CASE LAW KALEIDOSCOPE

by

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My brief this year is to look at the top ten property cases decided in the last year. The task of selecting them has not been an easy one. That is for two reasons. First and foremost, deciding which cases are sufficiently important to be included and which are not is inevitably a highly subjective exercise, in relation to which opinions may (and frequently do!) reasonably differ. Secondly, although the flow of decided cases has not slowed, this last year has been something of a barren one in terms of landmark decisions. The previous year saw no less than five relevant House of Lords cases. This year there have been none. Nonetheless I have done my best to pick out ten cases which seem to me to be of general interest. I have not included cases covered by other speakers during the earlier part of today which might otherwise have qualified for inclusion, including in particular Patel v Keles [2009] EWCA Civ 1187 in relation to business tenancies and Goldacre (Offices) v Nortel Networks UK [2009] EWHC 3389 (Ch.) in relation to administration.

Service charges

Daejan Investments v Benson and Others [2009] UKUT 233 (LC)

The effect of section 20 of the Landlord and Tenant Act 1985 is that the liability of residential tenants to contribute to qualifying works is limited to £250 each unless the requirements of the Service Charges (Consultation Requirements) (England) Regulations 2003 have been either complied with in relation to the works or dispensed with by or an appeal from an LVT. Section 20ZA(1) empowers the LVT to dispense with all or any of the requirements if satisfied that it is reasonable to do so.

The landlord of a block of flats carried out major works. Five lessees (whose service charge contributions between them totaled £270,000) contested liability on the ground that the landlord had failed to comply with the consultation requirements. The landlord had served a valid stage 1 notice of intention to carry out qualifying works but had then made various errors in relation to its stage 2 notice. Firstly, the notice did not contain a summary of the observations made by the tenants in response to the stage 1 notice. Secondly, the notice failed in terms to specify the place and hours at which the estimates could be inspected. Thirdly, the notice did not in terms invite the making of written observations. Fourthly, although the notice stated that subject to any observations that might be received, the landlord intended to instruct a named

contractor to proceed with the works but that such instructions would not be given before 31st August 2006, the landlord stated at a pre-trial review hearing on 8th August 2006 that the contractor had already been awarded the contract. The LVT concluded that as a result, the consultation process was for all practical purposes curtailed; that the lessees had reasonably concluded that further representations were futile; and that as a result, the landlord did not have regard to observations in respect of the estimates which the lessees may have made had they had the opportunity to do so. The LVT refused to dispense with the requirements. The landlord appealed to the Lands Tribunal.

As to the applicable principles, the Lands Tribunal held that (i) (following its earlier decision in Camden LBC v The Leaseholders of 37 Flats at 30-40 Grafton Way LRX/185/2006) the financial consequences of a refusal to dispense with the requirements (i.e. the degree to which the landlord might suffer or the tenant might gain financially) were not material considerations; (ii) the LVT's discretion was to dispense with the consultation requirements, not the statutory consequences of non-compliance: the primary focus therefore had to be on the scheme and purpose of the regulations; (iii) if Parliament had intended to give a power to remove or mitigate the financial consequences, it could easily have done so but it had not; (iv) for the same reason, it was not open to the tribunal to reduce the amount of the charge to reflect its view of the prejudice suffered; (v) the potential effects – draconian on one side and a windfall on the other – were an intrinsic part of the legislative scheme; (vi) the potential consequences for the parties were relevant only as part of the context in which the matter was to be considered: the purpose of the regulations was to encourage practical co-operation between the parties on matters of substance, not to create an obstacle race, so that if the non–compliance had not detracted significantly from the purpose of the regulations and had caused no significant prejudice, there would normally be no reason to refuse dispensation; (vii) those issues had to be considered having regard to the particular facts of each case, including the nature of the parties and their relationship, so that for example, the tribunal might reasonably take a more rigorous approach to non–compliance by a local authority or commercial landlord than to a case where the landlord was simply a group of lessees in another form, and when deciding whether it would be right to speculate on the likely response to a stage 2 consultation, it might be appropriate to differentiate between a case involving a large group of lessees,

only some of whom were represented by a negotiating group, and a much smaller group of tenants, jointly represented by an active tenants' association and closely involved in the discussions from the start; and (viii) given the carefully constructed sequence laid down by the regulations, it would rarely be reasonable to dispense completely with an entire stage of the consultation process.

On the facts, the Lands Tribunal held that (i) none of the first three failures had caused any prejudice to the lessees; (ii) although the evidence of actual prejudice caused by the fourth failure was weak, the LVT was entitled to regard the breach as serious rather than a technical or excusable oversight; it involved a failure by a corporate landlord to ensure that those responsible for the stage 2 consultation properly understood its requirements and its significance, and the result had been to nullify the lessees' statutory right at stage 2 to make further representations following examination of the estimates; (iii) the LVT had been entitled to start from the position that, given the seriousness of the breach, it was not for the lessees to prove specific prejudice: it was enough that there was a realistic possibility that further representations might have influenced the decision; and (iv) in all the circumstances, it was not possible to say that the LVT had erred in principle or that its decision was clearly wrong.

Note: an appeal to the Court of Appeal is pending.

Rent review

Bello v Idealview [2009] EWHC 2808 (Ch.); [2010] 04 EG 118

A lease granted in 1969 for 50 years at a ground rent of £60 provided for a rent review on 24th March 1994. No review took place. The defendant bought the premises at auction in July 2005. The terms of sale excluded the seller's liability for arrears of rent above £60 per annum. The claimant acquired the reversion in March 2006. It applied for the appointment of an arbitrator to determine the outstanding review. An arbitration took place but the defendant did not participate. In August 2007 the arbitrator determined the rent at £1,700 per annum. Under the lease the reviewed rent for the period from the review date became payable on 29th September 2007. The Claimant sought payment of the full amount (less £60 a year for the period up to its acquisition of the reversion). The defendant raised a number of arguments based on limitation and delay.

Flaux J. found in favour of the claimant. The short answer to the defendant's contentions was that they should all have been raised before the arbitrator. It was too late to raise them by way of a defence to the claim for the increased rent. In any event, (1) on the proper construction of the lease, time was not of the essence of the review clause; (2) (applying Amherst v James Walker [1983] 1 Ch. 305) absent an estoppel, mere delay, even a long delay of 13 years which was longer than any applicable limitation period, was not enough; (3) there was no evidence to found a defence of estoppel or anything similar, because the defendant could not point to anything which amounted to a representation that the landlord would not seek a review at or after the time when he bought the lease; (4) the reviewed rent for the period from the review date did not become due until the quarter day after the arbitrator's award (29th September 2007), so that the limitation period did not start running until then; and (5) any prejudice resulting from the fact that the defendant would (in order to obtain relief from forfeiture) have to pay rent back-dated to a period prior to his becoming the tenant was largely of his own making because he could have sought legal advice prior to buying the lease and/or participated in the arbitration.

Dilapidations

Van Dal Footwear v Ryman [2009] EWCA Civ 1478; [2009] 1 All E.R. 883

A building in Ipswich was let to Rymans, which remained in occupation following the expiry of the term under a series of tenancies at will. It was common ground that the repairing obligations under the lease were carried forward into the tenancies at will. One of the purposes of the tenancies at will was to enable Rymans to agree a new lease if they could. In December 2005 and July 2006 they made 2 offers to the landlord to take a new lease, neither of which was accepted. They vacated on 28th July 2007 leaving the building in disrepair.

The judge assessed the cost of the repair works at £135,606. He correctly assessed the diminution in the value of the reversion by reference to a notional sale of the landlord's interest in the building as at 28th July 2007 with and without the repair works done. However, the experts were agreed that in order for the property to have been sold in its actual condition on 28th July 2007, it would have been necessary to have marketed it for

6 months beforehand. The judge found that during the hypothetical marketing period Ryman would have repeated its offers to take a new lease to a prospective purchaser who would have accepted them, so that the purchase of the reversion and the grant of the new lease would have occurred at the same time. On that basis, the purchaser would have increased its offer for the building in disrepair by 7.4%, which gave rise to a diminution of £48,538.

The Court of Appeal allowed the landlord's appeal. What must be valued is the reversion at the moment when it reverts to the landlord. What the judge had been required to do was to value the bundle of rights that the landlord actually had on the valuation date. On that date the landlord did not have the benefit of an agreement for lease with Rymans or even an offer capable of acceptance. The proposition that property must be assumed to have been exposed to the market does not entail reconstructing that hypothetical marketing period: it is no more than an assumption required to enable the valuation to take place. The facts which the judge had taken into account with reference to an entirely notional preceding marketing period were of no relevance to the valuation required by s. 18(1) of the 1927 Act. By valuing the reversion with the benefit of an agreement for lease with Rymans, the judge had valued the wrong thing and the 7.4% uplift on value could not stand.

Agricullo v Yorkshire Housing [2010] EWCA Civ 229

A lease of business premises was granted in 2001 for 29 years on terms which included a tenant's repairing covenant. Clause 9.3 provided as follows:

> "The Tenant shall pay to the Landlord, on demand, and on an indemnity basis, the fees, costs and expenses charged, incurred or payable to the Landlord, and its advisors or bailiffs in connection with any steps taken in or in contemplation of, or in relation to, any proceedings under section 146 or 147 of the Law of Property Act 1925 or the Leasehold Property (Repairs) Act 1938, including the preparation and service of all notices, and even if forfeiture is avoided (unless it is relief granted by the court)"

The roof was in disrepair. In February 2003 the landlord served a s. 146 notice in the form required by the Leasehold Property (Repairs) Act 1938. The tenant served a counter-notice. The tenant ultimately carried out the works between February and July 2005. The landlord issued proceedings claiming (i) solicitors' and surveyors' costs

incurred in dealing with matters arising from the tenant's breaches of covenant from the date of the counter-notice until completion of the repairs, and (ii) loss of rent due to the landlord being unable to complete the letting of one of the ground floor units as a result of the tenant's delay in carrying out the work to its own premises.

The issue in relation to (i) was whether the relevant costs fell within clause 9.3. If they did, the landlord's claim was in debt and the 1938 Act did not apply. The Court of Appeal held that the costs did not fall within clause 9.3. They were not attributable to steps taken "in or in contemplation of, or in relation to, any proceedings under section 146". Proceedings under s. 146 are proceedings for the forfeiture of the lease. No such proceedings had been taken nor could they have been taken without the Court's leave under the 1938. The costs had been incurred in relation to persuading the tenant to do the work and ensuring that the work was properly done. That process was consensual. The fact that the work undertaken by the tenant was an alternative to forfeiture proceedings and due in part to the threat of such proceedings was not enough. Once the tenant served counter-notice, the landlord could have applied for leave, in which case it could have recovered its costs as costs in those proceedings, or it could have carried out the works itself under a Jervis v Harris clause, in which case it could have recovered the costs as a debt under that clause. But its election to deal with the problem by negotiation took the steps subsequently taken by its solicitors and surveyors on its behalf outside clause 9.3. The position would have been different had clause 9.3 been worded by reference to the enforcement of the tenant's covenants (as in Riverside Property Investments v Blackhawk Automotive [2005] 1 E.G.L.R. 114).

As to (ii), since the works had been done, the only ground under the 1938 Act which the landlord could rely on was that in s. 1(5)(e) (special circumstances). The Court of Appeal held that the judge had been right to refuse leave under this ground. Neither the tenant's admission that there had been breaches of covenant nor the fact that if leave were not given, the landlord would be left without a remedy were enough to constitute special circumstances.

Alienation

Clarence House v National Westminster Bank [2009] EWCA Civ 1311; [2009] L. & T. R.

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This case concerned the legal effect, as between landlord and tenant, of a "virtual assignment", i.e. an arrangement under which all the economic benefits and burdens of a lease together with all management responsibilities were transferred to a third party but without any actual transfer or change in occupancy. Key features of the arrangement included the following: (i) the virtual assignee was appointed as the tenant's agent in all dealings with the property, including the collection of rent from sub-tenants and the payment of rent to the landlord; (ii) vis a vis the landlord or the sub-tenants, the rent was so paid or collected by the virtual assignee as the tenant's agent and not in its own right; (iii) but the virtual assignee was obliged to pay the rent to the landlord without any right of indemnity against the tenant and was not obliged to account to the tenant for the rent collected; and (iv) the virtual assignee agreed to pay the rent and perform the covenants and to indemnify the tenant in respect of those matters.

The judge at first instance held that the arrangement amounted to a breach of a covenant against parting with or sharing the possession of the premises, but not of a covenant against assignment, underletting or declaring a trust.

The Court of Appeal agreed that the arrangement did not constitute an assignment, underletting or declaration of trust. However, it allowed the tenant's appeal on the issue of whether the arrangement amounted to a parting with or sharing of possession. "Possession" was to be given its normal meaning of a right to enter and occupy the land to the exclusion of others and did not include a right to receive rents and profits. Even if that were wrong, the virtual assignee had no personal right to receive the rents because it collected them as agent for the tenant and not in its own right. Even if it had the right to collect rent, it did so as assignee of a chose in action and not because of any proprietary right or interest in the land, and an assignment of the rent is not a sharing or parting with possession. There had therefore been no parting with or sharing of possession on any view. The result was that the virtual assignment "is not in fact an assignment – it merely mimics the economic result of one without changing the legal position vis a vis third parties at all".

Guarantors

Shaw v Doleman [2009] EWCA Civ 279; [2009] L. & T. R. 27

In 2004 a lease of a lock-up shop was granted to Mrs Shaw for 10 years. In 2005 she assigned the lease to Ceramic Café Limited (CCL). At the same time she entered into an AGA with the landlord. Clause 3.1 of the AGA provided as follows:

> "The Guarantor guarantees to the Landlord that the Assignee will pay the rents reserved by, and perform and observe the tenant's covenants in the Lease and the Guarantor will pay and make good to the Landlord on demand any losses, costs and expenses suffered or incurred by the Landlord if the Assignee fails to do so"

Clause 3.2 provided that the guarantee remained in force for "the Liability Period", which was defined in clause 1.4 as "the period during which the Assignee is bound by the tenant covenants of the Lease".

Clause 5 contained a put option entitling the landlord to require Mrs Shaw to take a new lease in the event of the lease being "terminated by disclaimer".

CCL became insolvent and in October 2007 the liquidator disclaimed the lease. The landlord sued Mrs Shaw for rent under clause 3 of the AGA. Mrs Shaw argued that "the Liability Period" had expired on the date of disclaimer because CCL then ceased to be bound by the covenants in the Lease. She contended that clause 5 rather than clause 3 had been intended to apply in the event of disclaimer.

The Court of Appeal found in favour of the landlord. In Hindcastle v Barbara Attenborough [1997] AC 70 the House of Lords had decided that on the proper construction of s. 178(4) of the Insolvency Act 1986, a disclaimer determines the lease as between the landlord and the tenant who disclaims, but as regards third parties, including guarantors, the lease is deemed to continue and their liability is unaffected. The AGA was to be read in the context of s. 178(4) as so interpreted. The effect was that for the purposes of Mrs Shaw's liability as guarantor, the lease and the obligations of CCL were deemed to continue. "The Liability Period" had not therefore expired because CCL was deemed to remain bound by the tenant covenants of the lease. Moreover, in Hindcastle the guarantor was held to be bound by a clause which provided that the guarantee should run "during the continuance of the lease". Mrs Shaw's

argument was inconsistent with that decision, because read literally the lease in that case also ended on disclaimer. But the relevant words were read as referring to the fictional or deemed lease following disclaimer. The position was the same in the instant case. Nor was the put option in clause 5 inconsistent with that conclusion.

Landlord and Tenant (Covenants Act 1995)

Good Harvest Partnership v. Centaur Services [2010] EWHC 330 (Ch.)
An underlease of business premises was granted in 2001 at a rent of £245,000 a year. The defendant was a party as guarantor of the tenant's obligations. In 2004 the lease was assigned. On the same day an agreement described as an AGA was entered into between the landlord, the tenant and the defendant, under which the tenant and the defendant each covenanted with the landlord that the assignee would pay the rent and perform the covenants "from the date of the assignment …. until the next lawful assignment of the Underlease".

The landlord sued the defendant for arrears of rent pursuant to the AGA. The defendant contended (among other things) that the AGA was void under s. 25 of the 1995 Act.

Newey J found in favour of the defendant. His reasons included the following: (i) s. 24 of the Act was intended to ensure that a guarantor's obligations should come to an end on the assignment of the lease; (ii) if a guarantor can be required to enter into a further guarantee when the lease is assigned, that guarantee can, as a matter of language, fairly be said to "frustrate the operation of any provision of [the] Act" within s. 25(1)(a)), in that it would, if valid, impose on the guarantor obligations equivalent to those from which s. 24 is designed to secure his release; (iii) a premise underlying s. 16, which provides for AGAs, is that a tenant could not otherwise give any guarantee, and it is difficult to see why guarantors should not likewise not be barred; (iv) had Parliament intended a tenant's guarantor to be able to guarantee the obligations of an assignee, it could have been expected to say so explicitly, particularly since guarantors are mentioned expressly in the Act more than once, but it has not done so; (v) s. 16 addresses the circumstances in which a tenant can give a guarantee for an assignee, but there is no equivalent provision dealing with guarantors, no reference in s. 16 to guarantors, and no indication in s. 16 that an AGA can include a guarantee from anyone

other than the tenant; (vi) were it the case that a tenant's guarantor could be required to give a guarantee for an assignee of the tenant, there would seem to be nothing to limit the guarantor's exposure to the period before that first assignee himself assigned; but for a landlord to be able to call on a tenant's guarantor to give a guarantee for assignees other than the first could drive the proverbial "coach and horse" through the legislation; and (vii) it was not by any means clear that the Act permits a guarantor to sub−guarantee a tenant's obligations under an AGA, but even if it does, it would not necessarily follow that he should be able to give a direct guarantee for an assignee. The agreement was therefore invalidated by s. 25 of the Act in so far as it purported to impose liability on the defendant.

Note 1: the important feature of this case was that the guarantor undertook a direct guarantee of the assignee's liability under the tenant covenants of the lease. It is less clear whether s. 25 would invalidate an agreement under which the guarantor agrees to guarantee the tenant's liability under an AGA. It can be said that there is no infringement of s. 24 in such a case, because the tenant's liability under the AGA is not pursuant to a tenant covenant. The judge's observations on this issue at (vii) above were clearly obiter. See the discussion in Fancourt '*Enforcement of Leasehold Covenants'* at paras. 18.18 to 18.20.

Note 2: it does not seem to have been argued that s. 25 applies only to an executory agreement to enter into a guarantee and not to a guarantee once executed. See Fancourt at paras. 23.18 to 23.20.

Break clause

Norwich Union Life & Pensions v Linpac Mouldings [2009] EWHC 1602 (Ch.)

Two leases of industrial units were assigned pursuant to licences to assign to a company called Linpac Mouldings Ltd. (Linpac). Each licence contained a tenant's break clause entitling "the Assignee (meaning Linpac Mouldings Ltd. only)" to terminate the term by notice. Linpac subsequently assigned the leases to Ecomold Limited (Ecomold). Ecomold went into administration. It sought the landlord's consent to the re-assignment of the leases to Linpac. The landlord refused consent. Its reasons were essentially as follows: (1) whilst the leases were vested in Ecomold, Linpac was not

entitled to exercise the break clauses; (2) if the leases became re-vested in Linpac, Linpac would have a case for arguing that it was entitled to exercise the break clauses; (3) if the break clauses were exercised, the landlord would lose a large rental income which it was unlikely to be able to replace; and (4) it was reasonable to refuse consent so as to avoid that undesirable change to the status quo. Ecomold nonetheless transferred the leases to Linpac and Linpac purported to give notice terminating the leases.

Two issues arose for decision: first, whether the landlord had unreasonably refused consent to the re-assignment; and secondly, whether Linpac was entitled to exercise the break clauses either after assignment of the leases to Ecomold but before it re-acquired them or after it re-acquired the leases through re-assignment.

On the first issue, Lewison J held that the landlord's consent had been reasonably withheld. The question was not whether the landlord's appreciation of the legal position was right or wrong, but whether it was a reasonable view to hold. In the light of Max Factor v Wesleyan Assurance Society [1976] 75 P&CR 8 it was impossible to say that the landlord's appreciation of the legal position was unreasonable. It was common ground that if the breaks were exercised, it would lose a large amount of rental income which it was unlikely to be able to replace. It was reasonable to refuse consent in order to avoid that undesirable change in the status quo.

On the second issue, the judge held that on the proper construction of the licences, the rights to break perished on the assignment to Ecomold. The proposition that the leases could be terminated by someone who once was, but no longer is, the tenant in possession made no commercial sense. The licences identified Linpac not only by name but also by status, namely, its status as assignee, and the natural meaning of "assignee" is a person to whom the lease has been assigned and in whom it remains vested. The absence of any requirement to serve notice on the tenant in possession was an astonishing omission if it had been intended that Linpac could terminate the tenancy without the tenant's consent. The fact that the break was conditional on Linpac having paid the rent and performed the covenants up to the break date was a further indication that the right to break was not intended to survive a further assignment by Linpac. Max Factor was authority against Linpac's argument and ought to be followed in

the interests of consistency and certainty. Nor (following Equinox Industrial (GP2) v Sketchley [2003] EWHC 2 (Ch.)) could the right to break revive on the re-assignment to Linpac.

Note: an appeal was heard in late March and judgment is awaited.

Business tenancies

Inclusive Technology v. Williamson [2009] EWCA Civ 718 [2010] L. & T. R. 4
Section 37A of the Landlord and Tenant Act 1954 empowers the Court to order the landlord to pay compensation where (a) the tenant has quit the holding either after making but withdrawing an application of a new tenancy or without making one, and (b) he did so by reason of misrepresentation or concealment of material facts.

On 7th June 2006 the landlord served a s. 25 notice specifying ground (f) under cover of a letter which (as the judge found and the Court of Appeal agreed) indicated that he then intended to carry out the works at the end of the tenancy. In a conversation on 16th August, the landlord confirmed that he was still serious about wishing the tenant to move out and still intended to carry out the works. But by the end of September the landlord no longer intended to carry out the works either at the end of the tenancy or within a reasonable time thereafter (although he still intended to do them in the future when the circumstances were right). He did not inform the tenant of his change of position. At the end of November the tenant signed a lease of other premises in the belief that he had no option but to vacate, because he believed, as he had been informed, that the landlord intended to carry out the works. He vacated on 15th December 2006.

The judge at first instance dismissed the tenant's claim for compensation. The Court of Appeal allowed the tenant's appeal. The letter which accompanied the s. 25 notice was a clear statement of present intention to carry out the works. It amounted to a continuing representation which became false and therefore a misrepresentation, or alternatively it gave rise to a duty or expectation that the landlord would inform the tenant if he changed his mind and his failure to do so amounted to concealment. Compensation was assessed by reference to the difference between the rent that would have been

agreed for the premises had the tenant been informed of the true position and the rent payable for the new premises less a discount for early receipt.

Note: The important feature of this case was the covering letter, which all three members of the court regarded as a clear and continuing representation that the landlord then intended to do the works. However, Carnwath and Smith LJJ accepted that the landlord is entitled when serving a s. 25 notice not to say anything at all, in which case "the tenant will have to do his best to make his dispositions on the basis of what he knows, and he may be forced to apply to the court". Hughes LJ said: "the important starting point is that service of a section 25 notice indicating a reliance upon ground (f) within section 30(1) cannot, by itself, as it seems to me, be capable of amounting to a representation of intention". Moreover, even a continuing representation "would not be rendered false simply because the landlord explored other commercial options. Accordingly, there is no question that there arises a duty upon the landlord to make periodic, or indeed continuous, fresh, informative statements to the tenant as to the progress of such other options as he may be exploring, the progress of any planning application, negotiations for finance or for anything of that kind".

Trespass/damages

Bocardo SA v Star Energy UK Onshore [2009] 3 W.L.R. 1010

Under the Petroleum (Production) Act 1934, the property in petroleum in its natural condition in strata in Great Britain vests in the Crown, which has the exclusive right to search and bore for it and get it, and to licence others to do so. Under the Mines (Working Facilities and Support) Act 1966, the court may confer on a person having the right to work minerals such ancillary rights as may be required to work them and determine the amount of compensation payable, which must be assessed "on the basis of what would be fair and reasonable between a willing grantor and a willing grantee, having regard to the conditions subject to which the right is or is to be granted".

An oilfield lay below land in Surrey, which included land beneficially owned by Mr Al Fayed. The defendant companies had a petroleum production licence under the 1934 Act to extract it. For that purpose they drilled three pipelines along a "deviated path", that is to say, not straight down from the well head but at an angle. The pipes entered

Mr Al Fayed's land at about 800 feet below the surface. Two of the pipes were for extracting the oil and the third was for pumping water (so as to cause the oil to rise). The two extraction pipes ran for 0.5 and 0.7 km. below the land and both terminated at about 2,300 and 2,800 feet below the surface. The casings were 8.5 and 12 inches in diameter. No oil or water could leak into the surrounding strata. The defendant companies had not obtained either Mr Al Fayed's agreement to the laying of the pipes or an ancillary right to do so under the 1966 Act.

Mr Al Fayed claimed damages for trespass. The two principal issues were (1) whether the defendant companies were committing a trespass, and (2) if so, what was the measure of damages for past and (in the absence of an injunction) future trespass?

On issue (1), the Court of Appeal held that (i) the claimant was the paper title owner of the strata beneath the land (but not the oil); (ii) the ancient maxim "*cuius est solum eius esse usque ad coelum et ad inferos"* is not part of English law; at common law the registered proprietor of the surface is also the owner of strata beneath his land, including minerals, unless there has been some express or implied alienation of the strata to another; the claimant's title certainly extended to the strata at the depth of the pipes and it was not necessary to decide how much further into the earth's crust it went; (iii) as the paper title owner the claimant was deemed to be in exclusive possession of the land; (iv) the defendants could only avoid being trespassers if there is some common law right, or express or implied analogous right by virtue of the 1934 Act, which permitted them to intrude in the way they had; (v) there was no such right; (vi) the defendants had therefore committed trespass; but (vii) the trespass was purely technical, because it did not interfere with the claimant's use or enjoyment of the land one iota, and the claimant had lost no rights because it neither owned the oil nor did it have a right to search, bore for and get it, those rights belonging exclusively to the Crown and its licensee.

On issue (2), it was common ground that the damages were to be determined against the background of what the claimant could have obtained under s. 8(2) of the 1966 Act for the grant of the relevant rights, and that the hypothetical negotiations should be assumed to take place before the trespass occurred. A critical issue was therefore what would have been awarded under s. 8(2).

At first instance Peter Smith J assessed damages by reference to a percentage of the value of the oil extracted and to be extracted. The Court of Appeal disagreed, holding (following Peter Gibson J in BP Petroleum Developments v Ryder [1987] 2 EGLR 233) that the general principles of compulsory acquisition applied to s. 8(2), so that the correct basis of assessment was by reference to what the landowner had lost, not the value of what the defendants were acquiring, but including anything which the special position of the grantee as a monopoly licensee would add to the value of the right to be granted. On that basis, compensation under s. 8(2) would have been fixed at the figure given by the defendants' valuer, namely £82.50 (which comprised £50 as standard compulsory purchase compensation for a deep tunnel, an additional 50% to reflect the fact that the defendants, as holders of the petroleum licence, were a special purchaser, and an additional 10% under s. 3(2)(b) of the 1934 Act). It was to be assumed that the parties to the hypothetical negotiation would be aware of the correct construction of s. 8(2) and that they would know that the compensation under s. 8(2) would be very small, i.e. in the region of £82.50. The defendants would have been generous in negotiation to avoid delay and the possible expense of going to court. On that basis, damages were to be fixed at £1,000.

Note: permission to appeal to the House of Lords has been given to both sides and it is believed that the appeal is due to be heard in June this year.