Guildhall CHAMBERS

dialogue

PROPERTY NEWS SPRING 2009

EDITORIAL

With Spring almost upon us, there is still little sign of those long awaited "green shoots of recovery". Increasingly, therefore, we are all having to turn our attention to areas of litigation that were more familiar in the dark days of the last recession. In light of these developments, this edition of our Property Team Newsletter concentrates on a number of areas that are receiving increasing attention in the courts.

With the dramatic escalation in mortgagee repossessions one of newest recruits to the team, Ross Fentem, considers the vexed question of brokers' commission and its potential effect on a mortgagee's security. Michael Selway, another new team member, offers a timely review of the law relating to tenancy deposit schemes. It is only now, almost two years after the material provisions of the Housing Act 2004 came into force, that failure to comply with the provisions of that Act are being appreciated when claims for possession are made.

Malcolm Warner considers the consequences on the collapse in the housing market as purchasers scramble to avoid contracts. Malcolm also gives consideration to the effects of the depressed market for developers and those with the benefit of options. William Batstone considers the hugely important result of the decision in *Mason v Boscawen* in causing a potentially prolonged agricultural rent freeze (as an unintended result of the fluctuations in the rate of VAT). Finally, I include a short word on further developments in the law relating to trusts of land since *Stack v Dowden*, including the significant decision in *French v Barcham* on the rights of trustees in bankruptcy to recover an occupation rent.

Tim Walsh, Editor

IN THIS ISSUE

Team news

As the new team leader I want to thank Ewan Paton for leading the team so well for the past 5 years and for all his hard work as editor of the newsletter, in which role he is now succeeded by Tim Walsh. I am pleased to announce two new members of the team. Ross Fentem was called in 2003 and joins us from Henderson Chambers in London. His practice covers all aspects of residential and commercial property law with a particular emphasis on mortgaged security, including mortgage fraud, and commercial landlord and tenant. Michael Selway joins the team after successfully completing pupillage and he is developing a busy practice in landlord and tenant, boundary and other property disputes. Full details of the team appear on the back page and, as always, please contact our clerk Charlie Ellis for details of rates and availability. In the year ahead we have a wide programme of seminars to look forward to. Several of us are speaking on various topics to the Bristol Law Society; Malcolm Warner and John Virgo are reprising their double act on probate litigation and fraud in conveyancing transactions; Malcolm will also be speaking about property issues in a recession, proprietary estoppel and constructive trusts, and some solutions to tensions in partnerships; and Raj Sahonte and Tim Walsh are presenting their successful papers on contentious probate and alternatives to such claims. Full details will be supplied but if you would like us to come and speak to you on any particular topic then please talk to Charlie. In 6 months or so we will bring you another newsletter and between now and then we hope to see you at a social function or two that we are planning.

William Batstone

A false sense of security?

This article analyses the phenomenon, frequently now experienced by practitioners bringing possession claims in the county courts, of a mortgagor claiming that the charge over property is unsafe because of a "secret commission" paid to the mortgage broker.

In the third quarter of 2008, the number of claims issued in England and Wales seeking possession of mortgaged properties reached 150,000. There is still some way to go until the 1991 high water mark of 180,000 is reached, but we are now far closer to that point than to the 2002 low of 80,000 claims. It is no surprise that mortgagors and their representatives are making use of every argument available to delay or prevent the mortgagees from retaking possession of their properties. Increasingly popular, particularly in the sub-prime arena, is a tactic which seeks to exploit a failure by mortgagees and mortgage brokers to inform mortgagors in advance of details of any commission, inducement or procurement payments to be made by the mortgagees to the brokers. Once properly understood, the ramifications of the "secret commission" line of the defence require careful tactical decision-making by mortgagees in order to avoid the risk to the security.

The key authority on which mortgagors rely is *Hurstanger Ltd v Wilson* [2007] 1 WLR 2351. Although it has been bubbling away in the consciousness of litigators for a couple of years now, the exponential increase in possession claims has recently led to a very marked resurgence in the popularity of its citation in the county courts. The situation in *Hurstanger* was, and is, commonplace. Sub-prime mortgagors retained a broker to act on their behalf. As their agent, he owed fiduciary duties to the mortgagors. However, the broker agreed with the mortgagee to be paid a commission, and therefore put his interest (in obtaining the best commission) in conflict with his duty (to obtain the best mortgage terms). The mortgage offer documentation included a statement by the mortgagee that *"We will pay monies to your broker strictly in accordance with your signed authority by the deduction from this advance; this is not a condition of the loan."* No other correspondence or

communications made reference to the fee. A commission of £240 was paid on completion. The sum was not disclosed.

Tuckey LJ held at [34] that the broker could only accept the commission if the mortgagors had given their fully informed consent to it. Without such consent, receipt by the broker of the commission would be a breach of his fiduciary duty. Additionally, payment by a mortgagee who knew of the agency gave rise to accessory liability. The cause of action was equitable, and therefore the available remedies were those provided by equity: essentially, the court had to consider rescission of the loan and charge, and equitable compensation.

The result was something of an equivocation. The mortgagee had to pay as equitable damages to the mortgagors the sum of the commission plus interest. However, rescission was refused in the exercise of the court's discretion. In Tuckey LJ's words, this was a "halfway house" case, where there had been sufficient disclosure to negate secrecy, but nevertheless the mortgagors' informed consent was not obtained. The documentation was not ambiguous but it was muddled. It should, said Tuckey LJ, have been clearer and it should have been accompanied by a warning (recommended by the Office of Fair Trading) that payment of the commission may prevent the broker from giving independent advice. Therefore: *"The agreement and charge are fair and have been held to be enforceable... To rescind the transaction altogether would be unfair and disproportionate. This is my view irrespective of whether the [mortgagors] would be able to make counter-restitution"* at [51].

Hurstanger caused some disquiet among mortgagees, but in the final analysis it is best viewed as a qualified victory for the lender. The security was safe and the matter was eventually remitted to the county court to consider enforcement of the charge. Mortgagors relying on *Hurstanger* have found that they are not on as sure a footing as they expected. What should be the real cause for concern to charge-holders is Tuckey LJ's comment at [47]: if this had been a "true" secret mortgage commission case and not a halfway house *"a difficult question would have arisen as to whether they were entitled to rescission as of right."* This is the ramification, firmly putting the charge over the property in jeopardy, that calls for deeper consideration.

Receipt by an agent (broker) of a commission from the other party to a transaction (mortgagee) without disclosure to the principal (mortgagor) is treated in law as a bribe, and therefore as a fraud on the principal. As well as allowing for a claim in equity, a bribe gives rise to a claim at law, with different remedies available from those in a purely equitable claim. Though emotive, the label "bribery" is not referable to the mortgagee's motives or intentions. In *Ross River Ltd v Cambridge City Football Club Ltd* [2008] 1 All ER 1004, Briggs J said at [218] that *"[b]ribery is established wherever the payment brings about the requisite conflict of interest which is not disclosed to, or consented to, by the principal. It follows that in a case of non-disclosure bribery may be established even where both the payer and the agent were unaware that they were doing anything wrong."*

In the mortgage world, there may therefore be a bribery claim at law where (i) a mortgagee pays a commission to the broker who is acting for the mortgagor, (ii) the mortgagee knows that the broker is so acting, and (iii) the mortgagee fails to disclose to the mortgagor that he has made the payment: see *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573. It is no defence for the mortgagee to say that it thought the broker would disclose or had disclosed the commission. Where the mortgagee takes the risk of non-disclosure and it eventuates, the mortgagee must shoulder the consequences: see *Logicrose Ltd v Southend United Football Club* [1988] 1 WLR 1256.

What are those consequences? In the first instance, the commission (bribe) may be claimed at common law as monies had and received. But because bribery is a species of fraud, then in principle the mortgagor is entitled without court intervention to rescind the contract (subject to the usual bars of delay, affirmation, intervention of third party rights and impossibility of counter-restitution): *"Where a contract ensues from [dealings which involve a secret commission], the principal is entitled to rescission if he neither knew nor consented to the payment"* (*Ross River* at [203]).

The significance of this is best illustrated by contrasting rescission at common law with rescission in equity. Where the mortgagor chooses or is obliged only to rely on his equitable claim, as in *Hurstanger*, rescission is a remedy made available by the court. Two important consequences follow. Firstly, there is a discretion whether to order rescission. In *Hurstanger*, a relatively novel analysis of the proportionality of the remedy to the fault led to rescission being refused. Secondly, it will usually be a condition of an order for rescission that the mortgagor give counter-restitution for benefits received: in short, that the mortgagor repay the monies advanced together with interest. In the mortgage market generally and in particular in the sub-prime arena in which *Hurstanger*-based arguments are becoming common, it is not unfair to suggest that an order for counter-restitution is unlikely to be made.

Where, however, the mortgagor is entitled to rely on his common law claim, his disaffirmation of the loan occurs not following an order of the court but instead upon communication to the mortgagee of his election to rescind. The contract for the loan and for the provision of security is avoided ab initio, as if it were never made, and it is not a necessary condition of his rescinding the contract that he provide counter-restitution. Although there is some confusion in the authorities, the best view appears to be that he need not tender counter-restitution of the loan monies: see O'Sullivan, Elliott and Zakrzewski, *The Law of Rescission* (2008) at [14.58].

The effect on the mortgagee may therefore be severe. After a comparably small "secret commission", an election to rescind by the mortgagor on proper grounds in principle avoids the loan and permits him to treat the security as unenforceable against him. The mortgagee has a right to demand counter-restitution, but it does so as an unsecured creditor obliged to bring a Part 7 claim for the monies advanced (less payments) plus interest. Although it would be expected that summary judgment would be granted in such a case, in order to return to a position of security the mortgagee must apply for a charging order, which leads to the process being strung out further with the risk of the registration of prior charges increasing all the while.

What, then, should be done? For the future, the answer is obvious. The safest course, adopted by some of the larger lenders, is not to pay commission at all. For the rest, the FSA's Mortgage Conduct of Business sourcebook (MCOB) now requires at paragraph 5.6.113 that a mortgage illustration issued by a mortgage intermediary (broker) must include *"a clear statement of the amount payable ... by the mortgage lender to the mortgage intermediary, or to any third parties"* as well as the names of the parties to the commission. Paragraph 5.6.114 goes on to suggest that where the commission is £250 or less, the amount of the commission need not be stated ("no more than £250" would suffice). As a matter of regulatory law, mortgagees can rely on MCOB, but in the private property law arena in the county courts, they should be more circumspect. In *Hurstanger*, the commission payment was £240. To avoid delay or further risk, full details of any commission must be provided (and accepted by mortgagors' signature) at the earliest opportunity.

For past transactions, details and documents are the key to staving off the delay and uncertainty that "secret commission" defences bring. Courts are conscious of the apparent windfall that mortgagors are trying to obtain, and it rightly does not take a great deal of evidence to persuade the District Judges that a particular commission was not vitiated by secrecy. Mortgagees are therefore well advised in commission cases to ensure that any documentation illustrating mortgagors' knowledge of and consent to commission is available at the first hearing to nip in the bud the expense of adjournment. To avoid a finding of true secrecy where the documents do not tell an unambiguous story, however, it may be necessary to obtain the oral evidence of brokers, together with the disclosure of their files. Practicality suggests that mortgagees are likely to prefer carefully negotiated settlement with their customers with a view to preservation of the security, rather than run the risk of lengthy and uncertain proceedings.

Ross Fentem

The statutory framework

The rules on tenancy deposit schemes – which apply to tenancies created from 6 April 2007 – are contained in the Housing Act 2004, at sections 212-215 and schedule 10. Section 212(2) defines a 'tenancy deposit scheme' as 'a scheme which is made for the purpose of safeguarding tenancy deposits paid in connection with shorthold tenancies [i.e. assured shorthold tenancies under the Housing Act 1988] and facilitating the resolution of disputes arising in connection with such deposits'. Section 212(8) defines 'tenancy deposit' as meaning 'any money intended to be held (by the landlord or otherwise) as security for the performance of any obligations of the tenant, or the discharge of any liability of his, arising under or in connection with the tenancy'.

Any tenancy deposit paid to a landlord in respect of an assured shorthold tenancy must be dealt with in accordance with an 'authorised scheme', and no landlord may require the payment of such a deposit if it is not to be dealt with in this way (section 213). The two types of 'authorised scheme' which the 2004 Act provides for are 'custodial' schemes and 'insurance' or 'insurance-based' schemes (schedule 10). In the following paragraphs, I outline the basic features of those schemes; I have tried not to go into too much detail (in particular, I have not set out the prescribed time limits for complying with the schemes' various requirements), but I hope to have given a useful introduction to the rules on tenancy deposit schemes.

Under a **custodial scheme**, the tenant pays the deposit to the landlord at the start of the tenancy, and the landlord pays the deposit into a designated account held by a 'scheme administrator'. At the end of the tenancy, if the landlord and the tenant are able to agree how the deposit should be divided between them, they should notify the scheme administrator, who will pay out the deposit in accordance with the parties' agreement. If, however, there is a dispute as to who is entitled to the deposit, the scheme administrator will continue to hold the deposit until it has been determined – either by the scheme's dispute resolution service or by the courts – who is entitled to the deposit. Once a decision has been made, the scheme administrator should be notified, and he must arrange for the deposit to be paid out in accordance with the decision.

"If there is a dispute as to who is entitled to the deposit, the scheme administrator will continue to hold the deposit until it has been determined..."

Under an **insurance scheme**, the tenant pays the deposit to the landlord at the start of the tenancy, and the landlord retains the deposit. At the end of the tenancy, if the landlord and the tenant can agree how the deposit should be divided between them, the landlord will repay the agreed amount to the tenant. If, however, there is a dispute as to who is entitled to the deposit and the landlord has not repaid the deposit to the tenant, the tenant should notify the scheme administrator, who must direct the landlord to pay the disputed amount into a designated account held by the scheme administrator. It will then be necessary for the scheme's dispute resolution service or, alternatively, for a court to determine who is entitled to the disputed amount. Once a decision has been made, the scheme administrator should be notified, and must pay out the disputed amount in accordance with that decision. Where the landlord fails to pay the disputed amount into the scheme administrator's designated account, the scheme administrator must still pay the amount found to be due to the tenant by the dispute resolution service or the court. The scheme administrator will then seek to recover this amount from the landlord. The scheme administrator must maintain adequate insurance in respect of failures by landlords to comply with the scheme's requirements.

In addition to protecting the tenancy deposit under a custodial scheme or an insurance scheme, the landlord must give the tenant certain details about how their deposit is protected, including:

- the contact details of the tenancy deposit scheme;
- the contact details of the landlord or agent;
- how to apply for the release of the deposit;
- information explaining the purpose of the deposit; and
- what to do if there is a dispute about the deposit.

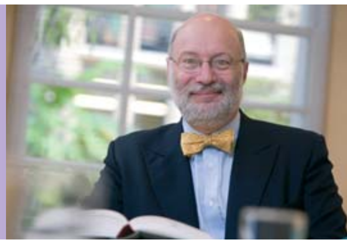
Section 214 provides that if the landlord is not protecting the tenant's deposit in accordance with one of the schemes outlined above, or has failed to give the tenant the required details about how the deposit is protected, then the tenant can make an application to the county court. If, on such an application, the court is satisfied that the landlord has not complied with the statutory requirements, then it must, as it thinks fit, either (i) order the person who is holding the deposit to repay it to the tenant, or (ii) order that person to pay the deposit into the designated account held by the scheme administrator under a custodial scheme. The court must also order the landlord to pay the tenant a sum of money equal to three times the amount of the deposit.

In addition, section 215 provides that the landlord may not give the tenant a section 21 notice (i.e. a notice under section 21 of the Housing Act 1988) at a time when the deposit is not being held in accordance with one of the above schemes, or certain other of the statutory requirements have not been complied with. Clearly, therefore, the rules on tenancy deposit schemes should be borne in mind when dealing with a case in which a landlord is seeking to recover possession of a property let under an assured shorthold tenancy after the new rules came into effect.

A useful source of guidance in respect of the rules on tenancy deposit schemes is the Directgov website, which can be found at *http://www.direct.gov.uk/en/TenancyDeposit/index.htm*.

Michael Selway

Conveyancing, development and options



Conveyancing

It is notorious that domestic conveyancing has died a death along with the purchase and sale of development sites. However we are seeing the after effects of purchasers scrambling to get out of contracts which are now uneconomic or where mortgage funding has been withdrawn.

Notices to Complete. It is so important to make sure that if you are serving a Notice to Complete that your client is in fact ready willing and able to complete. Obviously a wriggling purchaser will seize on any excuse to avoid the contract entirely so it is desperately important to check the vendor's position with minute care before serving the notice.

There is a common misconception that the ability to complete only needs to be shown at the time of expiry of the notice. In fact it should exist at the moment the notice is served and continue throughout its duration because the recipient can turn up the next day or any time until the notice expires and say "here I am ready, let's do it". Classically the server should be "poised" – see *Northstar v Brooks* [2005] EWHC 1919 and Emmett on Title at §8.032.

Deposits. Purchasers seem to have a fatalistic attitude to deposits when they cannot complete. This may explain why one so rarely sees in practice any attempt to recover them.

The Court has an unfettered discretion to order their repayment under Section 49(2) of the *Law of Property Act 1925*. In the writer's experience the Courts dislike the vendor retaining anything like an appreciable windfall. However in the recent case of *Midill (97PL) Ltd v Park Lane Estates Ltd*. [2008] EWCA Civ 1227 the Court of Appeal reviewed all the authorities and emphasised that deposits will only be repaid in exceptional circumstances and the possibility of a windfall was not an exceptional circumstance of itself.

In a world where less than 10% deposits are the norm the ability to sue for the balance of a full deposit is important. Consideration should be given to seeking summary judgement partly because there may in fact be no real defence (c/f applying under s. 49(2) as above) and, in any event, with a purchaser who may be in wider financial difficulties it is not sensible to hang around.

Development

Land banks may be in the deep freeze for the moment but that does not mean they should be forgotten about.

Option Rights. See the next section but on a general plane option expiry dates should be diarised and thought given to whether and how to extend any that are due to expire (see below).

Site Development Problems. Now is the prefect time to sort out those problems that were known about when the site was bought and it was decided to buy now and sort out later. It is a good time to double check titles for any other problems too. One important consideration is that a title problem or suchlike may blight a site in a more difficult market or delay a sale whilst the problem is sorted out (and an urgent sale may be necessary because of the client's finances).

A neighbour may be much more easily faced down over a claimed right of way now when money is tight rather than when development might be moving again. Tactically a threat that unless a confirmatory deed/transfer is signed up to (perhaps with some modest payment) an application will be made for declaratory relief in the Chancery Division has been found to work wonders. This is a very useful way of stopping the problem of neighbours who assert rights but are happy to let the developer stew.

Options

All options should be reviewed whether acting for grantor or grantee. What may have seemed innocuous provisions 5 years ago and been forgotten may need thinking about carefully in the present climate.

Put and Call Options. It is by no means unusual to see put and call options and developers in good times may not have been too bothered about agreeing to them. Now a put option may be very much a poisoned chalice – something for developers to seek to deal with by negotiation and for the vendor to be properly appraised of his negotiating position.

Extensions. A well drawn option may have the ability to extend incorporated within it. Exercising the right to extend needs care to avoid arguments, a case in point being *Rennie v Westbury homes (Holdings) Ltd* [2007] 2 P&CR 239 (where the reasonable recipient test in *Mannai* came to the rescue).

Any new agreement which extends an existing option has a disarming attraction of suggesting the existing option is given a new lease of life. This is not in fact the preferred view. What in fact is happening is that a new option is being granted albeit maybe on old terms (save length) and this new creation must comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (see the useful discussion in Barnsley's Land Options 4th Ed § 2-032). Realise also the consequential need – if this view is correct – of making new searches and registrations. Existing extensions or variations of land contracts which do not create a new contract which complies with Section 2 (and especially "supplemental" documents) are a fruitful area to avoid contracts.

Malcolm Warner

VAT on rent is itself rent

The agricultural holdings world has been shaken by the decision on 18 December 2008 of Mr Justice Lewison in *Mason v Boscawen* [2008] EWHC 3100 (Ch).

If a tenant with security of tenure under the Agricultural Holdings Act 1986 does not comply with a notice to pay rent then the landlord can serve a notice to quit which allows him to recover possession without having to satisfy the Agricultural Land Tribunal that a fair and reasonable landlord would insist on possession. Richard Mason has lived and farmed at Great Trewirgie, Probus, Cornwall for over 20 years but he has now lost his tenancy because he failed to comply with a notice that required him to pay "£6,047.94 rent inclusive of VAT". The rent payable in respect of the 225 acres of land, but not the farmhouse, had been subject to VAT since the landlord, the Hon Evelyn Boscawen, had elected in 2001 to waive the exemption from tax of the supply of an interest in land. Mr Mason did not pay the amount demanded and was served with notice to quit. Because of the draconian effect of failure to comply, a notice to pay is judged strictly and if it overstates the rent due by any amount it will be invalid and a resulting notice to quit will be ineffective to terminate the tenancy. Mr Mason demanded arbitration and on the case stated by the arbitrator he argued that the VAT element of the £6,047.94 was not rent so that the notice to quit was bad. For the detailed reasons given in his judgment, Lewison J found against Mr Mason and decided that the VAT element was itself rent so that the notice to quit was good. Lewison J gave him permission but Mr Mason did not appeal.

The effect of the decision is clearly devastating for Mr Mason but it has wider ramifications. The general principle under the 1986 Act is that rents may be reviewed every 3 years. Section 12 provides for arbitration of rent "as from the next termination date" and para 4(1)(b) of Schedule 2 introduces the 3 year cycle by saying that a demand for arbitration shall not be effective for the purposes of section 12 if the next termination date following the date of the demand falls earlier than the end of 3 years from the date of a previous increase or reduction of rent whether made under section 12 or otherwise. The next termination date for these purposes is the next day following the demand on which the tenancy could have been determined by 12 months' notice to quit served at the same time as the demand. Thus for a Lady Day tenancy, a demand served in February 2009 would be aimed at a reviewed rent effective from 25 March 2010. For such a demand to be effective, there must have been no increase or reduction in rent, whether the result of arbitration under section 12 or otherwise, since 25 March 2007. The problem is that the rate of VAT was reduced to 15% on 1 December 2008 and it is proposed that it will return to 17.5% on 1 January 2010. So in respect of 1986 Act tenancies where the landlord has opted to tax there will have been a reduction of rent on 1 December 2008 and there will be an increase on 1 January 2010. So in the example given, there could not be a review of the rent until 25 March 2013 at the earliest. At a time when agricultural rent increases are being seen more and more, the decision in *Mason v Boscawen* is a blow for landlords and an unexpected bonus for tenants of farms where the option to tax has been exercised.

Lewison J said in concluding his judgment: "I do not reach this conclusion with any satisfaction. The consequences of this conclusion, if correct, make it urgent for legislation to be rapidly passed if recent political events are not to have the effect of causing an inadvertent and possibly prolonged agricultural rent freeze." The Tenancy Reform Industry Group, the group responsible for the reforms of agricultural tenancies law in 2006, is being re-convened with a view to pursuing a legislative solution to what Lewison J described as the unintended consequences of his decision.

William Batstone

Further developments

Over the last couple of newsletters we have endeavoured to keep you up to date with developments in the law of trusts of land in the context of cohabitation disputes since the most recent House of Lords' pronouncements in *Stack v Dowden* 2007 2 AC 107 HL. Since our last newsletter there have been no major Court of Appeal decisions to report and therefore much uncertainty remains (particularly in relation to the contributions necessary for so-called "implied bargain" constructive trusts). Two recent decisions do, however, merit particular note.

Mizra v Mizra [2009] EWHC 003 (Ch) was a factually complicated first instance decision. It is significant because in *Stack v Dowden* Lady Hale acknowledged that parties' intentions as to their beneficial interest may change post-acquisition, for instance "where one party has financed... an extension or substantial improvement to the property". Subsequent decisions of the Court of Appeal in *James v Thomas* [2007] EWCA 1212 and *Morris v Morris* [2008] EWCA 257 have been said to demonstrate that in the absence of an express post-acquisition agreement a court will, however, be slow to infer from conduct alone that parties intended to vary existing beneficial interests established at the time of acquisition. In *Mizra v Mizra* one of the parties sought to argue that a constructive trust had arisen based upon certain payments to her father. On the facts it was unclear whether she had made those payments by way of loan or otherwise. Mr. Stephen Smith QC, sitting as a Deputy Judge of the Chancery Division, rejected any arguments that an implied bargain constructive trust had come into being. Applying *Lloyds Bank v Rosset* [1991] 1 AC 107 and *Stack v Dowden* he observed that *"An interest under a resulting or constructive trust of the type claimed [i.e. where not express] is not a default mechanism which springs into operation when no other viable means of repayment of funds is evident: the claim must have some foundation in the actual, inferred or imputed intentions of the parties"*. It should be appreciated, however, that the dividing line between loans and beneficial interests is not always clear cut. It has been suggested elsewhere, for example, that loan money may later generate a trust for the lender if assimilated de facto into the provision of the purchase price. One example may be where the lender, acting in reliance on a promise of beneficial entitlement, never makes any attempt to recover either capital or interest.

In *French v Barcham* [2009] 1 All ER 145 the court was concerned not with the existence of a beneficial interest but with the equitable account that should be undertaken. Mr. and Mrs. Barcham had acquired the material property as joint legal owners. A bankruptcy order was made against Mr. Barcham in 1994. It was common ground that the Barchams had acquired the material property as beneficial tenants in common in equal shares. The question that arose was as to what, if any, deductions should be made from Mrs. Barcham's half share of the net proceeds of sale to reflect the fact that since Mr. Barcham's bankruptcy Mrs. Barcham had remained in occupation. Stephen Davies QC and Stefan Ramel (both members of Guildhall Chambers) succeeded in arguing on appeal that Mrs. Barcham's half-share should be reduced by a sum equal to one half of the property's letting value from time to time since Mr. Barcham's bankruptcy. This is an important decision which clarifies the effect of the *Trusts of Land and Appointment of Trustees Act 1996*.

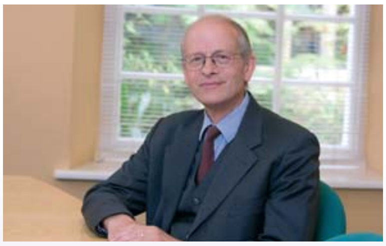
An essential prerequisite of the power to award compensation under section 13(6) of the 1996 Act (e.g. what may loosely be termed an occupation rent) is the entitlement under section 12 of the beneficiary claiming the compensation to occupy the land, i.e. the right of the beneficiary to occupy the land at any time by reason of that interest. What triggers the award of compensation is the exclusion of that right of occupation. A trustee in bankruptcy has no statutory right of occupation because of the terms of section 12(2) of the Act (there is no right to occupy "if it is either unavailable or unsuitable" for occupation by the beneficiary) and there is therefore no scope for the operation of section 13.

"It should be appreciated that the dividing line between loans and beneficial interests is not always clear cut. It has been suggested elsewhere, for example, that loan money may later generate a trust for the lender if assimilated de facto into the provision of the purchase price."

In *Stack v Dowden* it had been stated that the statutory powers in the 1996 Act had replaced the old doctrine of equitable accounting under which a beneficiary who remained in occupation might be required to pay an occupation rent to a beneficiary who was excluded from the property. *Stack v Dowden* was, however, a case in which both parties had a right of occupation and, in *French v Barcham*, Blackburne J. expressed the view that the House of Lords were not thereby suggesting that in cases where one of the parties has no statutory right of occupation, the statutory provisions had the effect that that party could no longer claim an occupation rent in any circumstances whatever. In short, the statutory scheme of the 1996 Act has not extinguished the role of the old fashioned equitable account which can still be called upon where the statutory scheme does not apply. This will be particularly relevant in accounts sought by trustees in bankruptcy. It may also have far wider relevance in view of the fact that section 13 appears to only look at the matter prospectively in the context of an occupying beneficiary's continued occupation. There may, therefore, be a wide range of circumstances where both beneficiaries had a right of occupation but the statutory regime would not apply.

Tim Walsh

Property law team



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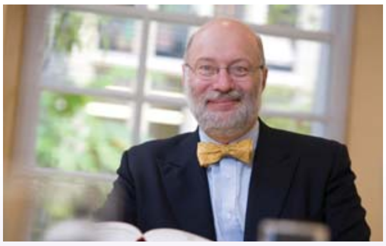

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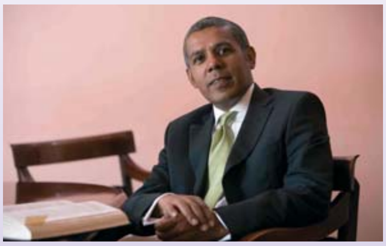

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