Guildhall CHAMBERS

Newsletter

PROPERTY & ESTATES NEWS AUTUMN 2012

EDITORIAL

Over the course of the last six months there have been numerous important developments that merit consideration and comment. In this newsletter we concentrate on ten such areas:

i In the first of our articles, Malcolm Warner reflects on that most elusive of concepts, the "ambulatory trust". The "ambulatory constructive trust" received some attention in the House of Lords' decision in *Stack v Dowden* and more recently in the Supreme Court in *Jones v Kernott*. However, the difficulties inherent in fixing or quantifying the interests of a potential beneficiary extend well beyond co-ownership cases to mutual wills, proprietary estoppel and other forms of remedial constructive trusts that may spring up and be relied upon in disputes over estates etc. Malcolm considers some of the difficulties that such cases raise whilst reflecting on a number of recent developments.

ii I provide my regular review of recent developments in the law of constructive trusts and cohabitation. *Jones v Kernott* may be "old news" now but the ramifications and limits of that case have yet to be fully worked out. My article touches on four recent Court of Appeal decisions that serve to elucidate the position as it is now evolving.

iii In the first of two articles by Ewan Paton he reflects on *Zarb v Parry* and *IAM Group PLC v Chowdrey*, two important Court of Appeal decisions considering the law of adverse possession under the Land Registration Act 2002. In particular, when does an applicant "reasonably believe" that the land in question belongs to him under Schedule 6 paragraph 5(4)(c) of the 2002 Act?

iv In his second article Ewan considers yet more important Court of Appeal authority on the rule in *Harris v Flower* and the rather unsatisfactory state of the modern authorities on that rule.

v Following Morgan J's first instance decision in *Betterment Homes Ltd v Dorset CC* in 2010, the Court of Appeal have finally reconsidered that case on appeal in *Taylor v Betterment Homes Ltd*. Raj Sahonte addresses both the first instance decision and the appeal and the helpful guidance that emerges in relation to user "as of right" in relation to prescriptive claims to easements and commons registration.

vi Three years ago the widely reported County Court decision in *Redstone Mortgages Plc v Welch* caused considerable disquiet for mortgagees bringing possession claims in "sale and leaseback" cases. Ross Fentem considers the important change in, or at least clarification of, the law in relation to the priority of mortgages in such cases following the Court of Appeal's decision in *Cook v Mortgage Business plc*.

vii After a period of comparatively quiet stagnation, the Court of Appeal have been remarkably active in recent months in considering the law on the construction of conveyances and the admissibility of extrinsic evidence in boundary disputes. Henry Stevens considers two of the more important of this year's authorities.

viii The case law in relation to tenancy deposit schemes has grown to become devilishly complicated in the short time since their inception. Michael Selway provides a timely review in light of important reforms that have been implemented by the Localism Act 2011.

ix As more retailers and other commercial tenants go to the wall the difficulty of recovering rent from insolvent tenants has become an acute and recurring problem. Holly Doyle's article considers the status of a landlord's claims for rent when a company is insolvent following the High Court judgment in *Leisure (Norwich) II Ltd v Luminar Lava Ignite Ltd*.

x Finally my pupil, Matthew Brown, considers the practical impact of the Equality Act 2010 on possession claims (an area in which he has had recent experience when acting for landlords).

As ever, please feel free to contact any of the contributors to this newsletter (or, indeed, any other member of our Property & Estates Team) if you would like to discuss the issues raised by their articles.

Please email me at tim.walsh@guildhallchambers.co.uk with any comments and suggestions about current and future articles, as we aim to make these newsletters as topical and relevant as we can.

Tim Walsh, Editor

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Ambulatory trusts

The interest in ambulatory trusts is that some of the practicalities remain in a state of flux – however the reader needs first to have some idea of what they are. Classically ambulatory trusts occur in the mutual will situation:

"The doctrine…is to the effect that where two individuals have agreed to the disposal of their property and have executed mutual wills in pursuance of the agreement, on the death of the first ("the first testator") the property of the survivor ("the second testator"), [comprising] the subject matter of the agreement [i.e. now both estates], is held on an implied trust for the beneficiary named in the wills. The survivor may thereafter alter his will, because a will is inherently revocable, but if he does his personal representatives will take the property subject to the trust."[1]

So far so good, but during the lifetime of the survivor how can they deal with the combined estates given that some sort of trust is now in place? What are the parameters of their permitted activities?

"The purpose of an arrangement [of this sort is] to enable the survivor during his life to deal as absolute owner with the property passing under the will of the party first dying…the object of the transaction is to put the survivor in a position to enjoy for his own benefit the full ownership, so that, for instance, he may convert it and expend the proceeds if he choose."[2]

We shall see later some further comment by Dixon J as to the fiduciary duties imposed upon the survivor as to the assets in his hands but the ambulatory nature of the trust can be seen where he continued[3]:

"…I do not see the difficulty in modern equity in attaching to the assets a constructive trust which allowed the survivor to enjoy the property subject to a fiduciary duty …crystallising on his death and disabled him only from voluntary dispositions inter vivos."

Notice that what changes during the lifetime of the survivor is the corpus of the trust estate but what is not in issue is what will happen to the corpus on death[4]. The trust estate therefore morphs with time.

A species of trust would appear to arise at the agreement stage but either can, apparently, resile until the death of the first so there is no immediate and irrevocable trust at that stage. On the death of the first a trust crystallises permitting utilisation by the trustee or, put another way, with a floating aspect over the joint estates. The trust only finally settles in a fixed manner on death.

Ambulatory trusts occur not only in mutual wills but, as we shall see, also commonly in proprietary estoppel cases. More recently they seem to have been accepted as underpinning some joint property cases.

It is useful at this stage to clear away a source of potential confusion – the requirement for certainty in express private trusts. We all remember from our student days that one of the three required certainties of a private trust was certainty as to the subject matter of the trust[5]. So a valid trust can be as to "my collection of Picasso engravings" as much as it can be to "the contents of my deeds box deposited with XYZ Bank". Equally, as with an ambulatory trust arising from a mutual will, the trust defined as at date of agreement may be as vague as "my estate at my death" and the final trust will then be fixed at date of death upon whatever is left[6].

Correspondingly one can see why Lord Walker in *Thorner v Majors*[7] did not have any difficulty with the possibility that between the date of (1) the promise of the farm by Peter to David at Peter's death coupled with detrimental reliance, and (2) Peter's demise, that the extent of the farm might change. After all the promise was effectively "whatever the farm comprises at my death".

So certainty of subject matter is not the problem it might be thought to be. The defining difference between this and other trusts appears to be the floating nature of the trust which one might say is another way of observing that certain common fiduciary duties do not apply or are modified. For instance compare the ambulatory trust with a discretionary trust where the trustees are themselves within the class of beneficiaries. In such a case the trustees can make dispositions in their own favour but are still bound by a duty to consider all the objects of the trust when exercising their discretions, they have a duty to act impartially and with an eye to the interests of successive beneficiaries. In a mutual will case the survivor is not so hidebound

1 Per Morritt J, in re *Dale* [1994] Ch 31, 37D

2 Per Dixon J in *Birmingham v Renfrew* (1937) CLR 666 (also at www.austlii.edu.au/au/cases/cth/HCA/1937/52.html - but conveniently quoted in *re Cleaver* [1981] 1 WLR 939, 946F).

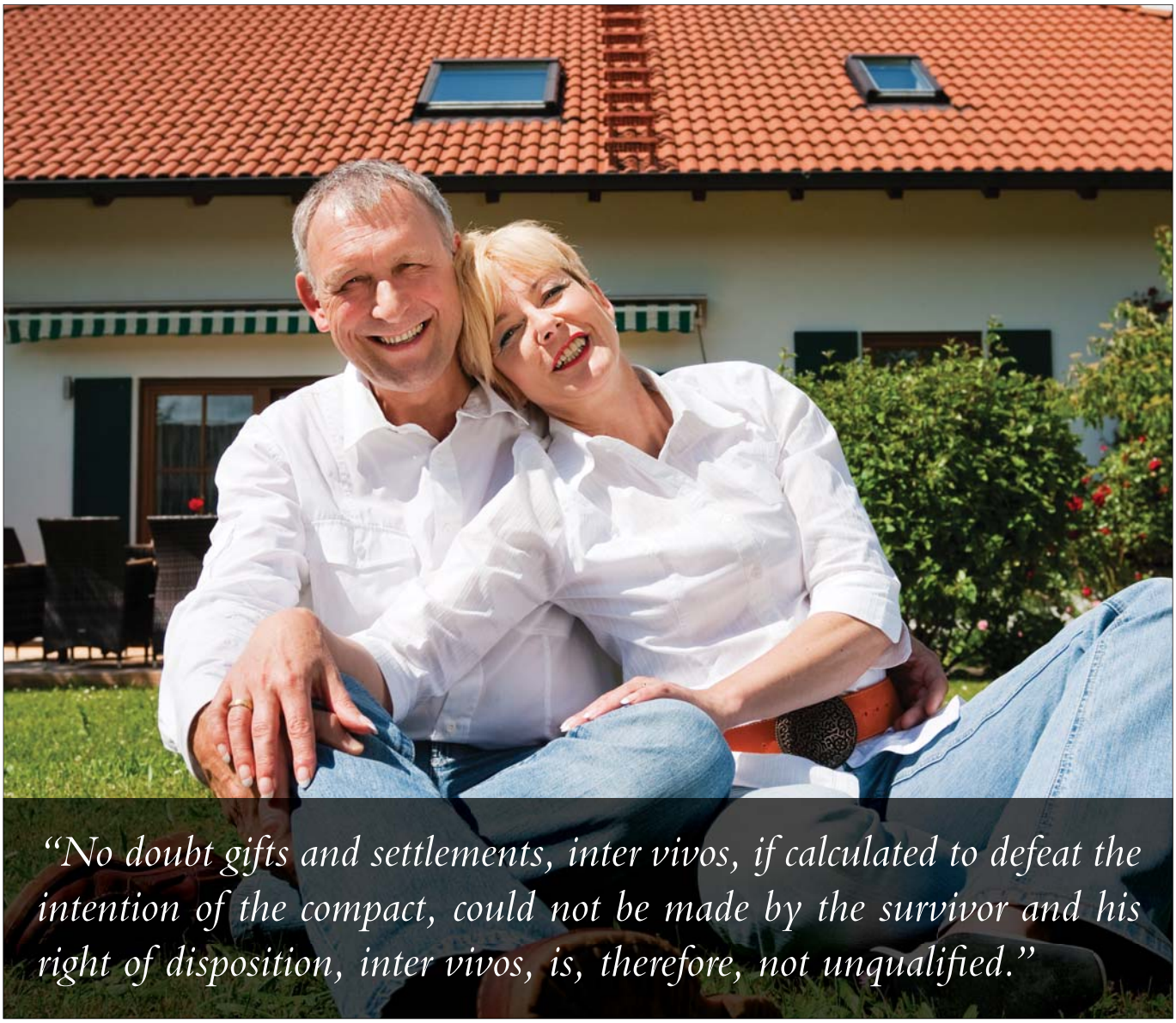
3 Ibid page 690 quoted at page 946H

4 i.e. the beneficial interests agreed between the parties when alive are unlikely to change. It is possible though for considerable changes to occur to the final dispositions by actions of the survivor - for instance, if the agreement as to remainder over was Blackacre to A and Whiteacre to B, and the survivor sells and lives off the proceeds of Blackacre during his/her lifetime.

5 See for instance Snell's Equity 32nd Ed s. 22-017.

6 Readers interested in the perceived difficulties caused to the House of Lords in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 and *Thorner v Major ibid* by s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 will be heartened by reading the decisions of Latham J and Dixon J in *Birmingham v Renfrew ibid* when they tackled part of the same issue and resolved it e.g. Dixon J *"I do not think that the promise was a contract or sale of land. For although the property of the testatrix included land at the time of the promise, the contract was to make a will which would operate not on any specific property or fund but simply on whatever assets she had at her death."* See also *Healey v Brown* [2002] WTLR 849, a case in which s.2 of the 1989 Act did not defeat a claim that would otherwise have been decided on the basis of a mutual will compact and related to a specific gift of a former matrimonial home. That case was in turn followed by the Deputy Adjudicator in *O'Higgins v O'Higgins* (Unreported, 14 February 2012) a case which succeeded based on a remedial constructive trust notwithstanding that the claim was based on a written agreement to bequeath a house which was found not to comply with s. 2.

7 [2009] 1 WLR 776, 796



on the statements in the authorities, whoever may be entitled on their death the survivor appears to be fully entitled to focus their utilisation of the trust property on themselves (rather than remaindermen).

Joint property cases

Before proceeding to the two main issues arising on ambulatory trusts in practice let us look briefly at joint property. In *Kernott v Jones*[8] it was remarked:

"It was also accepted [in Stack v Dowden[9]*] that the parties' common intentions might change over time, producing what Lord Hoffmann referred to in the course of argument as an " 'ambulatory' constructive trust"":*

For present purposes this meant that looking back in time the court could determine that as at the time of acquisition of a couple's home they might hold it for themselves upon a constructive trust in certain proportions. Then, as in *Kernott* the couples' circumstances changed and they formed (in effect) a new intention[10] that Mr Kernot's share would become fixed whilst Ms Jones' share would grow as the equity in the house grew. The result was that we can identify a constructive trust which at purchase is in maybe equal beneficial shares but at a later stage those shares may change to either (i) different but fixed shares or (ii) (as in the case itself) shares that would continually fluctuate with the housing market.

Wider Issues – esp. Mutual Wills and Proprietary Estoppel

The interesting issues – more stark in mutual wills and proprietary estoppel cases are:

i How far can the ultimate beneficiaries[11] control the "trustee" during their dominion over the estate(s)?

ii What can the ultimate beneficiary hope to achieve if the trust is broken prematurely?

8 [2011] UKSC 53 per Lord Walker & Lady Hale s. 14

9 [2007] 2 AC 432

10 See s. 48

11 Commonly the children in a mutual will between parents or the promisee in the proprietary estoppel case.

Beneficiary control

As to beneficiary control Dixon J in *Birmingham v Renfrew*[12] said:

"No doubt gifts and settlements, inter vivos, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, inter vivos, is, therefore, not unqualified."

Notice the judge is taking as his reference point for what the survivor can do, the terms of the original compact between the parties. He continues:

"But, substantially, the purpose of the arrangement will often be to allow full enjoyment for the survivor's own benefit…" (my underlining).

Again he is demonstrating that any limitation upon the freedom of action will normally spring from what was agreed when the original parties were alive. Nourse J[13] added in at this point:

"…Dixon J was there clearly referring to (lifetime dispositions) calculated to defeat the intention of the compact. No objection could normally be taken to ordinary gifts of small value."

However financially the world has moved on. The costs of long term care for the elderly can have a massive impact on an estate. Simple living costs of, say, an active widow who in a long widowhood still drives, wants to travel for enjoyment and to visit relatives and so on may be justified by asking what her late husband would have wanted - yet be seen by the beneficiaries as a spiteful attempt to live the high life and ensure they get nothing at the end of the day. Just to gauge where the line falls by putting small gifts on one side and obvious waste on the other is no real help. We can, indeed must, resort to the compact and perhaps also to the difference between what one can infer was agreed and in default what one might imply was agreed[14]. If one was to have asked husband and wife about their assumptions at the compact one can see the difficulties with this task. The wife might expect if she dies first that her widower might lead a similar life, even remarry. The husband's prospective attitude might be in that scenario that he would not remarry (*"been there, done that"*) but rather fancies enjoying being footloose and fancy free.

Similarly with a proprietary estoppel (after the point where there has been detrimental reliance) the promisor retains his estate until his death and may anticipate he can do what he likes with his own assets. However Lord Scott suggested in *Thorner v Major*[15] that if Peter had tried to sell the farm in his lifetime that David could have obtained "consequential relief" – leaving open the tantalising issue as to what that might have been.

Clearly the promisee has achieved at this earlier point a real floating trust that he or she may well see as something that he can protect from certain dissipating acts by the promisor. Perhaps even a dealing can be prevented in certain circumstances[16]. But the question remains, is the court going to be wholly fixated on the compact when deciding what actions by the survivor/promisor are permissible, is it going to adopt an "absolute owner" stance[17] as the default position or is it going to also stand back and apply a reasonableness or proportionality test? This remains an unknown in modern circumstances.

Premature determination

Gillett v Holt[18] was a case of premature determination of the floating trust – Mr Holt having indicated he no longer felt bound by his – as one might say – engagement, with Mr Gillett. Similarly with the floating trust as with a mutual will – suppose the survivor of mutual wills is left in possession of the contents of a wine cellar and the survivor is an alcoholic intent on drinking their way through it. What can the ultimate beneficiary hope to achieve at this early point in time in terms of material benefits compared with the assets promised for a future event (usually death)? *Gillett* saw this issue being grappled with head on. There the remedy was fashioned by Robert Walker LJ (as he then was) in part taking account[19] of the accelerated receipt of benefits that would otherwise only have been received later when Mr Holt died. In argument in *Jennings v Rice*[20] the writer had the temerity to suggest to the same judge that another key aspect must have been the certainty of receipt rather than the "risk of the game" that Mr Holt might have dissipated his estate for whatever reason by his death – which did not evoke any words of disagreement.

Notice that what the Court plainly did not do was establish the life expectancy of Mr Holt, assess his likely ultimate estate and carry out a net present value calculation to award to Mr Gillett. That course would as near as possible have carried out their engagement in a contractual manner. A variation would be to then discount for the "risk of the game" dissipation aspect[21]. One cannot work it out from the reported figures but the impression is that Mr Gillett received a respectable share but not an overly generous one – especially given that Mr Holt had passed away by the time *Jennings v Rice* was argued in 2002.

This question remains difficult to advise upon but relevant factors are bound to be discounts from what was agreed or promised, the life expectancy of the survivor/promisor (and indeed the ultimate beneficiary).

An important sub-plot though is the time gap between when the promisee acted to his detriment and the breach in a non-premature determination case (e.g. the promisor dies). The writer takes the view that the Court should follow what the parties themselves agreed. So if the agreement was "you come and look after me for the rest of my days and the house is yours" it should not matter whether the promisee looks after the promisee for 3 months or 30 years. Again it is a risk both sides take that the promisor will live a short or long time – their choice. However this was not the view of the Court of Appeal in argument in *Jennings* nor in the result[22]. That illustrates that the Court will go outside the engagement between the parties in assessing what remedy to fashion even in a complete fulfilment case. If this is the case in this scenario it must also affect the starting point for a premature determination case.

Malcolm Warner

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12 Ibid page 689 quoted at p 946F

13 In re *Cleaver* itself at 947A

14 See *Kernott* ibid at s. 26 quoting from the incisive words of Lord Neuberger.

15 Ibid at 783F

16 For instance the sale of the family estate or collections or an income generating business.

17 It will be recalled that trustees vested with the powers of absolute owners by the trust instrument do not have such a free hand as might be thought. They are in fact bound to utilise their powers as a reasonably prudent businessman would about his/her own affairs.

18 [2001] Ch 210

19 Described at p 238A

20 [2003] 1 P&CR 8

21 Dissipation is not used here in a pejorative sense – Mr Holt might have been unlucky with his investments or moved his money to the wrong bank before the credit crunch struck.

22 The learned editors of Snell's Equity appear to disagree with the Court of Appeal and adopt the pragmatic starting point of ascertaining what the parties agreed to in the original compact (s. 12-025).

Constructive trusts and co-ownership

In November of last year the Supreme Court delivered the long awaited judgment in *Jones v Kernott* [2011] 3 WLR 1121 (a copy of my article analysing that decision can be found on our website). Since then there have been a handful of developments. In particular, three decisions by a similarly constituted Court of Appeal at the end of March merit consideration.

1 *Geary v Rankine*

Geary v Rankine [2012] EWCA Civ 555 concerned an unmarried couple who had been in a relationship from 1990 until 2009. In 1996 Mr Rankine had purchased a guesthouse for £61,000. That property was purchased in his sole name using his savings and was intended as a commercial investment. It had initially been intended that Mr Rankine and Ms Geary would not live at the property but circumstances changed and eventually they both moved in and worked there together. Ms Geary helped with the cleaning and the paperwork as well as cooking three meals a day.

On these facts, it was accepted by Ms Geary that a claim based upon a "common intention" constructive trust at the time of acquisition was unsustainable. Her argument was that there had been a subsequent change in the common intention post-acquisition such as to give her an interest under a constructive trust.

Applying *Jones v Kernott* Etherton LJ expressed the view that the court could not impute intentions to the parties unless satisfied that the parties' actual common intention, express or inferred, was that the beneficial interest was to be shared (para. 19). In a single name case, the first issue is whether it was intended that the Claimant should have any interest at all (para. 20). The Court of Appeal stressed that *"the object of the search is a common intention; that is, an intention common to both parties"* (para. 21). Accordingly, the non-legal owner had to establish that, despite the fact that the legal title to the property remained in the other party's sole name, he *actually* intended that she should have an interest in it. That actual intention may have been expressly manifested or may be inferred from conduct *"but actual intention it remains"*. On the facts, there was no adequate evidence that the legal owner had changed his intention about ownership and no evidence that Ms Geary's alleged detriment was in reliance upon any assertion by Mr Rankine. Her claim accordingly failed.

Geary v Rankine is a helpful reminder of the limits of *Jones v Kernott*. The court is not at liberty to simply re-draw the beneficial ownership of a property to do what may be considered "fair". There are clear restrictions on when and what may be imputed to the parties. Moreover, although not referred to in the judgment, the Court of Appeal in *James v Thomas* [2007] 1 FLR 1598 and *Morris v Morris* [2008] Fam. Law 521 had in any event already made it clear that, even after *Stack v Dowden* [2007] 2 AC 432, the court would be *"slow to infer from conduct alone that parties intended to vary existing beneficial interests established at the time of acquisition"*.

2 *Chapman v Jaume*

On the same day, the same Court of Appeal delivered judgment in *Chapman v Jaume* [2012] EWCA Civ 476. In that case Mrs Jaume was the sole legal owner of a property she had acquired in an earlier divorce. Her new partner, Mr Chapman, had thereafter spent more than £130,000 extending and refurbishing the property. The issue before the judge involved determining the legal consequences of that expenditure.

Prior to the commencement of proceedings, Mr Chapman had twice made applications to HM Land Registry asserting that he had a beneficial interest in the subject property. When he came to issue proceedings, however, his case was put on the altogether different footing that the money he had spent was a loan. At first instance, the judge found that there had probably been some sort of fairly incomplete or inconsistent agreement but that no express conditions about reimbursement had ever been discussed. The judge also found that the pleaded case that there was a loan was a way of rationalising the situation after Mr Chapman ran into difficulty with his Land Registry applications; he then rejected Mr Chapman's claim in its entirety.

The judgment of the Court of Appeal is significant for the following reasons. First, it makes the obvious point that analytically there was no way for Mr Chapman to advance a case based upon a resulting or constructive trust. If a party's primary case is that the money was supplied in the character of a loan he cannot also fall back on an inconsistent case based upon trusts (para. 19). Further, the judge had fallen into error because he had not had the decision in *Seldon v Davidson* [1968] 1 WLR 1083 drawn to his attention. The ratio of that case was that *"Payment of money having been admitted, prima facie that payment imported an obligation to repay in the absence of any circumstances tending to show anything in the nature of a presumption of advancement"*. Counsel for Mrs Jaume attempted to argue that a presumption of advancement did apply to a cohabiting couple. Unsurprisingly, the Court of Appeal used this as an opportunity to reaffirm in the starkest terms that *"There is no presumption of advancement between cohabitants"* (para. 24). Hence Mr Chapman received his Money back.

"The Court of Appeal stressed that "the object of the search is a common intention; that is, an intention common to both parties"

"Whatever the parties had intended and whatever the reasons for transferring into a sole name, the short point was that the transfer had not been into joint names."

3 *Thomson v Hurst*

Judgment in the last of this triumvirate of cases followed the next day. In *Thomson v Hurst* the Court was concerned with a cohabitating couple who had intended to purchase their home in joint names. A mortgage advisor advised that as Mr Thomson had a poor credit rating the mortgage should be in Miss Hurst's sole name and they therefore decided that Miss Hurst should also be the sole legal owner of the material property. Inevitably, the trial judge found that there was a common intention that Mr Thomson would have a beneficial interest in the property but he declared that, on the facts, that was limited to only 10% of the equity. Mr Thomson appealed and argued that the principles set out in *Stack v Dowden and Jones v Kernott* should apply. It will be recalled that those decisions establish that equity follows the law (at least in the "domestic consumer context") so that in joint names cases there is a presumption that a couple are also beneficial joint tenants who accordingly have half share interests when that joint tenancy is severed. Mr Thomson's argument ran that, since the parties had intended to purchase in joint names (and he had been omitted merely because of his credit rating) he should be presumed to be entitled to a half share beneficial interest.

In an extempore judgment the Court of Appeal rejected that analysis. As yet the case has not been properly reported (indeed the Court of Appeal have still not approved the official transcript). Nonetheless, a short summary is available from which it would seem that the Court of Appeal were at pains not to extend the application of the presumptions in *Stack v Dowden* and *Jones v Kernott* (as they were in the earlier case of *Laskar v Laskar* [2008] 1 WLR 2695). Whatever the parties had intended and whatever the reasons for transferring into a sole name, the short point was that the transfer had not been into joint names. Accordingly, there was no scope for the legal presumption that they had intended to be beneficial joint tenants. It could not be assumed that, had the parties purchased in their joint names, they would have agreed to be joint beneficial owners based on the circumstances of the case.

As ever, such cases turn on their own facts. When quantifying beneficial entitlement (In the absence of express agreement) the court must undertake a survey of the whole course of dealing between the parties taking account of all conduct which throws light on the question what shares were intended. Presumably the fact that the parties had intended to buy as joint legal owners will be relevant to that survey and on appropriate facts may even tip the balance. The apparent importance of *Thomson v Hurst* is that it is no more than one factor among many.

4 *Gallarotti v Sebastianelli*

The final decision of note in recent months is *Gallarotti v Sebastianelli* ([2012] EWCA 865). Mr Gallarotti and Mr Sebastianelli were Italian friends in a platonic relationship who decided to live together. In 1997 they purchased a flat which was transferred into Mr Sebastianelli's sole name. The purchase price was £188,287.44. Mr Sebastianelli contributed £86,500 and Mr Gallarotti contributed £26,896; the balance was made up by way of a mortgage in Mr Sebastianell's sole name. The friendship ultimately broke down in 2008.

Initially the parties reached an express agreement that they would each have a 50% interest in the flat despite their unequal contributions. However, when that inequality had become apparent they reached a further agreement that Mr Gallarotti would pay a larger proportion of the mortgage repayments. That agreement or contemplated state of affairs was not subsequently borne out by events. The issue in the case (one which is frequently encountered in practice) was how the parties' express agreement and the subsequent departure from that agreement should be reflected in their respective beneficial entitlements. This was not, of course, a case in which the parties had executed any declaration of trust.

The Court of Appeal determined that the appropriate finding was that Mr Sebastianelli had a 75% share and Mr Gallarotti a 25% share. A number of points may be made about the route by which that conclusion was reached:

i First, the Court of Appeal expressly approved the adoption of a "common intention constructive trust" analysis in preference to a resulting trust analysis. This was held to be more appropriate *"where the parties have incurred expenditure on the strength of their personal relationship and without expectation of having to account [for every item of expenditure]"*. That was clearly appropriate on the facts and in any event even a resulting trust analysis may be displaced by the parties' express agreement. It will be recalled, however, that *Laskar v Laskar* did hold that in the absence of express agreement a resulting trust analysis was applicable to essentially commercial purchases even if they involved family members. It was for this reason that the analysis in *Stack v Dowden* was not been applied in that case.

ii Secondly, it was held that the recorder had been correct to proceed on the basis that, if there was an agreement which applied to the circumstances which had arisen, the court should conclude that the beneficial interests were established by that agreement alone. That breaks no new ground but is a welcome restatement of the position that was so succinctly summarised in *Mortgage Corporation v Shaire* [2001] Ch. 743.

iii The Court of Appeal held, however, that despite the parties' express agreement to share ownership equally, the reality of their arrangement (in view of the contemplated disparity in mortgage instalment contributions) was that they did intend that their financial contributions should be taken into account. When Mr Gallarotti failed to make the contemplated mortgage contributions *"The logical result of the agreement…was that the agreement for 50/50 sharing was at an end"*.

iv The outcome of the case is self-evidently supportable on the basis that the parties' express agreement had not been complied with or followed through but it does raise a recurring and difficult question. If the parties expressly agreed to share ownership equally, but also reached an agreement regulating the basis upon which the mortgage should be paid, why was this not merely treated as a case of equal ownership subject to Mr Sebastianelli's right to an equitable account in relation to the unpaid mortgage contributions? The short answer on the facts is that that would probably have been somewhat unjust on Mr Sebastianelli given the parties' disparate contributions. It may also be justifiable (following *Wilcox v Tait* [2006] EWCA civ 1867) on the basis that those contemplated mortgage contributions related to the period before the breakdown in the parties' friendship when equitable accounting may be regarded as generally inappropriate. Nevertheless, *Jones v Kernott* has set the courts on an arguably unwelcome course where the determination of the parties' respective beneficial interests is often not being separated from the analytically separate question of whether there should be an equitable account.

Tim Walsh

The Land Registration Act 2002

Get off my lawn: how (not) to stop time running

Zarb v Parry [2011] EWCA Civ. 1306 [2012] 1 WLR 1240

In this case the Court of Appeal considered the important issues of i) when the 'paper' owner of registered land may be to said to have stopped an adverse possessor's time running by physically retaking possession of the land; and ii) whether the possessor's belief as to ownership of the disputed land ceases to be "reasonable" for the purposes of section 98 and Schedule 6 para. 5(4) Land Registration Act 2002 once the paper owner sets out his own case and title. It was a neighbour dispute of a familiar type, involving a discrepancy between physical and paper boundaries. The disputed strip had, for a period in excess of 10 years prior to the Zarbs' commencement of proceedings, been enclosed by a hedge and fence as part of the Parrys' garden. The plan to the conveyance which divided the plots, however, had on its true construction (as was later found) retained the strip as part of the Zarbs' paper title.

The trial judge nevertheless held that the combined possession of the Parrys and their predecessors amounted to adverse possession for a sufficient period in excess of 10 years prior to issue of possession proceedings, barring the Zarbs' title – on the basis, under section 98 of the 2002 Act, that had the Parrys applied for possessory title immediately prior to the commencement of proceedings, all the conditions in Schedule 6 paragraph 5(4) of the 2002 Act would have been satisfied. The most problematic of these conditions is always (c):

"(c) for at least ten years of the period of adverse possession ending on the date of the application [NB and therefore, in a section 98 'defence to possession proceedings' case, the date of issue of proceedings] the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him"

Proceedings had been commenced in June 2009. Prior to that, on a "lovely morning" in July 2007, the Zarbs had entered on the Parrys' lawn and begun banging some new posts into it. They also cut down a tree, tore up some fencing, and unwound a surveyor's tape so as to delineate the boundary for which they contended, with Mr Zarb stating that he was taking the land by force as it belonged to him. After an angry confrontation and threats by the Parrys to call the police, they left some 20 minutes later.

It was argued at trial and on appeal that this was a sufficient physical retaking of possession which had interrupted the Parrys' required continuity of possession in the period prior to proceedings. Considering *Bligh v Martin* [1968] 1 AER 1157, the Court of Appeal held that the true owner had to retake possession so as to wholly exclude the 'wrongful' occupier from possession, as opposing parties could not both be in possession of the same land at the same time. The Zarbs had not gone far enough: they had the intent and the words, but had been interrupted in their attempt before completing it. Exclusion was required, not declarations of intent even when accompanied by some acts asserting possession, although at least in the view of the Master of the Rolls, it would have been a "pretty close run thing" if the Parrys had been absent for longer and the Zarbs had completed their efforts and put a fence up. One hopes that this is not taken as encouragement by the Court of physical self-help and retaking of possession in boundary disputes generally.

The other point of substance on the appeal was whether, after the Parrys received a solicitors' letter setting out the Zarbs' contentions as to the boundary and their paper title, in October 2007, their "belief" thereafter that they owned the strip in question could still be "reasonable" for the purposes of Schedule 6 paragraph 5(4). This was an issue I considered in an article in the Summer 2011 newsletter, referring to decisions of the Adjudicator to HM Land Registry. In this case, the Court of Appeal held that the Parrys' belief continued to be reasonable after this point and up until the issue of proceedings. Indeed, an initial joint surveyor's report had actually supported their position: a contrary report, which later formed the basis of the trial finding that the Zarbs had paper title, post-dating the proceedings. The fact that the boundary is known to be disputed, which therefore raises the possibility that you may be wrong about the title position, does not necessarily render "unreasonable" your belief to the contrary – even if you are later proved wrong.

This is an important point at the centre of Schedule 6 paragraph 5(4), because by definition in ***every*** such case the squatter will later be proved to have been wrong in his/her belief about paper title. That is why they are having to rely on adverse possession. Just how wrong (or obtuse) they can be, yet still be held to have had a "reasonable belief", was considered in my Summer 2011 article and was further considered by the Court of Appeal in the case below....

The man upstairs

IAM Group PLC v Chowdrey [2012] EWCA Civ. 505

Mr C bought his shop premises at no. 26a in 1993. For the next seventeen years he also exclusively possessed and used as storage and office rooms the upper floors of the neighbouring property, no. 26; as he had done in a brief earlier period as a tenant of no. 26a. Indeed, these areas were only accessible from no. 26a, and the ground floor tenant at no. 26 assumed that Mr C owned them too, even asking his permission to go there.

Mr C did not, in fact, own such a 'flying freehold' to these areas. They were part of the title to no. 26, which title was vertically divided from no. 26a in conventional fashion, as the judge found. Neither of the Land Registry titles to the relevant properties suggested any flying freehold attached to no. 26a, and showed the titles on the filed plans as conventional red edged rectangles.

IAM, who had purchased their title to no. 26 in 2000, corresponded with Mr C via solicitors in 2009 and 2010; pointing out the position on the registered titles. They commenced possession proceedings in August 2010. The judge found that, for the purposes of section 98 and Schedule 6 para. 5(4), Mr C had accrued 10 or more years of possession prior to the issue of proceedings, and that in that period he reasonably believed this adjacent land to be his. He was therefore entitled to be registered as its proprietor.

"the Court of Appeal held that the true owner had to retake possession so as to wholly exclude the 'wrongful' occupier from possession, as opposing parties could not both be in possession of the same land at the same time."

On appeal, IAM argued that Mr C could not have had a "reasonable" belief that he actually owned such a flying freehold, genuine as that belief was. First, when he purchased No. 26a in 1993, his solicitors must have advised him, and the transfer, title copies and search results would have shown, that he was only buying a registered title to no. 26a, which did not include the first and second floors of the property next door. Neither the solicitors' firm nor their file apparently still existed, but some such understanding should be imputed to him. Second, even if it had not been clear then, it was made clear in the letters before action in 2009 and 2010 when office copies of the titles were shown to him. How could he then have maintained the necessary continuity of "reasonable belief" for the full ten years immediately prior to the possession proceedings?

Easily, said the Court of Appeal (in which Etherton LJ gave the leading judgment). It was not appropriate to impute to Mr C knowledge of what his solicitors, or reasonably competent solicitors in 1993, might have thought about the title position. It was what he believed personally which mattered. There was "nothing to put him on notice" in 1993 that his title did *not* include the adjacent areas of which he had already been in possession as a tenant, and which were physically accessible only from No. 26a. As for the 2009-2010 correspondence, by that stage he had already "enjoyed unchallenged exclusive occupation for some 18 years" so the letters did not then make his continued belief as to ownership unreasonable.

This seems somewhat unsatisfactory. First, would Mr C not have seen, at the very least, the actual transfer of land to him, which he presumably signed, including No. 26a only? The finding that there was "nothing to put him on notice" that he did not own the adjacent upstairs areas of No. 26 seems to be premised on a positive assumption that he was shown no title documents at all; or that if he was, he (reasonably) failed to take in their contents.

Secondly, the finding in relation to the later correspondence appears to contain an element of 'bootstraps' reasoning based on the fact of long possession itself. That possession may previously have been "unchallenged", but now it *was* being challenged by correspondence giving chapter and verse on paper title. The issue under paragraph 5(4) is whether the squatter's continued belief in his *paper* ownership is reasonable, for the full 10 year period up to the date of the application or proceedings. Merely to assert, in response to contrary evidence of paper title, the fact of possession itself is to duck that issue. The squatter needs to say what his own belief is on paper title, and later show (as in *Zarb v Parry*) that it was then a reasonable belief, even if ultimately proved wrong in the later proceedings. In this case Mr C was not arguing that he had a pre-2002 Act accrued possessory title: he was relying solely on the 'new' provisions of that Act, and Schedule 6 paragraph 5(4) in particular. He therefore had to show some other basis for a continued reasonable belief of paper ownership. One would have thought that this would require at least some reference to or arguments based on his own documents of title, not just long possession and a sincere but mistaken belief.

Ewan Paton

Do not Tarry on the way...

Giles v Tarry [2012] EWCA Civ. 837 (21/6/12)

Yet again, the infamous 'rule in *Harris v Flower*' has come before the higher courts of the land:

"If a right of way be granted for the enjoyment of Close A, the grantee, because he owns or acquires Close B, cannot use the way in substance for passing over Close A to Close B" (Romer LJ, *Harris v Flower,* (1904) 74 LJ Ch. 127, 132).

I wrote an article for this newsletter as long ago as 2003, stating:

"So if, as in Harris itself, the user of the right of way is in fact and in substance using it ultimately to get to and use other land - either a wholly different parcel or e.g. a building situated partly on the dominant land and partly on the other land - he is going beyond the bounds of the grant, and commits a trespass on the right of way when he uses it for this purpose.

This 'rule' has been repeatedly confirmed by the courts, recently so in both Peacock v Custins [2001] 2 AER 827 and Das v Linden Mews Limited [2002] EWCA Civ. 590. In Peacock, a farmer owned two fields which he farmed together, but only one of the fields had the benefit of a right of way over neighbouring land. It was held that he could not use the way for what was in substance access to both fields. In Das, it was held that owners of a mews house which had the benefit of a right of way over a private road could not use the road so as to pass to and from some additional car parking land which they had acquired near their house.

The thorny issue is whether there exists an exceptional category of use of additional land merely "ancillary" to use of the dominant tenement. In Peacock, the Court of Appeal appeared to think that it might be all right if the dominant landowner used the right of way to get to his dominant land, then toddled across to his adjacent land for a picnic [p90k per Schiemann LJ]....."

Giles v Tarry brought some of the difficulties, and potential absurdities, of the rule into sharp focus. G and T had been in a state of "virtual war", and in litigation, for a number of years. It was, however, accepted on all sides that T's right of way over G's lane was to be exercised for the benefit only of T's "Paddock", and not to a further separately acquired parcel, "the Green Land". T had expressly undertaken in a 1995 compromise not to use the way "for the purpose of gaining access to the Green Land".

T came up with a clever idea. He would proceed, and drive his sheep, along the right of way into the Paddock. He (and the sheep) would then exit the Paddock, out of a gate onto an adjacent public highway. There they would briefly tarry (sorry), before going back from that highway into the Paddock, and from thence to the adjoining Green Land.

Was that not, therefore, a series of separate journeys – the first a permissible use of the private right of way to get to the Paddock, the next a legitimate exit onto an adjacent highway, and finally a journey from that highway (and not, therefore, an exercise of the private right of way) onto the Paddock then the Green Land?

The trial judge thought so, although the trial was conducted by the parties in person without the benefit of full citation of authority. Although it was "clearly a somewhat artificial device or expedient" and "the objective of [T] has been to graze his sheep both on the paddock and the adjacent green land", nevertheless "Usage of a right of way must be analysed in terms of actual movement, not the ultimate intention of the user".

The Court of Appeal, addressed by counsel for both parties, disagreed. *Harris v Flower* and its successor cases remained good law unless and until overturned by the Supreme Court or Parliament. In all those cases, the test was expressed using words and phrases such as "in substance", "colourable use", "bona fide use", the "essential purpose" of the use, and the "reality of the case". On the judge's findings here as to T's "objective" and the "artificial" device adopted to achieve it, he could not have reached the conclusion he did:

".....we are dealing with one continuous operation, the object of which as the judge found, is to enable the sheep to graze the green land via the right of way. The use of the highway as a transient stopover is itself a "colourable" use of the highway. The whole sequence is, as the judge found, an artificial device. It therefore falls foul of the principle in Harris v Flower." (per Lewison LJ, paragraph 57).

As G.C. Seabourne and I argued in another article [(2003) Conv. 127], to which Lewison LJ referred in his judgment, unless the dominant owner has some other means of access to his additional land, such land may be landlocked save via genuinely "spontaneous" and unplanned excursions (e.g. for picnics) to it from the dominant land, the intention behind which is only formed *after* the right of way has first been used to get to that dominant land! In *Giles v Tarry*, while Norris J eschewed any invitation to consider further possibilities or questions other than those arising on the facts as found, Lewison LJ suggested at least two other means by which T could achieve his "objective". One was to use the public highway alone to get to the Paddock (and from there enter the Green Land). The other would be *"...to ensure that the sheep are turned onto the paddock to graze it first before proceeding on to the green land"* although *"That might necessitate the erection of some gated barrier between the paddock and the green land.."*. It is not wholly clear why, even if the journey was broken by a spell of grazing on the paddock, this would not equally fall foul of *Harris v Flower* if there was always an intention ultimately to proceed later to the Green Land. Perhaps the idea would be to leave it to the sheep to wander in there themselves if they so chose...

Ewan Paton

"T came up with a clever idea. He would proceed, and drive his sheep, along the right of way into the Paddock. He (and the sheep) would then exit the Paddock, out of a gate onto an adjacent public highway."

User "as of right" and commons registration

In *Betterment Properties (Weymouth) Limited v Dorset County Council*[1], Morgan J was confronted with an application to rectify the register under the section 14 of the Commons Registration Act 1965. This March, the Court of Appeal dismissed an appeal in that case.

The registration of the subject land as a village green had been completed as long ago as 2001 and the application to rectify was brought late in 2005; it came on for hearing in 2010. The procedural history in the litigation is a tale in itself. Nevertheless the issue before Morgan J was one of considerable importance in the field of acquisition of easements and of what user amounts to user "as of right" when assessing qualitative and quantative user in the context of determining an application for the registration of a village green.

At the application to rectify the register, the principal matrix of fact was that the user of the land was contentious and that was demonstrated by the erection of signage at strategic points around the land in question by the owner. The signage required trespassers to keep out and the like. Further there were fences in place. Overtime both signage and fencing were taken down and in consequence re-erected by the owners. In due course however the owners of the land failed to reinstate either the fences or the signs.

1 [2010] EWHC 3045

Remarkably the primary users of the subject land were not those who broke through the fences or took down the signage. Rather the evidence was that the predominant use was by secondary users. This form of secondary user describes those who go through the vandalised fences and through the land passing posts which no longer bore extant signage. These secondary users sought to argue that they should be treated differently from those who actually breached the fences or tore down signage. As will be seen from what the judge said, those who broke down the fences and removed the signs to use the land were to be equated with those who used the land after the perpetration of acts of vandalism.

The judge firstly directed himself as to the law by going back to *Ex p Sunningwell Parish*[2] and the speech of Lord Hoffman. He considered first of all the meaning of "as of right" when concerning use of land for lawful sports and pastimes.

After analysing the two strands of the law which had to some extent developed separately, he unhesitatingly came to the conclusion that "as of right" equates with the Latin phrase "nec vi, nec clam, nec precario" and that therefore the law relating to the acquisition of easements and user as of right has a common root.

The judge said after analysing the law on both sides:

"From those cases I derive the following principles:

1 *The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known;*

2 *Evidence of the actual response to the notice by the actual users is thus relevant to the question of actual knowledge and may also be relevant as to the putative knowledge of the reasonable user;*

3 *The nature and content of the notice, and its effect, must be examined in context;*

4 *The notice should be read in a common sense and not legalistic way;*

5 *If it is suggested that the owner should have done something more than erect the actual notice, whether in terms of a different notice or some other act, the court should consider whether anything more would be proportionate to the user in question. Accordingly it will not always be necessary, for example, to fence off the area concerned or take legal proceedings against those who use it. The aim is to let the reasonable user know that the owner objects to and contests his user. Accordingly, if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did. I have not here incorporated the reference by Pumfrey J in Brudenell-Bruce's case to 'consistent with his means';*

   That is simply because, for my part, if what is actually necessary to put the user on notice happens to be beyond the means of an impoverished landowner, for example, it is hard to see why that should absolve him without more. As it happens, in this case, no point on means was taken by the authority in any event so it does not arise on the facts here.

In my judgment the following principles also apply:

6 *Sometimes the issue is framed by reference to what a reasonable landowner would have understood his notice to mean – that is simply another way of asking the question as to what the reasonable user would have made of it;*

7 *Since the issue turns on what the user appreciated or should have appreciated from the notice, it follows that evidence as to what the owner subjectively intended to achieve by the notice is strictly irrelevant. In and of itself this cannot assist in ascertaining its objective meaning;*

8 *There may, however, be circumstances when evidence of that intent is relevant, for example if it is suggested that the meaning claimed by the owner is unrealistic or implausible in the sense that no owner could have contemplated that effect. Here, evidence that this owner at least did indeed contemplate that effect would be admissible to rebut that suggestion. It would also be relevant if that intent had been communicated to the users or some representative of them so that it was more than merely a privately expressed view or desire. In some cases, that might reinforce or explain the message conveyed by the notice, depending of course on the extent to which that intent was published, as it were, to the relevant users."*

The Judge then turned to the evidence and came to the following conclusion: *"… a reasonable person using the land and knowing the facts which I have found to have existed would appreciate that the landowner objected and continued to object to that use of the land and that the landowner would back the objection by physical obstruction to the extent possible. For the avoidance of doubt, I ought to say something more specific as to what a reasonable user of the land for sports or pastimes would have known about the breaking down or cutting of fences and hedges and about the notices erected by the landowners.* ***I find that a reasonable user of the land would have known that the fences and hedges had been broken down or cut. Many users of the land came on to the land by means of gaps in the fences and hedges. It would have been clear enough to such a reasonable user of the land that one of the purposes of the fences and the hedges being there was to prevent the public accessing the land at those points. It would have been clear enough to a reasonable user of the land that the gaps had been created (against the wishes of the landowners) by persons wanting to gain access at such point.*** *I also find that a reasonable user of the land in the period up to, say 1984, would have known that the landowners had erected signs which had been torn down and re-erected. As the various statements of the legal principle make clear, it is not necessary for the landowners to show that every single user of the land knew what a reasonable user would have known. I find that the landowner was doing everything, proportionately to the user, to contest the user and to endeavour to interrupt it. In answering the question in this way, nothing turns in this case on the means of the landowners and I need not consider in any more detail the point made by Judge Waksman QC".* [emphasis added].

It is not possible to do justice to the analysis or reasoning in a short article but it is testament to the judgment at first instance that the Court of Appeal[3] did not find any real difficulty in upholding Morgan J.

There are lessons to be learned from this case and especially where land is purchased for development. There can be no substitute to the carrying out of a full survey to take in the boundary features and structures and if needs be to carry out repairs to them and resurrect any fencing. The survey will also show up how the land has been used for access or recreation. Signage can and should be erected to reinforce the primary obstacle to access, namely the boundary fences and hedges.

The property purchase protocol should not be limited to the routine. Instead the vendor should be required to provide a statutory declaration (or similar) setting out the history of the land so that a full record exists of how the integrity of the property was maintained and how the land was used. This should assist in arming the new landowner with weaponry to fight claims that the purchased land was and is a village green. Providing that the land was fenced off and/or properly signed to injunct trespassers in the last 20 years, the ability to resist an application for registration should stand some prospect of succeeding.

Raj Sahonte

2 [2000] AC 335

3 [2012] EWCA Civ 250

Sale and leaseback revisited

In 2010, the Guildhall Property Newsletter critically analysed *Redstone Mortgages plc v Welch* [2009] 36 EG 98, a decision of His Honour Judge Worster in the Birmingham County Court which had given rise to a lot of head-scratching and a considerable amount of disquiet among those advising mortgagees in possession actions. Those advisors will be relieved to know that the Court of Appeal in the *North East Property Buyers Litigation* ("NEPB"), reported as *Cook v The Mortgage Business plc* [2012] 1 P&CR 393, has more or less put an end to their concerns.

Welch: A recap

In *Welch*, a hard-up pair of property owners had entered into a "sale and leaseback" (or "equity release") transaction with a Ms Welch who had promised the owners that, if they sold the property to her, she would allow them to remain in occupation under an assured tenancy. Unbeknownst to the occupiers, Ms Welch obtained a loan secured over the property in favour of Redstone. When the inevitable default occurred and Redstone sought possession, it was met with an ultimately successful defence that the occupiers had an interest overriding its registered charge. The main element of Judge Worster's reasoning was that the agreement to grant the tenancy to the occupiers was an indissoluble part of the agreement to sell, and so the title charged to Redstone was already a title encumbered by an "equity" enjoyed by the occupiers (as an estoppel or under the tenancy). Further, the occupants had obtained a legal interest in the unregistrable assured tenancy in the "registration gap" between transfer of title and completion of the transfer and mortgage by registration. This last part of Judge Worster's reasoning was particularly puzzling, since although he relied on the principles laid down by the House of Lords in *Abbey National Building Society v Cann* [1991] AC 56, he came to a conclusion which appeared directly to contradict them. In any event, Redstone lost and had to pay £20,000.00 under a pro bono costs award to the Access to Justice Foundation.

The *NEPB* litigation

So much for Round 1. Round 2 was the *NEPB* litigation, which involved something close to 100 separate possession claims, 90-odd of which were stayed in order that His Honour Judge Behrens could give a ruling on common preliminary issues in the case reported at [2010] All ER (D) 275 (Nov). The basic story in each was similar. A sale and leaseback entity had bought out the occupiers' interest in their property and given promises akin to those given in *Welch* concerning a right to occupy and repurchase, together with the "release" of a lump sum some years in the future. As in *Welch*, the purchaser mortgaged the properties in order to fund the purchase (or further purchases), and neither the occupiers nor the mortgagees knew of the others' interest until possession proceedings were afoot.

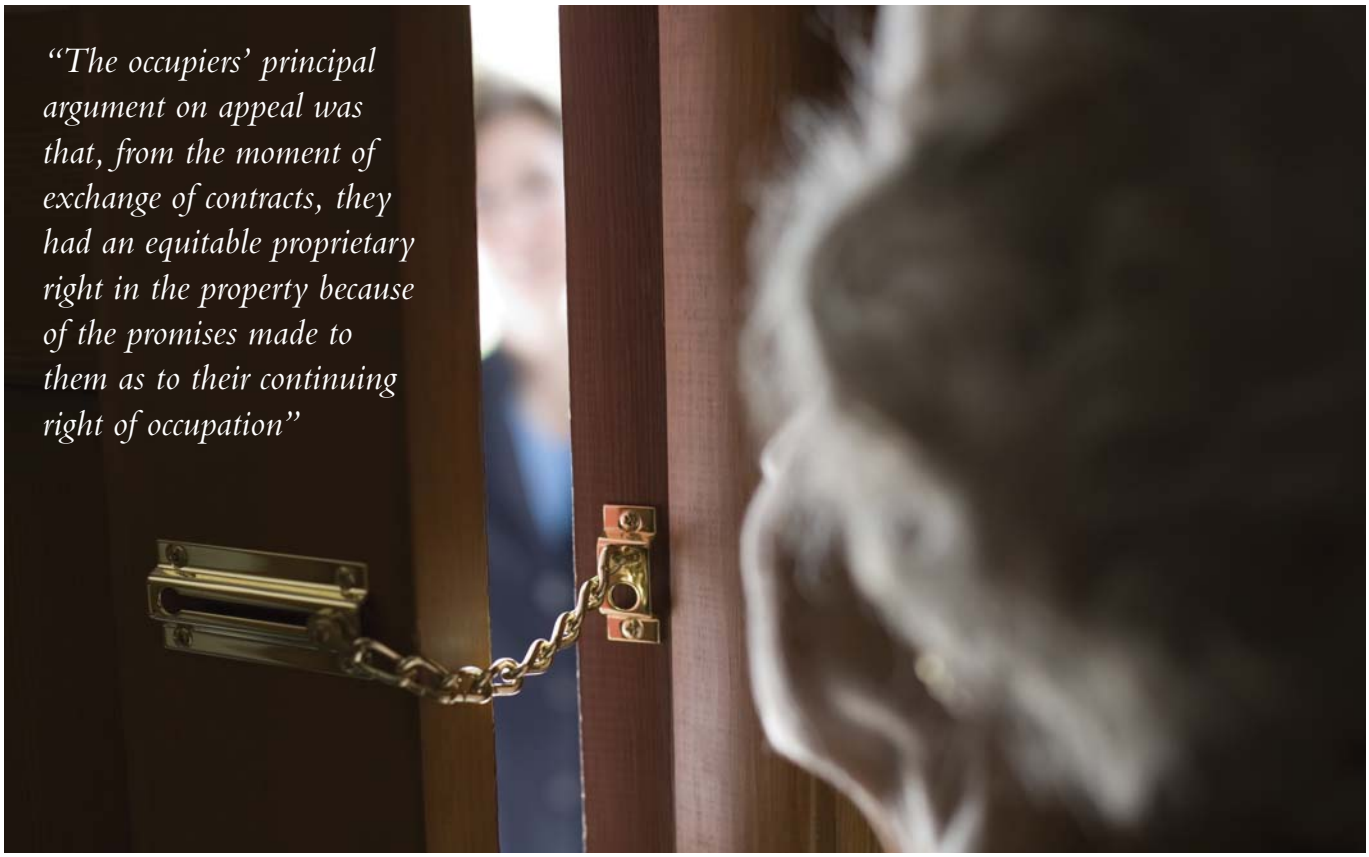
The key issue with which Judge Behrens was concerned was whether the alleged interests of the occupiers under the tenancies were capable of affecting the estates immediately before the relevant disposition (the registration of the charge) such that they were capable of overriding the mortgagees' interests in their charges. This was a re-run of the arguments in *Welch*, and Judge Behrens found convincingly for the mortgagees. Given the importance of *NEPB*, however, the Judge gave permission to appeal to the Court of Appeal, and at the beginning of 2012 the Court of Appeal handed down its decision, the leading judgment being given by Etherton LJ.

In brief, the occupiers' principal argument on appeal was that, from the moment of exchange of contracts, they had an equitable proprietary right in the property (whether by virtue of estoppel or trust principles) because of the promises made to them as to their continuing right of occupation. This, they contended, gave rise to an overriding interest under paragraph 2 of Schedule 3 to the Land Registration Act 2002 ("the LRA"), and not merely, as Judge Behrens had held, a personal right against the purchaser. Leading counsel for the occupiers argued that the manner in which the transaction must objectively be analysed was as an agreement to sell subject to a reservation, such that the buyer could not charge more than the interest in the property so encumbered.

In response the mortgagees *"subjected the legal interest of a purchaser under an uncompleted contract for the sale of land to a close and penetrating analysis"*, said Etherton LJ at [33]. But that close and penetrating analysis was ultimately of little relevance, because in the very next paragraph Etherton LJ went on to suggest that this part of the case had been addressed *"on too technical a basis"*. Fascinating though the arguments might be, what you really have to do is *"to analyse the true commercial and legal nature of the transactions between the ... vendors and the purchasers"*, and once that was done in ***NEPB*** it was clear that there were two separate transactions between those parties: a sale of the freehold, and a leaseback to the occupier on completion. None of the contracts of sale made any reference to the sale being subject to a reservation, and no third party (including a mortgagee) could have guessed that the vendor was expecting a leaseback after completion. In that circumstance, no equitable property interest could arise prior to completion of the sale. To that extent, the "substance" of the transactions between vendors and purchasers was precisely what was described by the "form" of the documentation.

Turning to the effect of *Cann*, Etherton LJ held that even if an equity had arisen upon exchange of contracts in favour of the occupiers, there was no moment in time between exchange and completion when the freehold acquired by the purchaser was free from the mortgage but subject to that equity. In each case, exchange of contracts and execution of the transfers and mortgages all took place on the same day.

The appellant occupiers recognised that ***Cann*** presented them with a serious obstacle. Their attempt to distinguish it on the basis that the "driver" of the transaction in *Cann* was to find a new home while in *NEPB* it was to release equity and secure a continuing right of occupation was never particularly



persuasive, and was roundly rejected. In substance and reality, the "driver" of the transaction in each was the need or desire to sell and purchase a property. Invocation of policy rationales for a different approach in *NEPB*, so as to place the risk of fraud or carelessness on the lenders' shoulders, similarly failed: why should policy dictate that vendors who choose not to set out the true transaction in the contract of sale should be entitled to take precedence over third party mortgagees who have lent on the faith of the truth of that document?

Taking up the gauntlet thrown down by Judge Worster in *Welch*, the occupiers then went on to run the puzzling "registration gap" argument. Etherton LJ explained the point at [57]:

"Between completion of the sale of registered land and the registration of the transfer the purchaser is, by virtue of LRA s.24(b), entitled to exercise the owner's powers in relation to a registered estate. Those powers include ... power to make a disposition of any kind permitted by the general law, including a lease. A lease of 7 years or less does not require to be registered before it is capable of operating at law... The effect of LRA s.29(4) is that, because a lease for 7 years or less is not a registrable disposition, the provisions in s.29(1)-(3) as to the priority of competing interests, apply on the assumption that the grant of the lease is a registrable disposition and was registered at the date of grant. [It] follows ... that an appellant vendor's rights under a lease for 7 years or less granted by a purchaser in the present cases have priority over a respondent lender's rights under a subsequently registered charge, even though the charge was executed before the grant of the lease..."

Etherton LJ was, rightly, unimpressed. Before registration of the purchaser as proprietor, his interest is equitable only; that is part of what the modern system of land registration is all about. An equitable owner cannot grant a legal estate. If Parliament had intended by the LRA to overturn this basic principle of land law, it would have done so clearly and by express words. Although *Welch* was mentioned only in passing by Etherton LJ in *NEPB*, it follows from his rejection of the argument founded on s.24 and s.29 of the LRA that the "registration gap" analysis of Judge Worster was simply wrong; as noted in the 2010 Newsletter, it in any event fails to take into account Peter Gibson LJ's analysis in *Lloyd's Permanent Building Society v Fanimi* (Lawtel 21/4/97).

Conveyancers beware

Before finally dismissing the appeals, Etherton LJ paused to take a shot across the bows of modern conveyancing practice. If the contracts for sale had given details of the entire transaction intended by vendors and purchasers, the problems for the occupiers would not have arisen. The lenders' solicitors would have had to report the unusual arrangements to their clients. The lenders would then have been in a position to make an informed decision as to whether to proceed. His Lordship concluded by saying, at [67]:

"I do not know why details of those contractual arrangements were not contained in the contracts for sale, but, if the arrangements were intended to be binding on any third party as well as the purchaser – a matter the appellant vendors' solicitors would have been bound to investigate and advise upon - their omission seems on the face of it plainly inconsistent with proper conveyancing practice."

I wonder whether the implied criticism is an unfair one. In many of the troubling "equity release" schemes I have come across, the purchasing entity will do all the running, directing the vendors to solicitors, producing the documentation with which to instruct solicitors, and in some cases going so far as specifically to advise the vendors not to reveal the leaseback arrangements to the solicitors. Sometimes, it may justifiably be said that the conveyancers failed to carry out sufficiently close inquiries of their vendor clients to advise them properly on the transaction they wished to conclude. In most, however, the more obvious fault lies with the vendors themselves, who (whether because of the "advice" of the purchasers or otherwise) can appear unwilling to reveal the whole scheme to their solicitors. Be that as it may, Etherton LJ has clearly opened the door to a rash of professional negligence actions against conveyancers in these sale and leaseback transactions. After *Welch* and *NEPB*, one can now confidently predict that Round 3 of this debacle will focus on the solicitors themselves.

Ross Fentem

Construction of conveyancing documents

Two recent appeal court cases have highlighted the degree to which the Courts will consider extrinsic evidence in the construction of property conveyances. In cases of uncertainty the Court will attempt to construe the whole agreement according to the canonical principles outlined in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896. In the case of a defective parcels clause or a generally ambiguous conveyance, admissible extrinsic evidence has been held to include the conduct of the parties subsequent to the conveyance, and an objective assessment of the circumstances surrounding the conveyance, including an appreciation of the topography.

Thus extrinsic evidence is often necessarily considered when arriving at a meaningful interpretation of title documents. Of course the admissibility of extrinsic evidence still falls to be determined by the Court, subject generally to Lord Hoffman's limiting third principle in ICS, viz:

"(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear..."

Generally a conveyance of land will contain a written description accompanied by a plan. If the plan is described as being "for the purposes of identification only" then the written parcels clause will often prevail. If the property is "more particularly described in the plan" then the plan will generally be seen providing the definitive description of the plot. Where the parcels clause is ineffective or deficient then the court may have recourse to the plan even though it is "for the purposes of identification only".

Cameron v Boggiano and Robertson [2012] EWCA Civ 157

In the recent case of *Cameron v Boggiano and Robertson* [2012] EWCA Civ 157 two neighbours had purchased property at different times from a common vendor. The Claimant sought a declaration that his land at No. 7 Choumert Mews extended right up to the rear wall of the Defendants' property, No. 60 Choumert Road . The Defendants denied that this was the case and claimed that the respective parcels were divided by a 4' gravel strip running parallel to and between the rear wall of No. 60 and a drain line.

The Claimant was the first in time to purchase his property and the sale documents for that transaction logically fell to be construed when the boundary between the two neighbouring plots was to be ascertained. The plan accompanying the contract and TR1 for the sale of his land at No. 7 was derived from the OS map and was described as inherently unclear, based on a small scale OS map over which boundary lines were thick and the colouring 'slapdash'. This was referred to as Plan A.

In addition to plan A, a further plan had been available to the Claimant and common vendor at the time of the first sale. This was a plan of the service runs which was marked up in greater detail than Plan A to show that No. 7 would only run up to the drain at the edge of the gravel strip.

Notwithstanding the concerns over the quality of the plan the Judge at first instance decided that Plan 'A' was the only plan material to construction of the boundary. Viewed objectively it was held to be sufficiently clear to permit construction of a boundary which corresponded with the Claimant's pleaded case.

The Defendants pleaded a very late amended counterclaim in rectification based on mutual mistake, upon which they succeeded. Thus the Claimant, having won on the construction point, was denied the fruits of his victory by the subsequent rectification point.[1]

The appeal and cross appeal

The Claimant appealed the rectification point and the Defendants cross-appealed on the construction point.

Allowing the Defendants' cross appeal on the construction point (and dismissing the rectification appeal) Mummery LJ conceded that the contract, TP1 and Plan A for the sale of No. 7 were indeed *objectively capable* of having the effect maintained by the Claimant, and that the subjective intention of the parties to that sale was not a legitimate part of the construction of the title documents. Ordinarily therefore, where the transfer and the transfer plan were clear and unambiguous a mismatch between the plan and the topographical features on the ground was not sufficient of itself to depart from the title documents.

1 The Defendant ultimately succeeded in showing that there had been a mistake and that the common vendor had not intended to transfer the gravel strip. Furthermore it was held that Plan C was available to the Claimant and the vendor prior to sale and that the vendor had only intended to sell land to the Claimant up to the line of the drain. Furthermore the Judge at first instance had been satisfied that the Claimant understood that his proposed purchase extended only as far as the drain line, and not over the gravel strip. Critically the Judge at first instance was satisfied that Plan C, although not prepared as the title map, had been available to the parties and represented an outward expression of accord with respect to the Claimant's and the vendor's understanding of what was being sold.

Where, however, the title and plan were insufficiently clear to establish the position of the boundary then it was permissible to rely on extrinsic evidence by way of the local topography (*cf Pennock v Hodgson* [2010] EWCA Civ 873). Where such ambiguity exists then it cannot be a breach of the exclusionary principle to look at the features on the ground at the time of the relevant conveyance.

In the instant case (and although Plan A was not qualified by the expression "for identification only") Plan A was so ambiguous that it fell to be 'contextualised' in order to give effect to its meaning. At paragraph 65 of his Judgment, Mummery LJ stated:

"It [Plan A]…is not to be construed in a vacuum. In more mundane terms this means that the reasonable layman would go to the property with the plan in his hand to see what he is buying. The reasonable layman is not a qualified surveyor or a lawyer. If the plan is not, on its own, sufficiently clear to the reasonable layman to fix the boundaries of the property in question, topographical features may be used to clarify and construe it."

It was determined that Plan A was of such poor quality that recourse could legitimately be made to an examination of the features on the ground at the time of the conveyance. The practical effect on the construction of the conveyance of No. 7 was that the boundary was to be construed as passing along the line of the drain, and not as contended up to the rear wall of No. 60.

The case is further authority for the proposition that where a transfer plan is intended to be definitive, but is still ambiguous, then the local topography can be employed in construing the parcel boundary.

Owen Ernest Wood & Ors v Hudson Industrial Services Ltd [2012] EWCA Civ 599

Whilst it is settled law that a parcels clause in a deed will prevail over a plan attached *'for the purposes of identification only'*, if the verbal description is insufficient, the court will have recourse to the plan. If the plan is also of no help in identifying the area, then the court can again refer to the surrounding circumstances, and ask objectively what the reasonable lay person thought was the area described.

In *Owen Ernest Wood & Ors V Hudson Industrial Services Ltd* [2012] EWCA Civ 599, a further judgment delivered by Mummery LJ this year, the Court of Appeal looked at the question of whether extrinsic evidence of the parties' discussions might become admissible in the construction of a parcels clause.

This case concerned the construction of a Deed of Gift dated April 1995. The appellants had been the owners of farm land and a dairy business which they gradually parcelled and sold by smaller plots after retirement. By deed of gift, they transferred a small parcel of land ('one acre or thereabouts') to their son David. Unfortunately there was a mismatch between the area of unregistered land described in the parcels clause in the Deed and the area of unregistered land delineated and edged red on a plan annexed to the Deed 'for the purpose of identification only'.

Hudson Industrial Services Ltd subsequently bought that land from the son and sought registration of its title to the 3¼ acres of unregistered land described by the deed plan. The appellants resisted the application for registration on the basis that the land conveyed to Hudson could only have been the farm yard from where the son operated a machinery business, and that was the 1 acre or thereabouts intended to pass under the deed.

At first instance the judge made a declaration that, as a matter of construction, the Deed of Gift had conveyed 3¼ acres from the parents to the son. The judge gave effect to the area of red edging shown on the annexed plan rather than to the verbal description of the area in the parcels clause. He did this on the basis that it was not possible to tell from the clause in the Deed where, within the area of the land delineated and edged red on the plan, the "one acre or thereabouts" was located.

The appellants had relied at first instance on the records and attendance notes of solicitors dealing between the parents and their son, and on the evidence of witnesses who had been privy to discussion with the son about the use of the yard for his business. In reaching his decision the Judge excluded that evidence, relying on the general exclusionary principle in *Prenn v Simmonds* [1971] 1 WLR 1381 (see also ICS supra) that evidence of previous negotiations between the parties is excluded from the process of construing the document.

The appeal

On appeal, Mummery LJ confirmed that extrinsic evidence of the parties' prior negotiation was indeed inadmissible. However, he pointed to the fact that what had passed between the witnesses as a preliminary to the original transfer was admissible as evidence of the surrounding circumstances known to the parties (*Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 per Lord Hoffman at paragraph 42[2]). It followed that the evidence was admissible to identify the plot of land in the parcels clause as the yard.

On the balance of probabilities Mummery LJ was satisfied that that extrinsic evidence pointed to the yard alone as being the area described in the parcels clause. Those circumstances were (a) the physical separation of the yard from other land included in the plan; (b) the yard area being 1.09 acres; (c) the absence of any other plausible candidate of similar area; (d) the yard was used for David's business and had been the subject of a planning application by David for a larger workshop.

Post-script

This article only touches on two of the recent Court of Appeal decisions. The reader should be aware, however, that over the last eighteen months or so the Court of Appeal has been extremely active in this area. Disputes over the construction of conveyances of land are a class apart from other disputes over the interpretation of contracts etc, but must be viewed in the context of the wider debate about what should be admitted as an aid to construction and when it may be necessary to seek rectification instead. It is certainly arguable that a lack of consistency in some of the recent pronouncements may be storing up real difficulties for the future. See esp. *Cherry Tree Investments v Landman Ltd* {2012] EWCA CIV 736.

Henry Stevens

2 "[42] The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."

Update on tenancy deposit schemes

In a nutshell, the statutory provisions relating to tenancy deposit schemes apply to cases involving assured shorthold tenancies created since 6 April 2007 where the landlord (or his agent) takes a deposit from the tenant (or a third party), and they require the landlord to protect the deposit for the benefit of the tenant by dealing with it in accordance with one of the schemes authorised for the purpose, which also facilitate the resolution of disputes arising in connection with such deposits.

The relevant provisions of primary legislation are contained in Sections 212-215 and Schedule 10 of the Housing Act 2004, and came into force on 6 April 2007. However, the Localism Act 2011 has made some important amendments to these provisions which came into force on 6 April 2012, and which effectively reverse some decisions of the Court of Appeal. There are also relevant provisions of secondary legislation in the Housing (Tenancy Deposits) (Prescribed Information) Order 2007.

Where a landlord receives a deposit from a tenant, the landlord must comply with the initial requirements of an authorised scheme and give the tenant prescribed information in relation to the deposit within 30 days of receiving it. Where the landlord fails to do this, the tenant may apply to a County Court for orders against the landlord including for the repayment of the deposit and for the payment of a sum of money between one and three times the amount of the deposit.

In *Tiensia v Vision Enterprises* [2010] EWCA Civ 1224, [2011] 1 All ER 1059, the Court of Appeal held that the court could not make orders against a landlord who had failed to fulfil his obligations within 14 (now 30) days if he had done so before the hearing of a tenant's application for such orders. However, the effect of the amendments made to the tenancy deposit schemes provisions by the Localism Act 2011 seems to be that the court will make orders against a landlord who has failed to fulfil his obligations within 30 days of receiving the deposit, even if he does so thereafter.

Further, in *Gladehurst Properties v Hashemi* [2011] EWCA Civ 604, [2011] 4 All ER 556, the Court of Appeal held that the court could not make orders against a landlord who had failed to fulfil his obligations after the tenancy had ended (although, in *Potts v Densley* [2011] EWHC 1144 (QB), [2012] 1 WLR 1204, the High Court appeared to say otherwise). However, the effect of the amendments seems to be that the court will make orders against a landlord who has failed to fulfil his obligations within 30 days of receiving the deposit, even if the tenancy has come to an end.

In *Suurpere v Nice* [2011] EWHC 2003 (QB), [2012] 1 WLR 1224, the High Court held that the court should make orders against a landlord who had failed to fulfil his obligations even if he had returned the deposit before the hearing of a tenant's application for such orders. This case was, like the other cases mentioned above, decided before the recent amendments to the tenancy deposit schemes provisions, but it would seem to be in line with the effects of those amendments.

In addition to the above, it now seems that unless the deposit has been returned to the tenant in full or with agreed deductions, or an application has been made to a County Court and determined, withdrawn or settled, then the landlord may not give a notice under Section 21 of the Housing Act 1988 when he has failed to fulfil his obligations within 30 days of receiving the deposit.

The amendments made to the tenancy deposit schemes provisions by the Localism Act 2011 seem to have clarified the intentions of those provisions and improved their effectiveness in achieving those aims, but there are issues that remain to be resolved and, of course, the effects of the amendments will not be known for sure until they have been tested by the courts.

Michael Selway

Rent: it may be expensive, but when is it an expense?

The High Court considers the status of claims for rent in an administration in *Leisure (Norwich) II Ltd v Luminar Lava Ignite Ltd (in Admin) [2012] EWHC 951 (Ch) [2012] B.C.C. 497*

The problem

Most payment obligations incurred by a company prior to the date it goes into administration or liquidation are what are known as "provable debts" i.e. every creditor submits a proof of their debt and the available pot of assets is divided between them pro rata. But the very process of orderly administration or liquidation of an insolvent company costs money, and the legislation dictates that these "expenses" of the insolvency process get paid out of the pot first, ahead of provable debts.

Because there is a finite pot to distribute, it is in the interests of the landlord of the premises of an insolvent company to argue that the unpaid rent due is an expense rather than a provable debt, to rank ahead of the company's general creditors. The lists of administration expenses and liquidation expenses (found in rules 2.67 and 4.218 of the Insolvency Rules 1986 respectively) do not expressly include rent, but the Court has held that in some circumstances rent is payable "as if" it were a liquidation /administration expense.

On 28 March of this year His Honour Judge Pelling QC (sitting as a Judge in the Chancery Division) considered an application by landlords for orders requiring the administrators of the respondent tenant companies to pay pre-administration rents in full as administration expenses with priority over provable debts in *Leisure (Norwich) II Ltd v Luminar Lava Ignite Ltd (in Admin.) ("Luminar")*.

The facts

The respondent group of companies had been one of the largest nightclub operators in the UK. They leased four properties from the applicant landlords with rent payable quarterly in advance on each quarter day. At the time of the administrators' appointment the companies had fallen into arrears with the rents. The main issue in the case was whether the administrators were obliged to pay the accrued rent as an expense of the administration even though it fell due before their appointment.

"Where rent payable in advance became due while the office holder was retaining the property, the whole sum was payable as an expense."

The landlords argued that all unpaid rent became payable as an expense, irrespective of when it had fallen due, if and to the extent that it applied to a period of occupation by the administrators. The administrators argued that the only rent that could become payable as an expense was rent falling due after the administration had commenced and the administrators had elected to retain the relevant property for the purposes of the administration.

The decision

His Honour Judge Pelling QC directed that the landlords were not entitled to the rent which fell due prior to the administration as an administration expense. He summarised the position of rent in corporate insolvency as follows:

a. Where rent payable in advance became due while the office holder (administrator or liquidator) was retaining the property, the whole sum was payable as an expense. This would be so even if the office holder gives permission to the landlord to forfeit the lease, or vacates the premises before expiry of the period for which the payment in advance is due, since rent payable in advance is not subject to the Apportionment Act 1870. This was the decision of Judge Purle QC in *Goldacre (Offices) Ltd v Nortel Networks UK Ltd (In Administration)* [2009] EWHC 3389 (Ch); [2010] Ch. 455; [2010] B.C.C. 299 ("*Goldacre*");

b. However, if rent payable in advance falls due for payment prior to a liquidation or administration, then it is a provable debt. It is not payable as an expense, even though the office holder retains the property for the purposes of the liquidation or administration for the whole or part of the period for which the payment in advance was payable.

c. Where rent is payable in arrears, if it accrues due during a period when the administrator or liquidator is retaining property for the purposes of the liquidation or administration, the office holder must pay as an expense at least the rent that accrued from day to day for so long as he or she retains possession of the premises for the purposes of the liquidation or administration. He declined to express a view on whether the office-holder will be liable to pay that part of the rent that has accrued in arrears that is referable to a period prior to the commencement of the administration or liquidation.

Some brief thoughts

Luminar followed *Goldacre* (which was criticised widely within the insolvency community when it was decided since it placed an onerous obligation on office holders to pay a full quarter's rent even where they used the premises minimally and vacated early), but struck back for office holders where the rent fell due prior to the liquidation (when the office holder appointed just after a quarter day would have the benefit of 3 months occupation 'for free').

One effect of the decision is that leases with monthly rents might be a more attractive option to landlords, since if the tenant goes into administration or liquidation the most the office holder could benefit from is a month of occupation without being obliged to pay rent as an expense. However, monthly rental payments would impose an increased administrative burden for landlords and a loss of the cash flow benefit of receiving 3 months rent in advance. One possible way of circumventing this might be by drafting a lease which provides for a shorter rental period to kick in on the occurrence of an "insolvency event".

Holly Doyle

A Complete defence?

The main advantage from the landlord's point of view of an assured shorthold tenancy ("AST") is that once the fixed term has expired possession can be recovered without having to establish any of the grounds set out in Schedule 2 of the Housing Act 1988. However, in all cases, whether notice is served during the subsistence of a fixed term, or during a periodic assured shorthold tenancy, the only way the landlord can recover possession is by bringing proceedings in court.

Since October 2001 the landlord has had a choice between commencing standard possession proceedings with particulars of claim or under the accelerated procedure contained in CPR 55.11 to 55.19. In any event, under either procedural track s.21 of the 1988 Act might suggest that so long as proper notice has been given[1] and the landlord has waited until expiry of that notice before issuing possession proceedings[2], the court has no discretion but to make an order for possession[3]. That long-held view will, no doubt, need to be partially revised following the Supreme Court's decision in *Manchester CC v Pinnock*[4], as confirmed recently in *Hounslow LBC v Powell*[5], *Corby BC v Scott*[6] and *Birmingham City Council v Richard Lloyd*[7]. However, this article is concerned with the more wide-ranging impact that the Equality Act 2010 ("the 2010 Act") will have upon possession proceedings.

The 2010 Act, most of which came into force on 1 October 2010, repealed the Disability Discrimination Act 1995 and extended the duties owed to disabled persons. It is a vast Act, dealing with many fields of activity in which discrimination can occur, and has already been heralded by the Equality and Human Rights Commission as the most significant development in equality law in 40 years. Importantly for landlords up and down the country, it is also relevant to possession proceedings.

The basic proposition underlying the new provisions is that the court will not make a possession order if to do so amounts to unlawful discrimination – a statement which applies equally to cases where the landlord has to establish that it is reasonable to make a possession order, and where there is no requirement for the landlord to establish reasonableness – for example where a tenant is occupying under an AST.[8] An eviction will amount to unlawful discrimination for the purposes of the 2010 Act if it is sought because of *"something arising in consequence of [the tenant's] disability"*, which cannot be shown to be *"a proportionate means of achieving a legitimate aim" (s.15(1))*.[9] Disability is defined as *"physical or mental impairment…[which] has a substantial and long-term adverse effect on [the tenant's] ability to carry out normal day-to-day activities"* (s.6(1) and *Sch 6* and the *Equality Act 2010 (Disability) Regulations 2010 (SI 2010/2128)*).

Since 1 October 2010 the circumstances in which eviction will amount to unlawful discrimination, so that the court will refuse to make a possession order, are accordingly wider than under previous legislation. Whilst it is too soon to obtain reliable statistics, a so-called "Equality Act defence" is likely to be raised with greater regularity than previous similar defences. On that basis, where there is any prospect of such a defence being asserted, a landlord will no doubt be best-placed to deal with the issues arising if he or she at least has an understanding of the applicable principles.

"Something Arising in Consequence of [the Tenant's] Disability"

Prior to the 2010 Act coming into force, it was only possible to contend that a landlord had discriminated against a disabled tenant if, for a reason which related to the disabled tenant's disability, he had treated him less favourably than he would have treated others to whom that reason would not apply. In any event, a landlord could justify his discriminatory conduct if he showed that one of several grounds applied.[10] Following the House of Lords' decision in *Lewisham LBC v Malcolm*[11] the availability of a disability discrimination defence was considerably restricted; a tenant was required to prove that the landlord in question would have treated a person differently who was without a disability. As such, it was relatively easy for a landlord to show that he would also have evicted a non-disabled tenant or a tenant with a different disability who acted as the disabled tenant had in the circumstances. There was also some suggestion by Lord Bingham and Lord Scott that a "reason" did not "relate to" a disability for s24(1)(a) purposes unless the fact of the physical or mental condition in question had played some causative part in the decision-making process of the alleged discriminator.[12]

In effect the *Lewisham* decision made it very difficult for a disabled person to prove disability-related discrimination. As such, Parliament responded by broadening the scope of disability discrimination; there is no longer any requirement of a comparator and "a reason" has been replaced with

1 Under either s.21(1) or s.21(4)

2 *Lower Street Properties Ltd v Jones* (1996) 28 HLR 877

3 Although the court may postpone possession for up to 6 weeks if exceptional hardship would be caused to the tenant – s.89 *Housing Act 1980*.

4 *[2011] 2 AC 104*

5 *[2011] UKSC 8*

6 *[2012] EWCA Civ 276*

7 (2012)

8 *s.35(1)* makes it unlawful for a person who manages premises to discriminate against an occupier of the premises by evicting them or subject them to any other detriment.

9 There is a partial exemption for "owner-occupiers" and landlords of "small premises" - see *s.38(9)* and *Sch 5* of the 2010 Act.

10 *Disability Discrimination Act 1995 s24(1)*

11 [2008] 1 AC 1399

12 Ibid per Lord Bingham at 1406 [H] and per Lord Scott at 1415

"something arising in consequence of [the tenant's] disability." It would seem that the latter now covers cases where, for example, the tenant's disability is the cause of the decision to sublet[13] or failure to pay rent.[14]

It does not appear to be disputed that even after the enactment of the 2010 Act a landlord is able to evict a disabled person by proper process. However, where the reason for this is related to their disability, and this is likely to be the case where the basis for the eviction is the behaviour of the tenant, the tenant is likely to satisfy the court, no doubt with the assistance of expert evidence, that the alleged breaches (or breach) are *"in consequence of his disability"*. The landlord must then justify the possession proceedings before the court will make an order for possession.

"Proportionate Means of Achieving a Legitimate Aim"

To date there is no direct appellate authority dealing with this particular aspect of *s.15(1)*. It appears clear that the landlord is required to show 2 things:

i that the eviction was directed at achieving a 'legitimate aim'; and

ii if so directed, that it was a proportionate means of doing so.

Accordingly, the first step for a landlord is to identify the legitimate aim in question. Unfortunately this phrase is not defined by the 2010 Act, although, until its repeal by the 2010 Act[15], the *Race Relations Act 1976, s.1A* contained a similarly worded justificatory defence within the context of indirect discrimination on the grounds of, ***inter alia,*** race. In that context the High Court confirmed that there was in fact no difference between that test and the test enumerated by the European Court of Justice in *Bilka-Kaufhaus*, namely whether the measures employed *'correspond to a real need…are appropriate with a view to achieving the objectives pursued and are necessary to that end."*[16] It is likely that a similar approach will be adopted in relation to *s.15(1).*

Whilst it is not possible (nor appropriate) to set out an exhaustive list, in ***Pinnock***[17] the Supreme Court did provide some examples of potential legitimate aims, albeit in the context of Article 8 not the 2010 Act. The examples given in relation to a local housing authority were:

- That the eviction would serve to vindicate the authority's ownership rights.
- That the eviction would enable the authority to comply with its duties in relation to the distribution and management of its housing stock, including, for example, the fair allocation of its housing, the redevelopment of the site, the refurbishing of sub-standard accommodation, the need to move people who are in accommodation that now exceeds their needs, and the need to move vulnerable people into sheltered or warden-assisted housing.
- That there are other cogent reasons, such as the need to remove a source of nuisance to neighbours.

In the majority of cases it would be surprising if the landlord's decision to commence possession proceedings was not deemed to be in pursuance of a legitimate aim, especially where substantial rent arrears have accrued or the tenant has caused damage to the landlord's property. As such, the pertinent issue in the majority of cases where an "Equality Act defence" is raised, will be whether issuing proceedings for possession was a proportionate means of achieving that legitimate aim. Certainly in *Pinnock,* albeit in the context of an alleged Article 8 defence, the Supreme Court agreed with the suggestions put forward by the Equality and Human Rights Commission, that proportionately is more likely to be a relevant issue ***"in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty".***[18]

Unfortunately, although unsurprisingly, proportionately is not defined by the 2010 Act. In any event it is difficult to provide practical guidance considering the issue is likely to depend upon the court's assessment in each individual case. However, one can at least sketch out steps which could be taken by a landlord to help convince a court that on balance the commencement of possession proceedings was a proportionate measure. Steps a landlord may wish to consider prior to commencing possession proceedings include:

- Considering at an early stage what impact if any the eviction will have upon the tenant in question and weighing up whether the need for an eviction outweighs the seriousness of the impact upon him or her.
- Determining whether alternative steps, as opposed to commencing possession proceedings, are available to remedy the issue in question. It may be possible, for example, to put the tenant in question in touch with a local charity specialising in the provision of support to individuals with learning disabilities. The landlord may even choose to contact the charity directly on the tenant's behalf.
- Working with the tenant and, if possible, his family, to draft a list of steps he or she should implement to prevent further breaches/rent arrears. This may be particularly useful where the landlord's complaint relates to the state of the premises.
- Granting an extension of time prior to commencing proceedings in order to enable the tenant to put things right. No doubt the more lenient the period the more proportionate any later decision to issue proceedings will appear.
- Viewing possession proceedings very much as a last resort; it will no doubt be difficult for a landlord to justify commencing proceedings at the first opportunity.
- Recording the steps taken, the alternatives considered and the reasons for pursuing the path chosen. It will, no doubt, be more persuasive in court if there is a clear paper trail available.

Conclusion

Whilst it is impossible to provide guidance applicable to every case, it appears, considering the circumstances in which eviction may now amount to unlawful discrimination, that one thing can be said with relative certainty: whilst the Equality Act 2010 does not provide a complete defence to a disabled person faced with eviction, it does make the process more complicated and more expensive for the landlord.

Matthew Brown

13 As in *Lewisham*

14 *See S v Floyd [2008] EWCA Civ 201* – decided prior to the enactment of the 2010 Act.

15 *See s.211, Sch 27 EA 2010*

16 High Court's decision in *R (on the application of Elias) v Secretary of State for Defence [2005] EWHC 1435 (Admin)* citing the relevant passage from *Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1986] IRLR 317*

17 [2010] 3 WLR 1441 at 1456 per Lord Neuberger

18 [2011] 2 AC 104 at [64]

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