



INVESTOR IN PEOPLE

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It gives me great pleasure to introduce the fourth issue of the Clarendon Chambers Property Review, produced by practitioners within the Clarendon Chambers Civil Team who undertake work in the fields of real property and landlord and tenant law. Its aim is to provide conveyancers, property litigators and general practitioners undertaking property work with a succinct and practical analysis of recent developments in relation to their fields of practice. In this issue we look at the draft rent arrears protocol and review recent case law in the field of landlord and tenant, mortgages and land registration.

Andrew J. Bullock

Assessment of Damages for Breach of Covenant for Quiet Enjoyment in a Commercial Lease

The judgment in *Ricci Stewart v Scottish Widows & Life Assurance Society plc* (unreported) 22nd June 2005 involved a consideration of a number of legal principles relating to assessment of damages for loss of business custom, in this case flowing from an admitted breach of a landlord's covenant for quiet enjoyment amounting to a derogation from grant, but equally applicable in ordinary contract. The landlord had installed speed humps on an industrial estate making it difficult or impossible for prestige cars to be driven to the tenant's premises for repair. The assessment was complicated by the fact that the tenant company had gone into liquidation due primarily to the size of its Crown debts, and by the absence of statutory accounts and VAT returns. Judge Eccles QC, sitting as a QBD Judge, emphasised that his assessment necessarily involved an exercise in judicial discretion, not a mathematical calculation. The very careful judicial dissection of detailed competing forensic accountancy evidence is a *tour de force*.

The following principles were applied:

- 1 An equitable assignment of choses in action (in this case existing and future repair contracts and the right to claim damages for breach of covenant) does not depend on any formality and can be couched in ordinary language: *William Brandt's Sons & Co. v. Dunlop Rubber Co Ltd* [1905] A.C. 454 per Lord Macnaghten.
- 2 A claimant must establish that the breach (be it of covenant or contract) was the "effective" or "dominant" cause of the loss, as opposed to simply providing the opportunity for the loss to be sustained. In determining causation the Court must apply its "common sense": *Galoo*

Ltd v Bright Grahame Murray [1994] 1 W.L.R. 1360 per Glidewell LJ.

- 3 A claimant's loss of opportunity or chance is actionable damage, to be proved on a balance of probability and evaluated if substantial: *Gregg v Scott* [2005] UKHL 2 per Lord Nicholls.
- 4 Although the normal basis for assessing the value of lost trade where a company has ceased to trade is to value the business at the date of closure, it may be appropriate to use the multiplier/multiplicand approach if there is evidence that but for the breach the company would have continued to trade: *Salford City Council v Torkington* [2004] EWCA Civ 1646 (Court of Appeal). In that event the proper course is to put a capital value on the loss to the company, subject only to considerations of causation and remoteness.
- 5 The rule in *British Transport Commission v Gourley* [1956] A.C. 185 does not apply to damages to compensate the company for actual loss sustained, because such loss by definition would not have been subject to corporation tax. *Gourley* does apply to damages to compensate for loss of profits and for the loss of the chance to make further profits. However, if the sums involved are relatively small, the Court need not follow *Gourley* strictly and should adopt the pragmatic approach taken by Ouseley J. in *Susan Linda Finley v Connell & Others* [2002] 2 Lloyds Reports 62, and not concern itself with the finer points of tax computation or try to adjust the reduction by setting off losses against profits.

Julian Lynch

Section 65 Land Registration Act 2002 – The First Authorities

Almost two years after its commencement, the judges of the Chancery Division are now starting to come to grips with the intricacies of the Land Registration Act 2002. Unsurprisingly, the first cases to come before them have concerned the provisions concerning alteration and rectification contained within section 65 and Schedule 4 of the act: an area which is inherently ripe for contention.

It will be recalled that under the general scheme of Schedule 4 both the court and the registrar have power to make an order for alteration of the register for the purposes of correcting a mistake, bringing the register up to date or giving effect to any estate, right or interest excepted from the effect of registration. A distinction is drawn in this regard between an application for alteration and for rectification of the register (meaning an alteration of the register that involves the correction of a mistake prejudicially affecting the title of a registered proprietor (paragraph 1)). The powers of both the court and the registrar are unsurprisingly more restricted in the case of rectification which may not take place without the proprietor's consent save where the mistake to be corrected was caused (or contributed to) by the fraud or lack of care of the proprietor or where it would otherwise be unjust for the alteration not to be made (paragraph 3 (2), 6 (2)).

In **James Hay Pension Trustees Ltd v Cooper Estates Ltd** [2005] EWHC 36 (Ch) the question for decision was as to whether it would be unjust to alter the register in circumstances where the defendant found itself in a ransom position as a result of an error in

the designation of boundary lines upon plans referred to within the transfer by which it derived title. Hart J unhesitatingly held that it was not and ordered rectification accordingly.

Of greater significance is the subsequent decision of Mann J in **Sainsbury's Supermarkets Ltd v Olympia Homes Ltd** [2005] EWHC 1235 (Ch). The factual background to this case is of quite fantastical complexity; the key point to note being that the proprietor of the title of which rectification was sought found itself in an unbar-gained for ransom position as a result of a defect in title of which its solicitors had notice. This was, as in **James Hay**, held to justify the making of an order for rectification upon the grounds that it would be unjust not to do so. The judgment further establishes the following points of general application with respect to the exercise of the jurisdiction to rectify:

- The words “caused or contributed to”, as employed within Schedule 4, mean something more active or significant than the submission of an application for registration together with supporting documents (*ibid* [86]).
- The duty of solicitor acting for an applicant for registration (probably) extends no further than to submit the title documents with which he has been supplied to the Registrar for consideration and is (certainly) satisfied by providing the Registrar with sufficient information to draw the existence of a potential problem to his attention. Thus, a mistake in the register will not be treated as having been caused by want of proper care on the part

of the proprietor concerned (so as to permit rectification) merely because his solicitor failed to take the further step of pointing up the existence of a defect in the title (*ibid* [87]).

- Although rectification is non-retrospective in nature (as under the 1925 legislation), it does not follow that the proprietor against whom rectification is sought will therefore also take free from an interest to which effect is thereby given (**Freer v Unwins** [1976] Ch. 288 considered) (*ibid* [96])

Mention should also be made of the case of **Fretwell v Graves** (16th March 2005) which came before HHJ Langan as an application for an interim injunction. The application raised two important questions of principle.

The first of these was as to whether a transferor under a void (or voidable) transfer can obtain rectification against a third party who derives title from the transferee. The learned judge accepted (at [24] – [25]) that it was at least arguable that this was so. The second issue raised was as to whether a right to rectification under section 65 was an overriding interest under the 2002, as had been the position under the 1925 Act (see **Mallory Enterprises Ltd v Cheshire Homes (UK) Ltd** [2002] Ch 216). The judgment (at [29]), shows that the learned judge entertained considerable doubts as to whether the 2002 legislation had altered the law in this area; however he declined to go so far as to make a finding to this effect (it being unnecessary for him so to do for the purpose of the application before him).

Andrew J. Bullock

Limitation & Mortgage Shortfalls Revisited

It was only in our last newsletter that we reported on the court of appeal's decision in **Wilkinson –v- West Bromwich Building Society** [2004] EWCA Civ 1063 and noted with concern that this might not represent a final answer to the problem commonly faced by both homeowners and lenders as to the period after which a lender cannot commence proceedings to recover the shortfall between the amount owed by a borrower and the amount for which the mortgaged property has been sold. Such disputes have increased as a result of the steady increase in property prices over the past few years which has

meant that lenders now find that they can recover old shortfalls, which often date back to the boom and bust property cycle of the last decade, against former borrowers new properties.

That case has now been decided by the House of Lords ([2005] UKHL 44) in a decision which should be cautiously welcomed by borrowers.

The brief facts of this case were that the borrower (W) fell into arrears on his mortgage in early 1989 and, thereafter, the lender (B) sought and obtained an order for possession. The last mortgage payment was made in July

1989 and the property was sold in November 1990 with a shortfall of almost £24,000.

B did not commence proceedings until 2002, over 12 years after W had paid his last instalment. B's primary submissions centred around a contention that section 20 of the Limitation Act 1980 did not apply because, at the date when the action was commenced, the outstanding debt was not secured by a mortgage; instead, B argued that, because the mortgage deed did not contain a covenant entitling B to demand the whole amount outstanding upon the non-payment of any one instalment, each instalment missed gave

rise to a fresh cause of action with its own limitation period. B also contended that a term could be implied into the mortgage deed that, upon the sale of the property, the balance of the advance became due so that the applicable limitation period would start at the time when the shortfall could accurately be identified.

No doubt to the relief of many borrowers with old debts, the House of Lords rejected these arguments and, instead, upheld the earlier decisions of the court of appeal in this case and in **Bristol & West –v- Bartlett [2002] EWCA Civ 1151**. Indeed, Lord Hoffman went so far as to suggest that the logical conclusion of B's argument would be to produce a very odd result whereby a lender would be entitled to sell the property (as B had) but would then only be allowed to

discharge out of the proceeds of sale the monthly instalments which were already due, with the balance of the proceeds of sale being retained as substituted security for the remaining instalments.

The decision is also notable because it demonstrates the court's increasing willingness to move away from an overly literal interpretation of a commercial document towards a more common sense understanding, even though, in this case, it necessitated implying a term that the whole amount outstanding became due once B had the right to exercise any contractual remedy available to it.

All of this points to a judgment which assists borrowers and it may be viewed (possibly wrongly) as authority for lenders having a

finite period of 12 years from the date of any default by their client borrowers. However, as I said at the beginning, this is a decision which should be treated with caution and it may yet turn out that the decision is only truly relevant to its own facts. In between these possible legacies, there remains a lot of scope for further disputes.

What the case does tell us, however, is that borrowers are still liable for a shortfall for at least 12 years after they have defaulted on a mortgage agreement. For lenders, it underlines the need to use documents which have clear and unambiguous contractual terms; it may also signal time to move away from some more traditional methods of drafting to modern documents written in plain English.

Adam Swirsky

Landlord's intention to demolish - some recent cases

Readers of this Review will be aware that Part II of the Landlord and Tenant Act 1954 gives some security of tenure to tenants of business premises. Section 30(1) of the Act sets out the grounds on which the landlord can oppose the grant to the tenant of a new tenancy. One of those grounds - section 30(1)(f) - is that the landlord "intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof."

In **Pumpninks of Piccadilly Ltd v Land Securities Plc and others [2002] EWCA Civ 621**, the tenant had an 'eggshell tenancy' of a shop in a larger building - a tenancy merely of the internal skin of the part of the building occupied by the tenant, with all load-bearing parts being excluded from the demise. The landlord opposed the grant of a new tenancy on the basis that he intended to carry out works which would remove the 'eggshell', transforming the tenant's shop premises into part of an open space. The Court of Appeal, rejecting the tenant's argument, held that "premises" is not confined to parts of a built structure that perform some structural function and could include an 'eggshell' within a building, demolition of which fell within section 30(1)(f). The Court left open the question of whether the same result would follow where the demised premises did include load-bearing parts but it was not intended to demolish those parts.

In **Ivorygrove Ltd v Global Grange Ltd**

[2003] EWHC 1409 (Ch) that question was answered. The court had to consider whether section 30(1)(f) applied to work which, although extensive, did not involve the structure of the building in the sense of load-bearing elements. Dismissing the tenant's appeal, Lawrence Collins J held that the section did not refer to the "structure" of the building and that it would be wrong to read in a requirement of demolition or construction of structural or load-bearing features. It was a question of fact and degree whether works could amount to demolition or reconstruction. Whether the relevant parts were load bearing was simply one of the factors to be taken into account. The requirements of section 30(1)(f) had been satisfied.

In **Wessex Reserve Forces & Cadets Association v White and another [2005] EWHC 983 (QB)** the land occupied by the tenants contained a number of structures, all of which - save for a small stone shed - had been erected by the tenants. In particular there were two large huts which were found by the judge to be "by far and away the largest and most substantial buildings on the land". The tenants argued that the huts were merely chattels; alternatively that if the huts were fixtures, given that they were tenant's fixtures they would take them down and remove them if the tenancy came to an end and therefore there would be nothing for the landlords to demolish. If this was so then the landlords could not satisfy the test in **Gregson v Cyril Lord [1963] 1 WLR 41**

which requires that any demolition must be by the landlord's "own act of volition".

The court gave judgment for the tenants. Applying the degree and purpose of annexation test, the huts were not chattels, but were tenant's fixtures. However, the judge held, "[i]n the usual case where there is no suggestion that the tenant will not be removing his tenant's fixtures on the termination of the tenancy, the landlord will generally be unable to show that there is a reasonable prospect that he will ever be in a position to demolish (or reconstruct) such tenant's fixtures." [87] The judge found on the evidence that the huts were capable of being dismantled and reassembled. He accepted the tenants' evidence that they would remove the huts at the termination of the tenancy. There was no prospect of the landlords showing that they had a reasonable prospect of demolishing the huts at the end of the tenancy by relying upon the prospect of the tenants removing them: the test in **Gregson** would not be met.

Moreover, "it would be surprising if a landlord could acquire a ground of opposition to a new tenancy based on the exercise by the tenant of his own right of severance of tenant's fixtures." [90(5)] The landlords could not show the requisite intention, for the purposes of section 30(1)(f), to demolish the two huts. They could show only an intention to demolish the shed, but that did not amount to "a substantial part of the premises comprised in the holding".

Alexander McGregor

The Draft Rent Arrears Protocol

The Civil Justice Council has issued a consultation paper seeking the views of consultees upon the merits of a pre-action protocol for possession claims based on rent arrears. The intention, as with other existing pre-existing pre-action protocols, is to ensure that all reasonable steps have been taken to avoid the necessity for litigation before proceedings are commenced. However where claims do arise the protocol should ensure that claims are efficiently managed.

The consultation paper includes a draft protocol which provides as follows:

- 1 The landlord will contact the tenant immediately he falls into arrears to discuss the cause of the arrears, the tenant's financial circumstances, his entitlement to benefits and the repayment of the arrears.
- 2 The landlord and tenant will do their best to agree a reasonable and affordable sum for the tenant to pay off the arrears based upon the tenant's income and expenditure.
- 3 The landlord will regularly provide the tenant with a copy of a rent statement in schedule form showing from the date when arrears first arose, all amounts of rent due, the dates and amounts of all payments made whether through housing benefit or by the tenant and a running total of the arrears.
- 4 If the tenant has difficulty in reading or understanding English, the landlord should make special arrangements to ensure that the tenant understands any information given.
- 5 The landlord will offer a tenant in receipt of income based Job Seekers Allowance or Income Support the possibility of the arrears being paid by the Department of Work & Pensions out of benefit, subject to the relevant regulations. Employees of local authorities, Registered Social Landlords and Housing Action Trusts should help tenants to fill out the necessary forms.
- 6 The landlord will assist the tenant in any claim he may have for housing benefit. Possession proceedings for rent arrears should not be started against a tenant who can demonstrate that they have:- (i) a reasonable expectation of eligibility for housing benefit; (ii) provided the local authority with all the evidence required to process a housing benefit claim; and (iii) paid other sums due not covered by housing benefit. The landlord should make every effort to establish effective ongoing liaison with the housing benefit departments and to make direct contact with them before taking enforcement action.
- 7 Because rent arrears may be part of a general problem with debt, the landlord will, if appropri-

ate, refer the tenant to a debt advice agency able to offer the tenant specialist assistance as soon as possible.

- 8 After service of the statutory notice but before the issue of proceedings, the landlord will contact the tenant to discuss the amount of the arrears, the cause of the arrears, repayment of the arrears and the housing benefit position.
- 9 If the tenant complies with an agreement to pay the current rent and a reasonable amount off the arrears, the landlord will agree to postpone court proceedings so long as the tenant keeps to the agreement.
- 10 The landlord will provide the tenant with an up to date rent statement no later than 10 days before the date of the hearing. The landlord will also disclose to the tenant the landlord's knowledge of the tenant's housing benefit position no later than 10 days before the date of the hearing.
- 11 The landlord will inform the tenant of the date and time of the court hearing and the order that the landlord will seek. The landlord must inform the tenant that s/he should attend the hearing as the tenant's home is at risk and must record such advice.

The draft Pre-Action Protocol is largely addressed towards social landlords (local authorities and housing associations). It is, however, intended that paragraphs 1,2,3,5,8,9,10 and 11 should apply to private landlords.

The feedback that has been received from consultees has been mixed. Whilst the majority of published responses have recognised the usefulness of the protocol, concerns have been expressed that its provisions may be unduly onerous if they are made to apply to private landlords. In any event, it seems that the protocol's focus is less concentrated towards the tenant's obligations to pay rent and more concentrated upon the landlord's efforts. Emphasis has also been placed upon the need to ensure that proceedings under Ground 8 are brought within the protocol. The Law Society has recommended that its provisions should be extended to deal with the special difficulties faced by vulnerable tenants.

The consultation period finished on 15 September and the Civil Justice Council will now refer the responses for consideration by the Department for Constitutional Affairs. It is to be hoped that the final version of the protocol will be linked to the existing housing disrepair protocol given the regularity with which the existence of a set-off of damages for breach of the covenant implied by section 11 Landlord and Tenant Act 1985 is put forwards as a defence to possession proceedings based on the existence of arrears.

Robert Kay

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