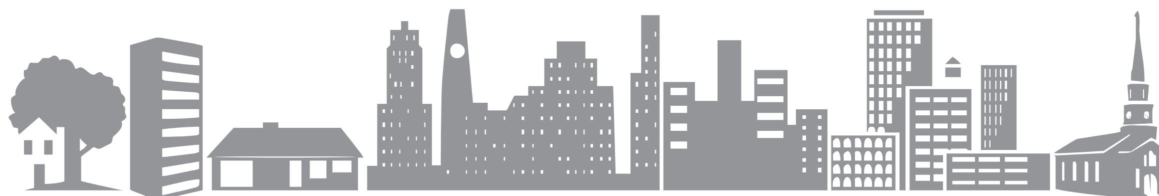

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Issue 152 February 2020

Editors

Gary Webber	General Editor
David Keighley	Deputy Editor Solicitor's practice points
William Batstone	Public access
Nigel Clayton	Mortgages
Peta Dollar	Property transactions
Tanfield Chambers	Residential tenancies, long leases and property litigation
Piers Harrison	Enfranchisement
Samantha Jackson	Boundaries, co-ownership and estoppel, nuisance and trespass
Emma Humphreys	Easements and restrictive covenants
Tim Selley	Mobile Homes
Sarah Thompson-Copsey	Landlord and Tenant (General)
Jonathan Welch	Planning

Topics this month

- **Landlord and Tenant (General)**: Forfeiture - Waiver of right to forfeit by exercise of CRAR; Commercial Lease - breach of the covenant for quiet enjoyment - offer of compensation
- **Long Leases:** Landlord and Tenant Act 1987 - First Refusal - exempt transactions; Service charges - appointment of a manager; Service Charges - interpretation of “Right to Buy” long leases; RTM Companies - service charges
- **Mortgages**: Leasehold property held by company subject to mortgage - dissolution of company - bona vacantia - disclaimer of lease - entitlement to vesting order; Commercial mortgage loans; Secret commission - remedies - set-off
- **Property Transactions:** Contract – “subject to contract”; Appointment of a manager under Part II of the Landlord and Tenant Act 1987 – effect of subsequent disposal for value
- **Public access**: Town or village greens - statutory incompatibility
- **Solicitors Practice Points:** Money Laundering and Terrorist Financing (Amendment) Regulations 2019 – Law Society Guidance

Boundaries and adverse possession

The editor of this section is Samantha Jackson of Clerksroom, London and Taunton (Samantha.Jackson@Clerksroom.com)

No Report this month.

Business lease renewal

The editor of this section is Sarah Thompson-Copsey, solicitor and freelance property law trainer (sarah@thompsoncopsey.com)

No Report this month.

Co-ownership

The editor of this section is Samantha Jackson of Clerksroom, London & Taunton (Samantha.Jackson@Clerksroom.com)

No Report this month.

Easements

The editors of this section are Emma Humphreys, solicitor, partner in Charles Russell Speechlys LLP and Georgina Redsell Senior Associate at Charles Russell Speechlys (www.charlesrussellspeechlys.com)

No Report this month.

Landlord and tenant (general)

The editor of this section is Sarah Thompson-Copsey, solicitor and freelance property law trainer (sarah@thompsoncopsey.com)

Forfeiture
Waiver of right to forfeit by exercise of CRAR

Brar v Thirunavukkrasu
[2019] EWCA Civ 2032

Summary
The exercise of CRAR (Commercial Rent Arrears Recovery) under the Tribunals Courts and Enforcement Act 2007 (2007 Act) and the Taking Control of Goods Regulations 2013 (SI 2013/1894) after the tenant had failed to pay rent meant that the landlord had waived the right to forfeit for the failure to pay that rent.

Facts
This case concerns a 21-year lease of commercial retail property entered into between the parties in 2013. The lease provides that rent is payable in four equal quarterly instalments. It also contains a forfeiture clause which states that:

> “The landlord may re-enter the property…at any time after…any rent is unpaid 21 days after becoming payable whether it has been formally demanded or not”.

The tenant failed to pay part of the quarter’s rent which fell due on 25 December 2015:

- 25 December 2015 - rent not paid;
- 15 January 2016 - ‘days of grace’ expire and right to forfeit arises;
- 18 January 2016 - enforcement agents instructed to exercise CRAR;
- 1 February 2016 - enforcement agents take control of tenant's goods for arrears (£8,270) + fees - in total £10,533.20;
- 4 February 2016 - sum paid in full by tenant to enforcement agents;
- 12 February 2016 - landlord purports to exercise peaceable re-entry;
- 17 February 2016 - landlord receives £8,270 monies from enforcement agents.

The tenant claimed that forfeiture was unlawful because the exercise of CRAR, after the right to forfeit, arose acknowledged the continued existence of the lease and meant the landlord had waived the right to forfeit for the December arrears.

Issues
The landlord argued that:

1. The exercise of CRAR does not act as a waiver of the right to forfeit and the previous authorities on distress were not binding on the Court of Appeal;
2. As the exercise of CRAR was invalid (for lack of notification) waiver had not taken place as there was no unequivocal representation that the lease continued to exist;
3. That the landlord relied on the exception to be

Landlord and tenant (general)

found in s210 of the Common Law Procedure Act 1852.

First instance
Both the County Court and the High Court on a first appeal agreed that the exercise of CRAR operated as a waiver of the right to forfeit.

Decision on appeal

1. The Court of Appeal rejected the first argument – that the exercise of CRAR was not an unequivocal act affirming the existence of the lease but, instead, a "neutral act" – considering it be "flawed on several grounds", not least because the effect of s79(4)(a) of the 2007 Act is that CRAR can never be exercised when a lease has been brought to an end by forfeiture and indeed CRAR can only be exercised by a landlord.
2. As to the second argument the Court of Appeal considered there to be "no merit in this ground of appeal". The court considered that the High Court was perfectly entitled to form the view that the tenant "knew that CRAR had been commenced by [the landlord] by the presence of the enforcement agents [at the property]", notwithstanding the fact that no formal notice had been given to the tenant. The court added that the entry onto the premises of the enforcement agents was itself a waiver – it was "consistent only with an intention on the part of the appellants to treat the lease as continuing because they plainly intended to exercise CRAR."
3. As to the third argument that where at least 6 months' rent is in arrear there can be no waiver by CRAR because of the effect of s210 of the Common Law Procedure Act 1852, the Court of Appeal said that this "would not only amount to substantially re-writing section 210 but it would mean that that this fundamental point on waiver has been overlooked by all lessors and courts since 1852 and by all academic and other commentators on the law relating to tenancies since that time" and was not "seriously arguable".

Comment
This case makes it clear that the exercise of CRAR will waive the right to forfeit the lease in respect of the arrears that were subject to the CRAR.

Commercial lease
Breach of the covenant for quiet enjoyment
Jafari v Tareem Limited
[2019] EWHC 3119 (Ch)

Summary
The High Court examined the relevance of an offer of compensation to the question of whether a landlord was in breach of the covenant for quiet enjoyment.

Facts
The Appellant is the commercial tenant of a dentist's surgery. The Respondent is the landlord and was conducting a major renovation of the rest of the building to create a 134-bedroom hotel. The works involved the installation of scaffolding over the exterior of the demised premises, noisy works and the erection of a hoarding which allowed rough sleepers to congregate. The landlord charged no rent for the period of the works but nevertheless the tenant contended that the works had caused a significant reduction in his profits and claimed for breach of the covenant for quiet enjoyment / nuisance.

Issues
The issues at trial were:
i) whether the landlord was in breach and
ii) if so, the damages that ought to be awarded to the tenant.

First instance
HHJ Johns found that the question to be answered was whether the landlord had taken all reasonable steps to minimise disturbance and, in considering that question, regard could be had to the financial compensation offered to the tenant.
Though there were some noisy works during restricted hours, and the scaffolding could have been better designed, it was significant that compensation had been granted in the full amount of the rent. Overall, taking this into account, the covenant had only been breached in a limited respect, namely by the landlord's failure to replace the windows as he had promised.
The judge went on to order the landlord to pay the sum of £10,875 for loss of amenity (15% of the rent) for damage caused by the works. He found that the works did not cause any loss of profit.

Decision on appeal
No fewer than seven grounds of appeal were raised. However, most of the grounds related to findings of fact or evaluative decisions made by the trial

Landlord and tenant (general) (continued)

judge. That being the case, the Appellant had to show that that the decision was *"wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided such as a gap in logic, a lack of consistency or a failure to take account of some material factor, which undermines the cogency of the conclusion": Prescott v Potaminos* [2019] EWCA Civ 932. In other words, the decision must have been one that no reasonable judge could have reached.

The juge's findings as to the periods of the noisy works and the question of the loss of profits were not such a decision, as they were based squarely on the evidence before the judge. As to the findings relating to loss of amenity, there was nothing wrong with an award tied to a percentage of the rent, and there was no set tariff for the percentage reduction to be applied. 15% was not outside the range of possible awards.

The only point of law raised was whether the judge ought to have taken the rent waiver into account when assessing whether or not the landlord had acted reasonably.

Nugee J highlighted a number of authorities which suggested that an offer of compensation was relevant to the issue of reasonableness. However, these cases all related to leases where the landlord had some right or obligation to carry out the works complained of. That was not the case here, and therefore it was submitted that the authorities were not applicable.

Though an interesting point, it was held that in this case the resolution of the issue would make no practical difference to the outcome, as the fact of the rent waiver would have been relevant to the compensation to be awarded – e.g. the judge would have found that no further damages were payable as the tenant had already been adequately compensated by the waiver. Accordingly, the judge did not deal with these points, as no useful purpose would have been served.

Comment

This case is interesting for what it does not say – the point about whether a landlord may rely on the offer of compensation as a defence to an alleged breach of the covenant for quiet enjoyment where the lease itself does not contain, for example, a right to build that expressly qualifies the covenant has been left open for determination in a case where the decision would make a practical difference to the outcome. If the offer of compensation is substantial enough, it may well be that there are no further damages to be paid in any event.

Long leases

The editors of this section are Richard Alford, Katie Gray, Diane Doliveux, Will Beetson, James Castle, Chloe Sheridan, Richard Granby, Piers Harrison, Jonathan Upton and Edward Blakeney, barristers of Tanfield Chambers, London (www.tanfieldchambers.co.uk)

There are four cases this month:

- Whether costs incurred by a statutorily appointed manager were recoverable
- The High Court examined the relevance of an offer of compensation to the question of whether a landlord was in breach of the covenant for quiet enjoyment.
- Whether the leaseholders under *"Right to Buy"* leases were liable to contribute to the landlord's costs of repairing structural defects.
- Who was entitled to receive payment of Service Charges;

Landlord and Tenant Act 1987

First Refusal - Exempt transactions

York House (Chelsea) Ltd v Edward Thompson [2019] EWHC 2203 (Ch)

Summary

A husband and wife who are the joint freeholders of a block of flats, granted a number of leases of various parts of that block to one or other of themselves. These were found to be disposals which were exempt from the provisions of part 1 of the Landlord and Tenant Act 1987 ('the 1987 Act'), either because these were gifts to family under s.4(2)(e) or disposals within a family under s.4(2)(h).

Facts

The Defendants, who are husband and wife, are the joint freeholders of York House. They became aware that the tenants of that block were intending to acquire the freehold under the Leasehold Reform, Housing and Urban Development Act 1993 ('the 1993 Act').

Concerned that the development opportunities in York House would not be properly reflected by a valuation under the Act as matters stood, they granted themselves 14 leases of various parts of the House and its surrounding areas. These included leases of storerooms, subsoil, air space, courtyards and internal corridor spaces, amongst other things. There was no premium payable under any of the leases and the rent reserved was in each case a peppercorn.

The Defendants did not serve notices offering the qualifying tenants' rights of first refusal over these

Long leases (continued)

leases pursuant to s.5 of the 1987 Act. The tenants contended that they ought to have done so and therefore sought an order that the Defendants transfer the leases to the Claimant company, pursuant to s.19 of that Act.
The Defendants argued that the disposals effected by the leases were exempt disposals, and alternatively argued that many of the disposals were not ‘disposals affecting premises’ to which Part One of the 1987 Act applies.

Issues

1) Did disposals effected by the leases fall within the exclusions under s.4(2)(e) or (h) the 1987 Act?
2) If not, was each lease a disposal affecting premises to which part one of the 1987 Act applies?

Decision
Mr Justice Zacaroli sitting in the Chancery Division of the High Court found that the leases were not relevant disposals, such that the Defendants had not been obligated to offer rights of first refusal to the qualifying tenants of the block.
In relation to s.4.2(e), the Claimant had argued that the disposals could not be gifts because:

- The creation of leases involved consideration. The judge disagreed, finding that it is conceptually possible to describe the grant of a tenancy as the making of a gift: the better analysis was that mutual covenants in a lease were part and parcel of the estate in land created.
- The Defendants were really seeking to retain the benefit of their property, rather than giving a ‘gift’ of leases. The judge disagreed: the purpose of the exception in s.4.2(e) was to allow the landlord to transfer his property to an acquiring party in which he had an interest – any ulterior motive behind the gift was not relevant.
- The Defendants granting leases to one or other of themselves could not properly be described as gifting to a ‘member of their family’ per various strict readings of the statutory language in s.4.2(e). The judge disagreed with these interpretations and further could see no legislative purpose for such an exclusion.

S.4(2)(h) excludes “a disposal consisting of a transfer by two or more persons who are members of the same family… to fewer of their number.” The Claimant argued in relation to this subsection that the creation of an estate in land such as a lease was not a disposal ‘consisting of a transfer’. The judge again disagreed: ‘transfer’ in that provision was used for the purpose of identifying ‘between whom’ the disposal is to take place, rather than in the sense of the ‘type’ of disposal permitted.
Although not strictly necessary, the judge went on to consider which of the disposals would be relevant disposals affecting premises to which part one of the 1987 Act applies. Agreeing broadly with the Claimant, he found that appurtenances include areas over which the tenants have rights under their leases and areas usually enjoyed with the building, including those to which access is required by the landlord in order to comply with its repairing obligations [113]. As a result, airspace to the height of the chimneys, subsoil and courtyards (inter alia) were found to be appurtenances.

Comment
Paragraphs 119-169 of the judgment contains in-depth analyses of whether various different parts of a block of flats may be considered as exterior, appurtenant or a common part of a building, which could likely be useful to readers considering the application of these issues to their own facts.

Service charges

Appointment of a manager
Chaun-Hui v K Group Holdings Inc
[2019] UKUT 371 (LC)

Summary
The Upper Tribunal considered the status of service charges recovered by a manager appointed under s24 of the Landlord and Tenant Act 1987.

Facts
This matter concerned the ongoing litigation relating to a property in Park Lane, London. The parties were in dispute about whether relevant costs incurred by a statutorily appointed manager were recoverable by the maintenance trustee under a tripartite lease following the termination of the management order and an assignment of the right to recover the arrears to the maintenance trustee by the Tribunal appointed manager.

Issues
The lessees contended firstly that once the management order had expired, the manager had no further power to deal with payments or arrears unless the management order so provided. Secondly, sums paid by lessees during the course of a management order are not “service charges” within the meaning of s18 of the Landlord and Tenant Act 1985.

Long leases (continued)

First instance
The FTT did not permit the lessees to raise the above points at first instance on the grounds that they had not been fully pleaded.

Decision on appeal
The Upper Tribunal rejected the lessees' submissions and found that sums paid by tenants to a Tribunal appointed manager were service charges properly so called. The sums are paid under the lease and a management order does not displace the lease covenants, which remain binding on the lessees. It would be "verging on the absurd" if the lessees, by seeking the appointment of a manager, rendered themselves unable to rely on the protections contained in sections 18 – 30 of the 1985 Act.
The Upper Tribunal accepted that this decision was potentially in conflict with the decision in *Kol v Bowring*, *2015 UKUT 530 (LC),* where HHJ Gerald held that monies paid under a management order were not paid as service charges. However, the point was not fully argued in *Kol*, and the correctness of the decision made by the Upper Tribunal was supported by its practicality as there would be continuity after the management order came to an end. In this case, the arrears accrued to the maintenance trustee on termination of the management order and there was no need for the deed of assignment.
However, as emphasised in *Kol*, attention must be given in the management order to what happens on termination – it would be helpful if the order terminated at the end of a service charge year. In a complex case, the manager should apply to the FTT for directions and approval of her actions.
As to the pleading point, the Upper Tribunal gave guidance as to the correct approach to parties raising new issues of law at the last minute. Where the parties are at final hearing, the Tribunal will be reluctant to allow a party to alter their position without notice. Further, where the issue is one of fact, the tribunal must take into account the importance of the change in position to the case overall, proportionality, prejudice to the other party and the reasons for the late change. However, if the issue is one of law, it ordinarily should be dealt with so long as the parties have sufficient opportunity to consider the point and seek advice.

Comment
Though the appeal related to the status of service charges demanded by a statutorily appointed manager, it is important to note the warning given by the Upper Tribunal as to the need for precision in the terms of a management order. The order must deal with the process on handover at the termination of the appointment. There ought to be an opening and closing sum recorded and a timetable to produce final accounts ordered, and it would be simpler if the management order terminated at the end of a service charge year. The appointed manager remains accountable to the Tribunal even after the appointment ends.
Further, the comments as to late changes in position will be of general procedural importance to litigants in the FTT.

Service Charges
Interpretation of long leases
The Mayor and Commonality and Citizens of the City of London v Various Leaseholders of Great Arthur House
[2019] UKUT 341 (LC)

Summary
The Upper Tribunal determined, by reference to the interpretation of the specific terms of various "Right to Buy" leases, whether the leaseholders were liable to contribute to the landlord's costs of repairing structural defects.

Facts
The lessees occupied their flats under leases granted pursuant to the "Right to Buy" statutory scheme. The leases permitted the landlord to recover the costs of repairs to the structure and exterior of the building "not amounting to the making good of structural defects".

Issues
The landlord had incurred costs of c.£8,000,000 in carrying out works to the walls of the building. The works were necessary to fix a structural defect in the walls. The landlord sought to recover the costs of the works through the service charge in the sum of c.£72,000 per lessee.

First instance
The First Tier Tribunal held that the works were not recoverable through the service charge, although the Tribunal's reasons for finding for the tenants were not particularly clear.

Decision on appeal
The Upper Tribunal examined the leases in their statutory context. The terms of the leases were derived from and mirrored the "Right to Buy" legislation. That legislation, although amended on a number of occasions, plainly intended to protect former council tenants from liability for substantial service charges after they acquired their properties where the service charge costs were associated

Long leases (continued)

with remedying structural defects of which the tenant was not aware. That purpose was achieved by removing the cost of works that had the effect of remedying a structural defect from the service charge.
That being the case, the landlord's contention that one had to look at the purpose for which the repairs were carried out could not stand. If the works were repair works, they would likely have been carried out for the primary purpose of repairing the building. The landlord's proposed construction of the lease therefore had the effect of including within the service charge all works, save those that were carried out for the purpose of making good a structural defect but incidentally achieved a repair. That did not sit comfortably with the statutory provisions from which the leases were derived. Accordingly, the costs of repair work that had the effect of making good a structural defect were not payable by the tenants through the service charge. It made no difference that the works also remedied deterioration that occurred over the time that the defect existed.
Though the landlord technically succeeded on the appeal, the decision of the FTT was broadly upheld by the Upper Tribunal for different reasons and the tenants were therefore the successful parties in reality.

Comment
Though the Upper Tribunal was interpreting the specific wording of the leases in question, as the terms derived from widely used legislation, the same or similar wording will be found in many other leases granted under the "Right to Buy" scheme and this decision is therefore of importance in cases concerning such leases.

RTM Companies

Service charges
Firstport Property Services Ltd v Settlers Court RTM Co Ltd
[2019] UKUT 243 (LC)

Summary
Gala Unity Ltd v Ariadne Road RTM Co Ltd [2012] EWCA Civ 1372 was not decided per incuriam, nor was the Court of Appeal's reasoning leading up to that decision demonstrably wrong. Difficulties certainly can arise from an RTM Company acquiring a right to manage appurtenant property in conflict with the existing management company, but these arise from the Commonhold and Leasehold Reform Act 2002 itself and not the court's interpretation of the Act.

Facts
The Respondent to the appeal (Settlers Court RTM Company Ltd) exercised its right to manage a block of flats known as Settlers Court in November 2014. The Appellant (Firstport Property Services Limited) is the named management company under lease of flats on an estate including Settlers Court. Firstport is still obliged to provide estate service due to its obligations to lessees and freeholders in other parts of the estate. However certain lessees refused of Settlers Court refused to pay their portion of the charges incurred by Firstport, arguing that by virtue of s.97(2) of the Act Firstport was no longer entitled to payment for their proportion of their service charge as that entitlement had passed to the RTM Company.
The RTM Company applied to the FTT for a determination of the payability of the service charges said to be due from leaseholders for estate management costs relating to appurtenant property shared with another block not itself managed by the RTM company.

Issue
Was *Gala Unity* wrongly decided to the extent that it determined that an RTM Co acquires the right to manage a wider estate where there is more than one block on a development?
Per *Morelle v Wakeling* [1955] 2 QB 379, the UT could only determine this issue on the basis that the decision in Gala Unity should be held to have been given per incuriam, i.e. that the Court of Appeal's reasoning in reaching the decision had been demonstrably wrong.

First instance
The FTT found service charges were payable to the RTM Company and not Firstport, being bound by the Court of Appeal's decision in *Gala Unity*. Permission to appeal was granted by the Deputy President.

Decision on appeal
Judge Siobhan McGrath found that the Court of Appeal in *Gala Unity* had not reached their decision in ignorance or forgetfulness of a binding authority. Neither was the reasoning leading to the decision demonstrably wrong notwithstanding that the implications of that decision were far-reaching and able to cause real difficulty. Difficulties "result from the legislation itself" [66]. Nor was the statutory interpretation of sections 72(1)(a), 96 and 97 of the Act manifestly wrong.

Comment
The judgment records that the parties had together produced a draft agreement for the existing management company to continue to provide the

Long leases (continued)

estate services and collect service charges for the same. The FTT determined that the parties had not ultimately agree binding terms, and that part of the decision was not appealed.
An agreement between the old and new management companies for the old to retain entitlements that would otherwise pass under the Act is expressly permitted by s.97(2). In practice this is the clearest way of avoiding the consequences of a conflict of the sort occurring here: both *Gala Unity* and this case indicate that the legal remedies available in the absence of such contract are unclear.

Mobile Homes

The editor of this section is Tim Selley, solicitor and partner with Crosse + Crosse Solicitors LLP (www.crosse.co.uk)

No Report this month.

Mortgages

The editor of this section is Nigel Clayton of Kings Chambers, Leeds and Manchester (www.kingschambers.com). Nigel also maintains the specialist website dealing with mortgages at www.legalmortgage.co.uk

There are two cases this month:

- Who was entitled to a Vesting Order following disclaimer of lease subject to a mortgage?
- The High Court considered a number of claims including whether a witness had to sign a mortgage in the presence of the borrower.

Leasehold property held by company subject to mortgage

Dissolution of company - bona vacantia - disclaimer of lease - entitlement to vesting order

Leon v HM Attorney General
[2019] EWCA Civ 2047

Summary
The Court of Appeal dismissed an appeal against an order made by the High Court (on appeal from the Chief Master) and held that a vesting order should not have been made in favour of a co-mortgagor (but not a co-owner) of leasehold property subject to mortgage. Instead a vesting order would be made in favour of the mortgagee.

Facts
A company which was owned or controlled by the appellant held a leasehold interest in a property granted by Westminster City Council, subject to a mortgage entered into by the appellant and the company with a mortgage lender. The leasehold interest was worth between £800,000-£1million, with the equity of redemption valued between £370-£570,000. The company was subsequently dissolved, and no application was made to restore it to the register. In consequence the company's leasehold interest vested in the Crown as bona vacantia and the Crown subsequently disclaimed the lease.
The appellant sought a vesting order of the lease on various grounds.

First instance
The Chief Master dismissed the claim on the ground that the lease had not been held on trust for the appellant but nonetheless made a vesting order under s 1017 Companies Act 2006 on the grounds that:

(1) The appellant had an interest in the lease by virtue of his position as co-mortgagor, and
(2) He was under a liability in respect of the lease which was not discharged by the disclaimer (and the requirement in s 1017(3) – that it was just to make the order, was satisfied).
Westminster CC appealed.

On appeal, Arnold J set aside the vesting order, and instead made a vesting order in favour of the mortgagee on terms that it should account to the next person entitled in accordance with the statutory trusts in s 105 Law of Property Act 1925.
The appellant appealed on two grounds:

(1) that the judge was wrong to hold that the appellant was not "a person entitled to it" for the purposes of s 1017(2)(a); and
(2) the Chief Master had been entitled to hold that "it would be just to [make a vesting order in the appellant's favour] for the purpose of compensating him in respect of the disclaimer", and that the judge had been wrong to interfere with that decision.

Decision on appeal

(1)The Chief Master concentrated on whether the appellant had an interest in the lease, without going on to ask whether he was entitled to it. The

Mortgages (continued)

judge had been right to say that the question was “does the interest claimed by the appellant entitle him to the property”. That does not mean an absolute entitlement. Where there are competing interests, the court will have to choose between them. As to counsel’s argument that the appellant was entitled as co-mortgagor to the equity of redemption, and that this meant he had the right, on payment of the mortgage debt to recover the property, this confused the right of the co-mortgagor of the property to redeem a mortgage with the equity of redemption. The equity of redemption is the interest of the owner of the property subject to the mortgage.

(2)The judge had been right to hold that the Chief Master did not really address the question of the compensation which a vesting order would provide to the appellant, rather he regarded a vesting order as a just outcome. In addressing the question of a windfall. The judge had been right to conclude that a vesting order would not satisfy s 1017(3).

Accordingly, it followed that a vesting order cannot be made in the appellant’s favour. On that basis it was common ground that a vesting order could be made in the mortgagee’s favour. The appellant was not deprived of protection as regards his liabilities, which are owed exclusively to the mortgagee. A vesting order in the mortgagee’s favour will enable it to realise its security in the event of any default, and the value of the lease is such that it will be fully recouped out of the proceeds of sale.
Appeal dismissed.

Comment
The entitlement to a vesting order in respect of disclaimed property is strictly governed by s1017 Companies Act 2006. An order may only be made in respect of (a) a person who claims an interest in the disclaimed property, or (b) is under a liability in respect of the disclaimed property, but in respect of (b) an order may only be made where it appears to the court that it would be just to do so for the purposes of compensating the person subject to the liability in respect of the disclaimer. There had to be a reasonable relationship between the liability and the benefit to be obtained.
Where the property is subject to a mortgage, the court may prefer the interest of the mortgagee, who on the making of a vesting order will hold the net proceeds of sale on the statutory trusts. Significantly, the court left open the appellant’s entitlement to contend that he was the person next entitled to the proceeds of sale.

Commercial mortgage loans

Secret commission – remedies - set-off
Wood v Commercial First Business Ltd (in liquidation)
[2019] EWHC 2205 (Ch)

Summary
The High Court allowed certain claims involving secret commissions paid by a commercial mortgage lender to a broker but dismissed a number of other claims.

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Mortgages (continued)

Facts

In 2006, Mrs W obtained a commercial mortgage loan of £1,020,000 from CFBL (described as a 'non-standard lender') on the security of a legal charge over Farm No. 1 to enable her to buy Farm No. 2 ('the First Disputed Mortgage'). The loan was arranged via a broker UKFMS for a fee £14,500 which was paid out of the advance. UKFMS was also paid a commission of £30,600 (3% of loan) from CFBL. Part of the loan was used to redeem a charge in favour of UKCC, a company which was owned and controlled by Des Phillips, who also owned and controlled the broker, UKMFS. W subsequently obtained further loans from UKCC secured on Farm No. 2.

In 2007, Mrs W obtained a commercial mortgage loan of £1,427,320 from CFBL on the security of a legal charge over Farm No. 2 ('the Second Disputed Mortgage'). The loan was again arranged by UKMFS, without charging a fee, but subject to a commission of £57,092.80 (4% of loan) from CFBL.

Later in 2007, Mrs W obtained a further advance of £174,474 from CFBL on the security of the existing legal charge over Farm No. 1 ('the Disputed Further Advance'). The loan was again arranged by UKMFS for a fee of £3,726 and commission of £5,234.22 (3% of loan) from CFBL.

Following default in payment, CFBL obtained orders for possession of Farms 1 and 2. The total amount due was £3,824,141. Mrs W subsequently brought the present claim against CFBL (and assignees under securitisation agreements) seeking to set aside the First Disputed Mortgage, the Second Disputed Mortgage and the Disputed Further Advance on various grounds including:

(1) Forgery in respect of the Second Disputed Mortgage,
(2) Lack of attestation (in respect of the First Disputed Mortgage,
(3) Undue influence/abuse of confidence,
(4) Breach of duty,
(5) Secret commissions, and
(6) Unfair relationship under the Consumer Credit Act 1974.

Mrs W remained in possession of both Farms pending the outcome of the proceedings.

Decision

(1) Forgery: The court attached little weight to Mrs W's bare negative assertion that she did not sign the relevant document, and having regard to expert handwriting evidence, rejected the claim.

(2) Lack of attestation: Th court made a finding of fact that although Mrs W signed the first mortgage in the presence of a witness, the witness did not countersign the deed in Mrs W's presence. However, s 1(3) Law of Property (Miscellaneous Provisions) Act 1989 only required a deed to be signed by an individual in the presence of a witness. It did not require the witness to sign in the presence of the individual. In any event, the deed, once registered, would have taken effect as a registered charge under s 51 Land Registration Act 2002.

(3) Undue influence/abuse of confidence: The allegations against UKMFS had not really been dealt with in evidence. Mrs W had solicitors acting for her in respect of all three transactions, and she returned to use UKMFS's services time and time again. The court accordingly rejected her claim.

(4) Breach of duty: Although Mrs W pleaded that as a result of the proximity between CFBL and UKMFS a general duty of care arose at common law so that there was an assumption of responsibility by CFBL to Mrs W. However, there was no evidence of substance on the point and it appeared to have been abandoned.

(5) Secret commissions: Mrs W's case was that the payment by CFBL to UKMFS of commission without her knowledge amounted to a secret commission or bribe. The court reviewed at length the authorities on fully secret and half secret commissions. In the present case the mortgage terms contained an express promise that in the event of commission being paid, the borrower will be notified of the exact amount in writing. The court accepted the unchallenged evidence that no such written notice was given, and the court treated them as fully secret commissions. On the evidence, all of Slade J's threefold requirements in Industries and General Mortgage Co Ltd v Lewis [1949] 2 All ER 573 were met and the relevant payments should be considered as secret commissions.

(6) Unfair relationship: The payments made by CFBL to UKMFS deprived Mrs W of the disinterested advice of UKMFS as her broker so that the relationship between Mrs W as borrower and CFBL as lender was unfair for the purposes of s 140A Consumer Credit Act 1974.

In terms of remedies, Mrs W was entitled to rescission as of right provided that she was able to make counter-restitution. The court therefore ordered an account to be taken of the amount required to repay the loan, together with an order for the recovery against CFBL as the third-party

Mortgages (continued)

briber of the amount of the commissions paid. However, since the court was of the opinion that the commission payments were not 'closely connected' to the mortgage contracts, Mrs W was not entitled to set these sums off in the taking of the account. Further, the order for the recovery of the commissions paid was only against CFBL (in liquidation), not the assignees under the securitisation agreements. It was inappropriate to grant any other relief under s 140B Consumer Credit Act 1974. Although Mrs W's claim in respect of the recovery of secret commission paid in respect of the First Disputed Mortgage was time barred under s 5 Limitation Act 1980 (as a claim for money had and received), her claim for rescission was not (nor would it have been as an unfair relationship.

Comment
This was a bit of a hollow victory for Mrs W since the claim only succeeded to the extent of enabling her to prove in CFBL's liquidation for the amount of the secret commissions. It did not enable her to set those sums off against the balance due under the mortgage.
That said, the court's conclusion that the payment of commissions by a mortgage lender to a broker was not sufficiently closely connected to the mortgage to enable them to be set-off may be susceptible to further argument.

Nuisance and trespass

The editor of this section is Samantha Jackson of Clerksroom, London and Taunton (Samantha.Jackson@Clerksroom.com)

No Report this month.

Planning

The editor of this section is Jonathan Welch, planning caseworker who will commence pupillage at Francis Taylor Building in 2019. (jhrwelch@gmail.com)

No Report this month.

Property litigation

The editors of this section are Richard Alford, Katie Gray, Diane Doliveux, Will Beetson, James Castle, Chloe Sheridan, Richard Granby, Piers Harrison, Jonathan Upton and Edward Blakeney, barristers of Tanfield Chambers, London (www.tanfieldchambers.co.uk)

No Report this month.

Property transactions

The editor of this section is Peta Dollar, solicitor and freelance property law trainer (peta@petadollar.co.uk)

There are two cases this month:

- Whether Heads of Terms headed "subject to contract" were legally binding?
- Whether a purchaser for value of land subject to a management order under Part II of the Landlord and Tenant Act 1987 takes free of the management order?

Contract
"Subject to contract"
Farrar v Rylatt
[2019] EWCA Civ 1864

Summary
Heads of Terms headed "subject to contract" were not legally binding, as there was no suggestion that the "subject to contract" tag applied to some provisions but not to others.

Facts
The Claimants sought declarations in respect of two alleged profit share agreements arising out of two different developments in West Yorkshire. In one case, the alleged profit share was said to arise from an oral agreement for the property to be held on trust, and in the other case, the alleged profit share agreement arose out of written but unsigned heads of terms (which were expressly stated to be *"Subject to Contract and Without Prejudice".*

First instance
Both claims were rejected at first instance.
The Claimants appealed to the Court of Appeal, claiming:

Property transactions (continued)

(1) In the case of the first property, the judge failed to address the existence or otherwise of the oral agreement separately from the existence of the trust, and his findings on the evidence were unclear and did not tally with his rejection of the Claimants' case;
(2) In the case of the second property, the judge should have found that there was a binding agreement despite the "Subject to Contract" tag.

Decision on appeal
Coulson LJ, giving the only judgment (Rose LJ concurring), agreed that the judgment at first instance was not clear. However, he could find no basis on which to allow the appeal relating to the first property. The judge had concentrated on the express trust because that was the principal issue raised by the Claimants, but in any event he concluded that the existence of the entirely oral agreement had not been made out and the judge was entitled to make the findings of fact that he made.
In relation to the second property, on the facts, the court held that the document was not legally binding and that it was accurately labelled subject to contract as the evidence clearly showed that its purpose was to provide an outline of the parties' proposal; amongst other things, this purpose was demonstrated by the wording in the document which stated that the parties "will enter" into a joint venture partnership and that the proceeds from the sale of the properties "will be" divided.

Coulson LJ:

> "...the HoT was not a curate's egg, with the Subject to Contract tag to be applied to some parts of the HoT but not to other parts. The tag applied to all of the terms because it was set out on the front of the HoT and nowhere was the tag disapplied to any of its terms." [para 73]

Comment
This case is a reminder that a document headed "subject to contract" cannot normally be relied upon.

Appointment of a manager under Part II of the 1987 Act
Effect of subsequent disposal for value
Urwick v Pickard
[2019] UKUT 365 (LC)

Summary
On registration, a purchaser for value of land subject to a management order under Part II of the Landlord and Tenant Act 1987 takes free of the management order, whether or not the order is noted on the title.

Facts
A former school was converted to flats and let on long leases. The freeholder did not manage the estate well, and three of the flat tenants successfully applied to the First Tier Tribunal for the appointment of a manager under Part II of the Landlord and Tenant Act 1987. The management order required that the order be registered against the freehold title, but no registration took place.
Seven of the flat tenants then exercised their right of collective enfranchisement and acquired the freehold of part of the estate through the medium of a company, DP Freehold, for a consideration of £2. DP Freehold was registered at the Land Registry as proprietor of the relevant part of the estate.
The manager then made his own application, seeking clarification that he was still required to manage the whole estate, including the land and buildings comprised in DP Freehold's registered title. In the course of the manager's application it became apparent that the direction to register the management order against the freehold title had not been complied with. That led the participating tenants to argue before the First Tier Tribunal that, as against DP Freehold, the management order was "void".

First instance
The First Tier Tribunal was satisfied that the purpose of the collective enfranchisement had been to evade the management order. The Tribunal accepted that the participating lessees had interfered with the manager's exercise of his functions in breach of the management order and held that they remained bound by it. The "loss of priority" for the management order did not discharge any of the manager's obligations. The order itself said explicitly that it would bind successors in title. The Tribunal also made an order varying the original management order so as to require the participating tenants to procure that DP Freehold comply with the amended order.

Decision on appeal
The issues on appeal were:

(1) What are the consequences of the failure to protect the management order by the entry of a restriction against the freehold title?
(2) Was the FTT entitled to vary the management

Property transactions (continued)

order to include a reference to the land in DP Freehold's registered title and to require the participating lessees to procure that DP Freehold comply with the management order?

(3) Was the FTT right to add a penal notice to the management order?

(4) Was the FTT right to reject the manager's application for an order that the participating lessees procure that DP Freehold transfer the enfranchised property back to DP Management?

The Upper Tribunal (Martin Rodger Q.C.) held:

(1) The consequence of registration of the transfer to DP Freehold was that the management order was postponed to the interest of DP Freehold which was not bound by it.

(2) So far as DP Freehold's property was concerned the manager's continuing functions had been neutralised and could not be performed. The First Tier Tribunal did not have jurisdiction to make an order requiring the participating tenants to procure that DP Freehold should observe and perform the terms of the management order. It could make a new management order, but only with prospective effect. After the registration of the transfer to DP Freehold, the land comprised in the transfer was not subject to a management order binding on DP Freehold.

(3) The order ought not to have been made, and therefore the penal notice ought not to have been added to it.

(4) Yes.

In his judgement Martin Rodger QC said:

> "The answer to the question posed at the start of this decision is that, on registration, a purchaser of property for valuable consideration takes it free of a tribunal's order appointing a manager under Part II, Landlord and Tenant Act 1987, whether or not the order was mentioned on the register of title. It follows that the appeal must be allowed. DP Freehold is not bound by the management order and the manager's functions are limited to the management of the Amenity Land and the collection of historic arrears." [Para 78]

Public access

The editor of this section is William Batstone of Guildhall Chambers, Bristol (www.guildhallchambers.co.uk)

R (Lancashire County Council) v (1) Secretary of State for Environment, Food and Rural Affairs (2) Janine Bebbington;
and
R (NHS Property Services Limited) v (1) Surrey County Council and (2) Timothy Jones
[2019] UKSC 58

Summary

The Supreme Court, by a 3:2 majority, allowed appeals from the Court of Appeal and quashed the registration as a TVG of land adjoining a primary school in Lancaster and of land adjoining Leatherhead Hospital.

The issue common to both appeals was whether the concept of statutory incompatibility between the purposes for which the land is held by a statutory undertaker and registration as a TVG defeated an application to register under s15 of the Commons Act 2006.

The Supreme Court was divided on the interpretation of the court's decision in *R (Newhaven Port and Properties Limited) v East Sussex County* Council [2015] UKSC 7 that the duty to register did not extend to a beach forming part of Newhaven Harbour held under specific statutes relating to its operation as a working harbour.

Facts

In the Lancashire case Ms Bebbington applied to Lancashire County Council, as registration authority, for 32 acres of Moorside Fields adjoining Moorside Primary School to be registered as a TVG under s15 of the 2006 Act on the grounds that "a significant number of the inhabitants of any locality, or of any neighbourhood within a locality", have "indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years".

An inspector appointed under a pilot scheme decided that 4 out of 5 areas should be registered as a TVG. The Council, as owner of the land, claimed judicial review of the decision because registration as a TVG was incompatible with its statutory duty as local education authority. The Council relied on the Education Acts 1944, 1996 and 2012 and, in particular, the duty imposed on it as local education authority to secure that sufficient schools are available for providing primary and secondary education and that they should be

Public access (continued)

sufficient in number, character and equipment to provide for all pupils the opportunity of appropriate education and, by regulations, to ensure that suitable outdoor space must be provided; for physical education to be provided for pupils; and for pupils to be able to play outside.
Ouseley J was not persuaded that the concept of statutory incompatibility was engaged and dismissed the Council's claim for judicial review ([2016] EWHC 1238 (Admin)). Some educational functions, e.g. open-air classes and organised recreation would not be prevented by public rights of access, with appropriate give and take. But the key question for Ouseley J was: "Can Lancashire County Council carry out its educational functions if the public has the right to use [the registered part of Moorside Fields] for recreational purposes?" and his answer to that was "yes and it would still be yes, even if it could make no educational use of the land at all." In the Newhaven case the answer to the equivalent question was no, because the particular piece of land had to be maintained at all times as a working harbour. The Court of Appeal upheld Ouseley J's approach. At [41] Lindblom LJ said:

> "There was no statutory duty to provide a school on the land, or to carry out any particular educational activity on it. There were no proposals to develop it for a new school. The fact that the county council, as owner of the land, had statutory powers to develop it was not sufficient to create a "statutory incompatibility" … Nor was the fact of its having been acquired and held for such purposes – if, indeed, it was. The relevant statutory purposes were capable of fulfilment through the county council's ownership, development and management of its property assets as a local education authority without recourse to the land in question – notwithstanding that, on its own contention, it had owned that land for "educational purposes" for many years. The registration of the land as a town or village green would not be at odds with those statutory purposes."

In the *Surrey* case Mr Jones supported an application to Surrey County Council to have 7 acres at Leach Grove Wood adjoining Leatherhead Hospital registered as a TVG under s15 of the 2006 Act. The Council, rejecting an inspector's recommendation, granted the application but the owner, NHS Property Services Ltd, wholly owned by the Secretary of State for Health, successfully judicially reviewed the decision before Gilbart J ([2016] EWHC 1715 (Admin)) on the grounds that registration as a TVG was incompatible with the discharge of the owner's statutory duty as a health care provider.
The statutory functions relied on by NHS Property Services Ltd and the purposes underlying them were equally general in character and content and included the duty to arrange for the provision of hospital accommodation, as well as various other healthcare services and facilities, under s3(1) of the National Health Service Act 2006. Gilbart J considered himself to be taking the same approach as Ouseley J had done in the Lancaster case in accepting that statutory incompatibility was established.

The Court of Appeal disagreed, Lindblom LJ saying at [46]:

> "As in the Lancaster case, therefore, the circumstances did not correspond to those of Newhaven Port and Properties. The land was not being used for any "defined statutory purposes" with which registration would be incompatible. No statutory purpose relating specifically to this particular land would be frustrated. The ownership of the land by NHS Property Services, and the existence of statutory powers that could be used for the purposes of developing the land in the future, was not enough to create a "statutory incompatibility". The clinical commissioning group would still be able to carry out its statutory functions in the provision of hospital and other accommodation and the various services and facilities within the scope of its statutory responsibilities if the public had the right to use the land at Leach Grove Wood for recreational purposes, even if the land itself could not then be put to use for the purposes of any of the relevant statutory functions. None of those general statutory functions were required to be performed on this land."

Issues
The issue common to both appeals was how the decision of the Supreme Court in *Newhaven* should be applied to the facts of the two cases.
In the *Newhaven* case the Supreme Court held that the general provisions of s15 of the 2006 Act should yield to the particular provisions of s49 of the Newhaven Harbour and Ouse Lower Navigation Act 1847, which required the trustees to "maintain and support the said harbour of Newhaven" and s33 of the Harbours, Docks and Piers Clauses Act 1847 which provided that "the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods." At [93] Lords Neuberger and Hodge said: "The question of incompatibility is one

Public access (continued)

of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes."

Decision of the Supreme Court

The majority of the Supreme Court (Lords Carnwath and Sales with whom Lady Black agreed) allowed the landowner's appeals in both cases and quashed the TVG registrations.

The question of statutory incompatibility is one of statutory construction and does not in addition involve an evaluation of the facts regarding the use to which the land has been put. The majority so interpreted the judgment of Lords Neuberger and Hodge in the Newhaven case, saying at [68]: "According to their judgment, the issue of incompatibility is to be determined as a matter of principle, by comparing the statutory purpose for which the land is held with the rights claimed pursuant to the 2006 Act, not by having regard to the actual use to which the authority had put the land thus far or is proposing to put it in future."

At [69] the majority said: "Thus, in para 94 they identify the relevant incompatibility as that between the 2006 Act and "the statutory regime which confers harbour powers on NPP to operate a working harbour".

In para 96, it is to that statutory incompatibility that they refer, not to incompatibility with any use to which NPP had as yet put the land in question or might in fact put it in the foreseeable future.

As a matter of fact, the Beach had not been used for the applicable statutory purposes. Further, in their opinion, by stating in para 96 that it was not necessary for the parties to lead evidence as to NPP's plans for the future of the harbour "in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred".

Lord Neuberger and Lord Hodge were seeking to emphasise, contrary to Lady Arden's and Lord Wilson's interpretation of their judgment, that what matters for statutory incompatibility to exist so as to prevent the application of the 2006 Act is a comparison with the relevant statutory powers under which the land is held, not any factual assessment of how the public authority might in fact be using or proposing to use the land.

Lord Wilson, with Lady Arden in the minority, referred to 4 passages from the Newhaven judgment which referred to continuing use for the statutory purposes of a working harbour and said at [146]: "It thus seems clear from the Newhaven case that registration of the beach as a green was there precluded as incompatible with the existing use of the land as a working harbour; and that, in the absence of existing use of the land, the public authority needs to adduce evidence. What evidence? Evidence which makes it reasonably foreseeable that public use of the land as a green would in practice interfere with a proposed exercise of the authority's powers in relation to the land for the statutory purposes."

Lord Wilson concluded at [147]: "It follows that I respectfully disagree with the suggestion in paras 65 and 66 of the judgment of Lord Carnwath and Lord Sales that incompatibility with statutory purposes should be assessed as a theoretical exercise rather than by means of a practical inquiry into interference with the authority's existing or proposed future use of the land" and [148]: "Adopting what I believe to be the correct, practical, approach to the assessment of incompatibility in relation to the present appeals, I agree with the Court of Appeal that neither the education authority nor the health authority has established that public use of its land as a registered green would be likely to be incompatible with its use of it pursuant to its statutory powers."

Lord Wilson would have upheld registration of the land as a TVG.

Comment

This is a finely balanced decision of the Supreme Court which will mean that land held by statutory undertakers for purposes that are theoretically inconsistent with recreational use by the public will escape registration as a TVG even in cases where there is no real prospect of the inconsistent statutory purposes being implemented.

Residential tenancies

The editors of this section are Richard Alford, Katie Gray, Diane Doliveux, Will Beetson, James Castle, Chloe Sheridan, Richard Granby, Piers Harrison, Jonathan Upton and Edward Blakeney, barristers of Tanfield Chambers, London (www.tanfieldchambers.co.uk)

No Report this month.

Restrictive covenant

The editors of this section are Emma Humphreys, solicitor, partner in Charles Russell Speechlys LLP and Georgina Redsell Senior Associate at Charles Russell Speechlys (www.charlesrussellspeechlys.com)

No Report this month.

Solicitors Practice Points

The editor of this section is David Keighley, solicitor, writer and freelance residential property law trainer (davidktraining@outlook.com)

Money laundering
Law Society Guidance

The Money Laundering and Terrorist Financing (Amendment) Regulations 2019

These regulations are now in force.

The new requirements include:
- A duty to collect proof of registration for entities (e.g. trusts and companies)
- A duty to inform the registry of any discrepancies in their information
- Changes to client due diligence and enhanced due diligence

The Legal Sector Affinity Group, which includes the Law Society, has published guidance which replaces the previous Law Society AML Practice Note.

propertylawuk.net

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