CASE LAW KALEIDOSCOPE

2019 (and a bonus bit of 2020)

A Paper for The Property Litigation Association

Autumn Trilogy 14 December 2020

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FALCON CHAMBERS

2019 was a slightly less vintage year for property litigation than 2018, although we still saw 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, Court of Appeal and Supreme Court in all sorts of interesting property areas. You just can't keep a good subject down. And then we have the new kid on the block – telecoms – which generated 10 decisions over the course of the year.

The job of picking the top ten has not been straightforward, with plenty to choose from. Here is a good selection, with examples drawn from both prime areas of our practice: property contracts and real property. But let's start with telecoms.

1. TELECOMS

I count my pick of the three seminal telecoms decisions of 2019 as one case, so as not to exceed my 10 case allocation. These three came along in three packed weeks in the autumn: two in the Court of Appeal and one in the Upper Tribunal, which has emerged not merely as primary decision-maker in the field, but as a fast-acting and expert tribunal that does not suffer fools gladly.

Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2019] EWCA Civ 1755

This was the first out of the blocks on 22 October. The Court of Appeal upheld the Upper Tribunal's ruling that it lacked jurisdiction to impose an agreement on a landowner under the Electronic Communications Code Pt 4 where the landowner

was not in occupation of the relevant site. If another operator was in occupation, then that operator was the relevant "occupier" for conferral purposes.

Two practical ramifications flow from this decision. First, applications for new 1954 Act tenancies must be litigated in the county court, where the terms will be determined in accordance with section 35. Secondly, it appears to follow that the operator cannot seek to supplement its rights under the tenancy with additional rights during the term, because it is not the occupier. This would seem to cut across what was intended by the drafters of the Code. For example, 5G equipment cannot then be installed allowed under an existing code agreement.

Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd [2019] UKUT 0338 (LC)

Next, on 8 November, the Upper Tribunal held that it lacked jurisdiction under the Electronic Communications Code Pt 4 to impose an agreement conferring Code rights on an operator and a landowner of a telecommunications site where the operator was in occupation of the land under a subsisting agreement. Nor could an operator in occupation under a tenancy continued by the 1954 Act avail itself of Part 5 of the Code to obtain a new tenancy; it had instead to apply to the County Court for a new tenancy.

This decision therefore cements into place the ruling from Compton Beauchamp. It is important to note that the Upper Tribunal considered that its solution in that case to the effect that there could be a surrender and regrant when a new agreement is imposed, was not available.

Cornerstone Telecommunications Infrastructure Ltd v University of London [2019] EWCA Civ 2075

And finally, on 26 November, the Court of Appeal gave its second telecoms judgment in just over a month. The appeal concerned a request for paragraph 26 interim rights by a telecoms operator, to carry out what is known as an "MSV" or (multi-skilled visit). Secondly, the Court of Appeal was asked to consider whether a claim for interim rights could only ever be parasitic on a claim for paragraph 20 final rights.

Agreeing with the result reached by the Upper Tribunal, the Court of Appeal decided first that an MSV formed part of the "works" to be undertaken "in connection with" installation of electronic communications apparatus and was therefore a paragraph 3(d) code right. Secondly, it held that a paragraph 26 application could be made on a free-standing basis, without rights also being sought under paragraph 20. This is useful to practitioners under the Code, as it permits the parties to agree, or for there

to be imposed, an agreement on an interim basis which does not carry with it security of tenure under Part V, thereby allowing short-term agreements to be entered into.

By way of Further Information, the Upper Tribunal presently appears to be policing consent orders under paragraph 26, and has required the parties to justify the term length of an agreement, even where it has been agreed by the parties.

The flow of Telecoms cases has not exactly abated in 2020, with at least one heading for the Supreme Court – but more of that next year, if I am allowed back.

LANDLORD AND TENANT

This is where the bulk of the proplit excitement was to be had in 2019. Many cases advance the law in interesting ways, but here are my top six landlord and tenant ones.

2. Canary Wharf (BP4) T1 Ltd v European Medicines Agency [2019] EWHC 335 (Ch)

The tenant, an agency of the European Union, held a lease granted in 2014 of part of premises in Canary Wharf, London, for a term of 25 years. On 29 March 2017, the UK gave notice under art.50 of the Treaty on European Union 2007 to the President of the European Council of the UK's decision to withdraw from the European Union. Subject to any agreed extension or withdrawal of the notification, the UK would cease to be a member of the EU on 29 March 2019. On 25 November 2018, the European Council endorsed the "Withdrawal Agreement" containing terms of the UK's departure, subject to ratification by the UK under s.13 of the European Union (Withdrawal) Act 2018.

The tenant contended that the UK's withdrawal from the EU would frustrate the lease on the grounds that (i) it would lose certain immunities under Protocol 7 to the TEU and the Treaty on the Functioning of the European Union; (ii) as a matter of law the tenant (or any other European Union entity) could no longer lawfully be located in the premises; (iii) the tenant could no longer lawfully exercise the rights conferred on it by the lease, including the right to assign; (iv) if any of grounds (i)–(iii) succeeded, it followed that the tenant would have no power to meet its future obligations under the lease, including the obligation to pay rent; and (v) the tenant's capacity, effectiveness and independence would be seriously impaired if it had to pay rent for two HQ buildings (one in Amsterdam, to which it was required to move and that it could use, and one in London that it could not use). The tenant claimed that the lease would accordingly be frustrated by supervening illegality or by frustration of common purpose.

Marcus Smith J held that, even after Brexit, the tenant would continue to have power to acquire or dispose of moveable and immovable property held in a third country. There was no evidence of State practice supporting a general rule of customary international law that the headquarters of EU agencies must be located within a Member State and although art.341 TFEU provides that the tenant's headquarters (or seat) will be where the institutions of the Union determine, there is no implied limitation that the headquarters must be in a Member State. It followed that it would not be ultra vires the tenant for it to pay rent pursuant to the lease after the UK withdrawal. Consequently, the tenant's claim that the lease would be frustrated by supervening illegality failed.

As to frustration of common purpose, although the UK withdrawal from the EU was not relevantly foreseeable in August 2011 (when the parties entered into an agreement for lease), there was no mutual contemplation that if the lease could not provide a permanent headquarters for the tenant for the next 25 years, the common purpose of the lease had failed. The tenant agreed to enter into a lease for a term of 25 years without a break clause and assumed the risk of change in that time, including that it might involuntarily have to depart the premises, which could be managed by the alienation provisions in the lease that had been carefully worded when the lease was negotiated. The changes did not render the tenant's occupation of the premises impossible and did not render the tenant's performance under the lease something "radically different". The tenant was not under a legal obligation to move its headquarters to Amsterdam. There was no common purpose beyond the purpose arising for the lease itself. The situation did not come close to frustration of a common purpose and the tenant's involuntary departure was expressly provided for in the lease. The issue of relative justice did not arise, and the lease would not be frustrated by failure of a common purpose.

Having been buried in obscurity for decades, frustration has now come roaring back as the defence of choice for tenants who have been unable to trade during the pandemic lockdowns. But perhaps more of that next year.

3. London Kendal Street No 3 Ltd v Daejan Investments Ltd [2019] L&TR 22

Last year, in relation to S Franses Ltd v The Cavendish Hotel (London) Ltd [2018] 3 WLR 1952, I commented as follows:

> 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. …

> Areas of particular difficulty are likely to include … (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.

And so it came to pass, in London Kendal Street No 3 Ltd v Daejan Investments Ltd, a decision of HH Judge Saunders, sitting in the County Court at Central London on 16 July 2019. The claimant tenant occupied a ground floor unit in a large 10 storey mixed use building containing many units, part of which the defendant landlord intended to redevelop. The tenant applied for a new tenancy in 2017, and the landlord opposed its application on the ground that it proposed to demolish or reconstruct its unit (or a substantial part of it) and could not reasonably do so without obtaining vacant possession.

This claim therefore started life as a pre-Franses case: all that the landlord would have to do, it then seemed, was to prove that it intended to do the necessary works, and had the wherewithal to do so. Equipped with the decision in Franses, however, the tenant contended (among other things) that the works would not be commenced within the required three-month period of the end of the lease (or any other reasonable period required by law), because the landlord would not carry out the works other than as part of a much bigger project which it was not yet ready to do. So, the issue was whether the landlord had the current intention to carry out the works at the termination of the tenancy.

As we lawyers like to say, cases turn on their own facts, and it is relatively rare for a principle to emerge which might be of use in other cases. In this case, ultimately, the issue was whether the landlord would be in a position to carry out the works at all, rather than the more interesting question (which ultimately did not arise in terms) whether, had the tenant volunteered to leave early, the landlord would have carried out the works there and then, or waited until it was ready to carry out the other works. In the end, the landlord maintained that it would carry out all the works together, and given that it had placed a works contract to that effect, and had prepared the ground well in advance, it was effectively common ground that all the works would proceed together – to the extent that the landlord could do them at all. As to that, the Judge accepted that it was likely that the works would proceed.

Permission to appeal was subsequently granted by Morgan J on the grounds that the tenant had a real prospect of establishing that the judge failed to: (1) understand or address the tenant's primary case; (2) apply Lord Sumption's "acid test" in Franses; and (3) take into account the landlord's own evidence that it would not commence the works in the face of an injunction. Unhappily for us, perhaps, the appeal has recently settled.

4. SHB Realisations Ltd v Cribbs Nominees [2019] L & TR 25

This case arose out of the insolvency of the former BHS, who owned a long lease of a unit in a major shopping centre owned by the defendants. The lease had been purchased in 1998 for a premium of over £7m at a peppercorn rent; at the date of the trial it still had 104 years left to run. BHS ceased trading from the unit in August 2016. The defendants served a section 146 notice citing (principally) the breach of the keep open covenant. The tenant (now in liquidation) applied for relief for forfeiture – though it failed to specify the particular terms on which it sought relief.

At trial, the liquidators claimed that they wanted time in which to assign the lease for valuable consideration. This was notwithstanding the fact they had tried, and failed, to do so for almost 2½ years prior to trial. A five day trial eventually took place at the end of January 2019 before HHJ Ralton, followed by written submissions. The Court heard extensive evidence from the parties' respective letting experts about whether there was any market for the lease given its terms and the nature of modern retailing. It also heard expert valuation evidence concerning the value of the lease to the Claimants and the value to the defendants' reversion should relief be refused. The Claimants claimed that the latter was in the region of £65m. They argued that such a massive windfall to the defendants meant that relief ought to be granted.

Judgment was handed down on 1 April 2019. The Claimants were given a strictly limited period of time (until 28 June 2019) in which to complete an assignment, provided they paid specified sums in short order. The case confirms that a lease can be forfeited for breach of a keep open covenant and re-affirms the central importance of being able to remedy the breach. It also establishes that there will be limits to the time allowed to a tenant to use assignment of the lease as an indirect means of remedying persistent breaches of covenant, even where the forfeiture will result in a significant windfall to the landlord and will result in a major loss to a lender. It is also a useful reminder to those seeking conditional relief of the need to clearly set out the terms on which relief is sought.

5. Sequent Nominees Ltd v Hautford Ltd [2020] AC 28

In 1986 a 100-year lease was granted of a six-storey building in Soho. Clause 3(11) of the lease permitted use of the building for retail shops, offices and residential purposes. Clause 3(19), in addition to requiring the tenant to perform and observe all the provisions and requirements of the planning legislation, contained a fully qualified covenant forbidding the tenant from applying for any planning permission without the prior written consent of the landlord, such consent not to be unreasonably withheld.

The tenant subsequently sought the landlord's permission to apply for planning permission for change of use of the first and second floors from offices to residential. The landlord refused permission, on the basis that such a change might ease any claim by the tenant under the Leasehold Reform Act 1967 to enfranchise the freehold.

The tenant took proceedings for a declaration that the landlord's refusal was unreasonable, on the basis that it was both a derogation from grant and the seeking of a collateral advantage. It succeeded both in the High Court and the Court of Appeal. On the landlord's appeal, the Supreme Court held, by a 3:2 majority, that a landlord might reasonably refuse consent to a tenant doing something which increased the risk of enfranchisement under the Leasehold Reform Act 1967, regardless of whether the lease had been granted before or after the passing of that Act. It held that in this case the landlord's refusal had been reasonable.

6. York House (Chelsea) Ltd v Thompson [2020] Ch 1

This was a case under Part 1 of the Landlord and Tenant Act 1987, in which judgment was handed down by the High Court (Zacaroli J) on 15 August 2019.

The freehold of York House, a block of 42 flats in Chelsea, was held by Mr and Mrs Thompson. In order to preserve the development value in various parts of the premises, they granted 14 leases to one or other of themselves. No premium was payable and the rent was a peppercorn in each case. No offer notices under s.5 of the 1987 Act were served.

A majority of the flat lessees claimed that the leases were relevant disposals and sought to acquire them by serving s. 12B notices under the Act.

The Judge rejected the lessees' claim. He held that each lease was a disposal by way of gift to a member of the landlord's family, and so was excluded from the definition of 'relevant disposal' by s. 4(2)(e) of the Act. Alternatively, he held that each lease was a disposal consisting of a transfer by two or more persons who are members of the same family to fewer of their number, and so fell within the exclusion in s. 4(2)(h) of the Act. This is the first case in which those provisions have been considered.

7. Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd [2019] EWCA Civ 1683

This case was concerned with a development land sale agreement, with the price to be determined by an expert in default of agreement according to "the Assumed Value of the Property", upon certain given assumptions. The meaning of one of the assumptions (namely what was the correct valuation date) was agreed between the

parties to be the date of the determination itself, but other issues remained outstanding.

The expert appointed by the parties referred a number of issues to a legal assessor. Mistakenly, the assessor included the valuation date as one of the referred issues, and gave his view, which happened to be different to that which had been common ground between the parties. The mistake benefited one of the parties, which then abandoned the common ground, and changed its position about the relevant date.

Litigation ensued, with the claimant contending, first, that the independent expert had no jurisdiction to decide the valuation date; and secondly that both sides had agreed that the valuation date was the determination date, and that their agreement was enshrined in the statement of agreed facts which the independent expert had directed, and from which neither party could resile.

These two points were decided in the claimant's favour, and were then argued afresh on appeal. By that time, however, the Supreme Court had decided in MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2018] UKSC 24 that parties who agree that variations to their contract can only be made in a specified way cannot then rely upon variations made in any other way. In Great Dunmow, the contract was of this type, and it was plain that the variation (if that is what it was) as to the valuation date recorded in the statement of agreed facts was not compliant. The appeal had therefore to be allowed on that short ground.

However, the Court went on to express a view on the other principal ground which the appellant had argued. In relation to jurisdiction, the Court held that the judge had been right to conclude that the independent expert did not have exclusive jurisdiction to decide the valuation date issues. As Patten LJ (with whom the other Judges agreed) said, "The balance of authority is in my judgment now firmly in favour of preserving access to the courts to determine this legal issue going to jurisdiction."

Independent experts should therefore be careful, when receiving instructions, to understand precisely what it is that they have been asked to decide, and in particular whether they are to form their own substantive views of the meaning of expressions used in the contract.

At first instance in the case, the judge had held that the effect of the agreement contained in the statement of agreed facts about the correct valuation date was contractual in nature, and was therefore binding on the independent expert for the purposes of his expert determination. This holding became unsustainable after the decision of the Supreme Court in MWB, and therefore the point was not debated in the Court of Appeal.

The current position, therefore, is that there remains an authority at first instance that decides that it is possible for a statement of agreed facts to operate as a

contractual variation. Parties (including arbitrators and independent experts) and their advisers will need to remind themselves about the effect of this when conducting references. In Great Dunmow, the point ultimately did not survive because the contract itself precluded any variation unless made in a certain way (with which the statement of agreed facts did not comply). But had the variation been contract-compliant, then there seems to be no reason in principle why the parties should not have been bound by it – indeed, as the judge held.

Great Dunmow at first instance therefore stands as an authority concerning the status and effect of a statement of agreed facts in an independent expert determination reference, joining the decision of the judge in Techno Ltd v Allied Dunbar Assurance plc [1993] 1 EGLR 29 concerning the status of such a statement in arbitration.

Accordingly, where third parties direct the parties to agree such statements, they ought to scrutinise them when received. In a straightforward case, the statements will simply record facts (areas, amenities, comparable rents and the like), and will cause no difficulty. In more complex cases, when the statements deal with matters of interpretation or other legal matters, third parties would be prudent to ask of the parties what status such agreements are intended to have. Statements of agreed facts are as useful a tool in arbitration and independent expert determination as they are in litigation: they clear the air, and leave the parties with a secure basis for their submissions, and the tribunal with a ready means of understanding the departure point for the dispute. But, as Great Dunmow shows, such statements may also create greater conflict than that which they are designed to resolve.

8. Bate v Affinity Water Ltd [2019] EWHC 3425 (Ch)

In this case, by agreement with the then owner, a water company installed a substantial mains water pipe beneath privately owned land in the 1940s, connecting a nearby borehole and pumping station with a distant reservoir. There it lay buried for over seven decades, until the then servient owner objected to its presence, because it obstructed a redevelopment project.

The servient owner contended that the pipe had not been installed pursuant to a statutory power (there being no reference to the then governing Public Health Act 1936 in the installation agreement); and although the installation agreement was described as an easement, it could not be so, for lack of an identifiable dominant tenement. A utility easement notoriously requires both a dominant tenement (the land which is served by the easement) and a servient tenement (the land over which the utility runs). In the case of a pipeline easement, it is of course easy to identify the servient tenement – but where and what is the dominant tenement?

This question may be answered by the terms of the document itself: it may say that the dominant tenement is the adjacent reservoir or power station. If it does not, then the utility company may be able to show, by use of other evidence, what the pipe actually serves.

But all utilities have two ends: the generating end and the receiving or consuming end. So which is the dominant tenement? Our current law seems to require that it can only be one or the other. This question was ingeniously resolved by the High Court in Re Salvin's Indenture [1938] 2 All ER 498 by the Judge's finding that the whole water company's undertaking was the dominant tenement, thus rendering it unnecessary to resolve the precise identity issue.

Re Salvin has received much criticism over the decades, both from judges in other cases, and from legal text writers. The judgment was, however, approved in this case. The Judge rejected all the servient owner's contentions, holding in addition (valuably for utility companies) that the mere fact that the parties have chosen to proceed by way of private treaty for the installation does not necessarily have the consequence that the statutory powers were not also in play.

Quite apart from this, the Judge also held that a stopcock added to the water pipe by the utility in more recent times was also protected by statute. This involved finding that the stopcock had been installed in a 'street' within the meaning of the Water Industry Act 1991.

9. Fearn v The Board of Trustees of the Tate Gallery [2019] Ch 369

The owners of four glass-walled flats in South London brought claims in nuisance and for breach of section 6 of the Human Rights Act 1998 and Article 8 of the European Convention on Human Rights, relating to Tate's use of an exterior walkway around the perimeter of the adjacent 10th floor of the Tate Modern Gallery. The walkway is open to members of the public as a viewing platform and the owners of the flats complained that people could observe them inside their flats.

Mann J found that Tate was not a public authority and the flat owners therefore had no direct privacy claim under the Human Rights Act. He went on to hold that the law of nuisance is capable, in an appropriate case, of operating to protect the privacy of a home against another land owner, but that there was no actionable nuisance in this case.

His reason for so finding was that occupants of flats with "more wall and less window" would not have a nuisance claim, because a building constructed in that way would not be likely to attract the external viewer in the way in which the Claimants' flats did. As he explained (with the benefit of having visited the flats and the viewing gallery), a major part of what caught the eye was the apparently clear and uninterrupted view of how the Claimants sought to conduct their lives in

the flats. One could see them from practically every angle on the southern side of the viewing gallery. That attracted the gaze which intruded on privacy. If there were breaks in the view, then the visual interest would be less continuous and less striking, and viewers would be less interested. There would still be a risk of intrusion into privacy from the viewing gallery, but at a level which was within what the modern flat dweller in this locality ought to have to put up with on the give and take principle. The vulnerability to the views from the viewing gallery would not be sufficient to amount to a nuisance.

The appeal against the decision was reported in February 2020, and I deal with it as one of my 2020 cases below.

10. Telereal Trillium v Hewitt (Valuation Officer) [2019] UKSC 23

In this case, the Supreme Court had to consider the correct approach to determination of the rateable value of a vacant 1970s office building in Blackpool known as Mexford House, in circumstances where the evidence showed at the relevant time a general demand in the area for comparable office buildings, but no actual tenant willing to pay a positive price for the building itself. The rateable value initially entered by the valuation officer with effect from 1 April 2010 was £490,000, reflecting his view that there were in the area other office buildings of similar age and quality, occupied by public sector tenants at rents of the same order.

The statutory rating hypothesis requires the rateable value to be an amount equal to the rent at which it is estimated the property in question might reasonably be expected to let from year to year. It was common ground that this value would be the figure at which the hypothetical landlord and tenant would come to terms as a result of bargaining for the property, in the light of competition or its absence in both demand and supply.

The difficulty in the case was that there was no evidence of actual demand for the particular property by which to conduct this hypothetical exercise: in the real world, nobody could be identified who would wish to bid for the property. Hence, although the ratepayer accepted that it was necessary to assume there had to be a tenancy granted on the statutory terms between the hypothetical landlord and the hypothetical tenant after negotiations, it contended that the tenant would bid no more than £1. The Valuation Tribunal for England agreed, determining that the rateable value should be reduced to £1.

The Upper Tribunal disagreed: the property was capable of beneficial occupation, and comparable premises were beneficially occupied at substantial rents. It substituted a rateable value of £370,000 - a rate which it was agreed represented the value of the occupation. But the Court of Appeal allowed the appeal and restored the VTE's assessment.

Completing this game of judicial ping pong, the Supreme Court decided, by a 3:2 majority, that in accordance with longstanding House of Lords authority, actual rents agreed between tenant and landlord were not the test of value for rating purposes. Instead, the principle underpinning rating (the so-called "principle of equality") was to seek a standard by which every property can be measured in relation to every other property. It is not seeking to establish the true value of any particular property, but rather its value in comparison with the respective values of the rest. Accordingly, the test is not at what rent might the property let in the open market, but rather what would be the value of the property to an occupier.

Rating, it seems, is indeed a special case. In rent review and lease renewal valuation, we may continue as before.

2020

Let me conclude with a little 2020 taster, given that this paper should have been given 9 months ago, and occupies itself with what in legal minds is probably now ancient history. There has been a surprising number of decisions in our field, notwithstanding the restrictions under which we have been placed. I instance just four. The remainder can follow next year.

11. Fearn v The Board of Trustees of the Tate Gallery [2020] Ch 261

The Court of Appeal decided the appeal in a simple and direct way, holding that there was no cause of action in nuisance based upon overlooking the land of another. The human rights ground was also given short shrift: Mann J had found "in effect … that in all the circumstances the appellants did not have a reasonable expectation of privacy in the absence of the protective measures which he considered they ought reasonably to have taken." There was, and could have been, no challenge to that finding.

The Court gave the appellants permission to appeal to the Supreme Court on both grounds, so this saga is not yet at an end.

12. Alexander Devine Children's Cancer Trust v Housing Solutions Ltd [2020] 1 WLR 4783

Simplifying the facts somewhat, the Trust operates a hospice for terminally ill children on its land, to which peace and privacy are obviously critical; while the predecessor in title of Housing Solutions developed the adjoining land, in breach of a restrictive covenant, to provide 13 social housing units (thus freeing up a much more valuable development site nearby). Having completed the development, and facing continuing protests from the Trust, the developer made an application under

section 84 of the Law of Property Act 1925. It succeeded in the Upper Tribunal (albeit at the expense of having to pay £150,000 compensation); lost in the Court of Appeal for one reason (per Sales LJ); and lost again in the Supreme Court for a completely different reason (per Lord Burrows). In essence, so the Court held, the Tribunal should have exercised its section 84 discretion against the developer, to reflect its "*deliberately unlawful and opportunistic conduct*". This obviously has considerable ramifications for other property transgressions – think developers rushing on a development that interferes with rights of light, for example.

13. EMI Group Ltd v Prudential Assurance Co Ltd [2020] EWHC 2061 (Ch)

More 1995 Act convolutions. This time, a guarantor was seeking to escape from a GAGA, claiming that the wording of the lease which had required it was contrary to the terms of the 1995 Act, with the result that the guarantee was void.

The facts were that the original tenant (HMV), its assignee (Forever 21 (UK) Ltd) and its assignee's guarantor (Forever 21 Inc) had all become insolvent or entered administration by late 2019. The landlord, Prudential, served a s.17 notice upon EMI, the guarantor's guarantor under a GAGA that had been entered into ten years previously. When EMI disputed its liability upon various grounds to do with the wording of the lease and GAGA, the Prudential took proceedings seeking payment of the arrears, which had increased to just short of £5m by the date of the hearing.

The issues in the case turned upon the wording used in the lease and GAGA, which are interesting in themselves. What is perhaps more interesting for our purposes is the interpretative aids the Deputy Judge used to arrive at the result which favoured the Prudential. The first was the "validity principle": that where there are two possible interpretations of provisions in a lease the construction which renders the provision valid should be preferred. The second was that, although contracts of guarantee are traditionally construed strictly, that is very much a rule of construction which should only be resorted to if the words cannot be fairly construed in their context. Much that is valuable was also said about the Court's ability under the anti-avoidance provision in s.25 of the 1995 Act to sever words to the extent that the provisions of the Act are offended.

The decision also lays to rest (at least for the time being) a couple of other points that often need to be considered in guarantee work: (a) whether the automatic requirement for the assignee to provide a GAGA, irrespective of whether it is reasonable to do so, was prima facie void (no); and (b) whether GAGA guarantor's liability survives only where the principal remains bound (again, no). A decision which usefully adds to the corpus of authority on the 1995 Act.

13. Beaumont Business Centres Ltd v Florala Properties Ltd [2020] EWHC 550 (Ch)

The Claimant ('Beaumont') was the lessee of an office building in the City of London which it occupied for the purposes of its business, the provision of high class serviced offices and business services. Beaumont sought an injunction, alternatively damages, against the defendant, the freehold owner of the adjacent building. Beaumont claimed that the defendant's extension of its building had interfered with its rights to light.

The affected part of Beaumont's building was relatively poorly lit before the infringement, and, like many offices, electric lighting was used. The defendant argued that where a room is already badly lit, making it darker still is not an actionable nuisance. It also argued that an interference which translated to only a small amount of loss of rental or capital value should not be regarded as substantial, even though the loss is more than *de minimis*.

The court rejected this argument. It held that to establish a claim in nuisance Beaumont needed to prove that the reduction in light to its premises had made them substantially less comfortable than before. In practice this meant that it must show that by virtue of the light reduction it was likely to suffer a loss of rental income over the course of its lease which was more than *de minimis*. It was therefore irrelevant whether the premises were well lit before the reduction.

The judge, Peter Knox QC, considered whether the Waldram method and its 50/50 rule was still appropriate today. In this case none of the affected rooms moved from 'well lit' to 'badly lit', so the 50/50 rule was irrelevant. The judge however declined to ignore the Waldram test, finding it a useful starting point. He also had regard to radiance evidence (false colour images and human response images) and found this demonstrated a perceptible reduction in light levels. He then went on to find that the reduction in light did result in a reduction in rents Beaumont received for the affected rooms. However difficult it was to quantify that reduction, Beaumont had established that the reduction caused a substantial interference to amount to a nuisance.

The court rejected the defendant's argument that Beaumont was simply trying to extract a ransom payment from the defendant, so as to disentitle it from an injunction.

The judge found that it would be appropriate to grant an injunction ordering the defendant to cut back its development. The premises were, however, occupied by a tenant, who had been granted a long lease after the claimant had first complained about the infringement, but who was not a party to the proceedings. Judgment was accordingly given for Beaumont in the form of a declaration that, as against the defendant, Beaumont was entitled to an injunction and that if, so advised, it might

join the tenant to the proceedings to seek an injunction. Failing that, Beaumont would be entitled to damages in lieu of an injunction in the sum of £350,000.

This was the first decision since the ruling of the Supreme Court in Coventry v Lawrence to declare that an injunction requiring demolition of an interfering part of a building was an appropriate remedy in a rights of light case. The Defendant has since applied for permission to appeal, so I had better say no more about the result for the time being.

Coda

We property litigators do not, of course, gloat over the misfortunes of others. But I think that we are entitled to take some satisfaction from the fact that when new legislation is introduced (and the Landlord and Tenant (Covenants) Act 1995 and the Digital Economy Act 2017 provide paradigm examples), members of the Property Litigation and Property Bar Associations are ready to test its proper limits.

Falcon Chambers **GUY FETHERSTONHAUGH QC**

Falcon Court

London EC4Y 1AA **December 2020**