CASE LAW KALEIDOSCOPE

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My brief this year (as in previous years) is to focus on the top 5 or so property law cases decided in the previous twelve months. It is fair to say that as regards significant property cases, the past year has been somewhat barren when compared with earlier years, so that the selection task has not been quite as hard as usual, although I have still omitted a fair number of cases that I might otherwise have included. Nonetheless, I hope that the following selection will be of general interest to property practitioners.

Break clauses

BNP Paribas Securities Trust Co (Jersey) v Marks & Spencer [2013] EWHC 1279 (Ch.) (Morgan J)

An office lease contained a tenant's right to break on (so far as relevant) 24th January 2012 on giving at least six months' notice. The break clause provided that the lease would only determine as a result of a notice if (i) on the break date there were no arrears of Basic Rent or VAT on Basic Rent, and (ii) on or prior to the break date, the tenant paid to the landlord £919,800 plus VAT. A break notice was served on 7th July 2011 to determine the term on 24th January 2012. On 25th December 2011 it paid the quarter's Basic Rent due on that date in full. On 18th January 2012 it paid the sum of £919,800 plus VAT. The lease duly determined on 24th January 2012. The tenant accepted that it had been liable to pay the December quarter's rent in full, but argued that it was entitled to be repaid an apportioned part of the rent so paid (plus other sums) for the period from 25th January 2012 to 24th March 2012.

Morgan J held:

(1) Absent the break clause, the amount payable on the last quarter day of the lease (25th December 2017) before it expired by effluxion of time (2nd February 2018). would be a proportionate part of the rent from 25th December 2017 to 2nd February 2018. That result would follow from the words "proportionately for any part of a year" in the reddendum, but the court would reach the same result even if those words had not appeared following the common sense view expressed by Peter Gibson LJ in York v Casey;[1]

[1998] 2 E.G.L.R. 25 at 28A-B.

(2) If it had been certain as at 25th December 2011 that the lease would end on the break date, the tenant would then have been in the same position, i.e. he would have been obliged to pay only an apportioned part of the quarter's rent payable on 25th December 2011;

(3) It was not certain as at 25th December 2011 that the lease would end on the break date because the sum of £919,800 plus VAT had not then been paid. The tenant was therefore liable to pay the quarter's rent in full;

(4) The lease did not contain any express term entitling the tenant to recover at a later date an apportioned part of the quarter's rent so paid, nor was the tenant entitled to recover such rent under the law of restitution;

(5) However, the lease did contain an implied term entitling the tenant to be repaid on and after the break date an apportioned part of the rent in respect of the period from 25th January 2012 to 24th March 2012. Such term spelt out in express words what the lease, read against the relevant background, would reasonably have been understood to mean;

(6) A similar conclusion was to be reached in respect of a car park licence fee, insurance rent and service charge which had also been paid in full prior to the break date.

NOTE: The judge granted the landlord permission to appeal to the Court of Appeal. The appeal is to be heard on 24th/25th March 2014.

Sureties

Topland Portfolio No. 1 v Smiths News Trading [2014] 1 P.& C. R. 17 (Court of Appeal)

L let commercial premises to T for 35 years with S as surety. The lease prohibited alterations to the demised premises. L granted a licence to T (to which S was not a party) which permitted certain alterations. S argued that it was released from its obligations as surety under the rule in HolmevBrunskill (1878) 3 QBD 495. That rule was expressed by Cotton LJ, with whom Thesiger LJ agreed, as follows:

> "The true rule in my opinion is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and if he is not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or otherwise one which cannot be prejudicial to the surety, the court will not, in an action against the surety go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by a finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge of whether he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

S argued that (i) the licence amounted to a variation of the lease without its consent, and (ii) it was far from self-evident that such variation was insubstantial or one which could not be prejudicial to S, because the effect of the works was to enlarge the burden of performing T's covenants to repair and decorate.

L advanced three arguments.

The first was that the definition of "the demised premises" in the lease incorporated "all additions, alterations and improvements thereto". Other parts of the lease also referred to additions, alterations and improvements to the demised premises. Accordingly, S must be taken to have appreciated that the burden of performing the tenant's covenants would increase if the premises were added to, altered or improved. The Court of Appeal

rejected that argument. S would have known that the burden of performing the tenant's covenants could not be increased as a result of additions etc., because no additions etc. could be made unless L consented outside the framework of the lease, in which event S was entitled to expect that its consent would be sought.

L's second argument was that the licence was a "forbearance" within the meaning of the proviso to the surety covenant whereby S was liable "notwithstanding any neglect or forbearance on the part of the Lessor … to enforce observance or performance of any of the covenants or conditions on the Lessee's part ….". That argument was also rejected. On the proper construction of the proviso, "forbearance" connoted a decision by the landlord not immediately to enforce the observance or performance of a covenant against a tenant who is in breach: it was not concerned with prior authorisation.

L's third argument was that even if the licence did not amount to a "forbearance", it amounted to a giving of time within the meaning of the proviso, because it postphoned the date on which the covenant against alterations was enforced. That argument also failed. As before, the essential point was that the tenant was not in breach of the covenant against alterations when the licence was granted. The licence did not postphone the time at which the landlord was entitled to require the tenant to remove the works: rather, it granted the tenant permission to construct the works.

Fixtures

Peel Land & Property (Ports No. 3) v TS Sheerness

At first instance: [2013] EWHC 1658 (Ch) (Morgan J)

The issue in this case was whether the tenant of a steel works was entitled to remove large parts of its plant. The site had been let to it by a building lease granted in 1971 for 125 years, under which it agreed to erect a new building consisting of a fully equipped steel making plant and rolling mill, capable of producing not less than 50,000 tons of steel products per annum. The tenant's case was that the plant in question constituted tenant's fixtures or, in some cases, chattels, which were removable under the general law. The landlord contended that (i) the majority of items were neither tenant's fixtures nor chattels, and (ii) in any event, the right of removal during the term had been excluded by certain terms of the lease, including clause 2(6), which was (as varied) as follows:

> "(6) Not at any time during the said term to erect make or maintain or suffer to be erected made or maintained any building erection alterations or improvements nor to make or suffer to be made any change or addition whatsoever in or to the said premises save in connection with the use of the said premises for such industrial purpose as may from time to time be approved by the Lessors under clause 2(14)"

As regards the issue of whether the items were tenant's fixtures or chattels, the judge reviewed the relevant legal principles and considered in some detail the facts relating to each disputed item. The judgment repays reading on both counts. He held in particular:

(1) The fact that removal of a particular item would have an adverse impact on the ability of the rest of the plant to function as intended does not prevent the item being removable: the test focuses on the physical condition of what remains (i.e. whether there is irreparable damage) rather than on its ability to function on its own, absent the removed item;

(2) The test for removability requires that the item retain its essential character and value, but that does not require one to ascertain the second hand value of the

removed item and ask whether that value is greater or less than the market value of the item, sold as scrap. The question as to whether an item, when severed, will retain its essential utility and value must be given the same answer whether it is asked just after the item is annexed or many years later, so that the market value of the item when it is about to be severed cannot be the basis of the distinction between what is removable and what is not;

(3) The principle that an item which when affixed becomes an integral part of the demised land or building is not a tenant's fixture does not mean that just because something can be called a "building", it cannot for that reason be a tenant's fixture: that is particularly so in relation to buildings which are prefabricated and then assembled on site and which can later be taken apart and re-erected elsewhere.

The judge further held that the right of removal had not been excluded by the terms of the lease. In so holding, he relied first on a dictum of Vaughan Williams LJ in Lambourn vMcLellan [1903] 2 Ch. 268 (cited in Woodfall) to the effect that "if the landlord wishes to restrict his tenant's ordinary right to remove trade machinery or fixtures attached to the demised premises … the landlord must say so in plain language. If the language used leaves matters doubtful, the ordinary right of the tenant to remove trade fixtures will not be affected", and second on the principle established in MowatsvHudsonBros (1911) 105 LT 400 and YoungvDalgety [1987] 1 EGLR 116 that a covenant to install fixtures does not in itself prevent the tenant from removing them.

On appeal: [2014] EWCA Civ 100

The landlord appealed to the Court of Appeal on the sole ground that the judge was wrong to have held that clause 2(6) did not prevent removal. Its appeal succeeded.

The court held that there is no rule of law that "especially clear words" must be used in order to exclude a tenant's right to remove fixtures. Rimer LJ (with whom McFarlane LJ agreed) expressed himself as follows:

> "…. the guidance provided by, or rule stated in, Lambourn v. McLellan amounts to no more than a statement that if a tenant's prima facie right to remove tenant's

> fixtures is to be ousted, the language of the lease must make that clear. The rule was not prescribing how such language should do so; and whether or not, in any case, it does make it clear must in my view be a question to be answered by a consideration of the language of the particular lease, applying to it the approach to the construction of contractual documents that Lord Hoffmann summarised in Investors Compensation Scheme v West Bromwich BS [1998] 1 WLR 896 at 912/913. If the outcome of that exercise is that the court arrives at a confident conclusion that the intention of the parties was that the tenant's right to remove tenant's fixtures was to be ousted, that will be the effect of the lease. If the court's conclusion is that the exercise leaves it unsure that that was the intention of the parties, or perhaps that the lease is ambiguous as to whether that was their intention, the right will not be removed. That is not a revolutionary concept: if a party to a document claims that it has the effect of removing the other party's common law rights, it is obvious that the document must make it clear that it does."

Vos LJ said:

> "42 I completely accept that, if there is to be a contractual inhibition on the tenant's legal right to remove tenant's fixtures, that inhibition must be clearly stated. But, as it seems to me, something that is determined on normal principles of construction to be the proper meaning of an unambiguous provision in a lease must be regarded as being clearly stated.
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> 43 It would be remarkable if the court could conclude (a) that the proper meaning of the provisions of a lease was that tenant's fixtures could not be removed, but (b) that that meaning was not adequately clearly stated to permit it to be given effect. Such a conclusion would throw the entire process of contractual interpretation into doubt. The process is designed to achieve a single proper construction, not several possible answers.
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> 44 Put another way, if the provision in question is ambiguous and has two or more equally possible meanings, the process of construction itself will take into account the policy of the law to the effect that tenants should generally be permitted to remove their trade fixtures in order to encourage commercial investment (see paragraph 13.142 of Woodfall). In such a case the provision in question would, other things being equal, be likely to be construed as not interfering with the tenant's right under the general law."

The court further held that the reference to "the said premises" in clause 2(6) meant the land and buildings from time to time, and therefore included tenant's fixtures which were part of the buildings whilst affixed. The tenant was therefore precluded during the term from removing any tenant's fixtures save as permitted by the proviso to that clause.

Administration/winding up

Re Games Station Limited [2014] EWCA Civ 180 (Court of Appeal)

In Goldacre(Offices)vNortelNetworksUK [2009] EWHC 3389 (Ch.) it was decided at first instance that if a quarter's rent (payable in advance) falls due during a period in which the administrators are retaining the property for the purposes of the administration, the whole of the quarter's rent is payable as an administration expense even if the administrators give up occupation later on in the same quarter. In Leisure (Norwich)IIvLuminarLavaIgnite [2012] EWHC 951 (Ch.) it was decided, also at first instance, that where a quarter's rent payable in advance falls due before entry into administration, none of it is payable as an administration expense even if the administrators retain possession for the purposes of the administration: it is simply provable as a debt in the administration. One consequence of these decisions is that it has become more common for companies to enter into administration on the date immediately following the quarter day, thus avoiding liability to pay the rent in full even if they retain possession.

The Court of Appeal has now overruled both cases. The "liquidation expenses principle", by virtue of which an administrator or liquidator who retains possession for the benefit of the insolvency process must pay the rent in full (also known as the "salvage principle" or "the Lundy Granite principle") is founded on equitable grounds, not on whether the rent is apportionable at common law or under statute. The true principle is that the administrator or liquidator must make payments at the rate of the rent for the duration of the period for which he retains possession for the benefit of the insolvency process, the rent being treated for that purpose as accruing from day to day. Lewison LJ, with whom Sharp and Patten LJJ agreed, said:

> "100 The result of Goldacre and Luminar has left the law in a very unsatisfactory state. If rent is payable in arrear then the office holder must pay the rent as an expense of the liquidation or administration (as the case may be) for any period during which he retains possession of the property for the benefit of the insolvency process. If appropriate that liability will be apportioned so as to reflect, as precisely as possible, the true extent of the benefit. If, by contrast, the rent is payable in advance no such apportionment is possible. In some cases this will result in the office holder paying more than the true benefit (as in Goldacre). In other cases it will result in his paying less (as in Luminar).

> 101 The true extent of the principle, in my judgment, is that the office holder must make payments at the rate of the rent for the duration of any period during which he retains possession of the demised property for the benefit of the winding up or administration (as the case may be). The rent will be treated as accruing from day to day. Those payments are payable as expenses of the winding up or administration. The duration of the period is a question of fact and is not determined merely by reference to which rent days occur before, during or after that period."

Negotiating/Wrotham Park damages

Eaton Mansions (Westminster) v Stinger Compagnia de Inversion [2013] EWCA Civ 1308 (Court of Appeal)

The tenant under long leases of two flats in a block of mansion flats unlawfully installed air conditioning equipment on the roof for periods from June 2007 to February 2008 and again from December 2008 to March 2010. The landlord claimed damages for trespass. It accepted that it had suffered no direct loss of any substance. However, it contended that it was entitled to damages calculated by reference to the court's assessment of what the tenant would have had to pay at the commencement of the period of trespass for permission to place the equipment on the roof. It argued that the parties should be assumed to have been negotiating for a consent which would have subsisted for the duration of the tenant's leases, because at the relevant time it was clear that the tenant wanted a right to install permanent air conditioning in the flats which would then be sold on that basis, and that he was not then interested in a temporary permission which could not be passed on to a buyer. The landlord had therefore lost by the trespass the opportunity of negotiating a price for such permanent permission, which (it said) would have been a substantial six figure sum. By contrast, a temporary unassignable consent subsisting only for the period of the trespass would have had a very limited value, which the judge at first instance assessed at £6,000.

The Court of Appeal held that the question did not depend on the general principle that in the hypothetical negotiations no account is to be taken of post-valuation events. Instead, the question was the more fundamental one of what was to be taken to be the subject matter of the negotiations. The hypothetical negotiations for a licence fee were

a convenient means of valuing the benefit to the trespasser and, in that sense, the loss to the claimant. Damages should be assessed by reference to the actual period of trespass. The valuation construct was that the parties were to be treated as having negotiated for a licence which covered the acts of trespass that actually occurred. Anything else would disconnect the licence fee, and therefore the damages, from the legal wrong for which they were intended to provide compensation. That conclusion followed inevitably from the requirement that damages should be compensation for the loss suffered in the sense of what the tortfeasor has gained from his trespass.

The court further held (overruling MessengerNewspapersGroupvNationalGraphical Association [1984] IRLR 397) that although aggravated damages may be awarded in a case of trespass where the defendant's conduct has been high-handed, insulting or oppressive, such damages are designed to compensate the claimant for distress and injury to feelings caused by the defendant's conduct, and cannot therefore be awarded to a limited company.

Injunction or damages in lieu?

Coventry v Lawrence [2014] UKSC 13 (Supreme Court)

This case concerned a claim for an injunction to restrain an alleged nuisance resulting from the use of land for speedway racing. The Supreme Court decided a number of important points in relation to the law of nuisance, including (i) the extent to which it is possible to obtain by prescription a right to commit what would otherwise be a nuisance by noise (it is); (ii) the extent to which the principle that coming to the nuisance is no defence remains good law (it does, although the position may be different where the only reason why the defendant's pre-existing activity is alleged to constitute a nuisance is that the claimant has changed the use of, or built on, his land); (iii) the circumstances in which a defendant can rely on his activities as constituting part of the character of the locality; and (iv) the relevance of the existence and terms of any planning permission to the question whether the defendant's activities amount to a nuisance, and if so, the appropriate remedy.

Of particular interest to property practitioners, however, are the Court's observations on A L Smith LJ's "good working rule" in Shelfer v City of London Electric Lighting Co [1895] 1 Ch. 287. As is well-known, that rule created a strong presumption in favour of an injunction, to be displaced only if four narrowly defined tests were satisfied (namely, that (i) the injury to the claimant's legal rights is small; (ii) and is one which is capable of being estimated in money; (iii) and is one which can be adequately compensated by a small money payment; and (iv) and the case is one in which it would be oppressive to the defendant to grant an injunction). That rule was held to be the correct approach in (among other cases) Regan v Paul Properties DPF No. 1 [2007] Ch. 135, in which the Court of Appeal granted an injunction in a rights of light case. However, the Supreme Court has now made it clear that the court's approach to damages in lieu of an injunction should be much more flexible than that suggested in Regan. Lords Sumption and Mance went so far as to say that the decision in Shelfer was "out of date and .... it is unfortunate that it has been followed so slavishly". The court declined to lay down more precise guidelines, although Lord Neuberger said this:

> "121 ... I would accept that the prima facie position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not. And, subject to one possible point, I would cautiously (in the light of the fact that each case turns on its facts) approve the observations of Lord Macnaghten in Colls, where he said:
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> > "In some cases, of course, an injunction is necessary — if, for instance, the injury cannot fairly be compensated by money — if the defendant has acted in a high-handed manner — if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money."
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> 122 The one possible doubt that I have about this observation relates to the suggestion in the antepenultimate sentence that the court "ought to incline to damages" in the event he describes. If, as I suspect, Lord Macnaghten was simply suggesting that, if there was no prejudice to a claimant other than the bare fact of an interference with her rights, and there was no other ground for granting an injunction, I agree with him. However, it is right to emphasise that,

when a judge is called on to decide whether to award damages in lieu of an injunction, I do not think that there should be any inclination either way (subject to the legal burden discussed above): the outcome should depend on all the evidence and arguments. Further, the sentence should not be taken as suggesting that there could not be any other relevant factors: clearly there could be. (It is true that Colls, like a number of the cases on the issue of damages in lieu, was concerned with rights of light, but I do not see such cases as involving special rules when it comes to this issue. Shelfer itself was not a right to light case; nor were Jaggard and Watson. However, in many cases involving nuisance by noise, there may be more wide-ranging issues and more possible forms of relief than in cases concerned with infringements of a right to light.)

123 Where does that leave A L Smith LJ's four tests? While the application of any such series of tests cannot be mechanical, I would adopt a modified version of the view expressed by Romer LJ in Fishenden 153 LT 128 , 141. First, the application of the four tests must not be such as "to be a fetter on the exercise of the court's discretion". Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted."

Leasehold enfranchisement

Westbrook Dolphin Square v Friends Life (Chancery Division (Mann J): judgment awaited)

The head tenant of a large residential complex granted underleases of 1,223 flats to 612 specially set up underlessee companies (which were not associated companies within the meaning of s. 5(6) of the Leasehold Reform etc. Act 1993). It served on the freeholder an initial notice under s.13 of the 1993 Act claiming to exercise the right to collective enfranchisement under Chapter 1. The freeholder resisted the claim on a number of grounds, some of which raised important issues of principle under the Act. These included that (i) s.5 of the Act was to be construed in accordance with the principle in Ramsay v IRC as not allowing enfranchisement in such circumstances; (ii) alternatively, such construction was to be arrived at pursuant to s.3 of the Human Rights Act 1998; (iii) more than 25% of the building was neither occupied for residential purposes nor comprised in any common parts within the meaning of s.4; and (iv) the s.13 notice failed to specify a realistic price. The judgment when handed down will be of considerable interest to anyone practising in the field.