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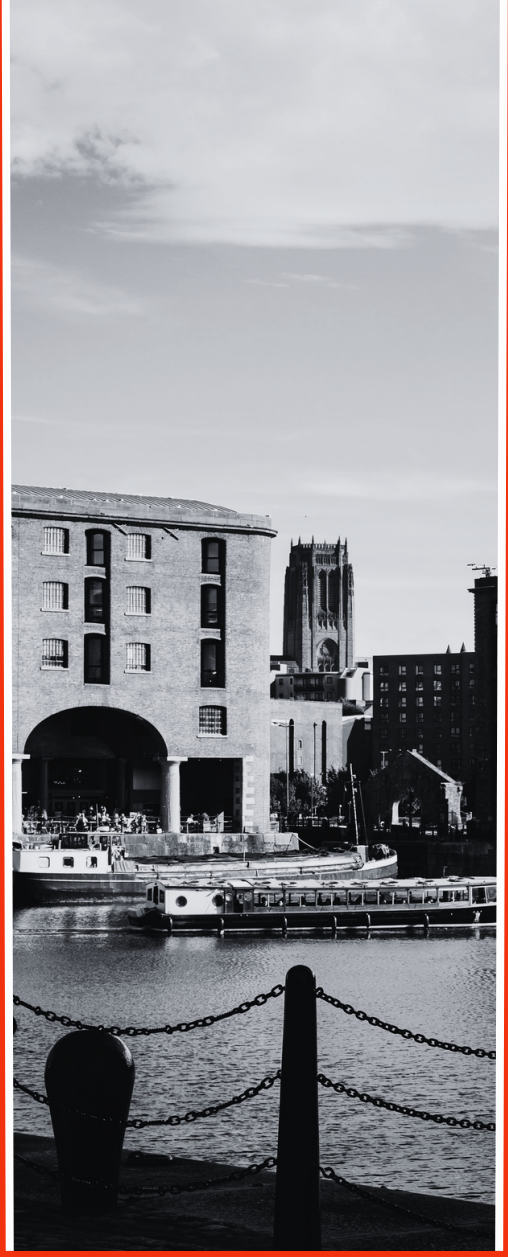

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EDITOR'S LETTER

Dear reader,

Despite the festive season fast approaching it seems that conveyancing contacts remain as busy as ever and we continue to be active on all fronts with very little let up. I hope everyone has the opportunity over the holidays to get some rest and take time out to be with friends and family.

Whilst transactional activity is clearly lower than previous years and the BSA continues to be a big problem for residential conveyancers undertaking leasehold transactions, it appears that 2024 may well generate new issues such as the new Law Society Code for Signing and Exchanging Property Contracts 2024 and the Leasehold and Freehold Reform legislation to keep us all on our toes.

Turning to some positivity, Property Law UK has gone from strength to strength. Contributors and guest editors continue to give up their time and share their expertise for the benefit of the profession generally and myself and the team in particular. As ever, I am extremely grateful for their continued support. In addition to that Helen, Clair, and Natasha deserve credit for the time and effort they expend on my behalf in working to tight deadlines to produce on a monthly basis a publication of which they should be enormously proud, as indeed am I.

The magazine has featured unsurprisingly a lot of copy on the BSA 2022. Special mention should be made of Tanfield Chambers and in particular Andrew Butler KC who along with colleagues I have had the pleasure of working with over the year on the BSA in an effort to create a pathway through what has been a maze which often appears impenetrable. The New Year beckons with a Tanfield Chambers Conference on the BSA on the 7th of February and a book to be published by the Law Society which Andrew and I have been working on along with a number of members of Tanfield Chambers, all of whom I would recommend to anyone with any BSA problems or potential litigation. Visit Tanfield Chambers website here for conference information, or contact me for more details about the upcoming BSA publication.

We have decided to produce a special additional edition of Property Law UK for December, and I am pleased to say that we have been able to provide a copy to everyone on our mailing list, not just subscribers. Although not truly representative of our normal publications, and not as extensive, it gives an idea of what subscribers receive in their inbox most months.

The December edition includes an in-depth piece on Tom Graham and the books that he has authored over the years in our 'Featured Editor' section. Unfortunately for us, but happily for Tom,

he has announced his retirement, and I would like to personally thank him for his contributions over the years to Property Law UK and also for the training events he has delivered for IQ Legal Training. He will be missed enormously.

Sarah Thompson-Copsey once more has explored an important case for us concerning the Landlord and Tenant Act 1987 namely SSV freehold Ltd v SGL1 Ltd which is an interesting case concerning the 1987 Act and Sarah once again is able to dissect the key features of this case in order to share the lessons to be learned.

Nigel Clayton at Kings Chambers, who I had the pleasure to meet at our inaugural conference in Leeds earlier in the year and whose presentation was very impressive, once again enlightens us with the case of Barclays Bank v Terry which looks at a compelling case concerning Barclays Bank rectification applications where a mortgage had been redeemed but the charge had not been discharged from the title. Nigel also shares with us the case of MS Lending Group Ltd against LVR Capital Ltd, which explores company charges and looks at whether a court can rectify the company's register to correct the wrongful removal of company charges.

Michael Lever, our go to expert on rent review, provides a final instalment of his epic work on how to undertake a rent review which should be of interest to lawyers and surveyors alike. Look out for Michael's new series on 'How to Do a Lease Renewal,' the first installment of which will feature in the January 2024 edition of Property Law UK.

Emma Preece and Emma Humphreys of Charles Russell Speechlys have co-authored a fascinating article concerning restrictive covenants in the case of Muskwe & Anor v Cochrane which discusses the modification of covenants under Section 84 of the Law of Property Act 1925.

Finally, I have produced an article looking at several important developments in 2023 and some things to look out for in 2024. I have also examined the case of Yarnold and others v Ziga which concerns a joint venture restriction of the land registry and other issues.

All that is left for me to do in signing off is once again thank subscribers, to thank contributors and guest editors of which there are many, and to invite anyone receiving this complimentary edition of Property Law UK to consider subscribing in 2024

If you have any questions or suggestions then please contact me at ian@iqlegaltraining.com or connect with me on LinkedIn here.

Season's greetings to everyone and may you have a prosperous New Year.

Managing Editor

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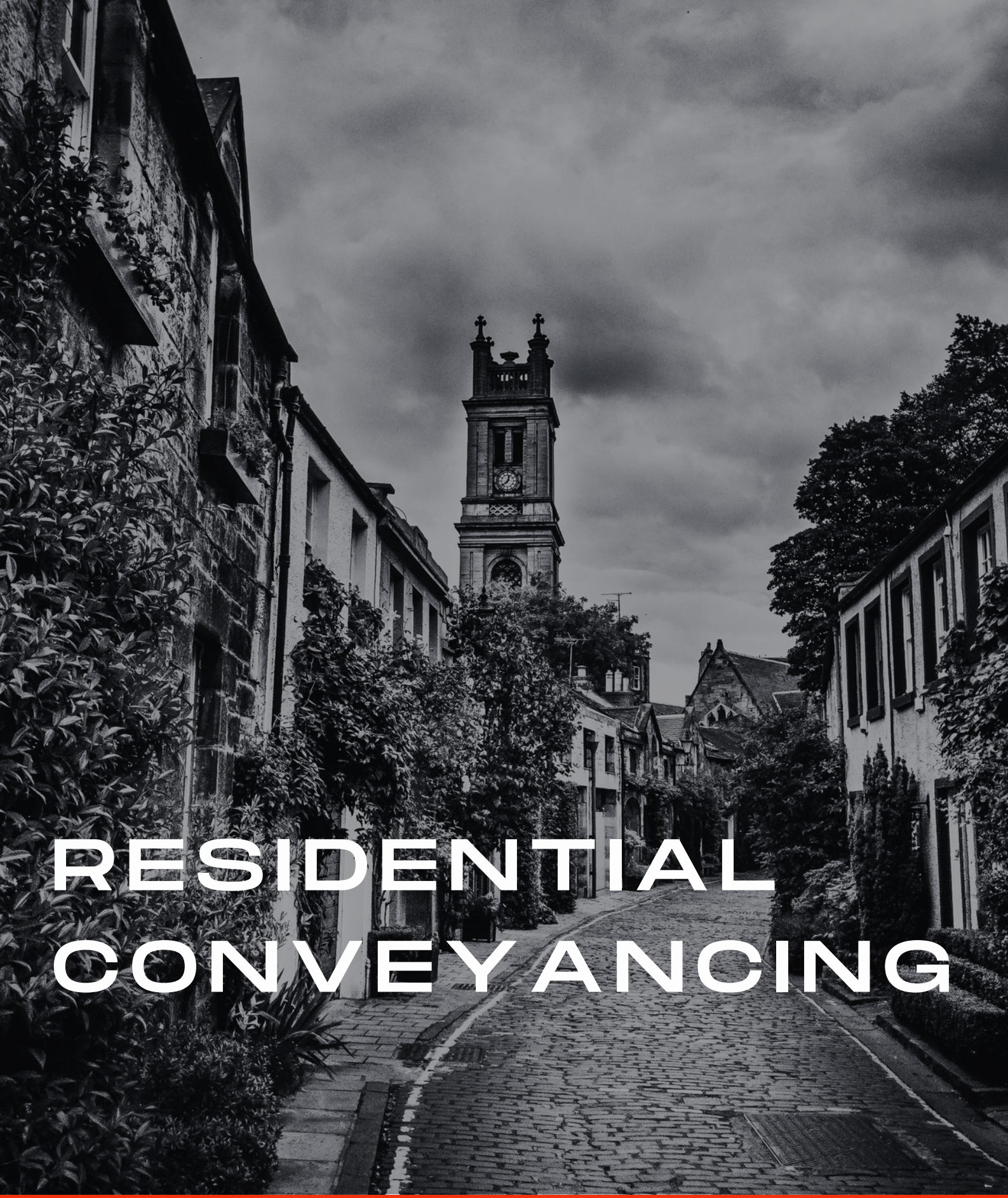

RESIDENTIAL CONVEYANCING

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Ian Quayle
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RESIDENTIAL CONVEYANCING

A YEAR IN REVIEW

Ian Quayle presents a comprehensive review of the past year, exploring key developments and trends that have shaped the landscape of residential conveyancing.

I have had a little time over the last few weeks to reflect on what has been a very busy year and have considered some of the key developments within the realm of residential conveyancing over that period. While I intend to steer clear of exhaustive discussions on the Building Safety Act, recognising the saturation of such discourse, I extend an invitation for any queries or concerns about the Act to be directed to my email address ian@iqlegaltraining.com.

For those less acquainted with our activities in the past year, I am pleased to highlight our monthly forums for residential conveyancers, commercial property lawyers, local authority lawyers and residential conveyancing support staff. These complimentary events, sponsored by Stewart Title, Geodesys, Move Reports and facilitated by IQ Legal Training, have proven to be popular and dynamic platforms for discourse and learning. Covering an array of topics, ranging from challenges associated with land registry restrictions to issues involving software systems, Case Management Systems, and reporting on Title, the forums cater for practitioners' diverse interests. The success of these regular events means that they will become a regular monthly feature for 2024 and will remain free for attendees.

Throughout the year, we have hosted a series of sponsored webinars, providing valuable insights into pertinent topics. These webinars are free to attend and highly informative. Anyone interested in participating in future forums please email me, or connect with me on LinkedIn here. Should you wish to be included in our mailing list for Continuing Professional Development (CPD) events and related updates, please do not hesitate to contact us by emailing info@iqlegaltraining.com and we will ensure your inclusion in our database.

The Law Society Guidance on Climate Change

In April of this year, the Law Society released guidance on climate change. Surprisingly, there has been a noticeable lack of awareness and concern among practitioners.

The Law Society's guidance on climate change, issued in April, is broad in scope, targeting the legal profession as a whole, including conveyancers. While it provides general advice, the Society has indicated that industry-specific guidance may be forthcoming in the future, though a definitive timeline remains unclear.

Stephen Tromans KC of Essex Chambers, a respected authority on the matter, raised a crucial

point related to potential negligence on the part of property lawyers. His opinion, provided to Groundsure, suggests that practitioners could be considered negligent if they fail to inform clients about the availability of climate change reports. However, this message has been misconstrued by some, implying an obligation for mandatory climate change reports in transactions, which is inaccurate. What is essential is informing clients about the option of obtaining a Climate Change Report during the due diligence process.

Climate change reports are now readily available from search providers. While not categorised as essential, they are considered necessary, and clients must be made aware of their availability and potential benefits.

The Law Society's guidance underscores the need to communicate to clients about climate change risks. Those risks encompass physical impact, legislative and regulatory changes, and potential liabilities. Clients should be informed about the general types of risk, but specific advice on the content of a Climate Change Report should normally be beyond the scope of the retainer of a conveyancer.

The legal landscape is evolving towards a heightened awareness of climate change in residential conveyancing. As practitioners, it is

vital that clients are aware of the option to obtain a climate change report.

TA Forms

Acting for the Seller

Recent case law highlights crucial lessons for sellers and conveyancers.

When acting for a seller it is imperative to educate the client about the risks associated with providing inaccurate information in TA forms. Sellers should be explicitly informed about the necessity of answering these forms with honesty and transparency. If a question is unclear, the client should express their lack of understanding, and if the answer is unknown, they must explicitly state so. Guesswork or assumptions should be avoided, as this could expose the client to a claim for misrepresentation and the risk of committing a criminal offence under Section 2 of the Fraud Act 2006.

Equally critical is the need for the client to promptly notify their conveyancer if any information within the TA forms changes.

Sellers are strongly advised against adopting a rosy perspective when responding to questions. Recent judicial comment emphasises the dangers of overlooking potential issues related to building control, planning permission, or even the presence of Japanese Knotweed in the garden.

Put simply sellers and their legal representatives need to navigate the completion of TA forms with utmost diligence, transparency, and a commitment to factual accuracy. The repercussions of providing misleading information can extend beyond mere legal implications, affecting the integrity of the transaction and potentially leading to legal disputes.

Acting for the Buyer

When acting for a buyer the client should view the questions in the TA forms as a comprehensive checklist. While clients need to be made aware of the potential to bring claims for misrepresentation, it is essential to address the practical challenges

associated with the pursuit of such claims.

While it's easy to assert that legal recourse exists for misrepresentation, the reality may not be attractive to aggrieved buyers. Advising the buyer client to sue the seller might not align with practical considerations. Initiating County Court action, even for a seemingly clear-cut case, can be a costly and uncertain endeavour.

For practitioners dealing with residential leasehold transactions, caution is warranted regarding the new Section 11 in the revised TA7 forms which concern Building Safety Act issues. It is imperative when advising a seller to go beyond advising a client to fill in the TA7 form. Instead, a conveyancer should actively provide seller clients with detailed information on what constitutes remediation work under the Building Safety Act together with an explanation as to the significance and consequences of a leaseholder deed of certificate and landlord certificate. This approach deviates from the norm to ensure that clients are aware of information required to answer questions in the TA7 form, linked to the Building Safety Act. This guidance should shield clients from potential pitfalls generated by the new section 11 questions.

Recent cases provide guidance for conveyancers when advising sellers completing TA forms, two noteworthy instances stand out: Rosser v Pacifico Ltd [2023] EWHC 1018 (Ch) and Downing v Henderson, a matter adjudicated at the London Central

County Court in 2023 (unreported).

The case of Rosser v Pacifico Pacifico Ltd [2023] EWHC 1018 (Ch) concerned the sale of a flat described as a two-bedroom dwelling. The estate agent, acting on behalf of the seller, provided the buyer with drawings and specifications utilised during the renovation, confirming the flat's status as a two-bedroom unit.

In addition, the seller whilst completing the TA forms asserted that he was not aware of any breaches of planning permission or building control. The buyer discovered that the second bedroom was illuminated and ventilated by a skylight installed without proper planning permission or building regulation consent, violating the property's listed building status in a conservation area.

The buyer was required to remove the skylight, rendering the flat licensable only as a one-bedroom unit rather than the originally marketed two-bedroom flat. At trial, the judge determined that the estate agent, by providing material to the buyer revealing that the property was a two-bedroom flat, made a false representation on the seller's behalf. In addition, the trial judge held that the seller should not have stated he was not aware of breaches of planning permission or building regulations without checking this was in fact the case. The case re-iterates the principles established in the William Sindall case of 1993.

The unreported case of Downing v Henderson heard in the London Central Court concerned a claimant buyer who successfully sued the defendant seller who had confirmed in an answer to a question in a TA form that the property being sold did not have Japanese knotweed in the garden. The court proceedings resulted in the buyer securing damages and an award of costs. The seller needs to be cautioned so that there is an awareness of the potential for liability for misrepresentation.

Additional Enquiries

Consideration needs to be given by the conveyancer for the buyer as to whether additional enquiries are required. While the

protocol does impose restrictions on raising general additional enquiries where the buyer client explicitly requests additional enquiries or if the information provided by the seller proves to be incomplete or inadequate they can be raised.

If we consider issues concerning the Building Safety Act crucial, additional enquiries should include whether the landlord has requested a leaseholder deed of certificate and, if so, when this request was made. Equally important is ascertaining whether the seller has duly notified the landlord of their intention to sell or initiated a request for a landlord certificate, along with the corresponding timeline. I am participating in the production of a book on the Building Safety Act to be published by the Law Society. This text is set to be published in the New Year and involves insights from various barristers at Tanfield Chambers.

Leasehold Reform: The Leasehold and Freehold Reform Bill

The proposed bill includes the following proposed reform:

In terms of lease extension valuations, the managed value is set to be removed, making it crucial for those involved in lease extension work to seek expertise from experienced surveyors and solicitors who specialise in this area.

Further provisions address acquiring an intermediate interest in collective enfranchisement, amending provisions on lease-back collective enfranchisement, and introducing amendments to lease extensions for leasehold houses with a requirement for a peppercorn ground rent. The government aims to discourage the sale of leasehold houses, introducing legislation that bans such sales while limiting costs on enfranchisement and restricting the landlord's ability to charge insurance costs. In addition, there is speculation about the potential resurgence of commonhold. While a relaunch of commonhold was previously threatened in January 2021, the government might revisit this option if issues with leasehold practices persist. Developers need to adopt more sensible and transparent approaches to administration charges to avert the possibility of commonhold becoming a preferred alternative.

Notably, the leasehold Reform Bill proposes that landlord's fees for landlords' enquiries become administration charges, subjecting them to the test of reasonableness - a positive

step forward in the realm of administration charges.

The Exchange Code of Practice

The Exchange Code of Practice introduces three distinct protocols regulating the exchange process and facilitating the electronic exchange of contracts. This innovative approach allows for the electronic signing of contracts, a topic that I'll delve into further in upcoming webinars scheduled for the new year. For now, it's essential to bring your attention to the code and encourage you to explore its contents.

While the code is not groundbreaking, its significance lies in overcoming challenges associated with telephone exchanges and transitioning them into an electronic system.

What to look out for in 2024

As we look forward to 2024, we can anticipate a continued focus on leasehold reform and the potential resurgence of commonhold. In addition, decisions of the First Tier Tribunal should provide some clarity where there is confusion concerning the Building Safety Act.

FEATURED EDITOR

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BARRISTER, TRAINER & AUTHOR

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Property Law UK is a high-quality legal publication which leverages the knowledge and experiences of expert practitioners to the legal industry.

PROFILE

Tom Graham is a barrister with nearly 40 years of experience in town & country planning, environmental law, highway law and public law.

He was formerly a solicitor and has had considerable experience in local government and private practice. Tom was the Chief Solicitor to North Hertfordshire District Council and has held senior positions in local government.

Tom has acted for developers, house-builders and landowners as a partner in private practice. He has appeared at many local inquiries and in the civil and criminal courts, the Lands Tribunal and in the High Court.

Tom, a distinguished author, has published multiple notable works, including "Contaminated Land", "The Environment Act 2021," "Pollution & the Planning Process: A Practitioner's Guide," "A Practical Guide To Planning, Highways And Development" and (his latest book) "A Practical Guide to Contaminated Land".

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- Property Development
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- Climate Change and Planning

LANDLORD AND TENANT

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Sarah Thompson-Copsey
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LANDLORD AND TENANT

LANDLORD AND TENANT ACT 1987, PART I - FSV FREEHOLDERS LIMITED V SGL 1 LIMITED

Sarah Thompson-Copsey examines a recent ruling by the Court of Appeal concerning the Landlord and Tenant Act 1987, Part I. The focus is specifically on tenants' pre-emption rights, s5 notices, principal terms, and severance.

FSV Freeholders Limited v SGL 1 Limited [2023] EWCA Civ 1318 .
BAILII link.

Summary

The Court of Appeal upholds the High Court's decision that offer notices

served under s5 of the Landlord and Tenant Act 1987 were valid; the landlord was required by statute to sever the transaction into individual "buildings", and so it was correct to state only the terms relating to the particular building in the notice.

Facts

The Landlord and Tenant Act 1987 (the 1987 Act) gives qualifying tenants of flats within a building (that itself falls within the Act) the right, acting collectively, of first refusal, or pre-emption, where their immediate landlord proposes to dispose of an interest in the building. The right is not freestanding and is a right only to take the disposal the landlord is proposing to make and on the terms it proposes.

The 1987 Act prohibits the landlord from making a disposal that falls within the Act without first serving on the tenants an "offer notice" under s5. (Breach of this obligation is a criminal offence.) The form of notice is not prescribed but it must contain "particulars of the principal terms of the disposal proposed by the landlord" and, where the proposed disposal consists of entering into a contract to create or transfer an estate or interest in land, s5(A) of the Act states that the principal terms of the disposal include in particular "the property, and the estate or interest in that property, to which the contract relates" and "the principal terms of the contract (including the deposit and consideration required)".

In addition, s5(3) of the Act provides that: "Where a landlord proposes to effect a transaction involving the disposal of an estate or interest in more than one building (whether or not involving the same estate or interest), he shall, for the purpose of complying with this section, sever the transaction so as to deal with each building separately".

On 11 February 2020, the administrators for FSV Ltd (the immediate landlord of the qualifying tenants) served s5 notices, under the 1987 Act, on the qualifying tenants in respect of FSV Ltd.'s proposed disposal of Blocks A-E, Fox Street, Liverpool. As the proposed transaction involved more than one building, the transaction was

severed: s5 notices were served on the tenants of Block A setting out a consideration of £350,000 and on the tenants of Blocks B, C & E (the blocks being considered together to be one "building" with a consideration of £1,050,000. Block D was empty and so the Act did not apply to it.

No acceptance notices were served and on 12 June 2020, the landlord agreed to sell Blocks A-E (the Entire Property) to SGL Ltd for £1.6m (which sum was broken down as to Block A: £350,00, Block B, C, E: £1,050,000 and Block D: £200,00).

The tenants contested the validity of the s5 notices and SGL sought a declaration that s5 had been complied with.

Issues

The question before the Court of Appeal was whether the s5 notices were valid given that they did not set out "the principal terms of the disposal proposed by the landlord" i.e., the disposal of the Entire Property for £1.6m.

First instance

At first instance, on 11 January 2022, District Judge Lampkin made a declaration that s5 had been complied with; the tenants appealed.

On appeal to the High Court, ([2022] EWHC 3336 (Ch)), Fancourt J allowed the tenants' appeal in part (as to whether Blocks A, B, C & E formed one, two, three or more "buildings" and gave directions for the hearing) but rejected the tenants' argument that the s5 notices were invalid. This latter part was the subject matter of the tenants' appeal to the Court of Appeal.

Decision

Dismissing the tenants' appeal, Asplin LJ (with whom Peter Jackson LJ and Arnold

LJ agreed), emphasised the need to read s5 of the Act as a whole and in context. Section 5(1) "provides that where the landlord proposes to make a "relevant disposal affecting premises" he shall serve a notice (an "offer notice") on the qualifying tenants". As that offer has to be capable of acceptance by the tenants it is important to consider s5 as a whole in that light.

Asplin LJ emphasised that "the requirements in section 5A (and 5B-E) are incorporated into section 5, and must be read in the light of it [and by so reading] the interpretation of section 5A in the circumstances which have arisen becomes clear …" and, in the circumstances of the proposed transaction, "the requirements of sections 5A – E must be read in the light of section 5(3) which is in mandatory term".

That means, she added that "In circumstances in which section 5(3) applies, references to the "disposal" by entering into a "contract" should be interpreted by reference to each separate building. The reference to "property" in section 5A(2)(a) should be construed to mean the building in question and the reference to the "contract" in section 5A(2)(b) must be interpreted to refer to the contract in relation to the building in question."

Interestingly, the completed contract required payment of an £80,000 deposit and was conditional upon a Sealed Court Order – neither of which was mentioned in the s5 notices. Obiter, Asplin LJ dismissed the argument that this invalidated the notices "In the light of my conclusions… the failure to mention the deposit of £80,000 and the condition precedent of obtaining a Sealed Court Order fall away… in any event, I consider that the Sealed Court Order was not a "principal term" of the main contract for sale of the Entire Property. It was merely part of the machinery for completion."

Comment

This case is of interest on the question of principal terms to be set out in a s5 notice where the proposed disposal involves multiple buildings; in such circumstances, the offer notices only need to contain the key terms of the transaction as they relate to each individual building, and not the

terms of the overall transaction (and note that the tenants cannot argue that the consideration proposed for a severed part is too high and should be adjusted).

Of perhaps more interest is the court's obiter view that a condition precedent to a disposal is not a principal term of the contract. Unfortunately, no reason is given for such view.

The matter of the machinery of severance itself – i.e. the definition of "building" (not in fact defined in the 1987 Act) in this case, remains to be decided.

Interesting too is s18 of the 1987 Act. This permits the proposed disponee to serve notices on the qualifying tenants in place of s5 notices served by the proposed disponor. It does not require 'severance' (even where the proposed disposal consists of more than one building) and requires the notices to contain "the general nature of the terms of the proposed disposal", including in particular "the property to which it would relate and the estate or interest in that property proposed to be disposed of by the landlord" and "the consideration required for making the disposal" (but does not refer to the deposit). Does "the general nature of the terms of the disposal" referred to in s18 mean something different from "the principal terms of the disposal" referred to in s5A?

RESTRICTIVE COVENANTS

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MODIFICATION OF COVENANTS

Emma Humphries, Partner, and Emma Preece, Senior Associate, Charles Russell Speechlys

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RESTRICTIVE COVENANTS

Emma Preece and Emma Humphries discuss modification of covenants under Section 84 of the Law of Property Act 1925 to allow the applicant to use the property as a self-contained home for children in care within their business.

Muskwe & Anor v Cochrane [2023] UKUT 262 (LC). BAILII link.

Summary

In Muskwe & Anor v Cochrane [2023] UKUT 262 an application was made to modify restrictive covenants under Section 84 of the Law of Property Act 1925 ("Section 84").

The covenant in question prevented the applicant from implementing planning consent. This planning consent was obtained on 11 December 2020 from Braintree District Council for a change of use of the property from a residential dwelling to a Residential Care Home for up to four children/young persons.

The Tribunal found that:

- Ground (aa) of Section 84 had

satisfied because the proposed use was reasonable, and the restriction does not secure the persons entitled to the benefit of it any practical benefit.

- Ground (1A) of Section 84 had been satisfied because impeding the covenant would not secure a benefit of value or advantage to the objector; and
- Ground (c) of Section 84 had been satisfied because the proposed modification would not injure persons entitled to the benefits of the restriction.

Facts

The applicants own a two-storey house within a large residential estate.

The applicants made a planning application for change of use to a residential care home for up to four children/young persons in October 2019. Permission was given on 11 February 2020, subject to the following conditions:

- To start within three years of the decision;
- To carry out the development in accordance with the plans submitted.

After obtaining planning permission, the applicants were able to look after children as an unregulated activity without Ofsted approval. The applicants acted in breach of the covenants from January 2022 to November 2022, where they housed two children. Activity ceased in November 2022 as Ofsted would not approve as the applicants were in breach of the covenants, as this would leave the children vulnerable to disruption from their home at some point.

Issues

The Tribunal had to decide whether grounds (aa), (1A) and (c) applied in deciding whether to modify the restrictions.

The relevant restrictions to this application are as follows:

According to the 1997 transfer, the property must not be used…
"… other than as a single private residence."

According to the 2000 transfer, use is prohibited…
"… other than as a single private dwellinghouse with usual outbuildings."

Neighbours to the property objected to the modification of the covenants on the following grounds:

1. When the property was in operation as a care home during 2022, there were numerous visits from the police and sometimes ambulance staff. A front window had been smashed by a child, and separately an aftershave bottle or perfume bottle was found smashed outside the property. On both occasions glass was scattered across the street. A neighbour claimed that interior damage had been caused to the property, and repairs were made on window blinds multiple times. There was also shouting and banging (which caused disturbance to neighbours) on numerous occasions.
2. Neighbours were worried about the impact the change of use would have on them, particularly during the summer months.
3. Neighbours were also concerned that the value and saleability of their home would be affected.

In reaching its decision, the Tribunal considered the following submissions made by the applicant:

1. Under Section 84(1) Ground (aa) the restrictions impede a reasonable use of the land for private purposes. The applicant argued that the proposed use is reasonable because planning permission was granted, there would be no external changes to the property and it could already accommodate a family with four children, so the use was not intensified. The neighbourhood already had a residential care home for children less than 200 meters away.
2. Under Section 84(1A) impeding the proposed use would not secure any practical benefits to those that would benefit from the restrictions and the modification would not cause neighbouring properties to suffer diminution in value or loss of amenity. If there were practical benefits, they were not of substantial value or advantage and money would be adequate compensation.
3. Under Section 84 Ground (c) the proposed modification would not injure the persons entitled to the benefit of the restrictions.

First instance

In relation to Section 84, Ground (aa):

- The Tribunal were satisfied that the proposed use was reasonable, and that it was impeded by the restrictions.

In relation to Section 84, Ground (1A):

- The Tribunal were satisfied that impeding the proposed user covenant would not secure a benefit of value or advantage to the objector.

In relation to Section 84, Ground (c):

- The Tribunal were satisfied that this ground was made out because the proposed modification would not injure persons entitled to the benefits of the restriction.

In relation to other matters:

- Under Section 84(1B) the Tribunal found that the planning officer's report for the planning permissions at the Property, and the expert valuation report's review of other consents in the area, supported the application.
- The Tribunal considered the period at which and context in which the restrictions were created and any other material circumstances. The Tribunal did not find that the spirit and intention of those restrictions on creation is offended by the modification.

BUILDING SAFETY ACT 2022 FLOWCHARTS

Building Safety Act 2022 Flowcharts
Earlier this year, we offered for sale various flowcharts detailing some of the key processes which are contained within the Building Safety Act 2022 and subordinate legislation, and which were causing significant problems for practitioners.

These flowcharts, which were produced with the assistance of Andrew Butler KC and Annie Higgo of Tanfield Chambers, have been refined and now deal with the following topics:

01 **Is a Building a Relevant Building?**

02 **Is a Defect a Relevant Defect?**

03 **Is a Lease potentially a Qualifying Leases?**

04 **Leaseholder Deed of Certificate – what steps does a landlord need to take to stop a lease from becoming a Qualifying Lease by default?**

05 **Landlord Certificate – timing, content and effect**

06 **Is a building a Higher Risk Building?**

07 **Higher Risk Buildings and "Independent Sections"**

08 **Is a Person (X) an Accountable Person?**

09 **Is a Person (X) a Principal Accountable Person?**

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MORTGAGES

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MORTGAGES - MISTAKEN DISCHARGE

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MORTGAGES

Nigel Clayton considers mistaken discharge in the case of Barclays Bank UK PLC v Terry & Anor, with particular focus on application for summary judgment to rescind and for alteration of the register.

Barclays Bank UK PLC v Terry & Anor [2023] EWHC 2726 (Ch) (23 October 2023). BAILII link.

Summary

The High Court granted summary judgment (in part) on the bank's application to rescind the mistaken discharge of numerous mortgages, and for consequential alteration of the register to restore them.

Facts

Barclays Bank issued a Part 8 Claim against representative defendants on behalf of 5,141 parties for alteration of their respective charges register on the basis that the bank had mistakenly discharged their charges. The bank also issued an application notice for summary judgment.

The background to the application was that Barclays had instituted a serious long-term project, to identify cases where a mortgage had been redeemed but for some reason it had not actually been discharged. It was an effort to tidy up the mortgage book and indeed tidy up the titles of those borrowers who had redeemed their mortgages.

The bank relied on a computer programme, devised, and tested over 11 months, which identified some 38,313 charges which it was satisfied represented mortgages which had been redeemed, but without the charges being discharged. When the bank met to decide whether to authorise the automatic discharge of the charges, it produced a further list of 2,730 cases which it mistakenly thought fell into the same category. After 29,505 charges had been discharged, both Land Registry and the bank began to receive enquiries from borrowers who thought they still owed something. Land Registry concluded it had not made a mistake; it had done what it had been asked to do by the bank. When the bank re-checked its list, it came up with 5,141 charges which had been mistakenly discharged and on which money was still owing.

Issues

How should the court approach a large-scale application to rectify a mistake and for consequential alteration of the register?

Held

(HHJ Paul Matthews sitting as a judge of the High Court): As to the law of mistake, applying Pitt v Holt [2013] 2 AC 108; Kennedy v Kennedy [2014] EWHC 4129 (Ch) and Garwood v The Bank of Scotland plc [2012] EWHC 415 (Ch) and considering the mistake made in NRAM Limited v Evans [2015] EWHC 1543 (Ch) (at first instance – the case went on appeal to the Court of Appeal [2017] EWCA Civ 1013) the judge concluded that the law allowed for a transaction of this kind to be rescinded for mistake:

1. the bank did not intend to make a gift of its security to its customer.
2. the mistake in the present case was a distinct

mistake.

3. the bank took some care to produce an accurate list – one could not say the bank was not being careful.
4. it was a mistake of two kinds (i) a fundamental mistake of fact, and (ii) a mistake as to legal effect.

The jurisdiction of the court was engaged, and the mistake was also sufficiently serious to make it unconscionable for the customers to retain the benefit of it.

As to the statutory power of alteration of the register in Schedule 4, Para 2, Land Registration Act 2002, the court had power to order the alteration of the register for the purposes of bringing it up to date under Para 2(1) and under Para 3(3) where the court has power to make an order under Para 2, it must do so, unless there are exceptional circumstances which justify its not doing so.

The court was satisfied there were no exceptional circumstances which would take the matter outside the usual default rule in respect of some of the represented parties, and would make the order, but was not satisfied in respect of the other parties, with those cases being left over to the 'bifurcated procedure.'

Comment

There is something of the "Thunderbirds are go" about this case with the judge recording that the bank had set up a "Go/No Go" meeting to decide what to do and had then "pressed the button." One can envisage a select group of highly trained Barclays black ops technicians holed up in a nuclear bunker deep in the bowels of Barclays Towers, working through their mortgage manuals next to a large red button emblazoned with a warning sign "Mortgage Discharge - Do Not Press This."

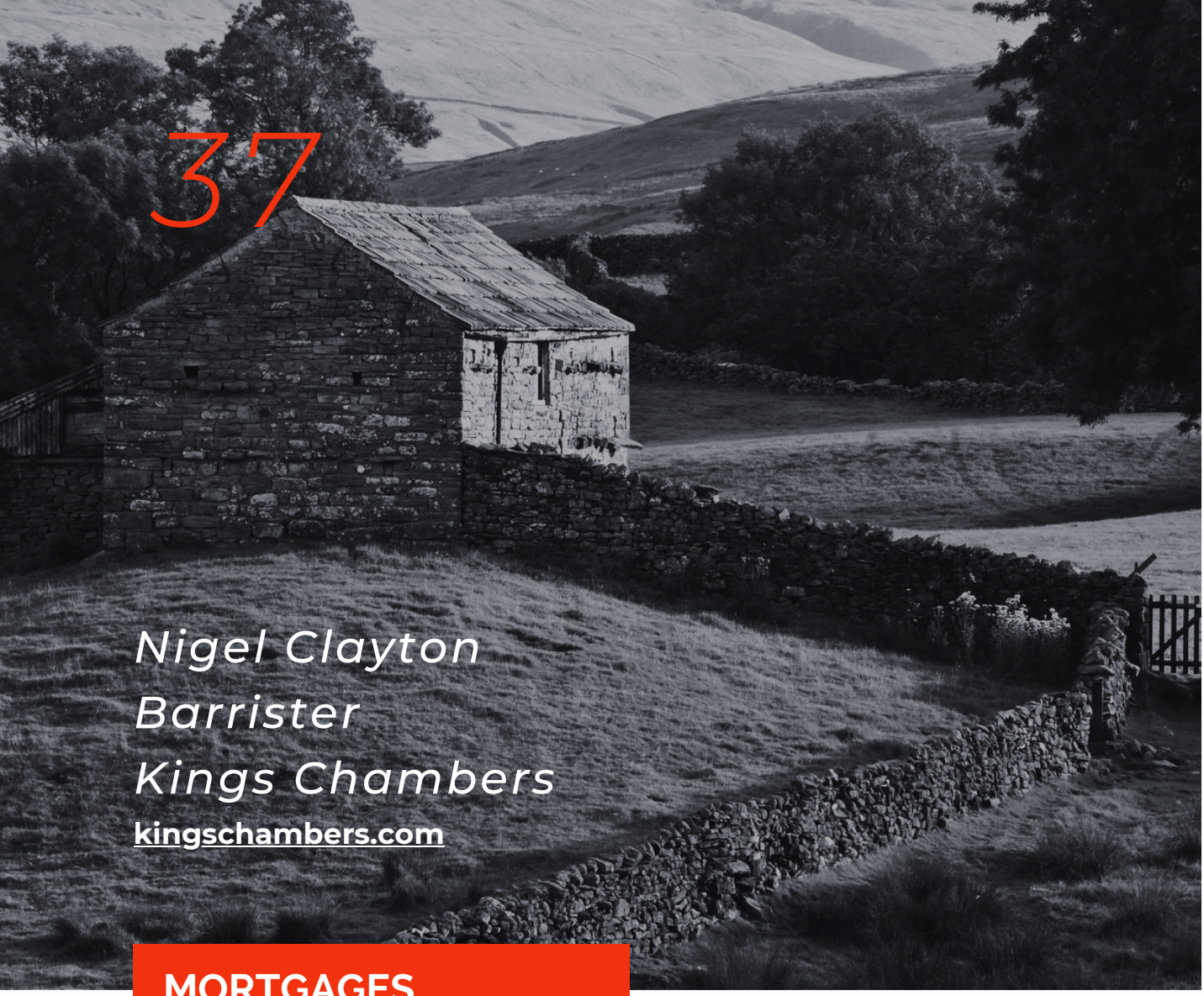
Rather more seriously, this sort of problem occurs from time to time. It used to cause real problems, but less so these days. It raises two, distinct, issues (1) whether the bank has a cause of action to, effectively, rescind the discharge, and (2) whether

the court (or HMLR) has the power to alter the register in consequence which, significantly in this case, involved consideration of whether there were exceptional circumstances which justified the court in not making the alteration. If the court is minded to rescind the discharge, it is difficult to envisage any circumstances in which it will not be appropriate to make the alteration.

Incidentally, the transcript contains a couple of other observations:

The judge expressed the view that CPR PD57AC (trial witness statements in the business and property courts) only applies to witness statements for use at trial; not on summary judgment applications.

The judge also expressed the view that for the purposes of CPR 19.8 (representative parties with same interest) the expression 'same interest' is to be interpreted purposively in light of the overriding objective and requires that the claims should raise a common issue or issues. Even though they may be divergent, provided they are not conflicting, the rule applies (following Google LLC v Lloyd [2022] AC 1217).



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MORTGAGES

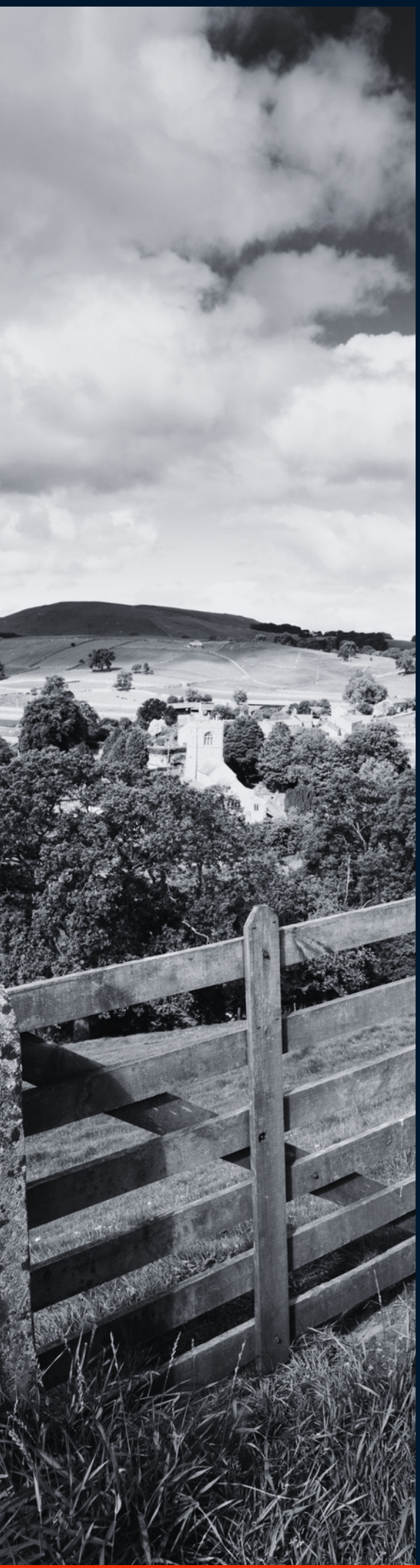
COMPANY CHARGES

Nigel Clayton discusses the case of MS Lending Group Limited v LVR Capital Limited in relation to company charges. Focal points consider the rectification of the companies register and making of administration.

Lending Group Ltd & Anor v LVR Capital Ltd & Anor [2023] EWHC 2509 (Ch) (04 August 2023). Judgement.

Summary

The High Court ordered rectification of the companies register to show that



two company charges remained 'outstanding' and then made an administration order in respect of the company.

Facts

Two lenders advanced £800,000 to a borrower company on the security of debentures which included floating charges, and which were registered at Companies House.

The sole director of the borrower company filed statements of satisfaction at Companies House incorrectly stating that the charges had been satisfied, based on promissory notes that he had issued in purported payment and redemption of the charges.

In default of payment, the lenders appointed receivers and subsequently issued administration applications (1) for rectification of the register at Companies House, and (2) for an administration order.

Issues

Whether and on what basis the court could order rectification of the Companies Register to correct the wrongful removal of company charges.

Held

(HHJ Hodge KC sitting as a Judge of the High Court): It was not open to the director to unilaterally seek to discharge the company's secured indebtedness by way of promissory notes. To the extent that the director had taken the view he could do so was 'plainly a legal nonsense.' The court had power to order rectification of the Companies Register pursuant to s 859M Companies Act 2006 where it was just and expedient to do so on the basis that there had been an omission or misstatement in any statement or notice delivered to the registrar, and (a) that the omission or mis-statement (i) was accidental or due to inadvertence or to some other sufficient cause, or (ii) is not of a nature to prejudice the position of creditors or shareholders of the company, or (b) that on other grounds it is just and equitable to grant relief.

There was clearly an omission or misstatement in the

purported statements of satisfaction which were false and that the provision of statements that are legally incorrect is some other sufficient cause in s 859M(2)(a)(i) or that it rendered it just and equitable to rectify the register in s 859M(2)(b). Rectification ordered.

A secured creditor under a floating charge had the power to appoint administrators under Para 14, Schedule B1, Insolvency Act 1986 (even if it had been wrongly marked as satisfied – per Re NMUL Realisations Ltd [2021] EWHC 94 (Ch)). The court was satisfied that the company could not pay its debts for the purposes of Para 35, Schedule B1. Alternatively, the court would have granted an administration order to the applicant lenders in their capacity as creditors of the company pursuant to Para 12, Schedule B1. The receivers were accordingly appointed as joint administrators.

Comment

We do not often cover company charges. A statement of particulars of a charge created by a company pursuant to s 859D Companies Act 2006 is required to be delivered to the Companies registrar for registration within 21 days after the date of creation of the charge pursuant to s 859A, and in default is void against a liquidator, administrator, or creditor of the company under s 859H unless an extension of time is obtained under s 859F.

Under s 859F(2) and (3) the court may on the application of a company or person interested and on such terms and conditions as seem just and expedient order that the period allowed for delivery be extended, on the ground that (a) the failure to deliver those

documents (i) was accidental or due to inadvertence or to some other sufficient cause, or (ii) is not of a nature to prejudice the position of creditors or shareholders of the company, or (b) that on other grounds it is just and equitable to grant relief.

The application is usually made by Part 8 Claim Form with witness evidence – see CPR PD 49A and see the notes in the White Book 2023, Vol 2 at 2G-45.
Note that the requirement to register particulars of a company charge at the Companies Registry is in addition to the normal requirement to register the charge at HM Land Registry.

For HM Land Registry practice and procedure in respect of the registration of company charges, see Practice Guide 29: registration of legal charges and deeds of variation of legal charges, para 4.

See also the HM Land Registry note – Avoiding Land Registry requisitions in respect of company charges.

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COMMERCIAL PROPERTY

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LAND REGISTRATION, RESTRICTION, AND LEGAL CHARGE

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COMMERCIAL PROPERTY

Ian Quayle discusses an interesting case dealing with a number of issues including the interpretation of a joint venture agreement, the use of a unilateral notice to protect an equitable charge and the application of S42(1)(a) of the LRA 2002.

Yarnold and others v Ziga and others [2023] UKUT 284 (LC) [2023] PLSCS 199. BAILII link.

Summary

The case concerned a joint venture agreement involving the Respondents investing in a property development. The investment was to be protected by a legal charge secured on the development.

The respondents contended that there was an implied term in the joint venture agreement that the land over which the investment was to be secured was not to be sold before the legal charge was registered.

In an effort to create some protection pending the registration of the charge the

Respondents applied to enter a restriction on the registered title. The appellants objected to that application.

Facts

The respondents invested in a property development on the understanding that their investment would be protected by the security of a legal charge over two parcels of land at Platt Bridge in Wigan. Before the charge was registered, the owner of the land contracted with the appellants for them to purchase parts of it. The appellants were parties to contracts to purchase leasehold interests in houses on the parcels of land which were to be subject to the charge.

When they realised their investment was not protected, the respondents applied to enter a restriction to prevent the disposition of the property under section 42(1)(a) of the Land Registration Act 2002, on the basis that it was necessary or desirable to prevent unlawfulness in relation to the disposition of the registered estates.

The First-tier Tribunal overruled the appellants' objections and directed the Chief Land Registrar to give effect to the respondents' application to enter a restriction on the registered titles of the land.

The appellants appealed.

Issues

- Was it appropriate for a term to be implied into the joint venture agreement and if so, what could be implied?
- Was the use of a restriction to prevent the disposition of the property compliant with S42(1)(a) LRA 2002?

Decision

Held: The appeal was dismissed.

1. The process of implying a term into the contract was not to become the rewriting of the contract in a way which the court believed to be reasonable, or which the court preferred to the agreement which the parties had negotiated. A term would be implied into a contract where it was necessary

to do so to give effect to the intention of the parties in the light of the express terms of the contract, commercial common sense and the facts known to the parties when entering into the contract: Marks & Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd [2016] EGLR 8 applied.

The four-part test for determining whether a term could be implied into an ordinary business contract was: (i) the term had to be necessary to give business efficacy to the contract; (ii) it had to be so obvious that it went without saying; (iii) it had to be capable of clear expression; and (iv) it was not to contradict an express term: Hallman Holding Ltd v Webster [2016] UKPC 3 applied.

2. The concept of necessity was not to be watered down. Necessity was not established by showing that the contract would be improved by the addition. The fairness of a suggested implied term was an essential but not a sufficient precondition for inclusion: Ali v Petroleum Company of Trinidad and Tobago [2017] UKPC 2 considered. The equity of a suggested implied term was an essential but not sufficient precondition for inclusion. A term

should not be implied into a detailed commercial contract merely because it appeared fair or because the court considered the parties would have agreed if it had been suggested to them. The stringent test was one of necessity, not reasonableness: Yoo Design Services Ltd v Iliv Realty Pte Ltd [2021] EWCA Civ 560 considered.

In the present case, there was a contractual obligation on the landowner to grant a charge, and once the money was handed over by the respondents, that obligation gave rise to an equitable charge which the respondents could have protected by the entry of a unilateral notice. They did not need any additional protection.

3. There was no doubt that the registration of the legal charge would come before any possibility of a sale. Thus, the investment would be "securitised" by the charge until the property has been sold; the charge would protect the respondents' interest and stop the property being sold without their consent.

It would lack business efficacy if the landowner could deprive the respondents of their security by selling parts of the land before a charge was registered. Viewed objectively, the parties could not be taken to have intended that the property would be sold before the legal charge was in place to provide the protection which featured in their agreement. Nor could it have been intended that the investor would simply rely on the landowner's voluntary restraint in not selling the property before the charge had been registered.

It would make no sense for the respondents' capital to be at risk for as long as it took to register a charge, and secure only after that. The parties must therefore have intended that the borrower would not be entitled to sell until the promised security was in place. A contractual fetter preventing the property from being sold before the security was in place was essential. Without it the lender's investment would be at risk, and the promised security would be illusory.

4. Hindsight could not determine what, objectively, the parties must be taken to have intended by their agreement. The question was how the parties intended the agreement to operate, and what obligations they were assuming to each other, not what remedies they would have anticipated if the agreement did not operate as they intended because NVC sold without waiting for the charge to be registered. The parties intended that the agreement would be secure and there would be no question of a sale before the legal charge was in place to provide that security.

The parties agreed on the form which the security was to take; there was nothing in the documents to suggest that the respondents might have to be content with the security of an equitable charge. A contractual term that the land would not be disposed of before the charge was registered was therefore necessary to give effect to the agreement that the respondents would be secured by a legal charge.

The grant of leases to the appellants were dispositions in breach of those terms. The registration of a restriction was justified to prevent that unlawfulness and permissible under section 42(1)(a) of the 2002 Act.

COMMERCIAL LEASES

PLUK

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Michael Lever
The Rent Review
Specialist

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COMMERCIAL LEASES

RENT REVIEW

Michael Lever provides the final installment of his series on How to do a Rent Review.

Introduction

This series provides an overview of the practicalities in England and Wales. Specific problems need particular attention; every property and every lease differs, so the series is not a substitute for specific advice.

As I say in my newsletter - Rent Review Matters - rent review is at the heart of commercial property. When a lease is completed, the property's value enters into the closed relationship of the actual

landlord and tenant. Without an agreed or ascertained open market rental value during the contractual term of the lease, the alternative would be a unilateral opinion. The outcome of a rent review is the direction - either positive or negative - the undistorted capital value is taking.

Commercial property markets

Commercial property caters for two markets: landlords and tenants. For landlords, the attraction is the combination of capital and rental growth for property performance. For tenants, it's the building for use and occupation for business development. Theoretically, both markets should be a partnership sharing the ups and downs. In practice, they are often at odds with each other. However, the conflict of interest is tenants who do not want to pay more than necessary and landlords competing with themselves.

In the landlord market, capital values become distorted when the objective fundamental value is out of sync with the subjective. The cause of the problem is the effect of interest rates having created a higher level than the fundamental value.

In the investment market for commercial property, the objective value is (1) the vacant possession value of the property and (2) its higher value when leased. Unlike the tenant's occupation, which is dynamic and busy, the landlord's occupation is monotonous, waiting patiently. Restless, subjective worth is symptomatic of a play on yield compression. Theoretically, a purchase price should be on (1) or (2). In practice, it is often an overpayment. So when the underlying rental value at the outcome of the review to market rent is lower than the rent payable before the review, despite the 'upward-only' cushioning the rent payable after the review is agreed or ascertained, the gambling on yield propels the investment into a higher risk than is sustainable. If the investment is mortgaged, and the loan-to-value covenant is breached, then the borrower is at the lender's mercy.

Understandably, tenants want to reduce property costs, minimise liabilities, and profit from the savings in their market. When they achieve their objectives, it is at the expense of their landlords.

Whether landlords can afford it depends upon the purchase date and the effect on net asset value. It is not simply a direct investment that can be affected adversely by the distorted value but also indirectly via a property fund or company whose shares are quoted on a stock exchange. Given that successful investment in the commercial property market hinges upon the words on a few sheets of paper, it shows how important it is for the outcome of a rent review to be an increase. This is why the trend is for index-linking rather than risk the cost of agreeing or ascertaining rent review to the open market value.

Despite template leases attempting standardisation and volumes of caselaw to iron out the creases, the commercial property market remains imperfect. In a perfect market, everything known about a property would be known by the landlord and the tenant, and neither would profit from the relationship.

Rent review complexities

In practice, 'how to do a rent review' is more than reading about the hypothetical lease, assumptions and disregards and applying the rent(s) of comparable evidence with the property in question. It is also about the provisions of the lease - the words and phrases that make up the totality of a lease, for it is the entire lease and any related documents that must be read for a rent review - many of which have a bearing on the rent such that a single word or subtle phrase can make a substantial difference to the rent.

In my experience of taking over negotiations from one of the parties frustrated by the failure of the other party to respond or counter-offer as much as is wanted, the tendency of what has gone on before is to have dived into the deep end of the rent to begin with as if that were the only way to start. My approach is to start at the shallow end, to agree on the factual common ground - for example, valuation area, terms and conditions in the lease material to the review, caselaw, etc. - before considering the evidence and how comparable it is. Where I am acting for the landlord, the tenant's surveyor invariably will assert that if I cannot provide any evidence supporting an increase, then it must be a nil increase. I

say that is nonsense since, per case law, a rent review is for the benefit of both parties, so we should work together to establish the market rent. Whether that cuts any ice depends upon the tenant's surveyor's stance. I often find that the tenant's surveyor expects me to do all the running so that all they need to do is find flaws in the reasoning.

Depending upon whom I'm up against or acting for makes a difference between whether I persevere or defeat the resistance by initiating the dispute procedure with the aim that the other party will baulk at how much referral is likely to cost, so concede.

As my approach takes time, generally longer than the client might envisage, and a lot longer when the dispute resolution procedure goes all the way to an award or determination for which carefully crafted representations are very time-consuming, the entire matter might take ages from start to finish.

I hope you have enjoyed this series and found it helpful. The next series, starting in January 2024, will be 'How to Do a Lease Renewal'.

Compliments of the Season.

Industry Event Calendar

Date	Provider	Details	Booking
09 Jan 10:00 AM - 11:00 AM	Redbrick Solutions and Conveyancing Data Services with Ian Quayle, IQ Legal Training	IQ Legal Training Webinar: Building Safety Act Update	Free, prior booking required. Link
09 Jan 2.00 PM	InfoTrack with Paul Addison, Managing Director of DevAssist	Webinar: Planning risks for commercial real estate transactions - what you and your clients need to consider	Free, prior booking required. Link
23 Jan 11:00 AM - 12:00 PM	IQ Legal Training with Ian Quayle	Commercial Property Forum 2024 – January	Free, prior booking required. Link
25 Jan 12:30 PM - 1:30 PM	IQ Legal Training with Ian Quayle	Webinar - Local Authority Lawyer Forum 2024 – January	Free, prior booking required. Link
29 Jan 2:00 PM - 4:00 PM	IQ Legal Training with Karen Sullivan	Webinar - Disability Equality Training: Improving Practice and The Experience of Disabled Clients	£80.00 per delegate Link
30 Jan 11:00 AM - 12:00 PM	IQ Legal Training with Zoe Upson	Webinar - Enhanced Communication Tips for Conveyancers	£40 per delegate Link

Industry Event Calendar

Date	Provider	Details	Booking
30 Jan 2:00 PM - 3:00 PM	IQ Legal Training with Ian Quayle and John de Waal KC, Essex Chambers	Webinar - Landlord and Tenant Act 1954	£40 per delegate Link
31 Jan 10:00 AM - 11:00 AM	Ian Quayle, IQ Legal Training in collaboration with Orbital Witness	Webinar - Key Residential Cases of 2023 and an Examination of What 2024 Holds	Free, prior booking required. Link
31 Jan 1:00 PM - 4:00 PM	IQ Legal Training with Ian Quayle	Webinar - Land Registration Issues for Commercial Property Lawyers 2023	£120.00 per delegate Link
20 Feb 11:30 AM - 12:30 PM	Redbrick Solutions and Conveyancing Data Services with Ian Quayle, IQ Legal Training	IQ Legal Training Webinar: Avoiding Negligence Claims in Residential Conveyancing	Free, prior booking required. Link
23 Feb 09:30 AM - 1:00 PM	Bath Publishing	Seminar: Planning & Environment Update 2024 (seminar + free book)	£175 + VAT per delegate Link
19 March 10:00 AM - 11:00 AM	Redbrick Solutions and Conveyancing Data Services with Ian Quayle, IQ Legal Training	IQ Legal Training Webinar: Rights of Way and Highway Issues - tips and traps for conveyancers	Free, prior booking required. Link

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