Falcon Chambers

Summer 2015

Newsletter

IN THIS EDITION:

Compiled by

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From the editor: Guy Fetherstonhaugh QC

As a "completely dedicated real estate set" (and we feel compelled to agree with that description of us in Chambers UK 2015) for a period approaching a half century, we like to think that we have indeed acquired "depth and breadth of expertise" (C UK 2015 again).

This newsletter – a Falcon Chambers publishing first – assembles a number of topics showcasing our involvement in the legal property world, which we trust will display our involvement to best advantage and remind our readers of a quantity of matters of interest.

At the heart of our practice is the law of landlord and tenant, as the reports of cases and articles that follow illustrate. Break clauses, AGAs, dilaps, service charges, business tenancy renewals: we write the literature; we give the conferences and lectures; we draft the documents; we fight the cases.

But our practice goes beyond contract, of course. The law of real property – rights of way, restrictive covenants, leasehold enfranchisement, mortgages, rights of light, telecoms, mooring rights, prescription, village greens, compulsory purchase, land registration, agriculture, development land issues, professional negligence – the whole panoply of English property rights – all of this adds a vital dimension to our area of expertise.

And we don't just fight cases (although that is our forte): we act as legal assessors, independent experts and mediators, and now, through Falcon Chambers Arbitration – **www.falcon-chambersarbitration.com** - we offer a bespoke or fixed cost property dispute arbitration service.

Moreover, our reach extends to close association with our surveying colleagues in the Dilapidations website (www.dilaps.com). We are also pleased to be involved with Hogan Lovells in the development of a series of Property Protocols intended to take debates about process out of landlord and tenant disputes, allowing proper focus on the substantive issues – see **www.propertyprotocols.co.uk.**

All in all, if there is a property angle, we are likely to be involved.

Happy and, we hope, productive reading. If you have any comments you would like to share with us that we might take into account in future issues, we would be delighted to hear from you: **feedback@falcon-chambers.com**

Case Round Up

Wood v Waddington [2015] EWCA Civ 538- easements; rights of way; s62 LPA 1925; construction of express grants. **Jonathan Karas QC** appeared for the Appellants and **Jonathan Gaunt QC** appeared for the Respondent. A report of the case by **Toby Boncey** can be found at this link [click here]

Zeckler and Barrymore v (1) Kylun Limited (2) Mr Patrick Hurst, Mr Keith Jeremy Randall Nethercot and Ms Janet Rosemary Lott, as Trustees for Walford Maritime Limited Pension and Life Assurance Plan and others [2015] EWHC 1386 (QB): applications for strike-out for abuse of process, also considering the Court's jurisdiction to vacate a unilateral notice, the meaning of "pending land action" and indemnity costs. **Janet Bignell QC** appeared for the succesful applicant.

KIS Beacon Hill v Compass Group PLC [2015] EWHC 1285 (Ch): effect of a CVA on the liability under a rent guarantee, considering the difference between a primary and secondary liability which might arise in such a case. **Gary Cowen** appeared for the successful respondent.

UK Leasing Brighton v Topland Neptune [2015] EWHC 53 (Ch)- guarantees; assignment; covenants. **Timothy Fancourt QC** and **Kirk Reynolds QC** appeared for the landlords. For more information see "Problems with Guarantors" by **Timothy Fancourt QC** in this issue.

West is West Distribution Limited v Icon Film Distribution Limited [2015] EWHC 838 (Comm): breach of accounting provisions; material breach; contractual termination; breach of obligations taking effect upon termination; damages. **Jonathan Gaunt QC** and **Oliver Radley-Gardner** appeared for the Claimant.

Oakrock Ltd v Travelodge Hotels Limited [2015] EWHC 30 (TCC): breach of tenant's refurbishment covenant, the effect of a CVA on rental liability and damages for breach of covenant. **Anthony Tanney** appeared for the applicant.

Patley Wood Farm LLP v Brake [2014] EWHC 4499 (Ch) *and Patley Wood Farm LLP v Brake* [2015] EWHC 483 (Ch), *Brake v Patley Wood* [2014] EWHC 1439 (Ch): arbitration; orders in arbitral proceedings; arbitration awards. For more information see "The Court's Powers to Make Orders in Arbitral Proceedings" by **Edward Peters** in this issue. **Edward Peters** appeared for the defendants in the first two cases mentioned and for the claimants in Brake v Patley Wood [2014] EWHC 1439 (Ch).

Balogun v Boyes Sutton & Perry [2015] EWHC 275 (QB): conveyancing negligence claim in relation to the grant of underlease of restaurant premises; rights of ventilation; whether a solicitor was bound to go behind his client's instructions on matters of fact and expertise known to the client; scope of rights conferred by the grant of an easement. **Oliver Radley-Gardner** appeared for the successful Defendant.

Boots v Goldpine [2014] EWCA Civ 1565- business tenancies; interim rent. The tenant, Boots, was represented by **Tamsin Cox**. For more information, see "The Landlord and Tenant Act 1954: Determination of interim rent" by **Tamsin Cox** in this issue.

Elim Court RTM Co Ltd v Avon Freeholds Ltd [2015] L&TR 3- right to manage; defects in notices, directory/mandatory. **Oliver Radley-Gardner** acted for one of the successful appellant landlords.

British Overseas Bank Nominees Limited v Analytical Properties Limited [2015] EWCA Civ 43 – breach of contract; contracts for sale of land; shopping centres. **Timothy Fancourt QC** and **Mark Sefton** appeared for the successful appellants.

Jewelcraft Ltd v Pressland [2014] P.L.S.C.S. 212: enfranchisement; meaning of house. **Anthony Radevsky** acted for the landlord in the County Court and is due to appear in the Court of Appeal. **Stephen Jourdan QC** is acting for the tenant in the Court of Appeal. For more information, see "A House Reasonably So Called" by **Adam Rosenthal** in this issue.

R (on the application of Best) v Chief Land Registrar [2015] EWCA Civ 17- adverse possession; illegality; ex turpi causa; squatting in residential premises; s.144 LASPOA 2012. **Jonathan Karas QC** was instructed for the Land Registry.

Winterburn v Bennett [2015] UKUT 59 (TCC)- easements; prescription; trespass; squatting; unlawful possession. **Guy Fetherstonhaugh QC** appeared for the appellants; **Caroline Shea** appeared for the Respondents. For more information see "The Ripening of Unlawful Use into Easements by Prescription" by **Caroline Shea** in this issue.

R (Carnegie) v London Borough of Ealing [2014] EWHC 3807 (Admin)- planning; predetermination; bias; treatment of heritage assets; judicial review; timing for service of facts and grounds. **Jonathan Karas QC** appeared for the interested party.

Crest Nicholson v Arqiva Services Ltd and others, Cambridge County Court, 28 April 2015 - business tenancies; electronic communications code; telecommunications. **Wayne Clark** acted for Crest Nicholson and **Stephanie Tozer** acted for the Arqiva companies. For more information, see "The Electronic Communications Code" by **Stephanie Tozer** in this issue.

Problems With Guarantors

By Timothy Fancourt QC

In recent years the validity of guarantees of tenants' obligations has come under a spotlight. In *Victoria Street v House of Fraser* [2012] Ch 497 it was decided that a repeat guarantee given on assignment of a lease by the assignor's surety was void, by virtue of s.25 of the Landlord and Tenant (Covenants) Act 1995. On assignment of a lease, the tenant's liability ends, subject to any AGA, and the tenant's guarantor must be released to the same extent. This creates problems with assignments between group companies, where the surety is the group company of substance.

An unusual angle on the operation of the statutory provisions relating to release of guarantors was provided by the cases of *Tindall Cobham 1 v Adda Hotels* [2014] EWCA Civ 1215 and *UK Leasing Brighton v Topland Neptune* [2015] EWHC 53 (Ch). In Tindall, it was held where an alienation covenant permitted intra-group assignments on condition that the assignor's guarantor guaranteed the assignee's liability, the condition alone could not be excised pursuant to s.25 of the Act, leaving the tenant free to assign without a guarantee: the whole provision for intra-group assignment without consent was void. As a result, the assignment without consent was unlawful.

In UK Leasing, the consequences of the Tindall decision fell to be worked out. The assignor was willing to rectify the unlawful assignment by taking an assignment back from the assignee, with the guarantor providing a new guarantee. But the parties could not agree whether the re-assignment or the new guarantee would be effective or void under the Act. The difficulty was that, as the original assignment was unlawful, it was an "excluded assignment" and the tenant had not been released. Section 11 of the Act states that, in such circumstances, the tenant will be released on the next lawful assignment. And under s.24(2) of the Act the guarantor would have to be released to the same extent. Since the assignment back to the tenant with the landlord's consent would be a lawful assignment, the tenant and the guarantor had to be released. But how could the tenant be released, as required, if it was again becoming the tenant? And if the tenant could become the tenant, could the guarantor become the guarantor again?

The Court (Morgan J) decided that s.3(2)(a) of the Act, which states that on assignment the assignee became bound by the tenant covenants of the tenancy, meant that the proposed assignment was effective, even though the tenant had to be released. The former tenant was notionally released pursuant to s.11 from its previous liability, but at the same time it assumed a new liability as tenant. As for the new guarantee, this too would be valid, even though immediately before the re-assignment the guarantor was an existing guarantor of the former tenant's existing liability, and so had to be released under s.24(2) of the Act to the same extent as the former tenant was released. The Judge was able to cut the Gordian knot by relying on obiter dicta of the Court of Appeal in the Victoria Street case, namely that the requirement for release of the guarantor would not prevent the guarantor from sub-guaranteeing the AGA of the tenant (because the guarantor is only released to the same extent as the tenant is released). Applying that by analogy, he held that the new guarantee would be valid because the assignor was not released from the tenant covenants of the tenancy to the extent that it assumed a new liability upon the re-assignment, and so the guarantor could remain liable to the same extent as the assignor did, under a new guarantee.

By this ingenious reasoning, the Court was able to uphold an eminently sensible solution to the problem caused by the unlawful assignment: the parties could resume the position that they were in before the unlawful assignment by the simple expedient of an approved re-assignment and the making of a new guarantee. But making the Act of 1995 work in practice remains hard work for practitioners and judges alike.

The Court's Powers to make Orders in Arbitral Proceedings

By Edward Peters

Section 44 of the Arbitration Act 1996 grants the Court various *"powers exercisable in support of arbitral proceedings".*

In *Patley Wood Farm LLP v Brake* [2014] EWHC 4499 (Ch) and *Patley Wood Farm LLP v Brake* [2015] EWHC 483 (Ch) Sir William Blackburne had to decide what test the Court should apply when deciding whether or not to exercise its discretion under that section.

The litigation in *Patley Wood Farm LLP v Brake* concerned a commercial partnership, centred on a luxury holiday lettings and events business. The business was operated from a farm which was the partnership's principal asset. One of the partners, the LLP, sought a dissolution of the partnership. That was the subject of an arbitration governed by the London Court of International Arbitration (LCIA). The arbitrator ordered dissolution of the partnership, and ordered that there should be a sale of the partnership assets, including the farm, with all partners having the right to bid for the partnership assets. In a previous arbitration claim, *Brake v Patley Wood* [2014] EWHC 1439 (Ch), the court rejected a claim by the other partners that the arbitrator's award should be set aside under s. 68 of the Act for serious irregularity, and a claim that the arbitrator should be removed under s. 24 of the Act.

The arbitrator then made further directions prohibiting the other partners from entering into any negotiations or agreement to purchase the farm, or from dealing with any potential purchaser, without the consent of the LLP or the arbitrator. With the support of the arbitrator, the LLP applied to the High Court for an injunction under s.44 of the Act, to require the other partners to comply with those directions.

Section 44(1) of the 1996 Act provides (amongst other things, and unless otherwise agreed by the parties) that the court has the same power to make orders in relation to arbitral proceedings, in relation to the various matters listed in s. 44(2), as it would have in relation to legal proceedings. The matters listed in s. 44(2) include making orders for the preservation of property which is the subject of the arbitration proceedings (s. 44(2)(c)), and the granting of an interim injunction (s. 44(2)(e)). Section 44(4) provides that, except in a case of urgency, the court can act only if the party applying for the order has the permission of the arbitral tribunal (or the written agreement of the other party).

The LLP argued that, when the Court was deciding how to exercise its discretion under s. 44, it should adopt a similar approach to applications under s. 42 of the 1996 Act - enforcement by the court of peremptory orders of the arbitral tribunal – and that the Court should therefore follow the approach taken by *Teare J. in Emmott v Michael Wilson & Partners Limited* (No.2) [2009] EWHC 1 (Comm), i.e. ordinarily to make the order sought, unless the order is not required in the interests of justice to assist the proper function of the arbitral process.

Sir William Blackburne rejected that argument, holding as follows:

"Section 42 is not the same as section 44. It is more narrowly drawn. It assumes that the peremptory order made by the tribunal has not been carried out and that the applicant has exhausted any other available arbitral process in respect of that failure. The case for the court's intervention is therefore all the more compelling. Under section 44, by contrast, there is no or no necessary requirement that the respondent to the application be in breach of the tribunal's order. As the marginal headings to the two sections indicate, section 42 is there to assist in 'the enforcement' of the tribunal's order, and then only if it is a peremptory order; whereas section 44 is as the heading indicates to 'support' the arbitral proceedings. It seems to me therefore that the court has a rather wider discretion under section 44 than it has under section 42. To my mind the question is simply whether in all the circumstances the court considers it appropriate to exercise its powers under the section in support of the arbitral proceedings. … That said … whereas the court should not simply act as a rubber stamp on orders made by the tribunal, it is not required to review the tribunal's decision and consider whether the tribunal ought to have made the order in question. … [T]he general philosophy of the 1996 Act is to honour and give effect to the arbitration agreement which the parties have entered into for the resolution of their disputes, so that the court's approach, where the arbitrator has acted fairly and within the scope of the arbitral powers conferred upon him, should be to adopt a noninterventionist approach but, where its aid is sought, to act in support of that arbitral process. Relevant to this is that … an arbitrator has no power to make an order binding on a stranger to the arbitration or to add a penal notice to his order in order to add teeth to it … so that the order made can be rendered more effective."

Applying those principles, in *Patley Wood Farm LLP v Brake* [2014] EWHC 4499 (Ch) Sir William Blackburne refused to make an order under s. 44. The arbitrator had said that the defendants should in principle be able to bid for the partnership assets. However his directions prohibited them from doing so without the consent of the arbitrator or the LLP. There was no prospect of the LLP granting consent to bid. The arbitrator had not given

the Brakes any mechanism to obtain consent. Nor had he given satisfactory responses to their requests for guidance as to what they would have to do in order to obtain his consent. In those circumstances the directions the arbitrator had made were unfair to the defendants, and were not workable in practice. It was therefore not appropriate for the court to endorse them with an injunction and penal order.

The arbitrator subsequently revisited and refined his directions, and with his support the LLP made a further application for an order under s. 44 in respect of those revised directions. That was determined by Sir William Blackburne in *Patley Wood Farm LLP v Brake* [2015] EWHC 483 (Ch). He held that he was not prepared to make an order in the same terms as the arbitrator's revised directions, on the basis that he considered that the court did not have jurisdiction under s. 44 to make some of the orders sought, or that it would not be appropriate in the exercise of the court's discretion to do so. However, he held that it was appropriate in all the circumstances for the Court to make an order under s. 44, endorsing some of the directions made by the arbitrator, but substituting others with orders in a modified form.

An easy way to prevent the acquisition of rights of way by prescription?

By Caroline Shea

Landowners can take comfort from a recent decision of the Upper Tribunal which appears to provide an easy way to prevent third parties' unlawful use ripening into easements by prescription. It is well established that trespassers who use another person's land to augment the enjoyment of their own land for twenty years can claim an easement by prescription if the use has been "as of right". Understandably landowners do not like this, since the presence of easements adversely affects the utility and the value of the burdened land, and if the rights have been acquired by prescription the loss of value to the landowner is not compensated in any way. In order to establish an easement by prescription, a certain quality of use is required. The test has three ingredients, all justifying an inference that the landowner has acquiesced in the unlawful use. The use must be nec clam (not secretly), nec vi (not forcibly), and nec precario (without permission). If any one of these three ingredients is missing, no claim will succeed.

"Nec vi" means peacefully, as opposed to forcibly. The authorities have previously highlighted the need for a landowner who wants to show that the unlawful user was forcible to protest against it in a way which brought to the attention of the trespasser that the use was contentious. The case of *Winterburn v Bennett* [2015] UKUT 59 (TCC) (on appeal from the First tier Tribunal) suggests that such protest can be established merely by erecting signs declaring the land to be private, whether or not such signs were erected in response to or directed at the trespassers' use, and whether the signs pre-date or post-date the use in question.

The Upper Tribunal relied heavily on the decision of the Court of Appeal in the case of *Taylor v Betterment Properties* (Weymouth) Ltd [2012] 2 P. & C.R. 3. *Taylor* concerned the acquisition by the public of rights of common over 42 acres of grazing land. The principles governing the acquisition of public rights of common are the same as those governing the acquisition of private rights by prescription. In that case Lord Justice Patten referred to the "easy" case where a landowner has erected signs which the trespasser sees, which he was distinguishing from the "difficult" case where (as in Betterment) there is no evidence that any trespasser had seen the signs. In the easy case, he said, such use was "contentious" or "not peaceful". The Upper Tribunal rejected a submission that the Taylor finding turned on the facts of the case, and did not purport to formulate a general principle of law.

It follows that, as matters currently stand, all landowners have to do to prevent any rights of way being acquired by long user is to erect signs in places where the trespassers will be bound to see them. This will be sufficient, regardless of future acquiescence, to render the user "vi" or contentious. Some might see this as a somewhat radical undermining of the law of prescription. It remains to be seen whether the Court of Appeal agrees.

A fuller version of this article can be found on the Practical Law Company Agriculture and Rural Law pages, where **Caroline Shea** writes a quarterly column, View from the Bar.

The Landlord and Tenant Act 1954: Determination of interim rent

By Tamsin Cox

The recent decision in *Boots v Goldpine* [2014] EWCA Civ 1565 provided useful guidance on two important aspects of the Landlord and Tenant Act 1954 which are often overlooked in practice. The main thrust of the dispute between the parties was as to the proper approach to determination of an interim rent. The statute doesn't specify when the interim rent should be determined, though it allows for an application to be made at any time between service of the initial notice and six months after the termination of the original tenancy: s 24A. In Boots, the landlord sought to avoid a determination of interim rent in line with the rent under an apparently agreed new lease pursuant to s 24C (which applies where the landlord grants a new tenancy) by refusing to finalise that new lease until interim rent had been determined. Although the lease renewal was unopposed, it said that such timing took matters outside s 24C to the more flexible (and in this case favourable to the landlord) s 24D (which applies where s 24C does not). On a second appeal, the Court of Appeal confirmed (the landlord having conceded the point mid-hearing) that it was not possible to know which interim rent approach applied until the lease renewal proceedings had been decided. The main proceedings and interim rent application were therefore remitted to be heard together, in the expectation that s 24C would apply once terms were finalised and the lease granted.

The other aspect of the case, which has (probably correctly) received more attention though it was not the main focus of submissions, was as to the question of what is required for parties to be said to have 'agreed' the terms of a new lease for the purposes of the 1954 Act. Obviously 'agreement' cannot require a contractually binding deal compliant with s 2 of the Law of Property (Miscellaneous Provisions) Act 1989, since it is possible to 'agree' certain aspects of a lease renewal (eg the property to be leased, or the length of term) whilst leaving others to be determined by the court (typically rent), and s 28 disapplies the Act entirely if a contractually binding agreement is reached. So what is an 'agreement' on some but not all aspects?

The Court of Appeal approved the comments made by Oliver J in *Derby v ITC* [1977] 2 All ER 890, confirming that a contractually binding agreement is not necessary in order for a party to be bound by an 'agreement' made for the purposes of the 1954 Act, but emphasising that an 'agreement' did need to be 'final' and not subject to any suspensory conditions. Although in this case the parties had both confirmed to the Court, at a hearing, that they had reached agreement on all the lease terms, the use of the phrase 'subject to contract' in some of the relevant correspondence was sufficient to allow either party to resile from that agreement.

Those points of guidance are important, and they do help to highlight fairly fundamental aspects of the renewal process which are often neglected in practice. Perhaps the most surprising aspect of the Boots case, however, was that following the second appeal to the Court of Appeal, the landlord failed to comply with directions, so that its defence was struck out and the final hearing was therefore conducted entirely on the tenant's terms, and ultimately led to settlement before judgment could be given. This was a surprising damp squib ending to over four years of bitterly contested litigation.

The Electronic Communications Code

By Stephanie Tozer

The Electronic Communications Code ("the Code"), which forms Schedule 2 of the Telecommunications Act 1984, enables operators of electronic communications networks to acquire rights to install and maintain equipment on third parties' land. It also defines the circumstances in which landowners can require alteration or removal of the equipment. These provisions are found in paragraphs 20 and 21 of the Code. Questions can arise as to how these provisions fit together – and matters become even more complicated if the operator has a tenancy protected by the Landlord and Tenant Act 1954. To date, practitioners have often adopted the approach of serving paragraph 20 and 21 notices, and a section 25 notice, simultaneously.

In *Crest Nicholson v Arqiva Services Ltd* and others, Cambridge County Court, 28 April 2015, Deputy District Judge Dack held that a notice cannot be served under paragraph 21 of the Code during the contractual term of a tenancy. The judge's logic might also suggest that a paragraph 21 notice cannot be served during any statutory continuation either. The decision is being appealed, but unless an appeal is successful, the position under the present Code is as follows:

- If a landowner wants to require the removal (or alteration) of any equipment during the fixed term of a tenancy or licence, it can only proceed under paragraph 20. It must therefore establish that the alteration is necessary to enable the landowner to carry out a proposed improvement of land in which he has an interest, and that the alteration will not substantially interfere with any service provided using the operator's network. This is a substantial hurdle.

- Although there is no guidance on this in the Code, it is thought that a landowner will not establish that the alteration is necessary to enable a proposed improvement to proceed, unless he can show that he is, or will soon be, in a position to proceed with the improvement. So, if the proposed improvement is to the land where the equipment is situated, unless he can terminate the tenancy or licence in the near future, he is not likely to succeed.

- Paragraph 21 prevents the landowner from exercising rights that it would otherwise have had to remove equipment from its land. So, it is not enough for the landowner to bring the tenancy or licence to an end. Assuming it can do so (and note that there may be difficulties in relying on ground (f) because the landlord will not in fact be able to commence works within a short time of the tenancy ending), the paragraph 21 notice procedure will have to be followed after the tenancy has come to an end – unless the Court has made an order under paragraph 20.

Members of chambers have also been involved in providing responses to the Government's consultation on a new draft Code: **Barry Denyer-Green** prepared the response on behalf of the Compulsory Purchase Association; **Guy Fetherstonhaugh QC** and **Oliver Radley-Gardner** prepared a response on behalf of Falcon Chambers. The consultation closed on 30 April 2015, and nothing further has yet been heard.

A House Reasonably So Called

By Adam Rosenthal

Adam Rosenthal discusses the age old question of what constitutes a "house" for the purposes of section 2(1) of the Leasehold Reform Act 1967

One would be forgiven for thinking that there is no more room for argument about the principles to apply under section 2(1) of the Leasehold Reform Act 1967 in deciding whether a building is a "house" such that the freehold can be compulsorily acquired by a long lessee under that Act. There have been numerous decisions of the Court of Appeal and the House of Lords / Supreme Court on this issue.

The scope for argument over the correct application of section 2(1) broadened with the amendments to the 1967 Act by the Commonhold and Leasehold Reform Act 2002, by which the residence test which previously had to be satisfied, was removed, paving the way for investors who were not owner-occupiers, to enfranchise under the 1967 Act (and the more recent version of that legislation relating to flats, the Leasehold Reform, Housing and Urban Development Act 1993).

Under section 2(1) of the 1967 Act, a "house" (which defines the type of building which is capable of being enfranchised) means, first, a building or part of a building designed or adapted for living in and secondly, a building which is "reasonably called" a house.

In *Hosebay v Day* [2012] 1 WLR 2884 (in which **Jonathan Gaunt QC, Anthony Radevsky** and **Mark Sefton** all appeared), the Supreme Court heard two appeals in cases concerning buildings which were constructed and formerly used as houses, but were no longer occupied for residential purposes. It was held that where the building was used solely for non-residential purposes, it would not be reasonable to call it a house, even if it was designed or adapted for living in. The judgment of the Supreme Court had been eagerly awaited, in the expectation that it would clarify the application of the "reasonably so called" principle in light of the abolition of the residence test. However, the judgment focuses principally on the more narrow facts of that case, where there was no residential use.

A different type of property which has caused controversy in connection with section 2(1), over the years, is the mixed-use retail / residential property, typically, a shop with a flat above.

In *Tandon v Trustees of Spurgeons Homes* [1982] AC 755, the House of Lords, by a majority of 3:2, held that the shop with flat above in issue in that case was a "house reasonably so called". In giving the majority speech, Lord Roskill attempted to lay down three "principles of law" to apply in later cases. However, in *Hosebay*, Lord Carnwath was dismissive of these so-called principles and concluded that they did not really go much further than the facts of that case.

The shop with a flat above did not pose such problems when there was a residence test. Bringing premises of that sort within the Act would mean, on the whole, that the shopkeeper who lived above the shop and held a lease of the building, would be entitled to enfranchise. However, now that the residence test no longer applies, there is a renewed impetus to argue that such properties are within the Act. The most recent Court of Appeal decision on section 2(1) is *Henley v Cohen* [2013] 2 P & CR 10. That case also concerned a shop with a flat above. The trial Judge, in the Central London County Court, distinguished *Tandon* on the ground that the shop and the flat were not physically connected. They were served by different entrances, the shop at the front and the flat at the rear and as such, it was not "reasonable" to call the combined building "a house". This was upheld by the Court of Appeal which also relied on the additional argument by the landlord, that the tenant had converted the first floor of the two-storey building into a flat in breach of the alterations covenant in the lease and therefore would not be entitled to rely on his breach of covenant to invoke the statutory right of enfranchisement under the Act.

In June 2015, the Court of Appeal is due to hear an appeal in the case of *Jewelcraft Ltd v Pressland,* where HH Judge Dight, in the Central London County Court, held that a shop in a terrace with separate houses above, was not a house reasonably so called, following Henley v Cohen and distinguishing *Tandon*. Although when originally built there was an internal access that had been removed 40 years ago and the only entrance to the flat was up an external rear staircase. The Court of Appeal is expected to consider, again, the application of *Tandon* and its recent decision in *Henley v Cohen*.

Adam Rosenthal acted for the successful landlord in the County Court and Court of Appeal in Henley v Cohen.

The Deregulation Act 2015

By Ciara Fairley

The Deregulation Act 2015 received royal assent on 26th March 2015. Sections 28-48 of the Act deal with housing and development: a number of important changes are being made and practitioners will wish to familiarise themselves with the relevant provisions of the Act.

Among the most significant changes being made are those being made in the context of residential property let on Assured Shorthold Tenancies ("AST"). Under the Housing Act 1988, landlords were able to recover possession of property let on an AST by serving a notice under section 21 of the HA 1988. There was no need to prove that the tenant was at fault, making this a valuable right and one that landlords frequently have to, or choose to, rely on in practice. The Deregulation Act 2015 does not tamper with this basic principle, but it does make it harder for landlords to recover possession using section 21 by imposing a number of additional restrictions on the circumstances in which such notices can be served.

The most significant restrictions are those set out in section 33 of the Deregulation Act 2015. These changes are intended to deal with so-called revenge or retaliatory evictions and essentially prohibit or render invalid section 21 notices that are served following specified complaints about the condition of the property or the common parts. The relevant provisions have not yet been brought into force, but are likely to have a major impact when they are introduced, not least because of the extremely poor drafting.

Other changes include changes to the time periods for serving a section 21 notice and the form of such notices. More welcome are the changes being made in relation to tenancy deposits. The requirements relating to deposits were first introduced by the Housing Act 2004. They have been a constant source of difficulty ever since - troubling both the courts and Parliament. The Deregulation Act 2015 attempts to address these problems, in particular, the problems thrown up by the Court of Appeal's well known decision in *Superstrike v Rodriguez* [2013] EWCA Civ 669; [2013] 2 EGLR 91. Sections 30-32 of the Deregulation Act 2015 successfully address some of the problems, but the opportunity to address them all has been missed.

For a more in depth insight into the issues raised by the Deregulation Act 2015 read **Ciara Fairley's** forthcoming article in the Estates Gazette entitled "Regulation not deregulation" and **Toby Boncey's** article Deregulating deposits: further regulation of the protection of tenancy deposits and section 21 notices in the Deregulation Act 2015 L. & T. Review 2015, 19(3), 90-96 (available on Westlaw).

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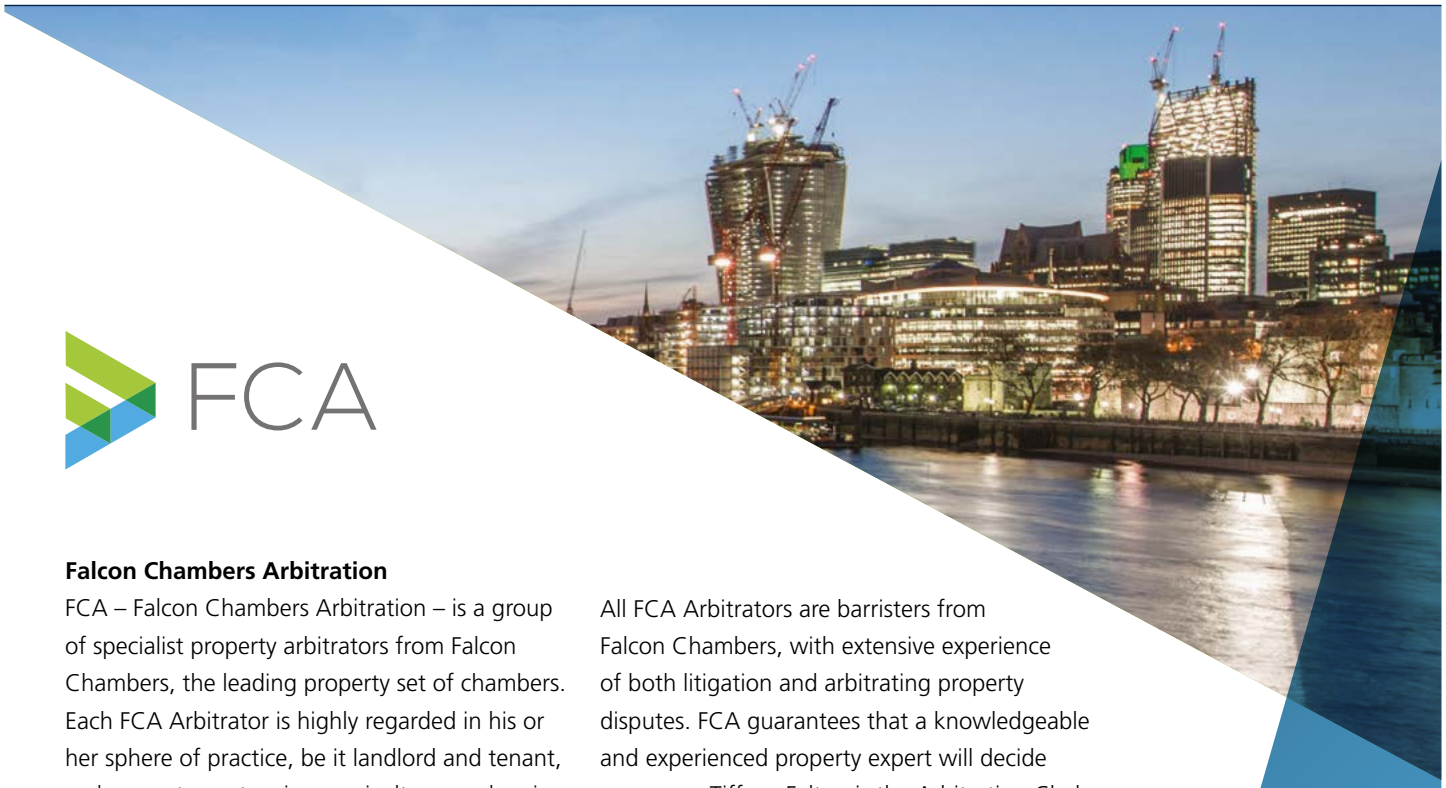

FCA

Falcon Chambers Arbitration

FCA – Falcon Chambers Arbitration – is a group of specialist property arbitrators from Falcon Chambers, the leading property set of chambers. Each FCA Arbitrator is highly regarded in his or her sphere of practice, be it landlord and tenant, real property, rent review, agriculture or planning and compulsory purchase.

FCA arbitrators have the experience and expertise to resolve almost any property related dispute more efficiently and more effectively than the conventional court process, often on a fixed fee basis.

FCA can undertake a full arbitration hearing with experts and the like or, if it is a discreet point, it may be possible for the arbitration to be dealt with on paper.

All FCA Arbitrators are barristers from Falcon Chambers, with extensive experience of both litigation and arbitrating property disputes. FCA guarantees that a knowledgeable and experienced property expert will decide your case. Tiffany Felton is the Arbitration Clerk. She can be contacted on **020 7353 2484** or by e-mail **clerk@falcon-chambersarbitration.com**

Normally Tiffany will be available Monday -Thursday from 09.00am - 3.00pm. Outside these hours Tiffany can be contacted by e-mail and on her mobile - 07879 118994

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Recent News

Barry Denyer-Green assists the Compulsory Purchase Association

Barry Denyer-Green, a past chairman of the Compulsory Purchase Association, and a member of its national committee, has been assisting the Association in the preparation of its response to the Department for Communities and Local Government (DCLG) and HM Treasury open consultation on Improving the Compulsory Purchase Process. The consultation seeks views on a range of proposals aimed at making the compulsory purchase regime clearer, fairer and faster. Among the points made by the government departments are whether public sector bodies should be given greater flexibility in their compensation offers at an earlier stage in the process, whether statutory targets and timescales should be introduced, whether the power to confirm a CPO should be delegated to inspectors, whether the rules on High Court challenges should be reformed, and whether certain of the acquisition procedures should be made fairer to both parties.

"proposals aimed at making the compulsory purchase regime clearer, fairer and faster."

In broad terms the Association supports the suggested improvements. But the reforms should include the right of claimants to serve reverse notices of entry, and fast-track arrangements to process applications for advance payments. The owners of small businesses, especially those holding leases with continuing rental obligation, having premises in especially town centre improvement schemes, are unfairly treated both by the legal rules and by acquiring authorities relying on those rules. The Association has suggested reforms to assist such persons, as well as putting forward proposals to improve the process for acquiring authorities.

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