R. 21. In this category of case, where a building is demised in horizontal sections, the extent of the demise is purely one of the interpretation of the individual lease at each stage.

The second category of case is where the demise is free-standing or is a building in a terrace. In this category, the roof and the airspace above it will normally be included in the demise: *Straudley Investments Ltd v Barpress Ltd* [1987] 1 E.G.L.R. 69; *Tennant Radiant Heat Ltd v Warrington Development Corp* [1988] 1 E.G.L.R. 41. Woolf L.J. recognised the potential for this separate class of case in his judgment in *Davies v Yadegar*. at [72E-H]. The relevant distinction being expressly drawn by Nicholls LJ in his judgment in *Straudley* at 70, when he described these kind of facts as "quite different" from a lease or tenancy of a top floor flat of a building which has been divided horizontally into flats.

In this second category of case, the starting point, and overriding consideration, necessarily remains the interpretation of the lease in question. However, the application of presumption, even if judges are reluctant to recognise or label it as such, plays an important role. Morgan J best summarised the applicable analysis as follows in *H Waites Ltd v Hambledon Court Ltd* [2014] EWHC 651 (Ch); [2014] 1 E.G.L.R. 119 at [50]:

> "Whether one says that there is a presumption to be applied, I consider that where one is dealing with a demise of a building, where the wording of the demise is expressed by reference to a vertical division, and there is no wording expressing any horizontal division, it is natural to react to that wording by holding that there is no horizontal cut off which excludes the airspace above the building or, for that matter, the sub soil below the building …"

In this writer's view, by analogy with the established law governing the full extent of the freehold ownership, it is logical and sensible that the general presumption should play such a role in this category of case.

Ralph Kline

Although necessarily a decision upon its own particular facts, *Ralph Kline Ltd v Metropolitan and County Holdings Ltd* is an example of this second category of case. The question of ownership of the roof was resolved as a matter of interpretation. Then, in the absence of any separate treatment of the airspace, and although expressly described as the final stage of the interpretation

process, the presumption was effectively applied that the ownership of the airspace followed that of the roof and that it did so to the full extent of the freehold ownership.

The issue of ownership had come to the fore after a new reversionary leasehold owner granted an airspace lease to the claimant. During the application for registration of the new airspace lease, the defendant, a pre-existing tenant of the reversionary owner, asserted that its own lease (the Mobax Lease) of the premises beneath (the demised premises), included the airspace already. The claimant argued that, as a matter of construction of the Mobax Lease, this was incorrect, the claimant's case being that the demised premises comprised only the internal parts of the buildings on the demised premises. In particular, the demised premises did not include the roofs of those buildings. When the case was referred to the High Court, the question for the Deputy Judge was whether the Mobax Lease did include the roofs and the airspace.

There was no dispute between the parties that the court's approach to the construction of the Mobax Lease should follow the guidance given by Lord Neuberger in *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619; [2015] L. & T.R. 25 particularly, at [14] and [15]. The judgment provides a useful example of the process of interpretation in action. The court's starting point was the definition of the "demised premises" in the Mobax Lease. That was:

> "ALL THOSE ground floor shop premises known as Numbers 1 to 15 inclusive Frognal Parade the residential flats known as Numbers 1 to 12 and 14 to 45 Frognal Court Numbers 1 to 6 Warwick Court and Numbers 1 to 4 Midland Court (all numbers inclusive) and the commercial garage premises in the basement at Numbers 14 to 19 Frognal Court and the ground floor shop premises known as Number 160 Finchley Road and the residential flat thereover all at Hampstead in the London Borough of Camden together with the gardens and grounds appurtenant thereto as the same are delineated on the plan Number L.507 annexed to these presents and thereon verged blue (all such premises being hereinafter called "the demised premises" which expression shall where the context so admits include all additions or improvements hereafter made to the demised premises and all fences walls gates fixtures drains and other works now or hereafter thereon) TOGETHER with the free running and passing of water and soil gas and electricity over under or through any pipes wires drains water-courses or other conduits which are now in over or under any of the Board's adjoining properties with the right (so far as the Board can grant such right) to maintain the same and TOGETHER WITH a right of support by the platform and adjacent works of the Board for the buildings erected upon the parts of the demised premises hatched in blue on the said plan".

Given the comprehensive definition of what were very extensive demised premises, and the very nature of the demised premises described, it may well be thought that the claimant's argument was ambitious. That proved to be the case. The learned Deputy Judge had no difficulty in concluding that, whilst the demised premises were described by reference to specific sets of premises, this description was not apt to confine the Mobax Premises to internal parts of the buildings only. Five specific points were made regarding the interpretation of the definition:

1. If the intention had been that the demise should be internal only, one would have expected that to be spelt out in the description. There was, however, no wording which specifically excluded structural or internal parts. The obvious explanation being that this was because they were included.
2. The demise included the open parts of the premises: gardens and grounds. It would have been odd to demise those open parts without qualification and then to confine the letting to internal parts only as the claimant contended.

3. The demise included "all additions and improvements hereafter made to the demised premises". The claimant's argument that additions could only be made internally, was again, rather odd in the light of the unqualified nature of the reference to additions and improvements.
4. The demise included "all fences walls gates fixtures drains and other works now or hereafter thereon", which was also inconsistent with an internal demise only.
5. The blue edging on the plan attached to the Mobax Lease enclosed all of the land and buildings. This was the third oddity, in the absence of further express qualification, if the intention was that only the internal parts were being demised.

The exceptions and reservations within the Mobax Lease were equally telling against the claimant's case. They included mines and minerals "in and under the demised premises" and the railway "under the demised premises". Unusual exceptions and reservations if the demise was internal only.

Adding strongly to the tenor of the drafting, the Mobax Lease included an express covenant for the tenant to keep the demised premises in good and substantial repair and condition when no express repairing obligation was imposed upon the landlord at all (or the ability to recover the costs of repairing the exterior through a service charge). The Mobax Lease also included an express obligation for the tenant to paint the inside and outside of the demised premises, but failed to include a correlative right of access for the tenant to the exterior. A right that was required if the claimant was correct in its argument that the exterior fell outside the tenant's demise.

Against a background where the user and alienation clauses contemplated the individual retail and residential units within the demised premises would be subject to individual underlettings, the Deputy Judge agreed with the defendant that it would have made no commercial sense for Mobax to have taken the Mobax Lease with such a gap in the scheme of repairing obligations, the obvious solution being that there was no such gap at all, a point which applied equally to the inclusion of the tenant's express covenant to insure the demised premises and the absence of any covenant by the landlord to insure the exterior if the demise was, indeed, internal only. In circumstances where the Mobax Lease was neither unclear nor unambiguous, the claimant's argument that the landlord's "missing" express obligations in respect of the exterior could be implied into the Mobax Lease was, therefore, given short shrift.

Having decided that the demised premises plainly included the entirety of the buildings, the Deputy Judge held, [at 60]:

> "it seems to me to follow that the [demised] premises also include the airspace. If, as I have decided, the premises demised by the Mobax Lease comprised the open parts of the premises and the entirety of the buildings, such a letting of land and buildings would normally also include so much of the airspace above the land and buildings as required for the ordinary use and enjoyment of the land and buildings, unless the airspace was specifically excepted from the demise."

The Deputy Judge then considered what, if any assistance, he derived from the authorities cited to him. Stressing that the question of whether the airspace was included within demised premises depends heavily on the terms of the relevant lease and the nature of the demised premises, he said that he did not consider authorities such as *Bernstein* particularly helpful. He said the role of that case was not to answer the question whether the airspace was or was not demised but, if demised, to establish or confirm the extent of the airspace demised.

On the basis that the demised premises did include the entirety of the buildings as a matter of interpretation, the Deputy Judge was, however, happy to adopt the wording of Morgan J in

Hambledon. He said that he found it natural to "react" to the wording of the Mobax Lease by holding that there was no horizontal cut off which excluded the airspace from the Mobax Lease. It is difficult to see why such reaction is not, in reality, simply the application, in this category of case, of the well-known general presumption.

Gorst v Knight

In *Gorst*, the issue of ownership of the subsoil underneath a terraced house reached the High Court on appeal. The lower court had declared that the long lease of a maisonette within the house (Flat 1) did not extend to the subsoil beneath, a decision confirmed by HH Judge Paul Matthews (sitting as a Deputy) on appeal. The interpretation of the lease was again recognised as being all-important.

The facts of *Gorst* were that the house was divided into two separate residential units, each being the subject of a lease. The upper maisonette (Flat 2) was held by the freeholder. The original lease of Flat 1 was granted in 1992 and demised the ground floor excepting the entrance hallway, and a paved area outside the front door, fronting the street, together with the patio at the back for 99 years. The premises were expressly defined as including the foundations and the cellar or void beneath the ground floor. The demise also included the right to the passage of various services "under" the demised premises and similar rights were reserved to the landlord. The Gorsts wished to make the cellar into habitable rooms, but since it was only five feet high, height could only be obtained by digging down into the subsoil to obtain another four feet. If the lease did not include the subsoil, then their proposed excavations to extend their flat would amount to a trespass.

Although it was common ground that, in 1992, both the subsoil under the house and the airspace above it were available to the freeholder as the subject of the demise, the Judge emphasised that this was not the appropriate starting point in considering the extent of the particular demise, the true question being whether the subsoil was demised on the true interpretation of the lease. Having carefully analysed the definition of the demise, the reservations and the context of the transaction, and taking account of the ability of the freeholder in 1992 to grant a lease of the subsoil, the Judge held that this was not a case in which the sub-soil had been so demised.

Whilst some have suggested that the Judge's treatment of the subsoil issue conflicts with the approach adopted in airspace cases, his approach was, in this writer's view, in line with the first category of airspace cases identified above. As HH Judge Paul Matthews explained, *Gorst* was a case involving the "horizontal" division of a building. That being so, the extent of the demise depended entirely upon the interpretation of the specific lease in question, that exercise of interpretation including the relevant matrix of fact.

Although the demise of a top floor flat which includes the roof may well be interpreted to extend to the airspace for the very kind of practical reasons listed by Woolf LJ in *Davies v Yadegar*, the Judge stated that there are not only "some similarities" to be drawn with the previous judicial treatment of airspace, but also a number of important contextual differences which must be taken into account when considering the question whether a demise extends to the sub-soil underneath such a building. As regards these differences, HH Judge Matthews stated:

> "Chief among them is the fact that the subsoil is the key to the stability of the whole building. If the foundations become unstable, the whole building is threatened. Not so the roof. Second, access to the subsoil is more difficult, and will generally involve going through the lowest

> demise in the building … Thirdly, the subsoil is not visible and open to the elements, as the roof is. A problem with it will not be so easily noticed at an early stage."

In so finding, the Judge analysed the judgment of John Jarvis QC (sitting as a Deputy High Court Judge) in *Lejonvarn v Cromwell Mansions Management Co Ltd* [2011] EWHC 3838 (Ch); [2012] L. & T.R. 31, the only previous authority to which he had been referred concerning the subsoil in a building divided into flats horizontally. He commented that this was a case where the judgment emphasised the difference, in a building divided horizontally, between extending upwards and digging downwards.

Significantly, HH Judge Matthews also made plain that he "put on one side" the case of a single lease of an entire freehold (not being a flying freehold) where the freeholder owned the subsoil. As he said, that was not the case before him, and one to be dealt with when it arises. In the writer's submission, such a case of "vertical" division may very well, as in the second category of airspace cases, and subject always to the terms of the specific demise, eventually be determined differently as and when it does reach the courts.

The law is stated as at 10 October 2018.