Falcon Chambers

This edition features the following:

- Case Round Up
- What's so different about property contracts?
- Proptech: Rise of the machines
- Cracking the code
- Recent news

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Falcon Chambers

From the Editor

The first half of 2019 has been a busy time for Falcon Chambers, whose members have been closely involved in many of the interesting cases across the property law sphere - as can be seen from the case round up on the following pages.

Also in this edition of our newsletter, Guy Fetherstonhaugh QC explores the intersection between contract law and property, with a particular focus on leases. In some ways, leases are no different from any other contract. However, since they generally convey an estate in land as well as creating a contractual relationship between the parties, an important and recurring question is whether all of the ordinary principles of contract law apply to them.

This edition of the newsletter also includes a very useful introduction to PropTech for property lawyers, by Oliver Radley-Gardner. Changes to the way things are done in the property world are likely to be on the horizon, and, as with any change, there will likely be opportunities as well as new challenges for lawyers arising from it.

Finally, it has been just over 18 months since the entry into force of the new Electronic Communications Code, which introduced a new regime under which operators can obtain rights to install electronic communications apparatus on third party land. To date there have been nine substantive decisions of the Upper Tribunal, on various aspects of the Code. James Tipler's article collates these decisions and distils one key lesson to take from each.

As can be seen from the case round up, the issues considered in the articles in this newsletter and our latest news, property law, and the work that we at Falcon Chambers do, is a wide-ranging and ever-changing field. We are proud of the breadth, as well as the depth, of our expertise, and look forward to an interesting variety of challenges in the new legal year. We hope that you enjoy this edition of our newsletter.

Stephanie Tozer QC

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Case round up

North West Investments Ltd v Soho 2 Collection Ltd (Central London County Court)

This was a successful reverse application for summary judgment dismissing a claim for a new 1954 Act tenancy and granting the landlord an order for possession and mesne profits. Although there was an ostensible issue of fact as to whether or not the tenant was in occupation at lease end, the evidence already available demonstrated a pattern of sub-letting before and after the expiry of the term. The court accepted that the inference that sub-leases had been in place at the term date was so strong that there was no real prospect of success on the claim or any other reason why it should proceed. The case also raised a procedural issue, the tenant having failed to serve a defence to the landlord's counterclaim. Under CPR Part 24, the court's permission was therefore required to seek summary judgment on the counterclaim. **Joseph Ollech** represented the successful landlord.

(1) SHB Realisations Limited (2) GB Europe Management Services Limited v (1) Cribbs Mall Nominee (1) Limited (2) Cribbs Mall Nominee (2) Limited (Bristol County Court)

This is an important decision concerning relief from forfeiture in circumstances where the tenant is and will remain unable to comply with a keep open covenant. The case arose out of the insolvency of the former BHS. The defendants served a section 146 notice principally citing the breach of a keep open covenant. Both the tenant (now in liquidation) and a mortgagee, which had recently advanced security to the failing company, applied for relief from forfeiture without specifying the particulars terms of the relief sought. The claimants were granted a strictly limited period of time to complete an assignment provided they pay specified sums in short order. The case confirms that a lease can be forfeited for breach of a keep open covenant and re-affirms the central importance of being able to remedy the breach. It also establishes that there will be limits to the time allowed to a tenant to use assignment of the lease as an indirect means of remedying persistent breaches of

covenant. **Caroline Shea QC and Ciara Fairley** acted for the defendants.

Cornerstone Telecommunications Infrastructure Ltd v Keast [2019] UKUT 116 (LC)

This decision of the Upper Tribunal decides a number of points under the Electronic Communications Code. First, the Tribunal expressed the view it was unlikely that a discrepancy between the rights or terms sought in a paragraph 20 notice and those sought in the claim would invalidate the notice where the rights/terms sought in the claim were less onerous than those set out in the paragraph 20 notice. Secondly, code rights could not be asserted purely against electronic communications apparatus within paragraph 5; code rights could only be asserted against land, and land excludes electronic communications apparatus. However, it was permissible to seek rights to keep apparatus on land, as the rights related to the land not the apparatus. Thirdly, policing the terms sought under the code was a matter of discretion, not jurisdiction. This discretion, however, was naturally ringfenced by the principles in paragraph 23. Finally, a "system of conduits" operator under the old code was converted by the transitional provisions into a "system of infrastructure" operator. **Oliver Radley-Gardner** appeared for the Claimant.

Earl of Plymouth v Rees [2019] EWHC 1008 (Ch)

This case concerned rights of entry relating to a farm on the outskirts of Cardiff let to a farmer under tenancies protected by the Agricultural Holdings Act 1986. The landlords claimed an injunction to restrain the farmer and his son from interfering with the exercise by the landlords of rights of entry reserved by the tenancy agreements. The judge held that a right to enter a farm "at all reasonable times for all reasonable purposes" did not entitle a landlord to dig boreholes and refused the injunction claimed. **Stephen Jourdan QC** appeared for the farmer and his son.

Kingsley v Kingsley [2019] EWHC 1073 (Ch)

This High Court dispute arose out of the termination of a farming partnership on the death of one of two sibling partners. The deceased brother's interest

passed to his widow, who claimed an order for the sale of the farm on the open market. This was resisted by the defendant (the sister of the deceased) as co-owner, who wished to continue the farming business which had been passed down the generations and who sought an opportunity to acquire her brother's interest in the farm, at a specified value, prior to any sale on the open market. The court accepted that it had jurisdiction to make such an order; and exercised its discretion in favour of the defendant to grant her a period of two months to complete the purchase of the farm at a price determined by the court. **Catherine Taskis** appeared for the successful defendant.

Moorjani v Durban Estates Limited [2019] EWHC 1229 (TCC)

This was a successful application to have a lessee's claim for damages struck out as an abuse of process. The claimant had brought a claim against the freeholder (the first defendant in this action) in the County Court in 2011. That claim went to trial in 2013, at which the lessee was awarded limited damages for disrepair to the common parts. Those damages were increased, slightly, by the Court of Appeal in 2015. In 2018, the lessee together with three other long lessees, brought a further claim for damages against the first defendant, which had sold the freehold to the second defendant in 2011. The Court struck out the claim, holding that the claimant was barred by the former judgment which he had obtained from the County Court from bringing any further claim in respect of that cause of action. The court also considered the decision in *Henderson v Henderson*. **Adam Rosenthal** acted for the successful first defendant.

TFS Stores Limited v BMG (Ashford) Ltd et al [2019] EWHC 1363 (Ch)

This was an important case concerning the contracting out procedures under s.38A of the Landlord and Tenant Act 1954 and Schedule 2 of the Regulatory Reform (Business Tenancies) Order 2003. The Court was asked to consider whether, in order to be valid, the commencement date specified by the tenant in its statutory declaration confirming that the lease will be outside the Act must be the

actual date of the grant of the lease – i.e. the date upon which its legal interest comes into existence – as opposed to the date on which the lease is expressed to commence. The various declarations relied upon contained a number of formulae including "…for a term commencing on the date on which the tenancy is granted" and "for a term commencing on a date to be agreed by the parties". The Court upheld all of these formulae as valid, holding that the purpose of inserting such details into the statutory declaration is merely identificatory – i.e. it is to make it as clear as possible that the tenant confirms that it understands that this lease, which it intends to accept, will be outside the protection of the Act. The case also raised questions concerning the law of agency and authority, estoppel by deed, ratification and wilful holding over under the Landlord and Tenant Act 1730. **Wayne Clark** and **Joseph Ollech** appeared for the landlords. **Guy Fetherstonhaugh QC and Mark Galtrey** appeared for the tenants.

Manchester Ship Canal Co Ltd v United Utilities Water Limited [2019] EWHC 1495 (Ch)

This was a successful application to strike out a claim by Manchester Ship Canal Co Ltd by United Utilities Water Limited. The Canal Company is part of the Peel Group. The claim was that discharges from post-privatisation sewers through pre-privatisation outfalls into watercourses were unlawful. The United Utilities team had previously succeeded in establishing in the Supreme Court that discharges from pre-privatisation outfalls were lawful (Manchester Ship Canal Co Ltd v United Utilities Water plc [2014] UKSC 40). Barling J held that the new claim was unmeritorious and that effluent originating in post-privatisation sewers could lawfully be discharged from pre-privatisation outfalls. The judgment is of wide importance to sewerage undertakers and watercourse owners and also considers in detail cause of action, issue estoppel and abuse of process. **Jonathan Karas QC** represented the successful applicant.

Morris & Perry (Gurney Slade Quarries) Ltd v Hawkins [2019] EW Misc 14 (CC)

This case concerned a farm in Somerset. The defendant, Ms Hawkins, owns the surface and the claimant, Morris & Perry, owns the minerals beneath

the surface. The 1975 transfer which originally severed title to the minerals from title to the surface reserved the minerals to the transferor with "a right of entry and all necessary ancillary rights in connection with winning and working the same" including a number specific rights set out in part I of the Schedule. It was held that this right entitled the owner of the minerals to plant trees on the surface in order to get planning permission to extract minerals. **Stephen Jourdan QC** acted for the successful appellant.

Cornerstone Telecommunications Infrastructure Ltd v Central Saint Giles General Partner Ltd & Anor [2019] UKUT 183

In this case concerning the Electronic Communications Code, the site provider was refusing access for a multi-skill visit (MSV), a necessary anterior step to determining a site's fitness for installation. The right to enter for an MSV had been established in *Cornerstone Telecommunications Infrastructure v The University of London [2018] UKUT 356 (LC)*. At the hearing, the MSV was no longer opposed and the one issue in dispute, the question of the terms of an indemnity, was resolved between the parties. The Deputy President Martin Rodger QC made orders for costs in favour of both site providers, but limited to £5,000. He indicated that MSV cases should not in future attract high legal costs and reminded both sides of disputes under the Code of the obligation to co-operate and to take the overriding objective seriously. **Oliver Radley-Gardner** appeared for the Applicant operator.

Alexander Devine Children's Cancer Trust v Housing Solutions Ltd [2018] EWCA (Civ) 2679

This case concerns the jurisdiction of the Upper Tribunal to discharge or modify restrictive covenants under section 84 of the Law of Property Act 1925 and, in particular, the application of the "public interest" test in ss. 84(1)(aa) and 84(1A)(b). The applicant, in breach of a restrictive covenant, had embarked on a housing development and only applied to the Upper Tribunal for modification of the covenant after an objection had been raised by the owner of the benefited land. The Upper Tribunal granted the application, holding that the restriction was contrary

to the public interest. That decision was overturned by the Court of Appeal. Acting on behalf of the developer, **Jonathan Karas QC** and **Elizabeth Fitzgerald** have obtained permission to appeal to the Supreme Court. This is the first time that the provisions of section 84 of the Law of Property Act 1925 will have been directly considered by the House of Lords or the Supreme Court and will therefore be of considerable interest to developers and real property practitioners in general.

Stanning v Baldwin [2019] EWHC 1073 (Ch)

The case concerned whether a landowner could rely on a prescriptive right of way to carry out a development of her property. The court considered whether the development would infringe the test of "radical alteration" derived from *Macadams Homes Ltd v Robinson* [2004] EWCA Civ 214 and concluded that it would not. There were also issues as to the boundary and whether the owner had acquired an easement of drainage by prescription. **Philip Sissons** appeared for the successful Claimant.

Mirza v Elmdon Real Estates LLP (unrep. 28 June 2019, Newcastle County Court, HHJ Kramer)

This was a claim for a declaration that an expert rent review was invalid on the basis that the expert failed to follow instructions. The claimant argued that the expert had used a methodology not permitted for this type of rent review in accordance with *Clarise Properties Ltd v Rees* [2017] EWCA Civ 1135 and that in choosing the decapitalisation rate to be applied he had had no regard to the term of the hypothetical lease or its terms under the rent review and hence had failed to follow his instructions in the rent review clause. The judge held that *Clarise* was not authority for the proposition that, legally, a s.15(2) type valuation methodology under the Leasehold Reform Act 1967 could not be used more generally in rent review and that he could not say from the determination and material in front of him that the expert had not considered the decapitalisation rate independently of the suggested agreement. **Cecily Crampin** appeared for the successful defendant.

3 and 41 Observatory Way, Ramsgate, CT12 6AZ and 24, 36, 54, 60 and 86 Pretoria Road Chertsey,

Surrey, KT16 9AZ - CHI/29UN/OLR/2019/0004 and 0008 - 00013.

In this matter, the First-tier Tribunal, Property Chamber (Residential Property) considered seven leases with doubling ground rent provisions. The Tribunal determined the appropriate capitalisation rate to be applied to doubling ground rent following applications under s.48 of the Leasehold Reform, Housing and Urban Development Act 1993 to determine the terms of acquisition of seven separate lease extensions. **Tricia Hemans** appeared on behalf of a number of the Applicants.

Hicks v 89 Holland Park (Management) Ltd [2019] EWHC 1301 (Ch)

The claimant's land was subject to restrictive covenants which prohibited the making of an application to the appropriate planning authority in respect of any plans drawings or specifications which had not previously been approved by the defendant's predecessor in title, and from commencing work until the definitive plans, drawings and specifications had also been approved. Previous proceedings had established that the defendant freeholder of a nearby building (as well as leaseholders of flats within the building) had the benefit of these covenants but would not be entitled to withhold consent unreasonably. The claimant wanted to construct a modern building on her land, part of which would be underground. She made three applications to the defendant for consent but all were refused, on the basis of aesthetics, disruption caused by construction works, the possibility of damage to nearby trees and 'construction issues' including issues relating to subsidence. It was held that when deciding the claimant's application for consent, the defendant was only entitled to have regard to its interest in the benefitted land (namely, the structure of the building thereon and the freehold reversion to the flats). Whilst the defendant's refusal on the basis of aesthetics, trees and disruption were therefore unreasonable, the defendant could reasonably have refused consent under the second covenant on the basis of structural issues. **Jonathan Karas QC and Stephanie Tozer QC** acted on behalf of the claimant and **Mark Sefton QC** appeared for the defendant.

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What's so different about property contracts?

Property litigation is a fascinating blend of real property and contract law. The real property side – rights of light, rights of way, boundary disputes, restrictive covenants – can involve a certain amount of contractual interpretation, but it is the pure contract work that contains the real surprises. Why? Because property contracts contain traps for the unwary, which mark them out from any other species of contract.

Property contracts are many and various: leases and licences, contracts for the sale of land, development agreements. I will focus in this article on leases, but with the occasional nod in the direction of other property contracts. What then is so different about leases?

Let me start with the common ground before turning to the differences. Leases are of course subject to the same rules of interpretation as other contracts. Indeed, many of the seminal cases in the field concern leases or other property contracts, as a casual browse through Lewison, *The Interpretation of Contracts*, establishes.

Over the last decade, we have seen the Supreme Court hard at work in a clutch of cases involving property contracts, developing the law on contractual interpretation:

- Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 concerned the interpretation of an agreement to develop land. Their Lordships affirmed the rule that pre-contractual negotiations were usually inadmissible in construing a contract, although they went on to hold that the agreement should be rectified so as to accord with the tenor of the negotiations.
- Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56 involved a contract for the sale of land containing uplift provisions in the event of a further sale. The purchasers then sold the land to an associated company at less than open market value, and claimed that the sale price should be used in the uplift

calculations. The Court acceded to a submission that a term should be implied into the contract, providing for the uplift to be calculated by reference to open market value.

- Arnold v Britton [2015] AC 1619 was involved with the interpretation of a number of leases. By a majority, the Court dismissed the proposition that the court should reject the natural meaning of a term simply because it seemed imprudent for the parties to have agreed it.
- Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742 was another appeal concerned with the interpretation of a lease, and in particular with the circumstances in which a term should be implied. The Court took this opportunity authoritatively to restate the relevant principles.
- MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2019] AC 119, this time involving a licence agreement to occupy serviced office premises. The Supreme Court decided that "no oral modification" clauses are valid and effective. Lord Sumption commented, giving the majority judgment, "*Modern litigation rarely raises truly fundamental issues in the law of contract. This appeal is exceptional*."
- Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2019] AC 553: although this concerned an easement, much of the focus was upon the terms of the grant creating the easement. It was therefore in substance a contract case, albeit one involving real property incidents.
- Wells v Devani [2019] 2 WLR 617: this just sneaks in as a property contract – actually an oral "agreement" concerning the terms upon which an estate agent had been retained (or not). Ultimately, another implied term case for the Supreme Court. Ten years ago, it is difficult to conceive of this Court taking such an interest in property, as opposed to human rights and public law – but now the altered diet seems to be very much to their fancy.

The impact of the Court of Appeal upon this field has been scarcely less marked. Just over the course of the last year, we have marked the following authorities upon contractual topics in the property sphere:

- Manchester Ship Canal Co Ltd v Vauxhall Motors Ltd [2019] 2 WLR 330: whether the doctrine of relief from forfeiture applied to a licence holder.
- JN Hipwell & Son v Szurek [2018] L & TR 15, holding that it was necessary to imply a term imposing a duty upon a landlord regarding electrical safety.
- First Tower Trustees Ltd v CDS Superstores International Ltd [2019] 1 WLR 637, which decided important issues concerning misrepresentation and non-reliance clauses in a leasehold context.
- Wild Duck Ltd v Smith [2018] L&TR 35: concerning a landlord's step-in rights under a lease.
- No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2018] 1 WLR 5682, holding that a landlord had been reasonable in withholding its consent to assignment of a lease.
- Trillium (Prime) Property GP Ltd v Elmfield Road Ltd [2018] EWCA Civ 1556: whether an onerous rent review clause could be corrected by construction.

And quite apart from this high-level judicial activity, property litigation of course abounds in the High Court, the County Courts and the Tribunals.

But to return to my theme: what makes property contracts, and leases in particular, special? Well, a great number of things, which have as their source the fact that property contracts usually concern estates in land – with the result that normal terms and conditions do not apply. In particular, much contractual jurisprudence affecting other areas of contract law simply does not apply with the same vigour.

Two examples, both to do with terminating contracts:

- *Frustration*: This doctrine operates in other areas whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. This has always been especially difficult to apply to property contracts, for the reasons explored by the House of Lords in National Carriers Ltd Respondents v Panalpina (Northern) Ltd [1981] AC 675. Despite the sterling efforts made by the Brexit-surprised tenant in Canary Wharf (BP4) T1 Ltd v European Medicines Agency [2019] L&TR 14[1], frustration of a lease has never successfully been effected in this jurisdiction.
- *Repudiation*: the proprietary remedy for a landlord whose tenant commits breaches of covenant is ordinarily to forfeit the lease, thus terminating the contract as well as the estate in land, but keeping open the possibility that the tenant and others with an interest such as mortgagees and sub-tenants might claim relief from forfeiture. But can a landlord instead accept the breach as repudiatory, thus terminating the lease on that ground instead (and incidentally preventing any application for relief)? According to the Court of Appeal in Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd [1972] 1 QB 318, "A lease is a demise. It conveys an interest in land. It does not come to an end like an ordinary contract on repudiation and acceptance." In two subsequent cases, the Court assumed (without hearing argument or deciding) that a lease could be terminated by a repudiatory breach of covenant by the landlord (not by the tenant): Nynehead Developments v RH Fibreboard Containers [1999] 1 EGLR 7; Chartered Trust plc v Davies [1997] 2 EGLR 87. In no case has the ability of a landlord to terminate a lease for a tenant's repudiatory breach been considered or decided: the point was left open by the Court

[1] Although the tenant was given permission to appeal, the appeal itself was subsequently compromised.

of Appeal in Reichman v Beveridge [2006] EWCA Civ 1659.

There are of course many other characteristics of a lease being an estate in land which impact upon the parties' contractual freedom of manoeuvre. The law has long taken the view that the free market should be constrained when it comes to leasing, in large part to dilute the concentration of economic power that comes with land ownership. The great reforming legislation in the Law of Property Act 1925 continues to play a significant role in determining what parties can do; while the leasehold property legislation since then has been voluminous. In perhaps no other area of practice has the State played such an interventionist role.

With all areas of law, the truism that a little learning is a dangerous thing is instructive. In property law, however, with its complex blend of contract, statute and common law, and given the alarmingly high values that may attend a poor decision, a little learning is a very perilous thing indeed.

Guy Fetherstonhaugh QC

Proptech: Rise of the machines

The new(ish) buzzword in the property sector is "PropTech". What it is, and what should interest us as property lawyers about it, is hard to pin down. This article tries to pin the term down and lays out the basics for people engaged in real estate law and litigation.

The Three Pillars of PropTech

In April 2017, Professor Andrew Baum authored *PropTech 3.0*, a research paper published by the Saïd Business School at the University of Oxford.[2] The paper is an exposition of the history and development of PropTech, and identifies the following as its three pillars:

(1) "*Smart Real Estate*", that is, the application of technology to real estate to facilitate its efficient management, control and use;

[2] https://www.sbs.ox.ac.uk/sites/default/files/2018-07/PropTech3.0.pdf

(2) "*The Sharing Economy*", that is, the use of technology to facilitate the shared use of residential and commercial space; and
(3) "*Real Estate Fintech"*, which embraces the use of technology to trade property, usually in a "tokenised" manner, that is, using distributed ledger technology, the most famous example of which is Blockchain. In layperson's terms, that means that instead of (for instance) data about the ownership of land being held by a single centralised entity (like the Land Registry), it could be held by a number of individuals in a network. Each member of the network holds a copy of the same ledger on their computer, and any change in ownership leads to each ledger being updated. Given that there are thus multiple independent copies of the ledger which are checked against each other, and given that transactions are only verified if there is a consensus within the network, it becomes nigh on impossible to falsify information, or for one member of the network to act without the knowledge and assent of the others.

Pillars One and Two

These two pillars are really just the operation of traditional property law principles in a wholly new context. Smart real estate will revolutionise the services that users of real estate will experience, and traditional lease documents will need to be updated to reflect those changes by ensuring that service charge provisions (for example) are kept up to date. Further, the increased demand for stable and high-quality connectivity for all types of building will mean the increased use of agreements protected by the Electronic Communications Code, and the need for rapid deployment of such infrastructure will doubtless increase the pressure on the market to adopt standardised wayleave agreements which get the balance right between flexibility for freeholders and certainty and security of service for operators and occupiers.[3]

[3] https://www.cityoflondon.gov.uk/business/commercial-property/telecommunications-and-utilities-infrastructure/Pages/wayleaves.aspx

Pillar Three

For property lawyers, pillar three is likely to be of most immediate interest. The third pillar will, if fully implemented, radically change how we have become accustomed to dealing with contracts concerning the transfer and use of property, and conveyancing. This involves the use of smart contracts and of blockchain technology. Blockchain I have explained in basic terms above. What is a smart contract?

In the words of Nick Szabo, commonly regarded as the originator of the idea, it is "a computerised transaction protocol that executes the terms of a contract. The general objectives of smart contract design are to satisfy common contractual conditions (such as payment terms, liens, confidentiality, and even enforcement), minimise exceptions both malicious and accidental, and minimise the need for trusted intermediaries. Related economic goals include lowering fraud loss, arbitration and enforcement costs, and other transaction costs".[4]

In simpler terms, a smart contract is a contract which is in the form of a computer protocol. The parties to the smart contract (think landlord, tenant, surety, mortgagee) set the "rules" that operate between them, and the protocol then ensures that payments are made, that steps authorised by the contract are executed and that performance is monitored. The steps taken by the smart contract are processed by a distributed ledger so that each step is verified and verifiable. So, a smart conveyancing contract would manage the payment of a deposit, the passing of information pending conveyance, confirmation and transfer of completion monies, and then the transfer of title, with the various stages of the transaction verified by, and the conveyance taking place on, the blockchain.

The revolution is, if not here, then near:[5] Some jurisdictions, like Estonia[6] and Sweden[7] have introduced public blockchain technology in land transfers. Our own Land Registry has been running

[4] Quoted by Tapscott and Tapscott, *Blockchain Revolution* (Penguin, 2016), 101

[5] Again I commend a paper produced by Andrew Saull and Andrew Baum, *The Future of Real Estate Transactions*, https://www.sbs.ox.ac.uk/sites/default/files/2019-03/FoRET-ReportFull_1.pdf

[6] https://www.rik.ee/en/e-land-register

[7] https://www.lantmateriet.se/en/nyheter-och-press/nyheter/2018/blockkedjan-testad-live--kan-spara-miljarder-at-bostadskopare-och-bolanekunder/

its Digital Street project[8] for some time, and, in April 2019, carried out, under controlled conditions, a transfer of a residential property in Gillingham (which had completed in the "real world" using traditional conveyancing in 22 weeks). Using the Land Registry blockchain prototype, it took 10 minutes with the parties being prompted to act at each stage by the application, and with the funds being released and (in that case a copy of) the Land Registry being updated automatically by the smart contract.

A Fourth Pillar?

There might be a separate and fourth pillar emerging too – the use of the smart contract in real estate. It is easy to see how that might be applicable to the real estate sector, because contracts in this sector are often executory, that is, are contracts which create long-term performance obligations on both sides to the agreement. So, a standard development agreement may have options, staged payments, triggers for overage and so on. Leases have rental and service charge obligations, consent requirements and break notice provisions usually subject to conditions. Smart contract technology would permit those executory functions to be monitored and enforced, as required, by the computer protocol, eliminating the need for human agency and hence the potential for human error. There would be no *Mannai Investments Limited v Eagle Star Insurance Co Limited* [1997] A.C. 749 notice problems, and nor would there be any further scope for disputes about the true construction of contracts which have repeatedly vexed the Supreme Court, authority to enter into agreements or to give notices.

Threat or Opportunity?

The self-executing smart contract may be perceived to be a threat to lawyers and agents who presently make their living from disputes arising out of the interpretation and execution of contracts. Commercial parties may decide that it is more efficient for contracts to be self-executing, and accept that taking the rough with the smooth is still better than incurring transaction and litigation costs.

[8] https://hmlandregistry.blog.gov.uk/2017/12/18/world-leading-through-digital-transformation/?utm_medium=Blog&utm_source=blog&utm_campaign=Digital_services&utm_content=JA_blog_feb18

On the other hand, smart contracts (and conveyancing using distributed ledger technology) have their own problems. First, such ledgers are of necessity public, and one of the promoted qualities of this technology is its transparency, which may not appeal to everyone. Secondly, the principle of RIRO ("rubbish in, rubbish out") applies. The blockchain ledger is hard to falsify because the information is embedded in separate, parallel ledgers across a large network. If the initial information input (say, a mistaken first registration of title) is false, it becomes hard to correct. This creates a further problem for smart contracts – as they are usually also blockchain-based (as it is through the blockchain that the protocol authorises various steps to be taken), they are hard to correct if they have gone wrong at the implementation stage. The retrospective effects of, for instance, rectification, or the retrospective consequences of a contract that is void *ab initio*, are hard to implement where the contract is held on a distributed ledger. [9] As ever, therefore, a new way of doing things may, in seeking to eliminate old problems, instead cast them in a different light or create entirely new ones. What is clear, however, is that it is important that property lawyers engage with this emerging area.

Oliver Radley-Gardner

Cracking the Code

In the little over 18 months since the entry into force of the new Electronic Communications Code ("the Code"), the Upper Tribunal (Lands Chamber) ("the Tribunal") has already provided a wealth of insights on the meaning and application in practice of the new Code in the nine references that have been decided and reported to date.

This article highlights one key lesson from each – though each of course merits a close reading in full.

1. **The right to carry out a preliminary site survey and inspection – a so-called "Multi-**

[9] Problems adverted to in https://www.freshfields.com/en-gb/our-thinking/campaigns/digital/fintech/whats-in/whats-in-a-smart-contract/; https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/smart-contracts-bridging-gap-between-expectation-and-reality; Sarah Green, "Smart Contracts, Interpretation and Rectification" [2018] LMCLQ 235

Skilled Visit" ("MSV") – is a Code right: *CTIL v University of London* [2018] UKUT 0356 (LC)

Entry onto a potential site to assess its suitability for hosting Electronic Communications Apparatus ("ECA") with the aid of persons with expertise across a range of different disciplines – the so-called "MSV" – is a vital first step for operators seeking to establish new sites.

Although none of the Code rights enumerated in para 3(a)-(i) expressly refers to any "survey", or inspection of land (as opposed to ECA), the Tribunal agreed with the operator's submissions that a right to carry out a non-intrusive MSV was nonetheless within the ambit of the Code rights in paragraph 3(a) (the right to *install* ECA on, under or over the land) or, failing that, paragraph 3(d) (the right to *carry out any works for or in connection with the installation of ECA* on, under or over the land or elsewhere).

Just as such rights must necessarily include a right to enter the land – without which a right to "install" or carry out works would be illusory – so too will such rights include the taking of other essential preliminary steps, including surveys and inspections. Whilst there exist other statutory powers enabling operators to enter open land, such powers do not apply to buildings, and Parliament could not be taken to have overlooked the archetypal rooftop communications site in its drafting of the Code.

2. **Orders for interim Code rights can be made conditional upon e.g. obtaining planning permission: *EE Ltd and Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington* [2018] UKUT 0361 (LC)**
3.

By this reference the operators sought the imposition of Code rights over Threadgold House, a block of flats in Islington, to enable them to install and use ECA on its roof so as to ensure continuity of coverage in light of the likely loss of another site nearby owing to the demolition and redevelopment of the building hosting that other site.

Applications for final (under paragraph 20) and interim (paragraph 26) Code rights were sought. In granting the application for interim Code rights, the Tribunal noted that the procedure was intended to be a swift, summary one that may be determined on paper only. At this stage the applicant need only show to the familiar "good arguable case" standard that the paragraph 21 criteria for making a final order are met. The application of this approach was explained and applied to the facts, and the Tribunal was satisfied that an order for interim rights should be made.

Notably, however, the Tribunal considered that the balance of public interest versus private prejudice would tip the other way should planning permission be refused for demolition of the building hosting the operators' other site. It therefore made the interim rights order conditional upon planning permission being granted to the building's owner for the proposed redevelopment. Such a condition was appropriate given that the grant of planning permission is a "readily ascertainable" matter of public record, so it should be clear when and whether the condition was met.

4. **Losses resulting from the exercise of Old Code rights before the new Code entered into force are not compensable under the new Code: *Elite Embroidery Ltd v Virgin Media Ltd* [2018] UKUT 0364 (LC)**
5.

The next reference to come before the Tribunal provides a cautionary tale for practitioners, regarding the correct regime and forum for claiming compensation.

A landowner discovered a fibre optic cable running under land it had acquired to build a new factory and offices upon had been wrongly situated by the operator pursuant to an agreement under the Old Code (Telecommunications Act 1984 Sch. 2) in the mid-1990s. The landowner suffered loss in and around 2016 in having to incur expenditure redesigning its building works, and in 2018 applied to the Tribunal for compensation under provisions contained in the new Code.

The reference was struck out. By the transitional provisions in Sch. 2 of the Digital Economy Act 2017, the repeal of the Old Code was without prejudice to rights of compensation under the same which had accrued prior to the entry into force of the new Code. The landowner's losses all accrued pre-28 December 2017, and not in connection with any new Code agreement. Such claims must be dealt with under the Old Code – and in the County Court.

6. **Failure to comply with Tribunal directions can result in significant sanctions: *EE Ltd and Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington* [2019] UKUT 0053 (LC)**
7.

The next reported reference took the Tribunal's attention back to Threadgold House for the final hearing of the operators' application for Code rights – and the first opportunity for the Tribunal to consider the new Code's consideration and compensation provisions. Space precludes a full treatment of the detailed guidance given on ascertaining what price should be paid for Code rights, and how landowners should be compensated where agreements are imposed, which has generated much commentary.

Perhaps less attention has been paid to the procedural ruling made by the Tribunal at the outset of the hearing, which contains a significant lesson in case management and practice. After the interim rights hearing (above), the Tribunal issued a timetable of directions requiring the parties to exchange and provide comments on a draft final code agreement. Contrary to those directions, the landowner failed to provide the operators with a marked-up version of the agreement the operators had proposed, instead referring to its expert witness's report (produced for the interim rights hearing) which contained a discussion of the terms that the expert thought unacceptable.

Having regard to the 6-month rule (reg. 3(2) of the Electronic Communications and Wireless Telegraph Regulations 2011), and the Tribunal's limited resources, the Tribunal indicated that it would not tolerate deliberate non-compliance with directions and failures to co-operate (at least not in the absence of any application for variation or relief). Accordingly, in exercise of its powers under rule 8(3)(b) of The

Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010) the Tribunal ordered that the landowner would be debarred from calling evidence or making submissions on the terms of the Code agreement (besides the consideration and compensation payable).

8. **Only the "occupier" of land may confer Code rights: ***CTIL v Compton Beauchamp Estates Ltd* **[2019] UKUT 0107 (LC)**
9.

The applicant operator sought Code rights from the freehold owner of a rural site which had previously been leased to another operator. The lease had expired (and was contracted out of the 1954 Act). But the other operator's equipment remained on site and in operation, protected from removal by paragraph 21 of the Old Code.

The Tribunal held that in the circumstances the other operator remained in "occupation", as the entity with de facto control of the site; and that nothing in Part 4 of the Code displaced the rule in paragraph 9 that Code rights can only be conferred on an operator by the *occupier* of land. Mere entitlement to possession on the part of a landowner will suffice under paragraph 105(6) (which extends the definition of "occupier") only where there is no other entity in occupation. The application therefore failed as a matter of jurisdiction.

However, interestingly, notwithstanding this conclusion the Tribunal accepted in principle that an operator already in occupation could *itself* apply for and obtain Code rights from its reversioner.

10. **The prohibition upon the acquisition of Code rights over ECA does not mean that it is impossible to acquire Code rights over land where ECA is present: *CTIL v Keast* [2019] UKUT 0116 (LC)**

This reference also concerned an application in relation to land already host to an ECA site. Among other issues, the Tribunal had to consider the landowner's argument that the applicant was not seeking Code rights over land at all – but rather over

ECA, which is excluded from the definition of land by paragraph 108 of the new Code. The ECA was affixed to and part and parcel of the land, such that all of the site was “ECA”; alternatively, the applicant could only get Code rights over the remainder of the “Swiss cheese” that lay under and around the ECA.

Not so, held the Tribunal. The true effect of paragraph 101 is that ECA installed pursuant to Code rights, notwithstanding the common law rules pertaining to fixtures, does not become part of the land, however firmly affixed; and the presence of chattels (whether ECA or otherwise) on or over land does not, on ordinary principles, prevent the grant of rights over that land. The operator could, therefore, have its “Cheddar”.

11. **For the purposes of paragraph 38(2) (right to require removal of ECA which interferes with or obstructs a “means of access” to or from neighbouring land where there is no Code right to obstruct the same), access means a current existing access, not a proposed access: ***Evolution (Shinfield) LLP v British Telecommunications Plc*** [2019] UKUT 0127 (LC)**
12.

Developers of a large residential site obtained planning permission for the construction of some 1200 homes, with a wide access route to be constructed just off a local roundabout. Shortly after the application for planning permission was approved, the operator installed a cabinet housing various cables and other ECA squarely within the intended access route. The cost of relocating the same was estimated at around £300,000.

As the Tribunal put it; “*this reference is really about who will have to foot the bill, however much it is eventually found to be*”.
The developers argued that they were entitled to seek removal of the cabinet at the operator’s cost under the provisions of paragraphs 38, 40 and 44. Where these are engaged, the Tribunal noted, the expense of removing the apparatus will always fall on the operator, not the landowner.

But the Tribunal held that the language of paragraph 38(2) refers to an existing physical means of access to land, rather than land which could potentially be used for such access. Otherwise, even a brick wall could be a "means of access" on the basis it might one day be pulled down. Parliament could not be presumed to have intended, to permit such a potentially dramatic interference with the lawful and reasonable use of neighbouring land as that contended for by the developers. On the contrary, the Code is "*intended to improve electronic communications services for the benefit of the public by accelerating and simplifying procedures for installing and retaining infrastructure by operators*".

13. **"The Tribunal is not attracted to excessively technical arguments about the form of Code notices where no question of jurisdiction is engaged": ***CTIL v Central St Giles General Partner Ltd & Clarion HA Ltd* **[2019] UKUT 0183 (LC)**

14.

In a short, robust judgment dealing only with costs, the Tribunal emphasised the importance of co-operation and engagement between landowners and operators to avoid disproportionate costs being incurred arguing about "senseless" disputes. Whilst agreement between the parties meant the Tribunal did not have to determine all the arguments canvassed, the Tribunal also gave a clear signal that it will not generally be receptive to arguments attacking the validity of Code notices on "excessively technical" grounds such as those raised in *Keast* – where discrepancies between the rights sought in the initial notice and the rights sought in the reference were seized upon, and dismissed – as well, it would seem, as minor defects in form.

15. **Although not strictly bound by them, the Tribunal will apply the LTA 1954 "Ground (f)" authorities where appropriate: ***EE Ltd & H3G Ltd v Trustees of Meyrick 1968 Combined Trust of Meyrick Estate Management* **[2019] UKUT 0164 (LC)**

16.

The Claimant operators sought the imposition of Code rights over the respondent's land. Imposition was resisted in reliance upon paragraph 21(5) of the

Code, the respondent landowner arguing it intended to redevelop the relevant site by building a mast of its own and that it could not reasonably do so if the Code rights sought were imposed. The intended development was designed with a view to being able to rent space on the mast for ECA back to operators for consideration in excess of that provided for by the Code and on the landowner's preferred terms, since the mast site – itself comprising ECA – would not be "land" over which Code rights could be sought and to which the Code would apply (paragraph 108).

The Tribunal decisively concluded that the landowner could not bring itself within paragraph 21(5). In applying and interpreting this provision the Tribunal noted that it was "explicitly modelled" on Ground (f) (LTA 1954 s.30(1)(f)). Whilst the Code is a "clean slate" and "a fresh start", "the principles applicable to the 1954 Act should be adopted where they are relevant", allowing for context.

The familiar authorities of *Betty's Cafes Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20 and *Cunliffe v Goodman* [1950] 2 KB 237 were therefore endorsed as applicable in principle to Code cases , such that the relevant intention is to be assessed at the date of trial (*Betty's Cafes*); and the landowner must satisfy the two-stage test process by proving it has both (i) a firm, settled subjective intention to carry out the redevelopment and (ii) that its scheme is practically realisable.

Similarly, the less venerable but equally significant principle in *S Franses Ltd v Cavendish Hotel (London) Ltd* [2018] UKSC 62 applies: if the landowner intends to carry out its development only so as to prevent the acquisition of Code rights, which would not be pursued if Code rights were not sought, its intention is impermissibly conditional and contrary to the policy of the Code, and will not therefore qualify for satisfying para 21(5).

Whilst not explicitly confirmed in the reference, there seems to be no reason why the Tribunal's decision should not apply equally to paragraph 31(4)(c) (termination of existing Code agreements).

Stay tuned

Although each of the decisions reviewed above provides useful and important illumination of the new Code, the Tribunal is only just beginning to scratch the surface of its many provisions and the complex issues it produces (and indeed appeals to the Court of Appeal remain outstanding in both the *University of London* and *Compton Beauchamp Estates* references). It is anticipated that many more important decisions will follow as new circumstances arise and new arguments are canvassed and tested on behalf of landowners and operators alike.

James Tipler

Falcon Chambers

Governing Bencher Elections 2019

We are delighted to announce that Elizabeth Fitzgerald has been elected as Governing Bencher of the Inner Temple at the Bench Table.

Enfranchisement and Right to Manage Awards 2019

Chambers were delighted to receive the award for Chambers of the Year at the Enfranchisement and Right to Manage Awards 2019. Our First Junior Clerk, Joanne Meah, was also recognised as Practice Manager of the Year.

Who's Who Legal UK Bar Guide 2019

10 silks and 13 juniors in Chambers were recently recognised for their work in the real estate field of the Who's Who Legal's 2019 UK Bar Guide. Four members of chambers, Guy Fetherstonhaugh QC, Janet Bignell QC, Oliver Radley-Gardner and Wayne Clark, were listed as most highly regarded silks and juniors in real estate.

Caroline Shea QC and Catherine Taskis – Council of Agricultural Law Association

Chambers are delighted to announce that Caroline Shea QC and Catherine Taskis have been appointed to sit on the Council of the Agricultural Law Association. Caroline and Catherine, who are co-editors of Muir Watt & Moss, are leading practitioners in agricultural and rural law. They both look forward

to contributing to the wide range of professional and consultative work performed by the Agricultural Law Association.

Greville Healey – Land Registration Rules Committee

It is with great pleasure that Chambers can announce that Greville Healey has been appointed as the barrister member of the Land Registration Rules Committee, the body which advises the Secretary of State about how to exercise his power under s.127 of the Land Registration Act to make and amend the Land Registration Rules.

Candi Percival – Marketing Executive

Chambers was very pleased to welcome Candi Percival to the role of Marketing Executive in April 2019 following four years at a mid-tier accountancy firm and six years at Essex Court Chambers. Candi is responsible for all aspects of marketing for chambers and its members.

Junior Seminar Series 2019

The Falcon Chambers Junior Seminar Series for 2019 recently came to an end, covering a broad range of topics including the interpretation of contracts, enforcing leasehold covenants, the Electronic Communications Code and service on persons unknown. Dates for the 2020 series will be published in due course.

Book Publications – Hague on Leasehold Enfranchisement

The Third Supplement to the current edition of Hague on Leasehold Enfranchisement has just been published. Tony Radevsky is one of the authors of this authoritative work.

Telecoms Newsletter

Following the publication by Chambers of the first edition of The Electronic Communications Code and Property Law: Practice and Procedure, Chambers

issued the first edition of its Telecoms Newsletter in February 2019. Chambers hopes to publish further issues at regular intervals to examine the life of the New Code. If you would like to be added to the distribution list, please e-mail candi@falcon-chambers.com.

Compiled by Imogen Dodds and Thomas Rothwell.