CASE LAW KALEIDOSCOPE

Presented at
The Property Litigation Association Annual Conference
at Keble College, Oxford on Friday, 22 March 2019

by

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2018 was a cracking year for property litigation, with activity in all fields, at all levels of tribunal. Although attempts to consign our field of practice to the lowest tribunals continue, we have seen many appeals going up to the High Court and Court of Appeal in all sorts of interesting property areas. You just can't keep a good subject down.

So, the job of picking the top ten has been more than usually difficult. But here is a good selection, with examples drawn from both prime areas of our practice: property contracts and real property.

Part II of the Landlord and Tenant Act 1954

S Franses Ltd v Cavendish Hotel (London) Ltd [2018] 3 WLR 1952

In this case, the trial judge found that the scheme of works proposed by the Landlord to thwart its tenant's business tenancy renewal was designed with the material intention of undertaking works that would lead to the eviction of the tenant regardless of the works' commercial or practical utility and irrespective of the expense. It was common ground that the words had no practical utility; their sole purpose was to enable the landlord to obtain vacant possession. As a result, had the tenant left voluntarily, the landlord would not have carried out the works. The case made its way to the Supreme Court by way of a leapfrog appeal.

Although the Court agreed that it was not for them to consider the landlord's *motive* in assessing the necessary intention, they did consider that a conditional intention of the sort held by the landlord did not engage the statutory ground. The reason for this is that section 30(1)(f) presupposes that the landlord's intention to do works must exist independently of the tenant's claim for a new tenancy, so that the tenant's right of occupation under a new lease would serve to obstruct it. In this case, there was no such independent intention: the landlord proposed to carry out the works purely in order to secure the vacation of the tenant. Summarising the point, Lord Sumption said: "The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily."

Comment:

The outcome of this appeal is of considerable importance for business tenants and landlords. Landlords will now need very careful advice concerning the purpose for which the works are being done. Tenants, conversely, will need similarly careful advice as to what may be open to challenge. Trials in the county court henceforth may well become significantly more contentious. Prospective landlords may well as a result seek to avoid the bother by insisting upon business tenancies being contracted out of the security of tenure provisions of the 1954 Act.

Areas of particular difficulty are likely to include (1) those where a landlord has a perfectly genuine intention, but in order to make sure of its position in court, bolsters its works with structural additions which it might well not carry out were its tenant to leave voluntarily; and (2) those which it would not carry out immediately (because it is assembling a development site). There may also be ramifications for ground (g) cases, where some landlords have in the past manufactured a scheme for its occupation which it would not pursue were its tenant to leave of its free will.

Contract

MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2019] AC 119

The defendant, Rock, entered into a licence agreement to occupy serviced office premises operated by the claimant, MWB. Clause 7.6 of the licence contained a "no oral modification" provision stipulating that "*all variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect*". Rock fell into arrears with its licence payments. Its director entered into an oral agreement for a revised payment schedule. When it attempted to make payment in accordance with that schedule, MWB refused to accept, locked out Rock, and issued proceedings for payment of the balance of arrears. Rock counterclaimed for damages for wrongful exclusion from the premises, in reliance on the oral agreement and payment thereunder.

At first instance, the judge upheld Rock's arguments as to the validity of the oral variation, but rejected its overall claim, holding that the amendment to the

contract was not effective because it was not in writing as required by clause 7.6.

The Court of Appeal (Arden, Kitchin and McCombe LJJ) allowed Rock's appeal, holding that the principle of freedom of contract entitled parties to agree to depart from a previously-agreed "no oral modification" clause, and so clause 7.6 did not preclude an application of the revised agreement. MWB then appealed to the Supreme Court.

That Court held by a majority that although at common law there were no formal requirements for the validity of a simple contract, which could be made orally or in writing, there was no principled reason why parties could not agree to bind themselves to a provision laying down specified conditions for any subsequent variation of their contract; that, in particular, "no oral modification" clauses, which were in common use because they served a legitimate business purpose and were intended to achieve contractual certainty about the terms agreed, did not cause any mischief or conflict with any overriding public policy; that the law of contract did not normally obstruct the legitimate purposes of businessmen in such circumstances; that there was no conceptual inconsistency between a general rule allowing a contract to be made informally and a specific rule that effect would be given to a contract which required writing for a variation; that unjust reliance on a "no oral modification clause" could be prevented to the extent that the resulting injustice fell within the ambit of estoppel; and, that, accordingly, the law would give effect to a contractual provision requiring specified formalities to be observed for a variation, including a "no oral modification". In so holding, it disapproved a dictum of Lord Denning MR in Brikom Investments Ltd v Carr [1979] QB 467, to the effect that such a clause is of no effect in the face of an express promise or representation on which the other side has relied.

The Supreme Court also held that MWB was not estopped from relying on clause 7.6 of the licence agreement. Moreover, the majority said that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including a "no oral modification" clause. At the very least (i) there would have to be some words or conduct unequivocally representing that the variation was valid

notwithstanding its informality; and (ii) something more would be required than the informal promise itself.

Finally, the Court left aside for future argument the question whether an agreement whose sole effect is to vary a contract to pay money by substituting an obligation to pay less money or the same money later, can be said to be supported by consideration.

***Comment**:* This is an important decision. As Lord Sumption commented, giving the majority judgment, "*Modern litigation rarely raises truly fundamental issues in the law of contract. This appeal is exceptional*."

It is important to an understanding of the judgment to appreciate that, the point at issue aside, the oral agreement which followed the written agreement was valid and binding. The Court was therefore giving full effect to the no oral modification clause. Boiler-plate clauses like this are common, but are usually treated as formulaic prose that achieves nothing in the face of a later "agreement", and are often ignored when the merits are explored. As this decision shows, however, clauses like this should be given their full weight.

First Tower Trustees Ltd v CDS (Superstores International) Ltd [2019] 1 WLR 637

The Claimant demised to the Defendant warehouse premises in Barnsley. Prior to execution of the lease, the tenant was given a copy of a report which indicated that there was no problem with asbestos. Its solicitors raised enquiries before contract, seeking among other things to ascertain whether the seller was aware of the existence of any hazardous substances including asbestos or asbestos containing materials. The reply was: "The buyer must satisfy itself". The enquiries also contained a standard form acknowledgment that even though the seller would be giving replies to the enquiries, the buyer should still inspect the property, have the property surveyed, investigate title and make all appropriate searches and enquiries of third parties.

On 16 April 2015, two weeks before the grant of the lease, the landlords' agents received a copy of a report which indicated that there was some asbestos in the bays. That information was not passed to the tenant.

The lease contained an exclusion clause which provided that the tenant acknowledged that the lease had not been entered into in reliance on any statement or representation made by the landlords.

In fact, the warehouse bays were so contaminated with asbestos that they were dangerous to enter. The tenant had therefore to carry out remedial work, which caused it to occupy the premises late. The tenant brought a counterclaim seeking damages for misrepresentation under section 2 of the Misrepresentation Act 1967. The landlords relied in their defence to counterclaim on the exclusion clause. The deputy judge allowed the counterclaim, holding that there had been a clear misrepresentation, and that the exclusion clause was unreasonable for the purposes of section 3 of the 1967 Act, as substituted, and section 11 of the Unfair Contract Terms Act 1977 and so of no effect, and that the lease did not limit the landlords' liability to damages under section 2 of the 1967 Act.

The landlords appealed, but the Court of Appeal (Lewison LJ giving judgment) dismissed the appeal, on the footing that a clause in a lease which simply stated that the lease had not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord was a contract term which would, apart from section 3(1) of the Misrepresentation Act 1967 , have the effect of excluding liability for misrepresentation and so was subject to the test of reasonableness in section 11 of the Unfair Contract Terms Act 1977; that whether such a clause passed the test of reasonableness was an evaluative judgment for the trial judge with which an appellate court should be slow to interfere; and that, accordingly, since the deputy judge had not misdirected himself in law or taken into account irrelevant factors or ignored relevant ones, there was no ground for interfering with his overall assessment that the clause was unreasonable for the purposes of section 3 of the 1967 Act.

Comment: Again, a classic exposition of the correct approach to take in relation to a misrepresentation claim where the contract contains an exclusion clause.

JN Hipwell & Son v Szurek [2018] L & TR 15

The Defendant let to the Claimant a building within a larger complex, from which she carried on business running a café. The lease included an "entire agreement clause" and a "non-reliance clause" that in entering into the lease the tenant was not relying on any representation made by the landlord ("the entire agreement provisions"). The tenant covenanted to keep the whole of the premises and all fixtures and fittings in good repair and, at cl.4.7, to permit the landlord to enter to repair the premises or any service media serving them (which were defined as including, inter alia, wires, cables and conduits through which electricity was conveyed). The landlord's covenants were more limited and included covenants to keep the premises insured and to maintain accessways and car parking areas.

Subsequently, there was a fire in connection with the electrical installation at the premises. Following this the landlord failed to provide to the tenant promised electrical certificates. There was then a further electrical incident. The tenant decided to close her business and she left the premises. She brought proceedings claiming her business losses.

The judge at first instance held that the lease did not adequately reflect the parties' true subjective intentions that the landlord should be responsible for the structure and exterior of the premises and the plumbing and electrical installation within it. She held that therefore a term to this effect should be implied into the lease and that the entire agreement clause did not preclude this. She found on the facts that the landlord was in repudiatory breach of this term, which the tenant had been entitled to accept, and she thus awarded the tenant her business losses. The landlord appealed.

The Court of Appeal (Gross LJ and Hildyard J) dismissed the appeal. It was necessary as a matter of business efficacy to imply a term that the landlord ensure the electrical installation was safe. There was a plain and obvious gap in the express provisions of the lease regarding the exterior of the premises and its electrical installation. Clause 4.7 connoted that the landlord had an obligation as to the safety of the service media it had installed at the premises. Counsel for the landlord had correctly conceded that an entire agreement provision does

not prevent the implication of a term for business efficacy. Accordingly the appeal would be dismissed.

Comment: This decision affords a good example of type of circumstance in which a court will accept that it is appropriate to imply a term. It is also interesting for its treatment of the entire agreement provisions.

Injunctions and negotiating damages

One Step (Support) Ltd v Morris-Garner [2018] 2 WLR 1353

This was not a property case (rather, a claim for breach of a contract restricting a competing business) – but the Supreme Court's fundamental review of the law of damages in cases not only of breach of contract but also of torts, including infringement of property rights, is of vital interest to those engaged in property disputes.

Much of the focus of the Court's attention was upon the approach to damages carried out by Brightman J in of Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798. In that case, a developer, Parkside, erected housing in breach of a restrictive covenant given to the Wrotham Park Estate. The estate owner brought proceedings seeking a mandatory injunction for the demolition of the housing. The judge held that although Parkside had clearly acted in breach of the covenant, it would not be just to order demolition of the houses; that damages should be awarded in lieu of the injunctions sought; and that the proper measure of damages was a sum which the estate owner might reasonably have required in return for relaxing the covenant, which he decided would have been 5% of Parkside's profits.

Such damages – damages in lieu of an injunction – have since been referred to in the property industry as "Wrotham Park" damages, although the amounts subsequently awarded have tended to be more generous, of the order of 30% of the development profit.

The decision in One Step was concerned with the propriety of applying the Wrotham Park approach in a case of damages for breach of contract, save as

an evidential technique for estimating the claimant's loss. The decision also illuminates the propriety of that approach in cases involving interference with property rights. The following principles emerge from the majority judgment of Lord Reed JSC (Lord Sumption taking a different approach).

First, the cases on the subject of damages in lieu (which we are now to call "negotiating damages" rather than "Wrotham Park" damages) do not purport to lay down a general rule as to how such damages should be quantified, regardless of the circumstances. It is for the court to judge what method of quantification, in the particular circumstances of the case before it, will give an equivalent for what is lost by the refusal of the injunction.

Secondly, in such a case, the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the asset in question. The defendant has taken something for nothing, for which the claimant was entitled to require payment. The aim of the exercise may therefore be said to involve the estimation of the deprived value, to which the hypothetical release fee may be relevant.

Thirdly, the assessment of the hypothetical release fee is itself a difficult and uncertain exercise. The premise of the hypothetical negotiation - that a reasonable person in the claimant's position would have been willing to release the defendant from the obligation in return for a fee - breaks down in a situation where any reasonable person in the claimant's position would have been unwilling to grant a release. The result of the exercise may be an appearance of precision, but it is artificial; and, despite the apparent precision of the figures and calculations deployed typically (and necessarily) on each side, it necessarily involves a question of impression.

Fourthly, such damages can (only) be awarded in substitution for specific performance or an injunction, where the court had jurisdiction to entertain an application for such relief at the time when the proceedings were commenced. Such damages are a monetary substitute for what is lost by the withholding of such relief.

Fifthly, and conversely, in cases of infringement of a property right, where an injunction is not available, for example because the covenant was not

specifically enforceable or the claimant's delay had made it impossible, the hypothetical release value should not contribute to the value of the land, because there was none. In that case, damages could not be awarded on that basis.

Comment: This decision is of interest to all of us who advise on remedies for interference with property rights.

Easements

Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2018] 3 WLR 1603

In this case, the question that was raised was whether a right granted by a transfer made in 1981 amounted to one or more easements. The right was worded as follows:

> "for the transferee its successors in title its lessees and the occupiers from time to time of the property to use the swimming pool, golf course, squash courts, tennis courts, the ground and basement floor of Broome Park Mansion House, gardens and any other sporting or recreational facilities … on the transferor's adjoining estate".

The Claimants comprised the freehold owner and sundry timeshare owners of a property lying in the middle of the Broome Park Estate, known as Elham House, together with 24 villas in its grounds, and claimed, as successors to the transferee under the 1981 transfer, the benefit of the 1981 rights, contending that they amounted to easements. The Defendants, who owned Broome Park Mansion and its grounds, argued that the rights granted (a) could not amount to easements because the facilities could only be maintained at considerable expense, (b) extended to facilities which were not even contemplated at the time of the 1981 transfer, and (c) comprised at best a bundle of easements and personal rights.

The Court of Appeal (the Chancellor, Kitchin and Floyd LJJ) had little hesitation in construing the grant to hold that the rights did (in the main) comprise easements. The focus of their attention was rather on the precise subject matter of the rights. As to this, they held that the rights:

(1) were only those existing in 1981;

(2) could also embrace replacements of the facilities existing in 1981 – but not to any extension or substantial upgrading of those facilities;

(3) could not extend to the restaurant, bar, gym, sunbed and sauna area in the basement of the Mansion House, since these amounted to services and facilities that could not exist without the chattels that make them what they are. To operate them if the Defendants ceased business, the Claimants would need to take possession of them. They could not therefore take effect as easements.

The Supreme Court dismissed the servient owner's appeal, and allowed the cross appeal. In essence, therefore, extending Re Ellenborough Park (in which the Court of Appeal held that the right to use a pleasure ground created an easement, the Court (Lord Briggs JSC giving the majority judgment; Lord Carnwath JSC dissenting) held that the rights comprised one easement of the right to use such recreational facilities as existed from time to time.

Comment: The judgment repays careful reading, and may be treated as the classic restatement of the ingredients of an easement.

Restrictive Covenants

Alexander Devine Children's Cancer Trust v Millgate Developments Ltd [2018] EWCA Civ 2679

A developer, Millgate, constructed some smart luxury homes in Maidenhead. In order to satisfy its s.106 obligations, it acquired some cheap land - cheap because it was burdened by covenants against building - and built social housing on it. It was well aware of the restrictive covenants, but took a commercial view - and only made a retrospective application for modification under s.84 of the Law of Property Act 1925 after the event.

At first instance in the Upper Tribunal, Lands Chamber, the Deputy Chamber President, Martin Rodger QC, held that ground (aa) was made out - the public interest in the social housing being occupied trumping all other considerations (including the developer's cynical conduct and the fact that local authority would have accepted a 7-figure payment into a social housing fund as an equivalent s.106 contribution). In the process, he depended upon the observations by Lord Sumption in Coventry v Lawrence to the effect that the ordinary remedy for interference with property rights was damages, not injunction.

The Trust appealed. Giving judgment in the Court of Appeal, Sales LJ held that the Upper Tribunal had failed to apply the correct tests, and allowed the appeal on all four of the grounds raised, refusing to modify the covenants.

Comment: The developer, Millgate, is petitioning the Supreme Court for permission to appeal. If it is unsuccessful, the benefited party may seek an injunction requiring Millgate to demolish the 23 unit social housing development that was erected in breach of the covenant. Either way, therefore, the case is likely to involve further judicial scrutiny of the Supreme Court's thoughts in Lawrence v Fen Tigers concerning the appropriateness of injunctions rather than damages.

Landlord and Tenant

No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2018] 1 WLR 5682

T applied to L for consent to assign its 999 year leases of some Docklands flats; L imposed conditions for its consideration of the application; T considered the conditions unreasonable, and applied to court for a declaration that consent had been unreasonably withheld. So far, so vanilla.

The three conditions that L laid down were (1) an undertaking in respect of L's legal fees of £1,600; (2) an inspection in order to check whether there had been any breaches of the terms of the leases (for which L required a further undertaking of £350 for surveying fees); and (3) a bank reference for the prospective assignees, in order to assess their covenant strength.

At first instance, HH Judge Walden-Smith decided the issues in favour of T, holding that none of L's conditions were reasonable, and that in particular a reasonable fee for considering the assignments would have been £350. As a result, L had been in breach of its statutory duty under s.3 of the Landlord and Tenant Act 1988 Act. L was also ordered to pay T's costs of the action, and to make a payment on account of £28,000.

On appeal, Henderson J disagreed that it had been unreasonable for L either to require an inspection, or bank references. However, he was persuaded that the "robust and sceptical approach" of the judge at first instance in relation to the

legal fees was amply justified. He also concluded that the requirement for T to give an undertaking in relation to fees was a prerequisite for L's consideration of the application, such that that bad reason vitiated the two good ones, with the consequence that L's success on those two matters was not enough to render the refusal of consent reasonable.

Reversing that decision, Lewison LJ gave judgment in the Court of Appeal in typically pithy terms, saying:

> "… the judge asked himself the wrong question. The question was not: would the landlord have maintained the unreasonable reason if the reasonable conditions had been complied with? Rather it is: would the landlord still have refused consent on the reasonable grounds, if it had not put forward the unreasonable ground? To put the point another way: the question is whether the *decision* to refuse consent was reasonable; not whether all the reasons for the decision were reasonable. Where, as here, the reasons were free-standing reasons each of which had causative effect, and two of them were reasonable, I consider that the decision itself was reasonable."

Comments: (1) The judgment provides a useful potted guide to the Landlord and Tenant Act 1988;

(2) L could have saved itself a lot of grief by paying attention to the Alienation Property Protocol - http://www.propertyprotocols.co.uk/the-alienation-protocol.

Trillium (Prime) Property GP Ltd v Elmfield Road Ltd [2018] EWCA Civ 1556

A rent review clause in a lease of office premises in Bromley provided for the rent to be indexed. Unfortunately for the tenant, the arithmetic used in the clause involved an element of double counting. The tenant brought proceedings seeking to have the lease construed in its favour, contending that it was obvious both what had gone wrong with the language, and what had been intended.

The courts have long been receptive to the proposition that an evident mistake in an unambiguous contractual provision may be corrected without recourse to the remedy of rectification. In Chartbrook Ltd v Persimmons Homes Ltd [2009] 1 AC 1101, Lord Hoffmann broadly approved the dictum of Brightman LJ in East v Pantiles [1982] 2 EGLR 111 that in order for this remedy to apply:

> "Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."

The tenant lost at first instance and on appeal. For reasons that were buried in the unusual factual matrix, the Court (Lewison LJ, with whom Leggatt LJ agreed) held that there was no proper proof that a mistake in the drafting had been made. However, even if there had been a mistake, the Court was not satisfied what the cure would have been, because there was more than one possible solution to the alleged drafting error.

Comment: When lawyers have to grapple with a case where a literal construction of a contract produces a result that does not favour their client, they usually resort to a number of tools to achieve a fairer outcome. Implication and rectification are two of these – but interpretation is the starting point, and correction by interpretation should be a prime consideration, even if it failed on the facts in this case.

Manchester Ship Canal Co Ltd v Vauxhall Motors Ltd [2019] 2 WLR 330

The Defendant, Vauxhall Motors Ltd, owns a substantial manufacturing plant at Ellesmere Port close to the Manchester Ship Canal. Under the terms of a licence granted in 1962 by the Claimant, Manchester Ship Canal Co Ltd (MSCC), Vauxhall were entitled to discharge surface water and trade effluent into the canal through a drainage system constructed by Vauxhall on MSCC's land under the terms of the licence. The licence was granted in perpetuity in consideration of an annual payment of £50. It contained a provision entitling MSCC to terminate the licence by notice if the annual payment remained in arrear after a warning notice had been given.

Vauxhall failed to pay the £50 due on 12 October 2013, and overlooked a reminder which MSCC sent. On 10 March 2014 MSCC terminated the licence was terminated. The value of the right to discharge surface water and trade effluent was of the order of £300,000 to £440,000 per annum.

Vauxhall took proceedings seeking relief against forfeiture of the licence, and succeeded in front of HH Judge Behrens. MSCC appealed, contending that relief should not have been granted, both because the Judge had no jurisdiction to do so, and also because the application for relief was made too late.

Giving judgment in the Court of Appeal, Lewison LJ held that Vauxhall's entitlement to discharge water through the infrastructure amounted to a possessory right sufficient to give it the right to seek relief. The Judge's exercise of his discretion to grant relief could not be faulted, and the appeal was therefore allowed.

Comment: This case provides a scholarly analysis of the circumstances in which the equitable jurisdiction to grant relief extends to non-property contracts. It is surprising how useful it can be to resort to this often overlooked weapon in the tenant's armoury.

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