June 2020

Property Law UK

Monthly Update

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the online resource for property lawyers

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Emma Humphreys & Georgina Redsell, Charles Russell Speechleys	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):** Mutual enforcement clause – implied term – duty to enforce covenant
- **Long Leases:** Service Charges – s20B – interim demands; Service Charges – apportionment; Service Charges - costs of proceedings – s20C - preparing service charge reconciliation Account; Insurance - obligation to pay – landlord obliged to insure in joint names
- **Property litigation:** Civil Procedure Rules CPR PD 51Z - Effect of stay – relationship with court's powers; Part 55 possession proceedings - Appeals – Effect of stay in PD 51Z; Possession Order - Application to set aside order for possession under CPR 3.1(7).
- **Property Transactions:** Sale of land - fixtures - ownership of fish stocks and solar panels.
- **Public Access:** Common land - removal from the register
- **Residential tenancies:** Tenant Fees Act 2019
- **Restrictive Covenants:** Discharge or modification - airport operations; Restriction to one dwelling per plot on small estate – injury to objectors if modification allowed to permit one additional dwelling.
- **Solicitors Practice Points:** Residential Conveyancing – Social Distancing.

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.

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

No Report this month.

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No Report this month.

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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)

Mutual enforcement clause

Implied term that landlord will enforce the clause

Duval v 11-13 Randolph Crescent Ltd

[2020] UKSC 18

Summary

The existence of a mutual enforcement clause in a lease necessarily implied a term that the landlord could not take steps to put it out of his power to comply with the clause.

Facts

11-13 Randolph Crescent is a building converted into nine flats, each held under a long lease. The landlord is 11-13 Randolph Crescent Ltd, a company owned by all the tenants.

The leases of the flats contain the following clauses:

Clause 2.6: A qualified covenant by the tenant against alterations:

> "Not without the previous written consent of the Landlord to erect any structure pipe partition wire or post upon the Demised Premises nor make or suffer to be made any alteration or improvement in or addition to the Demised Premises."

Clause 2.7: An absolute covenant by the tenant against cutting into any walls or ceilings etc:

> "Not to commit or permit or suffer any waste spoil or destruction in or upon the Demised Premises nor cut maim or injure or suffer to be cut maimed or injured any roof wall or ceiling within or enclosing the Demised Premises or any sewers drains pipes radiators ventilators wires and cables therein and not to obstruct but leave accessible at all times all casings or coverings of Conduits serving the Demised Premises and other parts of the Building."

Clause 3.19: A landlord's covenant that:

> "… every lease of a residential unit in the Building hereafter granted by the Landlord at a premium shall contain regulations to be observed by the tenant thereof in similar terms to those contained in the Fifth Schedule hereto and also covenants of a similar nature to those contained in clauses 2 and 3 of this Lease AND at the request of the Tenant and subject to payment by the Tenant of (and provision beforehand of security for) the costs of the Landlord on a complete indemnity basis to enforce any covenants entered into with the Landlord by a tenant of any residential unit in the Building of a similar nature to those contained in clause 2 of this Lease."

The tenant of Flat 13 (Mrs Winifred) asked the landlord for consent to carry out significant alterations to the flat. The works would involve, among other things, removing a substantial part of a load bearing wall at basement level. It was common ground that they would amount to a breach of clause 2.7 of the lease if not specifically authorised by the landlord.

Landlord and tenant (general) (continued)

Initially the Landlord was willing to grant the Licence but following objections from the tenant of 11G & 11H Randolph Crescent (Dr Duval) the licence was refused. However, following further evidence was presented the landlord reconsidered the matter and decided it was minded to grant a licence, subject to securing adequate insurance being put in place.
On two occasions Dr Duval asked the landlord to secure an undertaking from Mrs Winfield not to act in contravention of clause 2.7 of her lease by cutting or maiming any of the load bearing or structural walls within Flat 13. On both occasions, Dr Duval said that the landlord would be indemnified if legal action became necessary. As the landlord did not secure the undertaking Dr Duval issuing a claim against the landlord seeking, among other things, a declaration that the landlord did not possess the power to permit Mrs Winfield to act in breach of clause 2.7 of her lease.
Dr Duval also argued that the landlord had covenanted to enforce the absolute prohibition against certain works if requested to do so by another flat tenant. If the landlord could licence or waive compliance with what would otherwise be a breach of the alterations covenant, the landlord would have put it beyond its power to comply with its enforcement covenant. It was implicit in the enforcement covenant that the landlord would not put it beyond its power to comply, if and when required to do so.

Issues
The mutual enforcement clause did not expressly state that a breach would be committed if the landlord granted a licence to Mrs Winifred to undertake works that would otherwise be a breach of an absolute prohibition. The issue was therefore whether it was necessarily implied in the way the obligation had been drafted?

First instance
The judge found for Dr Duval. On appeal to the Central London County Court, the court found for the landlord. Dr Duval appealed to the Court of Appeal

Court of Appeal
The Court of Appeal held that the landlord would be in breach of its covenant by granting Mrs Winifred a licence to do an act that would otherwise be in breach of the lease – in other words the granting of the licence would put it out of the landlord's power to enforce the lease obligations. The court therefore found in favour of Dr Duval and allowed the appeal.

Supreme Court
The Supreme Court unanimously upheld the Court of Appeal decision that a landlord giving consent to a flat tenant to carry out alterations beyond that permitted by its lease was in breach of the landlord's covenant, given to the other flat tenants in the building, that it would enforce the tenants' covenants in the flat leases within the building.

The Supreme Court held that:

- The two alterations covenants in the lease were held to be quite distinct in purpose. Clause 2.6 (the qualified covenant) was intended to apply to day to day routine alterations that may be permitted with the landlord's consent, whereas clause 2.7 (the absolute covenant) was intended to apply to non-routine works that may be intrinsically damaging to the building and therefore require additional control;
- Whilst the mutual enforceability covenant in clause 3.19 of the lease did not expressly say that the landlord cannot give its consent to works that would otherwise be in breach of a tenant's lease, such a term can be implied:
- The purpose of the alterations covenants in clauses 2.6 and 2.7 and the mutual enforceability covenant in clause 3.19 are primarily to provide protection to all of the flat tenants in the building;
- Each tenant would have known that the absolute alteration covenant in clause 2.7 of the leases would apply to all tenants and that under clause 3.19, and subject to satisfaction of certain conditions, the landlord could be asked to enforce the absolute covenant;
- It would not give practical content to the obligation in clause 3.19 if the landlord had the right to vary or modify the absolute covenant or to authorise what would otherwise be in breach of it.

Citations
Lord Kitchin at paragraph 44:

> "It is well established that a party who undertakes a contingent or conditional obligation may, depending upon the circumstances, be under a further obligation not to prevent the contingency from occurring; or from putting it out of his power to discharge the obligation if and when the contingency arises."

And at paragraphs 53 to 55:

> 53. The purpose of the covenants in clauses 2 and 3.19 is primarily to provide protection to all of the lessees of the flats in the building. Each

Landlord and tenant (general) (continued)

of those lessees would have known that every other lessee was and would continue to be subject to the same or similar obligations and, in particular, to the qualified covenant in clause 2.6 and the absolute covenant in clause 2.7. Each lessee would also have known that, under clause 3.19, the landlord would, upon satisfaction of the necessary conditions, enforce those obligations. Clause 3.19 would therefore have been understood by every lessee to perform an important protective function.

54. What is more and as the landlord accepts, the first obligation in clause 3.19 is a continuing one with the consequence that the landlord is required to keep in place in every lease covenants of a similar nature to those in clause 2, including clauses 2.6 and 2.7. If a lessee threatens to carry out or has carried out an activity in breach of clauses 2.6 or 2.7 then, at the request of another lessee and on the provision of security, the landlord is obliged by the second part of clause 3.19 to take enforcement action.

55. In my view it necessarily follows that the landlord will not put it out of its power to enforce clause 2.7 in the lease of the offending lessee by licensing the activity that would otherwise be a breach of that clause. The clause is an absolute covenant and, under clause 3.19, the complainant lessee is entitled, on provision of security, to require the landlord to enforce it as an absolute covenant. As Lewison LJ said at para 27 of his judgment, it would not give practical content to the obligation if the landlord had the right to vary or modify the absolute covenant or to authorise what would otherwise be a breach of it.

Comment

Mutual enforceability provisions are typically found in residential flat leases. They are not normal in commercial leases.

This decision is a strong reminder that, even where the tenants are, in effect, the landlord, it may not always be open to them to agree that absolute covenants can be safely 'ignored'. If they do so they (as landlord) will be in breach of covenant and subject to action by lessees who do not agree with a licence being granted.

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, Ceri Edmonds & Mitchell Hayden-Cook barristers of Tanfield Chambers, London (www.tanfieldchambers.co.uk)

There are five cases this month:

- Mutual enforceability of covenants
- Whether a written statement that a landlord intended to make demands in the future was sufficient to comply with s20B of the Landlord and Tenant Act 1985
- Was a provision in a lease void insofar as it purported to allow the landlord to vary the apportionment of service charges from a fixed percentage.
- Were costs of a service charge account reconciliation covered by a s20C order made in previous proceedings between the parties.
- Was a lessee's obligation to pay service charges for insurance obtained by the landlord contingent on the lessor complying with its obligation to insure the premises in the joint names of the lessor and the lessee.

Block of flats

Mutual enforceability of tenant covenants

Duval v 11-13 Randolph Crescent Ltd

[2020] UKSC 18

Summary

The landlord of a block of flats was in breach of an implied covenant, where it purported to grant a licence to a lessee to carry out work which, but for the licence, would have been a breach of covenant in the lease of her flat, where the leases of the other flats required the landlord to enforce such covenants at the request of the other lessees.

For more detail see the case report in the Landlord and Tenant (General) section.

Service charges

S20B limitation – interim demands

Cookson v Assethold Ltd

(2020) UKUT 115 (LC)

Summary

A written statement that a landlord intended to make demands in the future was not sufficient to comply with s.20B of the Landlord and Tenant Act 1985

Long leases (continued)

Section 20B
The section provides as follows:

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Facts
The Appellant was the Freeholder and the Respondent the long leaseholder of a flat. The Freeholder, together with other leaseholders, exercised the right to manage. The Freeholder provided the RTM company with a statement of the service charges incurred to date, which had been seen by the Leaseholder. The Freeholder had also made defective demands of each leaseholder.

Issues
Was the information given to the leaseholder sufficient to comply with s.20B?

First instance
The FTT held that the leaseholder had been aware of the approximate amounts incurred and that the Freeholder expected to demand, accordingly the 18-month time limit in s.20B (1) had not applied.

Decision on appeal
Appeal allowed.
Neither the summary sent to the RTM company nor the invalid demands sent to the leaseholders had complied with the requirement of certification contained within the lease and neither had been accompanied by a statement of rights and obligations complying with s.21B of the Landlord and Tenant Act 1985.
Applying *Skelton v DBS Homes (Kings Hill) Limited* [2017] EWCA Civ 1139 information that a landlord proposes to make a demand is insufficient to comply with s.20B (2).

Comment
This decision clarifies that providing written notice pursuant to s20B (2) to extend the period for the making a demand for payment under s20B (1) is relatively onerous. Such notice is required to comply with any certification requirement in the lease and to be accompanied by a summary of rights and obligations.

Service Charges

Apportionment
Williams v Lessees of 38 Flats in Vista
(2020) UKUT 111 (LC)

Summary
A provision in a lease was void insofar as it purported to allows the landlord to vary the apportionment of service charges from a fixed percentage.

Facts
The leases of the subject flats provided for contribution towards the service charge of a percentage or *"such part as the Landlord may otherwise reasonably determine".* For some years, the freeholder had been demanding service charges apportioned by its own determination.

Issues

- Was the provision permitting the freeholder to determine apportionment void by virtue of s.27A (6) as providing for apportionment other than as agreed or determined by, inter alia, the FTT, as contended by the leaseholders; or
- Was the provision being subject to a requirement of reasonableness, which could be determined, inter alia, by the FTT prevent s.27A (6) being engaged?

First instance
The FTT held that the provision was not void by virtue of s27A (6) as the purpose of s27A (6) was to avoid contracting out of, inter alia, the FTT's jurisdiction. The FTT accepted the freeholder's argument that the lease permitted, inter alia, the FTT to determine the reasonableness of the landlord's apportionment and that as a result the provision was not void.

Decision on appeal
Appeal allowed.
The FTT had misapplied the decision in *Windermere Marina Village Limited v Wild and Barton [2014]*

Long leases (continued)

UKUT 163 (LC) ('Windermere'). Windermere and *Gater and others v Wellington Real Estate Limited [2019] UKUT 561 (LC)* ('Gater') required that any provision that purported to provide for a means of determination for any matter that could the subject of an application under s27A(1), including apportionment was void and the lease had to be read as if that provision was not present. Accordingly, as apportionment could be the subject of an application provision for determination by the freeholder was void even if subject to a requirement of reasonableness.
As the lease in question provided for fixed percentages in the alternative to determination by the freeholder it could be read without the provision for such determination, there was accordingly no need for the Tribunal to make its own determination as to apportionment.

Service charges

Costs of proceedings – s20C – service charge reconciliation

Point Curlew Tenants Association v Francis
[2020] UKUT 131 (LC)

Summary
The costs of a service charge account reconciliation were covered by a s20C order made in previous proceedings between the parties.

Facts
The Appellants were members of a tenant's association and held leases of lodges and chalets from the Respondent Freeholder. In earlier proceedings the respondents had sought a reconciliation of the service charge account and the freeholder had engaged a managing agent to undertake this work. In the earlier proceedings an order pursuant to s20C of the Landlord and Tenant Act 1985 was made prohibiting the recovery by the Freeholder of any costs incurred in connection with those proceedings.
The Freeholder served demands including the cost of the service charge reconciliation.

Issues
Was the cost of the reconciliation a cost incurred in connection with the earlier proceedings?

First instance
The FTT held that the service charge reconciliation would have been necessary in any event on the appointment of managing agents, the cost had been reasonably incurred and was reasonable in amount.

Decision on appeal
Appeal allowed.
The s20C order in previous proceedings had included all costs that had been incurred in those proceedings and had not been limited to legal costs. It was not open to the FTT, even if identically constituted, to go behind that order and allow recovery of any costs incurred in those proceedings. On the facts, the freeholder had admitted that the reconciliation had been undertaken as part of the litigation, that it would have been necessary in any event or was a task sought by the leaseholders was irrelevant.

Comment
When a 20C Order is proposed, the parties (and the FTT) should consider the scope of any such order as well as the principle. The standard wording employed by the FTT in this case covered all costs incurred whether these were costs that would have been incurred in any event, this may not have been the intention of the Tribunal making the original order.

Insurance

Obligation to pay – landlord obliged to insure in joint names

Brickfield Properties Ltd v Georgiades
[2020] UKUT 118 (LC)

Summary
A lessee's obligation to pay service charges for insurance obtained by the landlord was not contingent on the lessor complying with its obligation to insure the premises in the joint names of the lessor and the lessee.

Facts
The Respondent held a long lease of a maisonette. Clause 3(2) of the lease required him to pay a service charge comprising:

> "a sum equal to all such sums as the Lessor [i.e. the Appellant] may from time to time pay for insuring and keeping insured the demised premises against loss or damage… in the full rebuilding costs (or otherwise as provided in Clause 5(ii))".

By Clause 5(ii) the lessor covenanted to keep the demised premises insured against loss or damage "under a comprehensive insurance policy in the joint names of the Lessor and the Lessee" in the full rebuilding costs.

Long leases (continued)

Issue
Was the requirement to pay the insurance charge contingent on the lessor complying with its obligation to insure the premises in the joint names of the lessor and the lessee.

First Instance
The FTT held that it was to be implied in Clause 3(2) that the obligation on the lessor to pay for insurance was for that insurance which the lessee was required to effect under Clause 5(ii).

Decision on appeal
The lessor appealed the FTT's decision on two grounds.

- First, the lessor argued that the FTT was wrong to imply a term in Clause 3(2) requiring the lessee to pay the costs of insurance only if the policy complied with Clause 5(ii).
- In the alternative, the lessor argued that the policy taken out did in fact comply with Clause 5(ii).

The appeal was allowed.
The starting point was the principle that a term will be implied in a contract only where it is necessary to do so in order to give it business efficacy, or where the terms is so obvious that it goes without saying: *Marks and Spencer plc v BNP Paribas* [2016] AC 742.
The Upper Tribunal accepted the Appellant's argument that the implication was not necessary. If the landlord failed to comply with the precise terms of Clause 5(ii), the lessee could claim a remedy, such as damages for any loss so caused or specific performance of covenant, but that did not absolve him from the obligation to reimburse the landlord for sums spent on insurance.
Moreover, it was held that that the obligation to pay in Clause 3(2) was not expressed to be conditional upon the landlord insuring in joint names. Applying *Yorkbrook Investments Limited v Batten* (1986) 52 P&CR 51, there were no clear words to suggest that the lessee's obligation to pay should be regarded as dependent on the landlord's compliance with the detail of Clause 5(ii).
Because the appeal succeeded on the first ground, the Upper Tribunal declined to decide on the landlord's alternative ground.

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

Possession claims

Please see the material in the Property litigation section below.

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 and pupil at Francis Taylor Building. (jhrwelch@gmail.com)

No Report this month.

Property litigation

The material in this section is this month provided by Nigel Clayton of Kings Chambers, Leeds and Manchester (www.kingschambers.com), who edits the mortgage section of the site.

There are three cases this month:

- Guidance from the Court of Appeal on the application of the new Practice Direction 51Z
- Whether appeals from orders for possession brought under CPR Part 55 are subject to the stay imposed by PD 51Z
- The Court reviewed the criteria to be applied on applications to set aside interim and final orders for possession

Possession claims

Effect of stay under PD 51Z – relationship with court's powers

Arkin v Marshall
[2020] EWCA Civ 620

Summary
The Court of Appeal has held that the PD is not *ultra vires*. It also held that:

- The court has the theoretical power to lift the stay but this might only occur in the most exceptional circumstances such as perhaps where the stay itself operated in such a way as to defeat the purposes of PD 51Z and endanger public health.
- Orders for directions cannot be enforced whilst the stay is in force.

Facts
Following default in payment, a lender appointed a fixed charge receiver in respect of three properties. In September 2019 they commenced two sets of possession proceedings under Part 55.
The claims were defended and in Nov 2019 they were allocated to the multi-track with a CCMC listed for hearing on ***26 March 2020***. On that day at the court gave agreed directions (without a hearing) for disclosure by 1 May 20, inspection by 15 May 20, exchange of witness statements by 26 June 20 and for listing in a trial window 5 Oct 20 to 8 Jan 21.
PD51Z was issued on ***26 March 2020***. The Ds took the view that the proceedings were therefore stayed and that they did not have to comply with the directions. C disagreed, but argued that if the stay applied, it should be lifted.
The issue was referred to the judge on the basis of written submissions. On ***15 April 2020*** he handed down judgment in which he concluded that the 90-day stay applied and he had no discretion to lift it, but he indicated that once it was over, some adjustments could be made including pushing back the trial window. This was before the amended PD51Z came into effect on ***20 April 2020***.
C appealed. Permission was granted by the High Court, which transferred the appeal to the Court of Appeal under CPR 52.23.

Issues

1. Does the court have jurisdiction to consider the vires of PD51Z and should it do so?
2. If so, (a) was making of PD51Z properly authorised by CPR 51.2 as a pilot scheme "for assessing the use of new practices and procedures in connection with proceedings"? (b) Is PD51Z inconsistent with or rendered unlawful by the provisions of the Coronavirus Act 2020? (c) Is PD51Z inconsistent with Art 6 of the European Convention on Human Rights or the principle of access to justice?
3. Does PD51Z apply to cases allocated to the multi-track in which case management directions had been given before it was introduced?
4. Does the court have jurisdiction to lift the stay imposed by para 2 of PD51Z?
5. If so, should the judge have lifted the stay in this case?

Decision on appeal
The Court of Appeal held that it had jurisdiction to the consider whether PD51Z was ultra vires but held that it was properly authorised as pilot scheme; it was not in breach of the Coronavirus Act; and was not inconsistent with Article 6.
As to the issue of whether the court had jurisdiction to lift a stay imposed by a Practice Direction, the Court of Appeal concluded that while the judge retained a theoretical power to lift a stay, it would almost always be wrong in principle to use it, and on the particular facts of the present case, the court did not have the power to lift the stay.
But what about directions? The judge had postponed the agreed directions until after the stay, but para 2A(c) of the amended PD51Z provided that the stay did not apply to an application for case management directions which were agreed by all parties.
The Court of Appeal concluded that while it was open to the parties to comply with directions, the stay means that neither party can apply to court to enforce compliance with the directions while the stay remains in force, even if they had been made under para 2A(c). The judge should not have postponed the agreed directions. He should not have made any order at all, and should have left the stay in place. The parties would have to wait until the end of the stay to make any applications. Insofar as the judge gave agreed directions, following para 2A(c), they can remain in place.
Appeal dismissed.

Property litigation (continued)

Citations
Sir Geoffrey Vos:

> "In our view PD 51Z cannot be read as formally excluding the operation of CPR 3.1. As a matter of strict jurisdiction, therefore, a judge retains the power to lift the stay which it imposes. But the proper exercise of that power is informed by the nature of the stay and the purposes for which it was evidently imposed. PD 51Z imposes a general stay on proceedings of the kind to which it applies, initially subject to no qualification at all, and subsequently qualified only in the limited and specific respects provided for in paragraph 2A. The purpose was that during the 90-day period the burden on judges and staff in the County Court of having to deal with possession proceedings, which are an immense part of its workload, would be lifted, and also that the risk to public health of proceeding with evictions would be avoided. That purpose is of its nature blanket in character and does not allow for distinctions between cases where the stay may operate more or less harshly on parties affected by the stay were entitled to rely on their particular circumstances – however special they might be said to be – as the basis on which the stay should be lifted in their particular case. Thus, while we would not go so far as to say that there could be no circumstances in which it would be proper for a judge to order that the stay imposed by PD 51Z should be lifted in a particular case, we have great difficulty in envisaging such a case. The only possible such case canvassed before us was where the stay would operate in such a way as to defeat the purposes of PD 51Z and endanger public health..." (para 42).
> "We would, in these circumstances, hold that, although as a matter of strict jurisdiction a judge retains a **theoretical power to lift any stay**, it would almost always be wrong in principle to use it. We do not, however, rule out that there might be the **most exceptional circumstances** in which such a stay could be lifted, in particular if it operated to defeat the expressed purposes of PD 51Z itself." (para 46)
> "The fact that the parties agreed directions before PD 51Z came into force does not point towards the need to lift the stay. The parties are capable of complying with the directions they agreed whether or not the stay is lifted. The stay simply means that neither party will be able to apply to the court to enforce compliance with the agreed directions whilst it remains in place. If either party fails to do what it agreed to do during the period of the stay, the other party will, no doubt, be able to rely on that circumstance once the stay is lifted. It will be able to ask the court, at that stage, to take the conduct of the other party into account in making revised directions. A party to a claim that has been stayed under PD 51Z cannot, however, as we have said, apply to the court to enforce compliance with agreed directions, even if those directions have been made under the express exclusion in paragraph 2A(c)." (Para 50)

Comment
There is no doubt that both versions of PD51Z have caused some real problems for practitioners, but the practical reality is that all proceedings in Part 55 claims are stayed, save for the exception in para 2A(c) which permits an application for case management directions which are agreed by all

Property litigation (continued)

parties, and while it is open to the parties to comply with these directions (or any pre-stay directions), no applications can be made to enforce them.
Para 3 makes clear that the fact that a claim will be stayed does not preclude the issue of the claim.
The current stay is due to come to an end on 24 June. However, the government has announced that the stay will be extended to 23 August. See the Press release: https://www.gov.uk/government/news/ban-on-evictions-extended-by-2-months-to-further-protect-renters

Effect of stay in PD 51Z on Appeals

London Borough of Hackney v Okoro
[2020] EWCA Civ 681

Summary
Following on from the decision in *Arkin v Marshall* [2020] EWCA Civ 620 *(see previous report above)* the Court of Appeal confirmed a further discrete issue, that appeals from orders for possession brought under CPR Part 55 are also subject to the stay imposed by PD 51Z.

More detail
The stay imposed by para 2 of PD 51Z is upon "all proceedings for possession brought under CPR Part 55…" The words are competent to include every stage of such proceedings including first or second appeals up to final judgments of the Court of Appeal (but not to the Supreme Court) because such appeals are beyond the jurisdiction of the Master of the Rolls in making Practice Directions under CPR Part 51.2. Proceedings which are brought under Part 55 are still brought under that Part even when they are under appeal, and Part 52 applies.
The claim, including the appeal, would be remitted to the count court for further consideration after the termination of the stay imposed by PD 51Z.

Comment
In passing, the Court of Appeal noted that counsel had accepted that applications to set aside a possession order made in the absence of a defendant were covered by the stay as well.

Possession Order

Application to set aside order for possession under CPR 3.1(7)
Sangha v Amicus Finance Plc (in Administration)
[2020] EWHC1074 (Ch)

Summary
The High Court dismissed an appeal against a judge's refusal to set aside an order for possession made at a hearing which the defendant attended, under CPR 3.1(7), and reviewed the criteria to be applied on applications to set aside interim and final orders.

Facts
The lender advanced £550,000 to S on a 10-month term loan secured by a first legal charge over a property. Following default in repayment, the lender commenced Part 55 possession proceedings and obtained an order for possession followed by a warrant which the borrower initially applied to suspend under s 36 Administration of Justice Act 1970 on the ground that he wished to refinance. Prior to the (adjourned) hearing, the borrower obtained legal advice to the effect that he may have a defence to the claim for possession (based on allegations of misrepresentation which had been raised in separate proceedings involving a loan made by the lender to the borrower's company) so he applied to set aside the order for possession under CPR 3.1(7). The court stayed the warrant pending the application.

First instance
The Deputy District Judge dismissed the application, noting that an application to set aside an order under CPR 3.1(7) was different to an appeal. The possession order was a final order, and although it may be set aside where there had been a material change of circumstances or a manifest mistake by the judge in the formulation of the order, neither applied The judge stressed the importance of finality and expressed concern that to set aside an order would give carte blanche to a party who had taken legal advice and wanted to advance a defence based on facts of which they were already aware.

The borrower appealed on the grounds that the judge:
Applied too rigid a dichotomy between interim and final orders;
- Elevated the importance of finality to an unwarranted extent; and
- Gave undue weight to finality when these proceedings could be consolidated with the other proceedings.

Issues
- Does CPR 3.1(7) apply to final orders; and if so
- What is the test?

Decision on appeal
The power to set aside an order under CPR 3.1(7) applies to ***interim and final orders*** but the circumstances in which a court would set aside a final order are heavily circumscribed. The possession order was a final order, irrespective

Property litigation (continued)

of (a) whether the possession hearing was a 'trial' (*Forcelux v Binnie* [2009] EWCA Civ 854 considered), (b) whether further action was required to enforce it, or (c) it remained open to the borrower to redeem the mortgage.

The most recent test for setting aside a final order under CPR 3.1(7) was given by the Court of Appeal in *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422:

- It is not sufficient to show there has been a change of circumstances or that the facts were misstated at the time of the original decision;
- Finality is a critical consideration; and
- The circumstances in which it might be appropriate to set aside a final order will be very rare.

If a party ***fails to attend trial*** – CPR 39.3(5) prescribes the circumstances which apply if that party wishes to apply to set aside an order made. Where a ***party attends***, but does so 'ineffectually' is not to be equated to non-attendance for the purposes of CPR 39.3 and even if it did, the borrower did not satisfy the requirements. The application to set aside the possession order boiled down to a wish to run a point based on facts and evidence which were known to the borrower at the time of the hearing and at a time when he had access to legal advice.
The Deputy District Judge made no error of law. The test she applied, which applied to setting aside interim orders was actually more generous to the borrower and her exercise of discretion could not be challenged. The circumstances were not so exceptional as to justify setting aside a final order. Appeal dismissed.

Comment
Practitioners (and litigants in person) frequently run into practical problems about how to challenge orders made in Part 55 possession proceedings, whether they be interim or final orders, or orders made at an attended hearing, or in the absence of a party.

Some useful points are as follows:

1. Under CPR 3.3(4) a court may make an order of its own initiative, without hearing the parties or giving them an opportunity to make representations, but under CPR 3.3(5) a party affected by the order may apply to have it set aside, varied or stayed, and the order must contain a statement of the right to make such an application. Under CPR 3.3(6) the application must be made within such period as may be specified by the court or if no date is specified, not more than 7 days after service.
2. Similarly, if under CPR 23.8(c) the court deals with an application without a hearing, where it does not consider that a hearing would be appropriate, the court will treat the application as if it were proposing to make an order of its own initiative under CPR PD 23A, para 11.2, and CPR 3.3(5) applies.
3. The rules do not stipulate how an application under CPR 3.3(5) to set aside, vary or stay is to be dealt with, but the Court of Appeal has said that it is good practice to require any such application to be made at a hearing (*Collier v Williams* [2006] 1 WLR 1945 per Dyson LJ at [37]).
4. Under CPR 39.3(1) the court may proceed with a trial in the absence of a party, and where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside under CPR 39.3(3). Under CPR 39.3(4) the application must be supported by evidence and under CPR 39.3(5) the court may grant the application only if the applicant (a) acted promptly when he found out that the court had exercised its power to enter judgment or make an order against him, (b) had a good reason for not attending the trial, and (c) has a reasonable prospect of success at the trial.
5. An initial listed hearing of a Part 55 possession claim is not a 'trial' for these purposes (*Forcelux Ltd v Binnie* [2009] EWCA Civ 854), but the court may set aside an order made in the absence of the mortgagor using its general case management powers in CPR 3.1, and applying the requirements of CPR 39.3(5) by analogy (*London Borough of Hackney v Findlay* [2011] EWCA Civ 8).
6. In some cases a party who failed to attend a hearing at which the court enters judgment or makes an order against him may have to consider whether to make an application to set aside the judgment or order under CPR 39.3(5) and/or appeal under CPR 52. For the relationship between the two and the court's powers, see *Bank of Scotland v Pereira* [2011] 1 WLR 2391. A party seeking a new hearing will normally be expected to apply under CPR 39.3(5) first, but if he is unlikely to be able to satisfy the requirements, there is nothing to stop him seeking to appeal in the normal way. In many cases the applications will be made in the alternative (see *Bank of Scotland v Pereira*, per Lord Neuberger MR at [35]-[40]).

Property transactions

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Sale of land

Fixtures? Fish stocks and solar panels

Borwick Development Solutions Ltd v Clear Water Fisheries Ltd

[2020] EWCA Civ 578

Summary

Fish stocks in a commercial fishery were classified as wild animals, which could not be the subject of ownership. The seller's rights to the fish arose as a result of its ownership of the land on which the lakes were situated and accordingly passed on the transfer of that land.

Solar panels were fixtures, which passed automatically on the sale of the land to which they were attached, in the particular circumstances of the case, having regard not only to the degree but also to the purpose of the annexation.

Facts

B owned a commercial fishery, which included nine man-made lakes and pools. The defendant (CW) bought the land from B acting by an LPA receiver. The sale contract did not address the fish stocks in the lakes or the solar panels at the site. B argued that it was, at all material times, the owner of the fish and the solar panels.

Issues

Did CW own the fish stocks and/or the solar panels?

Decision on appeal

The appeal related to the fish stocks only. The Court of Appeal (LJ Peter Jackson, LJ Rose and Sir Timothy Lloyd) unanimously allowed the appeal, holding that the fish passed to the purchaser's ownership on sale.

Their reasoning was as follows:

- All fish have always been classed as wild (as opposed to domestic) animals, despite the fact that the fish in this case had never lived in the wild and were not free to escape from the lakes.
- It was not open to the court to alter this "long established classification of animals" and to regard certain fish as domestic – any change to the classification would require legislation.
- Wild animals cannot be the subject of ownership. The seller's rights to the fish arose solely as a result of its ownership of the lakes in which the fish were located and its ability to prevent the fish from escaping, and accordingly those rights came to an end on the transfer of the land. If the seller had wanted to be able to enter the land after the sale and do anything in respect of the fish, the seller would have had to reserve rights accordingly in the transfer.

Comment

It is useful to have a decided case on the nature of fish stocks in a commercial fishery. So far as solar panels are concerned, it should be noted that not all solar panels are fixtures – it depends, as stated above, not only on the degree of annexation but also the purpose of the annexation.

Public access

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Common land

Removal from the register

Hampshire County Council v Secretary of State for Environment, Food and Rural Affairs

[2020] EWHC 959 (Admin)

Summary

This was a successful application for judicial review of an Inspector's decision to allow a part of Yateley Common in Hampshire, which included parts of Blackbushe Airport, to be removed from the commons register under s22 of and para 6 of Sch 2 to the Commons Act 2006 on the grounds of mistaken registration under the Commons Registration Act 1965. The Judge decided that the Inspector had erred in law when he decided that the whole of the operational land of the airport, which included the application land, fell within "the curtilage of a building", namely the terminal building.

Facts

The application land comprised about 46.5 hectares (115 acres) of operational land which includes the runway, taxiways, fuel storage depot and, in the south-eastern part of the site, the terminal building, including control tower, which is a two-storey building with a footprint of about 360 sqm. On 1 November 2016 the operators of the airport applied to Hampshire County Council under para 6 of Sch 2 of the 2006 Act to remove the application land from the commons register. The Council referred the application to the Secretary of State whose Inspector held a public inquiry from 2 to 5 April 2019. By his decision letter dated 12 June 2019 the

Public access (continued)

Inspector determined that the statutory requirements were satisfied, and he allowed the airport operator's application to remove the land from the register. The Council applied for judicial review to quash the decision, supported by the Open Spaces Society and others. That application was opposed by the Secretary of State and the airport operator.

Issues
Para 6(1) of Sch 2 to the 2006 Act provides that:

> "If a commons registration authority is satisfied that any land registered as common land is land to which this paragraph applies, the authority shall, subject to this paragraph, remove that land from its register of common land."

Para 6(2) specifies four requirements to be satisfied for the paragraph to apply to any land:

> "(a) the land was provisionally registered as common land under section 4 of the 1965 Act;
> (b) on the date of the provisional registration the land was covered by a building or was **within the curtilage of a building**;
> (c) the provisional registration became final; and
> (d) since the date of the provisional registration the land has at all times been, and still is, covered by a building or within the curtilage of a building."

There was no dispute about (a) and (c) because the land had been provisionally registered as part of Yateley Common on 16 May 1967 and the registration became final on 26 March 1975.
The central issue was whether the Inspector erred in law in deciding that the whole of the operational land of the airport, which included the application land, fell "within the curtilage of a building", namely the terminal building, at all material times.

Decision
The judge concluded that the Inspector fell into error when he accepted the airport operator's case that land lies within the curtilage of a building where the land and the building can be said to be part and parcel of the same entity or so inter-related as to form a single unit. At [124] the Judge said:

> "The only support for the overarching principle advanced by the Defendant and by BAL, namely that the land and building should comprise part and parcel of the same entity, or are so inter-related as to constitute a single unit or integral whole, comes from the Calderdale case. That principle does not accord with Methuen-Campbell, Dyer, or Barwick, where, in a statutory context analogous to the present one, the correct question to ask is whether the land in question forms part and parcel of the relevant building."

The statutory context of the Calderdale case was listed building control and it is fitting that there should be a wider test in that context because of the concern to bring within the ambit of listed building control structures or objects closely related to the listed building such that their removal or alteration could adversely affect its interest. But in the context of de-registration of common land under the 2006 Act, the Judge said at [127]:

> "In my judgment the phrase "the curtilage of a building" in that legislation requires the land in question to form part and parcel of the building to which it is related. The correct question is whether the land falls within the curtilage of the building and not whether the land together with the building fall within, or comprise, a unit devoted to the same or equivalent function or purpose."

In reaching that conclusion Holgate J approved the test of Nourse LJ in Dyer (at p.358D) that "an area of land cannot properly be described as a curtilage unless it forms part and parcel of the house or building which it contains or to which it is attached", which is the same approach as Buckley LJ laid down in Methuen-Campbell (pp.543-4).
The Inspector's decision was quashed, and the airport operator's application to de-register the land falls to be redetermined.

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, Ceri Edmonds & Mitchell Hayden-Cook barristers of Tanfield Chambers, London (www.tanfieldchambers.co.uk)

Tenant Fees Act 2019

Now in force in respect of all tenancies
Tenant Fees Act 2019
http://www.legislation.gov.uk/ukpga/2019/4/contents/enacted

Tenant Fees Act – Government Guidance

Form N5B – Accelerated possession proceedings

Residential tenancies (continued)

The Act now applies (since 1 June 2020) to all tenancies and statutory periodic tenancies entered into before 1 June 2019. Amongst other things, breach of the Act will prevent a landlord from serving a s21 notice. Section s17 of the Act:

> "No section 21 notice may be given in relation to the tenancy so long as all or part of the prohibited payment or holding deposit has not been repaid to the relevant person."

The new N5B court form to be used in accelerated possession proceedings has been updated to take account of the Act (Questions 19(a) to (d)).
There is a detailed explanation of the Act in the revised Government Guidance note.

Electricity safety standards

Now in force

The Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020

Guide for landlords: electrical safety standards in the private rented sector

These regulations will apply to all new tenancies from 1 July and existing tenancies on 1 April 2021 (reg 1). In essence, they require private landlords to ensure that an electrical safety check is done before the commencement of the tenancy and for every existing tenancy, by 1 April 2021. After that safety checks will need to be done every five years or sooner. (Reg 3). There are large fines for non-compliance (reg 11). There is a detailed explanation in the Guidance note.

Restrictive covenant

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There are two cases this month:

- Whether the restrictive covenants in question were still capable of protecting the safe operation of a nearby airport?
- Whether injury would be caused to the objectors by a proposed modification?

Discharge or modification – s84

Airport operations

Miller v Subhani

[2020] UKUT 94 (LC)

Summary

The Tribunal refused the discharge of restrictive covenants under s.84(1)(a), (aa), (b) and (c) of the Law of Property Act 1925. The intended use of a proposed agricultural barn, even if used to hangar aircraft only temporarily, was held to be as an aircraft hangar. The Tribunal held that the restrictive covenants in question were still capable of protecting the safe operation of a nearby airport, that the use of the proposed construction was not reasonable and that by allowing similar developments in the vicinity of the airport the Objector had not impliedly agreed to the discharge of the restrictions.

Facts

The Applicant wished to discharge restrictive covenants preventing him from implementing planning permission for the construction of an agricultural barn (the Barn) on the application land, being 32 acres comprised of arable field and woodlands.
The application land is subject to restrictive covenants imposed to protect the safe operation of the nearby Sandown Airport, including:

1. Nothing shall be done or omitted to be done on the land hereby conveyed that shall be a nuisance annoyance or cause an interference with the use of the said adjoining land of the Purchaser as an airport whether private or licenced by the Civil Aviation Authority.
2. …
3. Not to permit or suffer any growth or placing of any structure (other than a fence not exceeding four feet six inches in height) of a height as to … the land shown cross-hatched black on the plan annexed hereto exceeding four feet six inches.
4. No buildings or other erections whether permanent or temporary shall be erected or placed on the land hereby conveyed without the prior written approval of the Purchaser or its successors in title first obtained
5. To use the land hereby conveyed for agricultural purposes only and not to use or permit to be used any part thereof for the display of advertisements

The Applicant made an application under section 84(1) of the Law of Property Act 1925 for the discharge of restrictions 4 and 5 under grounds (a), (aa), (b) and (c) in order to enable construction of the Barn. The Objector was the leasehold owner

Restrictive covenant (continued)

of Sandown Airport. Sandown Airport, operates flying schools for the training of private pilots and parachuting activities.
The Applicant had already created a strip of grass which he proposed to use as a private airstrip (the Farm Strip) for his personal use. The Farm Strip was parallel to the grass runway at Sandown Airport, the strips being 250m apart from each other. However, the Farm Strip was not visible from the control tower, being masked by buildings and topography. The Objector considered that the discharge of restrictions 4 and 5 would enable the use of the Barn as a hangar and that this would in turn pose a serious risk to the operation of Sandown Airport.
The Applicant maintained that Sandown Airport's operational safety was protected by restriction 1, which he did not propose to modify or discharge.
The Applicant maintained that the profile of the Barn was consistent with hangars and other buildings constructed in the area in closer proximity to Sandown Airport and would present no obstruction or risk to the safe operation of aircraft. He therefore contended that restriction 4 was obsolete under ground (a).
It was suggested by the Applicant that by impeding the proposed use of the application land for the construction of the Barn, which "would allow plant and machinery to be housed on site", restrictions 4 and 5 did not secure practical benefits of substantial value or advantage to the Objector under ground (aa). In addition, the Applicant submitted that he might want to use the application land for other purposes in the future similar to those already undertaken at Sandown Airport without any apparent adverse effect on flying operations (i.e. live music, car boot sales etc).
The Applicant suggested that the Objector had implicitly agreed to the discharge of restrictions 4 and 5 under ground (b), by not objecting to similar developments on other land also burdened by the covenants.
The Applicant considered that the size and location of the Barn and proposed activities would not conflict with the use of Sandown Airport and would not injure the Objector, so as to satisfy ground (c).
The Applicant's proposed use of the Farm Strip depended upon Schedule 2, Part 4, Class B of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO). This allows the use of any land for any purpose for not more than 28 days. The Applicant maintained that the proposed use of the Barn was not as a hangar, but instead to store an aircraft "for one or two days a year".
The Applicant also submitted that there would be no conflict between his use of the Farm Strip and Sandown Airport, on the basis that the air to ground communication service was not mandatory and that the airport was an unlicensed airport with no control zone.
The Objector submitted that all proposed development around the airport was considered on its merits, and that no objection would be raised to development that did not adversely affect airport operations. However, the proposed use of the Farm Strip presented a serious risk of a mid-air collision and any discharge of restrictions 4 and 5 would effectively remove any protection against this from the conflicting use of the Farm Strip.
Furthermore, a material adverse impact on operational risk assessments would be created, threatening the ability of Sandown Airport to host parachuting activities.
The Objector was not confident that the Applicant would hold to any proposed legal undertakings to manage these risks.

Issues
If Restriction 4 & 5 were discharged would the restrictive covenants in question still be capable of protecting the safe operation of a nearby airport.
Decision
No grounds were established and the application to discharge restrictions 4 and 5 was refused.
Ground (a): Restrictions 4 and 5 were imposed to protect the safe operation of the airfield. The Tribunal stated that the relevant question under ground (a) is whether these restrictions are still capable of fulfilling this purpose. The fact that parts of the burdened land had been developed by hangars and other buildings did not render these restrictions obsolete; they continue to ensure that any development or use of the burdened land does not compromise the operational safety of Sandown Airport.
Ground (aa): The Tribunal held that restriction 5 did not impede the purported use of the application land as an agricultural barn, although it would impede the use of the Barn as a hangar to store the Applicant's aircraft, even temporarily. The Tribunal was satisfied on the evidence that the intended use of the Barn would be to hangar aircraft, and to use the Farm Strip as an airstrip. It held that it was this specific use which must satisfy ground (aa).
The Tribunal considered there was a real risk of conflict between aircraft using the Farm Strip and aircraft using Sandown Airport. Therefore, by impeding construction of the Barn, restriction 5 secured practical benefits of substantial value or advantage to the Objector by protecting a safe flying environment in the vicinity of Sandown Airport. While restriction 1 provides general protection against nuisance, annoyance or interference with the use of

Restrictive covenant (continued)

Sandown Airport, the Tribunal found that restriction 5 is a specific limitation on the use of the application land to agricultural purposes only. This acts to avoid any dispute about whether restriction 1 has been breached, and the four restrictive covenants act together to ensure the safety of Sandown Airport is not compromised.
Finally, restriction 4 was held to secure to the Objector practical benefits of substantial value or advantage, enabling him to prevent construction in circumstances where there are reasonably anticipated adverse consequences.
Ground (b): The Tribunal did not accept that the Objector had agreed, either expressly or by implication, by act or omission, to restrictions 4 and 5 being discharged or modified in relation to the application land.
Ground (c): Given that ground (aa) had not been established, ground (c) also failed.

Restriction to one dwelling per plot on small estate

Injury to objectors if modification allowed to permit one additional dwelling

Martin v Lipton
[2020] UKUT 8 (LC)

Summary
The Tribunal felt that there would be limited injury to the objectors caused by the proposed modification to allow the applicant's development to proceed, in terms of impact on amenity and the value of the objectors' land and in terms of setting a damaging precedent for future developments on the estate (often referred to as the "thin end of the wedge" argument). The Tribunal therefore ordered that the covenants should be modified under ground (aa) with modest payments of compensation to six of the objectors totaling £15,000. The compensation granted was for disturbance the objectors would suffer from the applicant's development, not for any loss of value of the objectors' land.

Facts
The applicant wished to construct a second house in his garden, situated on an estate of 44 properties in Weybridge. It was the applicant's intention to reside in the new house once built and to sell the existing house on the plot (No.11). The applicant had received two planning permissions for the development.
The estate was built around 1930 and its original form had largely been preserved by covenants requiring that not more than one dwelling-house be erected on each plot. The beneficiaries of the restrictive covenants were the owners of the other properties on the estate (the objectors). The restrictive covenant meant that the development could not be carried out without either the objectors' consent or the modification of the covenants.
The application to modify the restriction sought to rely on section 84(1)(aa) and/or section 83(1)(c) LPA 1925 ("ground (aa)" and "ground (c)").
In relation to ground (aa), all parties agreed that the building of an additional house in the garden of No.11 was a reasonable use of the land, and that it was impeded by the restriction. However, the objectors claimed that by impeding that reasonable use of the garden of No.11, the restriction secured the following practical benefits of substantial value or advantage:

- the prevention of short-term disruption caused by the works themselves;
- the prevention of permanent change to the appearance of the estate;
- the prevention of the detrimental effect on the enjoyment of individuals' homes caused by the construction of the new house in the centre of the estate;
- the prevention of any risk of future applications to modify or release the restrictive covenants on other plots occurring from the modification of the restrictive covenant (the "thin end of the wedge" argument);
- the protection of views from gardens;
- the protection of greenery and trees;
- the protection of not being overlooked or feeling overcrowded;
- the maintenance of the character of a low density residential neighbourhood; and
- the protection against the noise and bustle from the occupation of an additional dwelling on the estate.

Additional information about the estate and plot
No.11 was a large detached house on a prominent plot in the centre of the estate. It occupied the largest plot on the estate (approximately 40 metres wide, making it twice as wide as some of the narrower plots).
Many of the other properties on the estate had been extended to reach the full width of the particular plot they were situated on and many had extended into the attic space and basement space. Some of these houses had also modernised their appearance, not in keeping with the original "Arts and Crafts" design of the estate.
One particular feature of the No.11 plot was the mature boundary planting, including a hedge at the front of the house; a fence and tall dense shrubs and a very tall beech tree lining the southern

Restrictive covenant (continued)

boundary; as well as a row of conifers and shrubs lining the eastern boundary.

Issues

1. Whether the restriction should be modified under s.84(1)(aa) LPA 1925, i.e. on the basis that it impeded a reasonable user of land. (Under s84(1A), modification is permitted where (a) the person who is entitled to the benefit of the restriction does not secure any practical benefits of substantial value or advantage from it; or (b) that the restriction is contrary to the public interest. For the purposes of section 84(1A), consideration also has to be given as to whether money is adequate compensation for the loss or disadvantage to the beneficiary as a result of the modification of the restriction.)
2. Whether modification would not injure the persons entitled to the benefit of the restriction, in accordance with s84(1)(c).

Decision

The Tribunal agreed that each of the long-term benefits relied on by the objectors were capable in principle of being a practical benefit of the restriction. However, the proposed development was not considered to have the serious adverse consequences that the objectors claimed.

In considering the protection of views from gardens, the Tribunal determined that there were no significant views into the garden of No.11 from the gardens of adjoining properties because of the dense boundary planting. The adjoining houses' existing view of the foliage would not be hampered by the planning permission granted, which envisaged all boundary planting remaining.

In considering the protection of greenery and trees, the Tribunal dismissed many of the objectors' concerns as unrealistic. For example, the objectors' expert argued that much of the boundary planting would need to be removed in order to facilitate the construction of the new house and was concerned that the new house's owners might further remove shrubs to enlarge the garden. The Tribunal noted that the claimant intended on moving into the new house once construction was finished and had agreed to maintain the boundary foliage to help isolate the garden from views of neighbouring buildings. Further, the claimant had submitted a tree protection plan as part of the planning permission, which showed where protective fencing would be installed to guard against collision damage or soil compression. The planning permission was also conditional on the approval of a further aboricultural plan and method statements and required the retention of existing trees identified in the plan for five years from first occupation of the new house. Further, the claimant had agreed that any order for modification of the covenant should be conditional on his agreeing not to remove any trees or shrubs other than as necessary during construction.

In considering the privacy of the neighbouring gardens, the Tribunal found that these would not be materially less private than before. This was in part because a public footpath would still run between the new house and the neighbouring properties. The planning inspector considered that the proposed development would not harm the living conditions of the occupiers of the neighbouring properties in terms of outlook, privacy or light any more than No.11 currently did. The Tribunal substantially agreed with that conclusion.

In considering the practical benefits of not feeling overcrowded and the maintenance of the character of a low density residential neighbourhood, the Tribunal found that the proposed site was the only significant proportion of the street scene which had not yet been developed on the original building line. Although the Tribunal acknowledged that the new house would bring about change, the Tribunal contended that the change would not make any significant difference to the character of the estate or to the enjoyment of it by residents. The Tribunal further agreed with the planning inspector that the new house would be consistent with the rest of the road and it would not look intrusive or exceptional.

In considering the protection against noise and bustle from the occupation of the additional dwelling, the Tribunal accepted the possibility that a large family could move into No.11, increasing levels of noise to the immediate properties on the estate. However, the Tribunal did not consider there to be any substantial advantage to the current residents of the estate in preventing the noise and bustle of one additional home in relation to the existing 19 units on Oakfield Glade. The Tribunal felt that the restrictive covenant did not protect nor was it intended to protect, the occupants of the estate against the ordinary consequences of life in a low density residential neighbourhood.

In considering the short-term consequences of the construction, it was estimated that the construction of the new house would take approximately 18 months, based on the development of house No.4 on the estate which had recently been demolished and reconstructed. The Tribunal agreed with the objectors that the development would likely cause noise and obstruction to the road for neighbouring properties.

The Tribunal considered whether protection from the disturbance likely to be caused by a development project was capable of being a practical benefit of substantial value or advantage. The Tribunal considered that a fair balance must be struck

Restrictive covenant (continued)

between the needs of development in the area and the protection of private contractual rights. The Tribunal determined that this particular restriction in issue was not aimed specifically at the prevention of disturbance; it was a density restriction designed to limit the number of houses which may be constructed on the estate. Further, the Tribunal found that the disturbance would not be intolerable and protection from it was not a practical benefit of substantial value or advantage. However, the Tribunal conceded that the development would be intrusive and quite protracted and the disturbance to immediate neighbours called for modest compensation. Compensation of £2,000 was awarded to each of four neighbouring properties for the disturbance they would suffer; two properties which would suffer the most disturbance were awarded £4,000 and £3,000 each.

The Tribunal found that it had not been provided with any meaningful evidence that it could use as a base line to assess any diminution in value of any of the adjoining properties. It concluded that the objectors' homes would be no less attractive to purchasers than they were before the development. The Tribunal considered the objectors' argument that the modification of the restrictive covenant would establish a damaging precedent and would materially change the physical and legal context in which any future applications for modification would be determined. The Tribunal clarified that the application under consideration was in relation to No.11 Oakfield Glade and was to permit one additional attached house on the largest plot on the estate. Subject to that modification, the restriction would continue to bind No.11. It would also continue to bind each and every other plot on the estate to which it already applied. The Tribunal reinforced Carnwarth LJ's point in *Shepard v Turner* that the thin end of the wedge argument raises issues of fact, not of law and that the effects of the modification would depend upon the nature of the future proposals. It was reiterated that "any application under section 84(1) must be determined upon the facts and merits of the particular case. Applications of this type are fact sensitive, and it cannot be assumed that the outcome of one case will be mirrored in the outcome of a different application, even one seeking a very similar modification on the same estate".

The question for the Tribunal was whether modifying the restriction to permit the proposed development was likely to open the way to further developments which, taken together, would undermine the efficacy of the protection afforded by the covenants from which the objectors benefited. The Tribunal acknowledged the objectors' concern that the estate was of considerable interest to developers and they already regularly received unsolicited inquiries from companies who wished to acquire land on the estate. The Tribunal focused on two relevant points here:

1. That several other houses on the estate had already departed from the one dwelling per plot principle: one being sub-divided to create two additional small detached houses, another had been sub-divided to create an additional dwelling, one had been converted into two flats and one had been sub-divided into three properties; and
2. The proposed modification, in the Tribunal's opinion, was entirely in keeping with the original pattern of development on the estate. The Tribunal considered that it would be difficult for someone unfamiliar with the conveyancing history of the estate to identify which properties stood on the original single plots.

The Tribunal accepted that other similar applications that might be successful on the merits of this case. However, it discounted the risk that success for the current application might lead to a greater risk of back-land development, the replacement of existing single detached houses with two or more smaller houses on a single plot, the amalgamation of plots to secure development at a greater density or the possibility of blocks of flats or terraced housing. These would be radical departures from the principle on which the estate was laid out. The Tribunal was therefore satisfied that the integrity of the original pattern of covenants would not be materially undermined by the modification being sought. Nor would it materially alter the context in which any future application in relation to a different part of the estate would fall to be considered.

The Tribunal therefore directed that, as all requirements of section 84(1)(aa) had been satisfied, the covenants should be modified with the changes linked to the specific development proposed.

As the application had succeeded on the basis of ground (aa), is was not necessary for the Tribunal to consider the higher hurdle presented by ground (c).

Solicitors Practice Points

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Coronavirus

Sales and purchase of property – social distancing *Law Society Guidance* https://beta.lawsociety.org.uk/topics/coronavirus/guides/coronavirus-covid-19-sector-specific-guidance-conveyancers

The Law Society, in conjunction with others, has published guidance aimed at enabling sales and purchases to be carried out while maintaining safety as social distancing measures are eased or increased in line with government guidance. The guide addresses issues including:

- Meeting with clients
- ID verification
- Considerations for electronic and wet ink signatures,
- 'Mercury' style execution,
- Simultaneous exchange and completion
- Amending undertakings
- Dealing with lenders

Publications

***Business Premises: Possession and Lease Renewal, 6th edition.* Gary Webber and Daniel Dovar. Sweet and Maxwell, 2018**
This publication gives clear explanation and detailed commentary on how a landlord or lessor can obtain possession of business premises, and how a tenant can oppose such action or renew the lease. Written from the litigator's point of view, this guide covers a range of areas including termination, non-payment of rent, licenses, forfeiture, proceedings for possession and applications for new tenancies.
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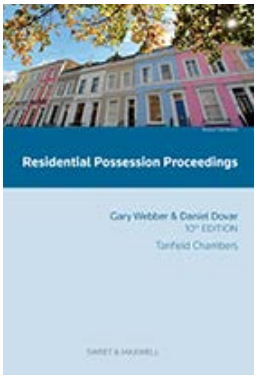

***Residential Possession Proceedings. 10th edition.* Gary Webber and Daniel Dovar. Sweet and Maxwell, 2016**
The definitive guide to the law and procedure relating to the possession of residential property in a single text.
"For a lawyer who wants to bring an eviction claim – this book is great." *The Landlord Law Blog*
It succinctly explains the action a landlord can take to regain possession of a property and how a tenant or occupant might oppose any such action. It also explains the possession rights of landlords, tenants and occupiers under the various forms of tenancy. Finally, Residential Possession Proceedings details the court proceedings necessary to affect or defend possession.
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Property Law UK updates are edited by Gary Webber. The deputy editor is David Keighley davidktraining@outlook.com

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