Hot Cases: Case Law Roundup

Kate Harrington & Jay Jagasia
14 March 2024

Guildhall CHAMBERS

THE CASES

- *Nazir v Begum* [2024] EWHC 378 (KB) – AP
- *Gill v Lees News Ltd* [2023] EWCA Civ 1178 – LTA1954
- *Brown v Ridley* [2024] UKUT 14 (LC) – AP
- *Fosse Urban Projects Limited v Whyte* [2023] UKUT 286
- *Reeve v McDonagh* [2024] EWHC 439(Ch)
- *TUI UK Limited v Griffiths* [2023] UKSC 48

Guildhall CHAMBERS

Nazir v Begum: AP & Statutory Trusts

- High Court appeal (Freedman J) – handed down on 21 Feb 2024
- First higher authority on whether trust exception under para 12 of Schedule 6 of LRA2002 applies to statutory trusts which arise upon administration of a deceased's estate

Guildhall CHAMBERS

Nazir: Background

- Disputed land (DL) owned by Cs' father who died intestate in 2010
- Cs obtained letters of admin in 2019
- Cs registered as proprietors of DL in 2022
- Claim for possession of disputed land
- D relied on defence under s.98(1) LRA2002 = AP for 10 years (3rd Condition)
- D succeeds at trial – trial was directed at whether possession could be made out
- Cs appeal = cannot establish 10 years because of trust exception – statutory trust created in 2019 during 10-year period
- First time point raised on appeal (*Singh v Dass* [2019] EWCA Civ 360)

Guildhall CHAMBERS

Nazir: Trust Exception

Para 12 of Schedule 6 LRA2002:

A person is not to be regarded as being in adverse possession of an estate for the purposes of this Schedule ***at any time when the estate is subject to a trust, unless the interest of each of the beneficiaries in the estate is an interest in possession****.*

Guildhall CHAMBERS

Nazir: Statutory Trust

S.33(1) of Administration of Estates Act 1925:

On the death of a person intestate as to any real or personal estate, that ***estate shall be held in trust by his personal representatives*** *with the power to sell it.*

Not a trust in conventional sense because no identifiable property or identifiable beneficiaries until administration brought to an end – PRs own legal and beneficial title during administration

Guildhall CHAMBERS

Nazir: Authorities on the Topic

- *Ruoff & Roper* – considered arguable that trust exemption applies to statutory trusts
- HMLR PG4 (s.3): "*arguably this means that an application cannot be made where, at any point during this period, the registered proprietor at the time (i) was dead and their estate was being administered…*"
- BUT argument rejected in *Best v Curtis* (FTT – Judge Elizabeth Cooke as she then was)
- *Megarry & Wade* – consistent with *Best*
- *Jourdan & Radley-Gardner* – consistent with *Best*

Guildhall CHAMBERS

Nazir: Outcome

- Trust exemption does not apply to statutory trust created by s.33(1) of 1925 Act
- Statutory trust is not a real trust and exemption should be construed as only applying to conventional trusts
- Importantly, under LA1980, 'trust' incorporates wider definition derived from s.69(17) of Trustee Act 1968 which extends to PRs – LRA2002 did not
- Extending exemption to statutory trust would extend to a trust without beneficiaries and would mean that qualification under para 12 ("*unless the interests of each of the beneficiaries in the estate is an interest in possession*") would be difficult to apply
- Statutory mischief – contrast successive interests and statutory trusts where former could result in beneficiary not coming into possession for significant period of time (> 10 years) but under latter administration should come to end quicker (< 10 years)

Guildhall CHAMBERS

Nazir: Implications

- Different treatment between LA1980 and LRA2002 – trust exemption broader in latter even though former regime intended to be more restrictive
- Trusts arising on bankruptcy?
- Duties of PRs – if time runs, then should they be more vigilant and take steps to stop time
- Position of beneficiaries of estate – have no direct means of stopping time until estate administered

Guildhall CHAMBERS

Gill v Lees News Ltd: LTA1954

- Nothing to see here!
- Grounds A, B and C – discretionary grounds
- (1) When must Ground A be established?
- (2) Scope of value judgment: "*the tenant ought not to be granted a new tenancy*"
- First decision from CA directly on those issues

Guildhall CHAMBERS

Gill: Grounds A, B & C

- **Ground A**: "*where under the current tenancy the tenant has any obligations as respects the* ***repair and maintenance*** *of the holding, that the tenant ought not to be granted a new tenancy* ***in view of the state of repair of the holding****, being a state resulting from the* ***tenant's failure to comply with the said obligations***"
- **Ground B**: "*that the tenant ought not to be granted a new tenancy in view of his* ***persistent delay in paying rent*** *which has become due*"
- **Ground C**: "*that the tenant ought not to be granted a new tenancy in view of* ***other substantial breaches*** *by him of his obligations under the current tenancy,* ***or for any other reason*** *connected with the tenant's* ***use or management of the holding***"

Guildhall CHAMBERS

Gill: Facts

- T serves notice which is met by counter-notice relying on Grounds A, B & C
- Trial judge found at date counter-notice served (1) substantial disrepair and T in breach of repairing covenant and (2) T had persistently delayed paying rent
- BUT also found that T had remedied disrepair by date of hearing and delay in paying rent was minor and neither would reoccur
- Accordingly, judge decided L had not established that T ought not to be granted new tenancy
- First appeal dismissed (Richards J)
- Second appeal to CA

Guildhall CHAMBERS

Gill: Ground A & Timing Point

- What is the material time for assessing state of repair?
- (1) Date of notice or counter-notice
- (2) Date of hearing
- (3) Not a single date

Guildhall CHAMBERS

Gill: Earlier Learning on Timing

- *Betty's Cafes* – Ground F case where intention to demolish or reconstruct is to be established at date of hearing – *obiter* observations in CA and HL that Ground A not confined to one particular date and position at date of notice and date of hearing should be considered
- Romer LJ: "*It is, of course, very unlikely that a landlord would rely on any of these grounds of opposition unless they in fact existed when he served his counter-notice, but I should have thought it reasonably plain that subsequent events would be relevant and admissible in relation to the tenant's repairing obligations…*"
- CA in *Gill* did not feel confined by previous case law or statutory words to confine Ground A to single point in time

Guildhall CHAMBERS

Gill: What time is it?

- Not a single date – Ground A falls into line with Grounds B & C
- Lewison LJ: "*What has happened between the date of the notice…and date of the hearing is plainly relevant; and doubtless in many cases it will be given considerable (or even decisive) weight…the tenant has a clear incentive to remedy any breaches…But it would be too prescriptive to say that breaches…at the date of the notice should be ignored if they have been remedied by the date of the hearing. If the tenant has a lamentable record of performance and only puts things right at the last minute that is, in my judgment, something that the court can legitimately take into account*"

Guildhall CHAMBERS

Gill: Scope of Value Judgment

- "*Ought not*"
- (1) Should value judgment be approached solely from perspective of L, with any hardship to T ignored?
- (2) Should value judgment be confined to matters relating to particular ground of opposition?

Guildhall CHAMBERS

Gill: Whose Perspective?

- *Lyons v Central Commercial Properties* [1958] 1 WLR 869 – Morris LJ: "*court has to ask itself whether it would be unfair to the landlord, having regard to the tenant's past performances and behaviour, if the tenant were to enjoy the advantage which the Act gives to him*"
- *Horne & Meredith Properties v Cox* [2014] 2 P&CR 18 – Lewison LJ: "*The overall question under this head is whether it would be fair to the landlord, having regard to the tenant's past behaviour, for him to be compelled to re-enter into legal relations with the tenant*"
- BUT T's perspective potentially relevant provided directed at overall question of whether fair to L to require him to re-enter into legal relationship with T – Lewison LJ: "*…entitled to take into account…the tenant's business was [their] livelihood, not least because that was relevant to the question whether there would be future compliance…*"

Guildhall CHAMBERS

Gill: Compartmentalised Approach?

- *Lyons* – Ormerod LJ: "*But the word 'ought'…implies that the discretion of the judge is not confined to the consideration of the state of repair*"
- *Eichner v Midland Bank* [1970] 1 WLR 1120 – Lord Denning MR: "*…open to [the trial judge] to look at all the circumstances…also, I may add, to look at the conduct of the tenant as a whole…*"
- *Youssefi v Musselwhite* [2014] 2 P&CR 14 – having referred to *Lyons* and *Eichner*, Gloster LJ endorses compartmentalised approach: "*This involves the court…focussing exclusively on the state of repair…The discretion is not circumscribed in any way other than by the requirement that, in asking itself the question…the court has to focus on the state of repair…*"
- Conflict – *Kent v Guest* [2022] 1 P&CR 9 (Snowden J)
- CA in *Gill* chose to depart from *Youssefi* and reject compartmentalised approach – court not confined to matters relevant to particular ground

Guildhall CHAMBERS

Gill: Implications

- Decision is common sense approach to multi-factorial exercise
- Perils of LTA1954 litigation – opposition well founded at commencement but not at end – costs risks
- Get out of jail card for T and the well-advised T
- What is well advised L to do – (1) early offers = “opposed unless you commit to putting defects right by [XXX]” (2) review merits during action and reasonable concessions

Guildhall CHAMBERS

Brown v Ridley: AP & 'Reasonable Belief'

- 3rd Condition – para 5(4)(c) of Sch 6 of LRA2002: "*for at least ten years of the period of adverse possession* ***ending on the date of the application****, the applicant (or any predecessor in title)* ***reasonably believed*** *that the land to which the application relates belonged to him*"
- (1) Reasonable belief for 10 years ending on date of application?
- (2) Reasonable belief for any 10-year period within period of adverse possession?
- Hugely important because of timing of an application – first instance decision (and a number of others) considered (2) correct

Guildhall CHAMBERS

Brown: *Zarb v Parry* [2012] 1 WLR 1240

- First instance decision (and others) did not consider *Zarb* binding
- BUT careful analysis of *Zarb* demonstrates that Arden LJ and Lord Neuberger treated 10-year period as period ending on date of application (and Jackson LJ agreed with that approach)
- Arden LJ's approach to statutory construction necessary step to finding that Ds could satisfy RB requirement – so part of *ratio* = binding authority
- NB same approach was not adopted to *IAM Group plc v Chowdrey* [2012] 2 P&CR 13 – CA simply proceeded on assumption that 10-year period was period ending on date of application

Guildhall CHAMBERS

Brown: Result

- FTT and UT bound by *Zarb*
- First instance decision (and others) wrong
- BUT UT would have construed para 5(4)(c), contrary to *ratio* in Zarb, as meaning reasonable belief in ownership had to exist for any 10-year period within relevant period of AP and not confined to period of 10 years ending on date of application
- Might not be the end of story!

Guildhall CHAMBERS

Brown: Implications

- In *Brown*, found that reasonable belief established to Feb 2018 – application made in Dec 2019 – too late!
- Need to get on with it – application needs to be made shortly after reasonable belief ends
- NB if squatter evicted, has 6 months to bring application – squatter evicted in more generous position even though reasonable belief likely to be challenged at point of eviction…

Guildhall CHAMBERS

Fosse Urban Projects Limited v Whyte [2023] UKUT 286

Builds on the decision of the Supreme Court in *Millgate Developments Ltd v Alexander Devine Children's Cancer Trust* [2020] 1 WLR 4783 (SC)

Upper Tribunal (Lands Chamber) discretion to discharge or modify a restrictive covenant

The Applicant built a house on land subject to a restrictive covenant

Restriction from 1996 Conveyance "*Not to use the land hereby conveyed other than as garden land in connection with the adjoining property*".

Guildhall
CHAMBERS

Section 84(1) of the Law of Property Act 1925

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete, or

(aa) that in a case falling within subsection (1A) below the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or

(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction

Guildhall
CHAMBERS

Risk of ‘built first apply later’

Tribunal discretion so Applicant’s conduct is relevant

Millgate: Supreme Court's disapproval of the conduct of the developer in deliberately committing a breach of the restrictive covenant with a view to making profit from so doing, conduct which Lord Burrows described as "*cynical*” and “*contrary to public interest*”

Fosse [84]: “*In my view the applicant's 'build first and apply later' approach can be properly characterised as cynical. I therefore decline to discharge or modify the covenant to sanction the development*”

Should be basis of advice given to clients on risk of building where there is a restrictive covenant

Guildhall
CHAMBERS

Reeve v McDonagh [2024] EWHC 439(Ch)

Residential property in Poole

Respondents wished to demolish existing house and erect a bigger house

Applicant house to rear of Respondents with benefit of restrictive covenant over Respondent's property created by 1958 transfer that "…***no additional buildings whatsoever shall at any time be erected on [the Lodge]***"

Part of the purpose was to protect the sea view from Barnwood

On 26.05.2022 Part 8 claim by Respondents seeking a declaration that the development would not breach the 1958 covenant

Guildhall CHAMBERS

s.84(2) Law of Property Act 1925

(2)The court shall have power on the application of any person interested—

(a)To declare whether or not in any particular case any freehold land is or would in any given event be affected by a restriction imposed by any instrument; or

(b)To declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is or would in any given event be enforceable and if so by whom.

Guildhall
CHAMBERS

Approach to Construction

A restrained, rather than a generous, interpretation of (freehold and leasehold) covenants is normally appropriate:

In GLN (Copenhagen) Southern Ltd v Tunbridge Wells BC [2005] LLR 282, Neuberger LJ said [51]:

"*While deprecating the notion that one should construe a covenant in an artificially narrow way simply because it is restrictive of the use to which an owner can put his property, I am of the view that a restrained, rather than a generous, interpretation of such a covenant is normally appropriate*"

The Natural and Ordinary meaning of the Words:

"*buildings*" not a verb: means "additional buildings" as further or ancillary structures

The Purpose of the 1958 covenant

1958 Transfer not available

Intended to protect sea view

Guildhall CHAMBERS

Commercial Common Sense

Lord Neuberger in *Arnold v Britton* [2015] UKSC 36:

> *"…reliance…on commercial common sense and surrounding circumstances…should not be invoked to undervalue the importance of the language of the provision which is being construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously gleaned from the language of the provision*" [17]
>
> "*The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties, is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.*" [19]

Guildhall CHAMBERS

TUI UK Limited v Griffiths [2023] UKSC 48

Package holiday in which Mr Griffiths became ill

He brought a case against the holiday company

At trial Mr and Mrs Griffiths gave uncontested evidence of fact

Expert for Mr Griffiths was not called to give oral evidence, but questioned under CPR r35.6

Trial judge dismissed claim on the basis that the Claimant had failed to discharge the burden of proof.

Guildhall
CHAMBERS

Principle questions raised on appeal

(i) what is the scope of the rule, based on fairness, that a party should challenge by cross-examination evidence that it wishes to impugn in its submissions at the end of the trial?

(ii) in particular, does the rule extend to attacks in submissions on the reliability of a witness's recollection and on the reasoning of an expert witness? and

(iii) if the rule does so extend, was there unfairness in the way in which the trial judge conducted the trial in this case?

Guildhall
CHAMBERS

Unchallenged Evidence

The rule in *Brown v Dunn* (1893) 6.R.67, [1893] 1 WL UK:

> In civil proceedings a party must challenge by cross-examination the evidence of any witness of the opposing party on a material point they wish to be accepted.

Lord Hodge in *TUI* at [75-76]:

> *In the absence of a proper challenge on cross-examination it was not fair for TUI to advance the detailed criticisms of Professor Pennington's report in its submissions or for the trial judge to accept those submissions*
>
> *Both the trial judge and the majority of the Court of Appeal erred in law in a significant way. The trial judge did not consider the effect on the fairness of the trial of TUI's failure to cross-examine Professor Pennington. The majority of the Court of Appeal did, but they erred in limiting the scope of the rule to challenges to the honesty of a witness. As a result, neither properly addressed the application of rule to the facts of this case*

Guildhall CHAMBERS

Application to Property cases

Property cases can be highly contentious, e.g. boundary disputes

If party disagrees with the findings of a Single Joint Expert:

(i) ensure sufficient questions are asked of Single Joint Expert

(ii) advise clients of the serious risks of not asking such questions

Guildhall CHAMBERS

Thank you

Guildhall
CHAMBERS