

# Butterworths Property Law Newsletter

July 2010  
Vol 2 Issue 7

## NEWS UPDATE FOR PROPERTY LAW PROFESSIONALS

### Property profits taxation warning

Landlords have been warned not to disguise any profits they make after selling their properties from the taxman.

Accountants say that officials from HM Customs & Revenue (HMRC) are increasingly examining records from the Land Registry to confirm the accuracy of tax returns.

Data obtained under the Freedom of Information Act by accountants UHY Hacker Young found that investigations into avoidance of Capital Gains Tax (CGT) had recovered £73.6 million in 2009/10, compared to just £59.7 million in 2007/08.

The firm said that this figure was even more surprising when viewed in context.

Roy Maugham, tax partner at UHY Hacker Young, said, "This is a massive increase in CGT from enquiry work, particularly as the amount of CGT payable has collapsed as asset values slumped during the recession."

"It shows just how aggressive HMRC is becoming in tackling tax evasion in this area", he added. The data showed that the amount of CGT which HMRC had calculated was payable more than halved (-53%), falling from £5.3 billion in 2007/08 to £2.5 billion in 2009/10 as the recession hit. Maugham continued, "Gains on property transactions are a particular area of attention for HMRC. Other enquiries involve HMRC challenging whether a property is really a taxpayer's main residence and, therefore, exempt from capital gains tax."

### Housing market stalls on abolition of HIPs

The abolition of Home Information Packs (HIPs) last month has resulted in a surge on properties coming onto the market and a stalling of house prices, according to property website Rightmove. It was found that there are now 56% more properties on the market than in June 2009, while London saw an increase of 88%. The average cost of a property in England and Wales increased by only 0.3% in the five weeks prior to 12 June. This increase followed a rise of 0.7% in the previous month.

Rightmove said that although the figures marked a sixth consecutive monthly increase in house prices, it was far less than the 2.6% increase seen in April. Miles Shippie, commercial director of Rightmove, said that a continued shortage of mortgages had been joined by an increase of sellers and rumored capital gains tax increases to cause a dip in market recovery. "It is an unfortunate concatenation of events that disrupts what was passing as normal service,

where investor appetite provided an uneasy balance to the first time buyer-starved market."

The Royal Institution of Chartered Surveyors said that it expects activity on the market to increase over the coming months; with 10% more chartered surveyors reporting an increase in new buyer enquiries. It was also suggested that a higher level of instructions should lead to a flatter trend in house prices in the latter part of the year.

### Landlord register scrapped

The decision of the Housing Minister to scrap the planned residential landlord register has been welcomed by the British Property Federation (BPF). Plans for the register were originally suggested in the Rugg Report in 2008. The Labour government said that it planned to take forward the proposals despite criticism that they would be costly to the housing sector and would be ultimately ineffectual. Director of policy at the BPF, Ian Fletcher, said, "Landlords had lost all confidence in the

ever more complex 'simple' registration proposals, and will be glad to see the back of them. It would be a pity, however, to jettison a number of sensible recommendations, for example extending self-regulation across the agency sector." Fletcher said that there are a number of issues requiring the government's attention, including encouraging future investment from institutions and individuals, planning considerations, and tenancy deposit scheme compliance.

### Mortgage lending increase continues

The Council of Mortgage Lenders (CML) has reported that gross mortgage lending increased by 7% between April and May this year. Total mortgage lending rose to £11.3 billion in May, up from £10.5 billion in April.

This represents an increase of 10% on May 2009. The CML said that while the market is a little more buoyant than a year ago, gross lending may marginally miss its existing forecast of £150 billion for 2010. Chief

economist at the CML Paul Samter said that ongoing uncertainty over the regulation of the financial markets was a cause for concern. "The Chancellor has announced that the Bank of England is to take on regulatory responsibility for the banking system. As well as regulating individual firms, the Bank will have 'macro prudential' powers and be accountable for the stability of the system as a whole. It is not yet clear what levers it will have at its disposal to do so," he said.

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ISSN 2040-0128



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## ■ Case digest

# Case digest

***Crafrule Ltd v 41–60 Albert Palace Mansions (Freehold) Ltd***  
**[2010] All ER (D) 267 (May); [2010] EWHC 1230 (Ch)**  
**27 May 2010**

*Landlord and tenant – Leasehold enfranchisement – Entitlement – Tenants of flats wishing to exercise right to collective enfranchisement – Property comprising two parts, each of which qualifying as “self-contained part of a building” within the meaning of relevant statute – Landlord contending right to enfranchisement not exercisable in respect of “self-contained part of building” comprising two or more self-contained parts – Whether statute requiring “self-contained part of building” to be indivisible into smaller self-contained parts – Leasehold Reform, Housing and Urban Development Act 1993, ss 3, 4, 13.*

Section 3 of the Leasehold Reform, Housing and Urban Development Act 1993 provides, so far as material:

“(1) Subject to s 4, this chapter applies to any premises if:  
 (a) they consist of a self-contained building or part of a building ...”

Section 4 of the Leasehold Reform, Housing and Urban Development Act 1993 provides, so far as material:

“(3A) Where different persons own the freehold of different parts of premises within subs (1) of s 3, this chapter does not apply to the premises if any of those parts is a self-contained part of a building for the purposes of that section.”

The tenants of 10 of the flats numbered 41–60 Albert Palace Mansions wished to exercise the right to collective enfranchisement conferred by s 1(1) of the Leasehold Reform, Housing and Urban Development Act 1993 (the Act) in respect of all 20 of the flat, numbered 41–60 (the property). The defendant company (the company) was appointed nominee purchaser to act on the tenants’ behalf, pursuant to s 15 of the Act, and an initial notice was served on the landlord

in March 2008. The claimant landlord disputed the tenants’ entitlement to enfranchisement on the ground that the property was made up of two parts: flats 41–50, and flats 51–60.

It was common ground that each part would itself qualify as a ‘self-contained part of a building’ within the meaning of s 3 of the Act, and could not be further sub-divided into smaller self-contained parts. It was the landlord’s contention that the right to enfranchisement could only be exercised in relation to a self-contained part of a building which did not itself comprise two or more self-contained parts. The landlord issued proceedings in the county court to determine the matter. The judge found that the property constituted premises to which Ch 1 of the Act applied, as defined in s 3 of the Act, and that in the circumstances the company was entitled to acquire the whole of the landlord’s interest. The landlord appealed.

The sole issue which arose for consideration was the true construction of the phrase “a self-contained part of a building” in ss 3 and 4 of the Act. The company submitted that the statutory test was framed in clear and simple language and that the landlord’s position was flawed in that it proposed ambiguity where none existed. The company drew further support for its approach from s 4(3A) of the Act, which had been inserted by the Housing Act 1996, contending that the clear implication of that provision was that a self-contained part of a building was normally capable of comprising two or more such parts and that that general rule was restricted only in the specific case where the freehold was not in single ownership.

The landlord contended, *inter alia*, that it was illegitimate to have regard to s 4(3A) in construing the original provisions of the 1993 Act, since an amendment could not affect the construction of the Act as originally enacted unless the contrary intention appeared from the amending Act. The landlord further contended that, if the company’s construction were right, the result would be that tenants could enfranchise a part of a building in which they had no direct financial stake or interest, and that in an extreme case, the

tenants in one part of a self-contained building could force themselves as new landlords on tenants of another part, even if the tenants of that other part had no interest in acquiring their freehold.

The appeal would be dismissed.

The language of s 3 of the Act was clear and neither expressly nor by implication did it require that a self-contained part of a building should be indivisible into smaller such parts. The natural implication of ss 4(3A) and 13(8) to (10) of the Act was that, in the absence of special provision to the contrary, an initial notice might relate to a self-contained part of a building which was capable of further subdivision.

That construction was in no way contrary to the policy of the Act. “Majority rule” was an inherent part of the statutory scheme and Parliament had to be taken to have intended that the wishes of individual tenants should be capable of being overridden in the interests of providing workable machinery to implement the wider statutory purpose. Further, it was not impermissible to have regard to s 4(3A) for the purpose of construing the original provisions of the Act, because the point of so doing was not to modify or contradict the meaning of s 3(2) as originally enacted, but merely to provide confirmation that Parliament in 1996 had intended s 3(2) to bear the same meaning as it always had.

Since it was common ground that the property satisfied the statutory definition and that none of the exclusions in s 4 of the Act applied, that was the end of the matter.

*Majorstake Ltd v Curtis* [2008] All ER (D) 70 (Feb) considered.

*Per curiam*: Even if it were permissible to have recourse to Hansard, the passages relied on by the landlord would not go far enough to resolve any ambiguity in the landlord’s favour, because they do not clearly relate to the specific issue of severance. While it is true that the minister placed emphasis on the right to enfranchise the smallest viable unit in a block, he also recognised that there was a balance to be struck between the interests of leaseholders who wished to enfranchise and those who did not. He nowhere said, in terms, that a majority of leaseholders would be prevented from enfranchising if the premises in question did not constitute the smallest viable unit in the block.

# Establishing a beneficial interest in property

Where two or more people together own real property, they hold it under a trust of land. Where property is held on a trust of land, the legal estate and equitable estate are separate. The legal estate must be held by the co-owners as joint tenants. The beneficial interest in the property can, however, be held by the co-owners either as:

- joint tenants; or
- tenants in common.

If the co-owners are joint tenants, each has an “indivisible share” in the property, where each owns the whole, rather than an identifiable share of the property. The right of survivorship applies so on the death of one joint tenant, the deceased’s interest in the property passes automatically to the other(s).

## Court rulings after *Stack v Dowden*

In several recent decisions the court has applied the principles set out in *Stack v Dowden* [2007] 2 All ER 929 to establish an unmarried couples’ respective share in the jointly owned home once the relationship has ended. The main issue is whether the conveyance indicated that each party was intended to have a specific beneficial interest rather than establishing a *prima facie* case of joint and equal beneficial interests until the contrary was shown.

A conveyance into joint names indicates a presumption that a beneficial joint tenancy was intended unless and until the contrary is proved. The burden is on the person seeking to show that the couple intended their beneficial interests to be different from the legal interests. Each case will turn on its own facts. The court needs to ascertain the parties’ shared intentions (actual, inferred or imputed) with respect to the property, considered in the context of the couple’s whole course of conduct in relation to the property.

The main principles in *Stack* are:

- a conveyance into joint names results in a legal and beneficial joint tenancy, unless the contrary is shown; and

- the burden of proof is on the owner seeking to show that they intended to hold their beneficial interests as tenants in common.

Factors to be considered include:

- any advice or discussions at the time of the transfer, that would indicate their intentions at that time;
- the purpose for which the house was acquired;
- the reasons why they purchased the house jointly;
- the reasons why the survivor of the couple was authorised to give a good receipt for capital monies;
- the nature of the parties’ relationship;
- whether the couple had children for whom they both had responsibility to provide a home;
- how the purchase was financed, both initially and subsequently;
- how the parties arranged their finances, for example, whether their accounts were held separately, together or a combination of both; and
- how the couple discharged their outgoings on the house and other household expenses.

The recent Court of Appeal decision in *Kernott v Jones* [2010] All ER (D) 244 (May) endorses the principles set out in *Stack*, although one judge found it difficult to see how the facts in *Stack* had led to the conclusion that it was a sufficiently unusual case to discharge the heavy burden of rebutting the presumption of equality.

## *Fowler v Barron*

In *Fowler v Barron* [2008] All ER (D) 318 (Apr), the starting point was a transfer into joint names giving rise to a presumption of joint and equal beneficial ownership. The claimant relied on circumstantial evidence to show that the parties had a shared intention that the presumption should not apply.

The cohabitants’ financial and domestic arrangements differed in several respects from those in *Stack*. They had executed mutual wills and did not have

any separate substantial assets other than the family home. One of them had not made any direct financial contribution to purchasing the home, but had paid for some of the other family expenses, such as gifts, school clubs and trips, holidays and special occasions.

The court emphasised that a secret intention of one of the parties was not sufficient. It must have been reasonably understood by the other party. The court decided that the claimant cohabitant was entitled to 50% of the beneficial interest in the family home, despite her not having contributed directly to the costs of acquiring it. By contrast *Stack* had contributed to the interest payments on the mortgage but was held to have less than a 50% share.

## *Laskar v Laskar*

In *Laskar v Laskar* [2008] All ER (D) 104 (Feb), property was purchased by a mother and daughter as an investment. The court held it was not appropriate to apply the presumption of joint beneficial ownership laid down in *Stack* as neither party lived in the disputed property.

## Practical implications

To avoid the uncertainty and difficulty of establishing the beneficial interests of co-owners, advise clients to clearly record the basis on which they purchase a property. If the co-owners are not to be beneficial joint tenants, specify precise shares either in the transfer or by means of a separate Declaration of Trust.

If the transfer deed is left silent, the parties should record their intentions, and the contributions that each will make to the purchase price, mortgage payments and other outgoings in a letter of intent to be retained with the conveyancers’ records.

The co-owners should also try to record any change in their intentions during their co-ownership (eg, if one party becomes unemployed, or becomes a full time parent and ceases making financial contributions).

Taking these steps may help a court to realise the express intentions of the parties, or help to avoid the need for costly litigation altogether. It remains to be seen if the courts will take a similar approach to the increasing trend for strangers or friends to purchase properties jointly. This trend is still quite recent – a spate of disputes may be likely in the future in the event that the co-owners go their separate ways.

## In Practice

# Notices – the limits of *Mannai*

Time is generally of the essence for serving notice to exercise a call option or to break a lease. In some cases time can also be of the essence for service of a notice to operate a rent review. Although the House of Lords ruling in *Mannai v Eagle Star* [1997] 3 All ER 352 can be called upon to save a notice containing an error that would not affect the “reasonable recipients” understanding of that notice, it does not save a notice that has failed to comply with any conditions precedent specified in the option agreement or lease. An invalid notice can have serious consequences, financial and otherwise. It can also give rise to a claim of negligence against the adviser. The time periods and deadlines for serving a notice require careful attention.

The mechanics of serving the notice must also be complied with for the notice to be valid. In *Hotgroup v Royal Bank of Scotland* [2010] All ER (D) 280 (May), a tenant was held not to have validly exercised a break clause. It had complied with the time limit for serving notice on the landlord. However, the lease required that a copy of any notice would not be deemed validly served unless a copy had been served on the property manager. The tenant did not serve such a copy until after the deadline for exercise of the break.

### Interpretation of common deadlines

Interpretations of common deadlines:

- **By:** The notice can be served up to 23.59 on the date specified. A notice to be served by 7 October will be valid if served at or before 23.59 on 7 October, but not later;
- **From:** The date specified will generally be excluded, so that the notice can be served only from the start of the following day – for example, a notice that can be served from 7 October will be valid if served at or after midnight between 7/8 October. Similarly, if the term of a tenancy is expressed to be “from” 7 October, it will generally be viewed as starting on 8 October;
- **Not less than/At least:** When calculating the relevant period, the first

and last days are excluded – therefore a notice to be served not less than or at least 10 days after 7 October must be served on or after 18 October;

- **Within one year:** The calendar year is used – a notice to be served within one year of 7 October 2006 can be served at or before 23.59 on 7 October 2007, not later;

- **Within one month:** When calculating the period for documents made or effective after 31 December 1925, the calendar month is used – a notice to be served within one month of 31 March 2006 can be served at or before 23.59 on 30 April, not later.

### Meaning of “year”, “month” and the “corresponding date rule”

The terms of a contract may fix any date for the beginning of a year. In the absence of any express definition of the term, it may appear from the contract that a period beginning or not beginning on 1 January, as the case may be, was intended (*IRC v Hobhouse* [1956] 3 All ER 594)

## Leasehold enfranchisement

**The relevant leasehold enfranchisement legislation does not require a qualifying self-contained part of a building to be indivisible into further self-contained parts.**

In *Crafrule v 41-60 Albert Palace Mansions* [2010] All ER (D) 267 (May), the High Court ruled on the meaning of a qualifying self-contained part of a building for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 (LRHUDA 1993), as the issue was important and there was no existing authority on the point. The court held that:

- LRHUDA 1993 did not require either expressly or by implication that a self-contained part of a building should be indivisible into smaller self-contained parts. If Parliament had intended to oblige tenants to claim the smallest part of a building that satisfied the qualifying criteria it would have said so. The notice provisions in LRHUDA 1993 confirmed the construction. An exclusion (introduced to LRHUDA 1993 by amendment in 1996) was simply a restriction of the general rule, only in the specific case where the freehold of each self-contained part was not in single ownership. It was permissible to have regard to this provision to provide confirmation

that in 1996 Parliament intended the provision defining the qualifying premises to bear the same meaning as it always had. The point was not to modify or contradict the meaning of the original wording by reference to the later amendment.

- This literal construction was not at odds with the statutory purpose, nor did it lead to absurd or anomalous consequences. The policy of LRHUDA 1993 is to enable leaseholders to acquire either the whole premises or a new lease at a price which the legislature thinks fair. Parliament must, therefore, have intended that the wishes of individual tenants were capable of being overridden to provide workable machinery to implement the wider statutory purposes will give consumers more control and choice of when they use electricity allowing them to save money.

The court confirmed that no recourse could be had to *Hansard* as LRHUDA 1993 was neither ambiguous nor obscure in relation to the point in issue, nor did it lead to an absurdity. It would not, in any event, have assisted. It contained no specific confirmation of an intention that a majority of leaseholders should be prevented from enfranchising if the relevant premises did not constitute the smallest viable unit in a block.

In all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after 31 December 1925, unless the context otherwise requires, "month" means calendar month. In mortgage transactions a month has always been taken to mean a calendar month; and according to the custom in the City of London a month in a mercantile transaction has always been

deemed to be a calendar month. (Law of Property Act 1925, s 61.)

When the period prescribed is a calendar month running from any arbitrary date, the period expires upon the day in the succeeding month corresponding to the date upon which the period starts. There is a necessary exception where the period starts at the end of a calendar month which contains

more days than the next succeeding month. In that case, the period expires at the end of that succeeding month. A period of a month which begins on 29, 30 or 31 January must in the ordinary year terminate on 28 February, or on 29 February in a leap year. The period can never extend into a third month (*E J Riley Investments Ltd v Eurostile Holdings Ltd* [1985] 3 All ER 181).

## Government puts an end to garden grabbing

The government has amended Planning Policy Statement 3 (PPS3) giving local councils powers to reclassify land previously used as garden land. The new powers will allow councils to prevent unwanted development on gardens (emotively known as "garden grabbing" but also known as infill development providing new housing in urban and suburban gardens).

Garden land has been classified as "previously developed land" falling within the definition of brownfield land (having the same status as waste ground and industrial areas) which is more open to development than greenfield land.

The designation was intended to increase the amount of affordable housing. However, because garden plots tend to be small, they do not meet the threshold for affordable housing (new developments need to have at least 15 dwellings before they are required to include affordable homes).

Consequently developers choose garden plots over former industrial brownfield sites as they are cheaper to develop (rarely requiring decontamination) and often do not require affordable housing provision. The building of houses on previously developed land, such as gardens, rose from 1:10 to 1:4 between 1997 and 2008.

Concerns have been raised that the amended policy will put smaller developers who provide local employment out of business, but local councils retain the option to grant planning applications for large garden sites as an appropriate way to supply much needed housing in a manner that is

not detrimental to the local character of an area.

Local councils and the Planning Inspectorate must have regard to the amended policy in preparing development plans and, where relevant, to take it into account as a material consideration when determining planning applications. With garden land now declassified as brownfield land, local councils will have the power to decide whether or not to grant planning permission, basing their decision on the requirement for specific housing (ie, family housing, not flats), maintaining the character of areas and recognising people's need for access to green space.

Any developer who currently has an option over garden land but has yet to secure planning permission will be caught by the amended policy. The decision whether or not to grant planning permission will be made by the local council and based on the needs of the community, and not on appeal by the planning inspector based on a more national interpretation of the planning rules. If the council and local people do not consider that the proposed development benefits the local community, planning permission may be denied.

The government has also scrapped the minimum density target for the amount of housing in a given area, allowing councils to decide what new homes are best for their area.

Until now at least 30 homes needed to be built on every hectare of developed land, making it difficult for large-scale developers to get planning permission for bigger homes and gardens resulting in a

lack of affordable family-sized homes. The amended policy should allow for required housing to be built without the undue influence of targets.

This inability of developers to build infill developments should result in better use of other brownfield sites, such as derelict factories and unused railway sidings.

However, these types of sites are expensive to develop due to decontamination issues and so the amended policy could potentially result in more development on greenfield sites, particularly expanding into the space around existing towns and cities. The Campaign to Protect Rural England believes that the brownfield targets and density standards have been instrumental in protecting valuable countryside, preventing urban sprawl and regenerating inner cities.

They are concerned that the amended policy could undermine the sustainable use of land and increase the pressure on the Green Belt. In order to avoid building on greenfield sites it is important to increase the density of building on existing residential land.

The Home Builders Federation considers the amended policy "unnecessary and counterproductive" and that local councils already have enough power to refuse unsuitable infill development. They feel that, due to the current shortage of housing, the government should be making development easier rather than more difficult.

However, the government maintains that the amended policy is not intended to hinder development but to encourage developers to utilise alternative brownfield sites.

Further information on this can be found at: [www.communities.gov.uk/publications/planningandbuilding/pps3housing](http://www.communities.gov.uk/publications/planningandbuilding/pps3housing)

**Elinor Clark, LexisPSL**

## ■ Notices

# When signing on the dotted line is not enough

In *Hilmi & Associates Ltd v 20 Pembridge Villas Freehold Ltd* [2010] EWCA Civ 314, the question was whether a limited company had validly "signed" a notice under s 13 of the Leasehold Property and Urban Development Act 1993 (LPUDA 1993). Such a notice was of course the first step in the acquisition of the freehold title by the majority of long leasehold tenants, in this case of a block of flats in west London.

### Requirement of signature by tenant

Under LPUDA 1993 most notices can be signed by or on behalf of tenants. However, notices under s 13 (and s 42 in relation to individual leasehold extensions) must "be signed by each of the tenants, or (as the case may be) by the tenant, by whom it is given".

In *Hilmi* one of the four qualifying tenants of flats in the building was a limited company, Datamust Company Ltd. It had "signed" the s 13 notice by its director signing the notice.

In *City and County Properties Limited v Plowden Investments Limited* [2007] L&TR 15, HHJ Reid QC had held that a notice signed by one director of a corporate tenant was not sufficient. In *Hilmi*, HHJ Dight, having considered the *City and County* decision, had nevertheless held at first instance that a single director's signature was sufficient.

### Companies Act 1985

The s 13 notice having been served prior to 6 April 2008, the now superseded Companies Act 1985 was the statute which governed the formalities required for companies to enter into documents and execute deeds and other documents.

Section 36 of the Companies Act 1985 dealt with companies entering into contracts, s 36A dealt with companies executing documents, and s 36AA imposed additional requirements for the execution of deeds.

The question for the court was whether signing a s 13 notice should be regarded as (1) akin to entering into a contract or (2) executing a document. This required the Court of Appeal to undertake what they themselves described as the somewhat metaphysical enquiry as to how a

company, which cannot itself hold a pen and paper, can sign a notice.

Under s 36 of the Companies Act 1985, any person acting under a company's authority, express or implied, could enter into a written contract on behalf of the company by a single signature.

Under s 36A, a company could execute a document either (1) by affixing the common seal of the company to it, or (2) by the signatures of two directors of the company (or by a director and secretary of the company).

HHJ Dight's reasoning at first instance had been based on his view that the purpose of the requirement for signature by the tenant was to ensure that the tenant really knew what he was doing, and that, "the focus ... is not on the method by which an initial notice is signed but on the person by whom it is signed". He went on to say that, "whenever a company acts through the agency of an officer authorised to so act on its behalf the company has, in my judgment, personal knowledge of the transaction in which its officers are acting. In so doing the purpose of s 99(5) ... will have been fulfilled".

### Formality required for signature by company

In overturning HHJ Dight's decision, and holding that the greater formality of s 36A was required for a company to validly sign a s 13 notice, Lord Justice Lloyd said in the leading judgment in the Court of Appeal:

"I would accept the submission of Mr Heather, that, at any rate in the context where some degree of formality is required to make a document valid and effective for some particular legal purpose (and the point can only arise in such a context), it is appropriate and natural to speak of the execution of the document, as a matter of ordinary language. That is so even for a document to be made under hand rather than by deed."

Lord Justice Lloyd therefore went on to conclude that:

"A notice in writing as required by either s [13 or 42] of the 1993 Act is plainly a

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document, whatever definition of 'document' one may use. Therefore I conclude that the notice in the present case, which was signed by only one director and did not have the company's common seal (if it has one) affixed to it, was not signed by the company."

### No *Mannai* rescue

*Hilmi* also acts as a useful reminder that the case of *Mannai Investment Co Limited v Eagle Star Life Assurance Co Limited* [1997] AC 749, which rescues many otherwise defective common law notices, will rarely assist in the case of a statutory notice such as an initial notice under s 13.

Having quoted Lord Justice Chadwick's judgment in *Burman v Mount Cook Land Limited* [2001] EWCA Civ 1712 to the effect that the key question in relation to any notice is whether the notice is a valid one for the purpose of satisfying the relevant statutory provision, Lord Justice Lloyd concluded that "the question for this court is whether the company did sign by the steps that were taken, not what the reversioner might reasonably have thought about it."

### Companies Act 2006

Sections 36, 36A and 36AA of the Companies Act 1985 have now been superseded by ss 43 to 47 of the Companies Act 2006, which came into force on 6 April 2008.

Although the result in *Hilmi* would have been the same under the 2006 Act, s 44 does introduce an additional method for the execution of a document by a company:

- (2) A document is validly executed by a company if it is signed on behalf of the company:
  - (a) by two authorised signatories, or
  - (b) by a director of the company in the presence of a witness who attests the signature.
- (3) The following are "authorised signatories" for the purposes of subs (2):
  - (a) every director of the company, and
  - (b) in the case of a private company with a secretary or a public company, the secretary (or any joint secretary) of the company.

Thus a single director can now validly execute a document on behalf of a company provided that his signature is attested by a witness present at the time of the signature.

**Nick Isaac**  
Barrister, Tanfield Chambers

# Virtual assignments: the final word?

## The future of virtual assignments and the Court of Appeal's decision in *Clarence House*

- How has the Court of Appeal in *Clarence House* resolved the tension between virtual assignments and the tenant's covenants against alienation?
- Does this mean that landlords ought now to extend their standard alienation prohibitions so as to prohibit virtual assignments expressly?
- How ought tenants to react to any such new expanded alienation prohibitions?

The Supreme Court has now refused permission to appeal in the case of *Clarence House Ltd v National Westminster Bank plc* [2009] All ER (D) 70 (Dec); [2009] EWCA Civ 1311, and so it is perhaps an opportune moment to consider whether, in the light of the Court of Appeal's decision, virtual assignments will (or ought to) continue to be relevant to property practitioners.

For the uninitiated, a virtual assignment is a conveyancing device for leases under which:

*"... all the economic benefits and burdens of the relevant lease (including any management responsibilities) are transferred [by the lessee] to a third party, but without any actual assignment of the leasehold interest or any change in the actual occupancy of the premises in question" [per HHJ Hodge QC at first instance in Clarence House].*

It enables transactions involving large portfolios of leases to be dealt with swiftly and efficiently without the need for consents to assignments under each of the particular leases having to be sought from each of the particular landlords.

In *Clarence House* the court examined the relationship between a virtual assignment and a tenant's covenants against alienation. At first instance ([2009] EWHC 77 (Ch), [2009] 3 All ER 175) HHJ Hodge QC declared that the tenant was in breach of its alienation covenants because (but only

because), as a result of the virtual assignment, it either parted with possession or was permitting the sharing of possession of the premises. The Court of Appeal (All ER (D) 70 (Dec)), however, allowed the tenant's appeal (and rejected all of the additional points taken in the landlord's respondent's notice). The tenant was found not to have breached its alienation covenants and so the landlord's claim for damages had to be dismissed.

Ward LJ (who gave the only judgment in the Court of Appeal) decided that the term "possession", when used in an alienation covenant, ought to bear its ordinary and normal sense. As such, it involved the physical control of the property and was characterised by the right to exclude all others from the property. Possession thus required more than mere receipt of rents and profits (contrary to HHJ Hodge QC's conclusion that this was sufficient).

In *Clarence House*, the property was fully sublet. Both before and after the virtual assignment it was the subtenant (and the subtenant alone) who was in possession of the premises. The tenant had parted with possession of the premises on the grant of the sublease and, not being in possession of the premises at the date of the virtual assignment, it could not be said to have parted with possession by the making of the virtual assignment.

Notwithstanding this conclusion (which was sufficient to dispose of the appeal) the Court of Appeal went on to consider whether, in any case, the virtual assignment effected a transfer of the right to receive rents and profits. After all, HHJ Hodge QC had been influenced by s 205(1)(xix) of the Law of Property Act 1925 (which defines possession as including "receipt of rents and profits or the right to receive the same, if any") in concluding that the virtual assignment did involve a parting with possession. Ward LJ stated that the effect of the terms of the virtual

assignment was that the virtual assignee was appointed agent for the tenant to collect the sublease rents. In collecting such rents it could say to the subtenant: "You must pay me the rent on behalf of your landlord," but it could not say: "You must pay me the rent because you owe me the rent". The virtual assignee had no right to sue the subtenant for the rents in its own name and it mattered not that upon receipt of the rent the monies became (under the terms of the virtual assignment) the property of the virtual assignee. In reality, the position of the virtual assignee was analogous to that of a managing agent, the appointment of whom would not amount to a breach of the covenant against parting with or sharing possession, even if the managing agent were permitted to keep 10% of the rent.

Finally, the Court of Appeal looked at each of the limbs of the covenant against alienation which were not concerned with parting with or sharing possession. The virtual assignment did not result in a breach of any of these because:

- There had been no "declaration of trust" with regard to the property or the lease. The virtual assignment was a purely contractual arrangement pursuant to which no fiduciary duties were owed to the virtual assignee. It could not be regarded as constituting a bare trust because the virtual assignee (*qua* supposed beneficiary) could not effectively compel the tenant (*qua* supposed trustee) to bring the trust to an end by requiring there to be a transfer of the legal title. This was because, pursuant to the lease, no assignment could take place without the landlord's consent and the tenant could not compel the landlord to agree to such an assignment.
- There had been no "assignment of the demised premises" because, in this context, it had been established as long ago as 1900 (in *Gentle v Faulkner* [1900] 2 QB 267 at 276) that only a legal assignment would be caught. Certainly the virtual assignment did not constitute a legal assignment and neither, in any event, did it constitute an equitable assignment as, although the virtual assignee might have had a right to call for an assignment, such assignment was conditional on the

## Virtual assignments

landlord's consent. Given that the landlord's consent was not likely to be forthcoming, this right was illusory as there was no possibility of any order for specific performance of the obligation to assign being made.

- There had been no "underletting". An underlease is a demise of property for a term which creates a new inferior estate and constitutes the relationship of landlord and tenant between the parties. A virtual assignment does not achieve this because it creates no privity of estate.

### Where next?

So where does this leave us? Should landlords immediately instruct their solicitors to add to their alienation prohibitions an additional restriction prohibiting the "passing of the economic benefits and burdens of this lease and any underlease of the demised premises by way of a virtual assignment or any similar concept or arrangement"?

Maybe not. For, at a pragmatic level, is the landlord necessarily prejudiced by such a transaction? He still has the same tenant and the person in possession and occupation of the property has not altered. Moreover, most tenants are unlikely ever to contemplate or desire to effect a virtual assignment (for, as Ward LJ noted, they are the preserve of "a handful of city law firms acting for tenants with large property portfolios"). But, if it occurs, a virtual assignment effectively deprives the tenant of its income stream (thereby reducing its covenant strength) and divests it of its day-to-day responsibilities for the property (thereby diminishing its power to ensure performance of the lease covenants). This may be undesirable from a landlord's perspective, but then so

might be a change of control of the tenant (whereby it ceases to be a member of a group of companies and thereby its covenant strength is diminished) or poor investment decisions made by a tenant which impair its financial muscle. Landlords rarely seek to protect against these eventualities in the typical lease. Furthermore, where a tenant might benefit from the right to make a virtual assignment but its lease prohibits it, then it might be argued at a rent review that the lease is less valuable on account of its unusual prohibition against virtual assignments. In all the circumstances, landlords may decide to leave their standard terms unamended.

### Resisting expansion

How far should tenants go to resist expanded alienation prohibitions? If the tenant insists that the prohibition is subject to the landlord's consent, such consent not to be unreasonably withheld, the problem becomes one of certainty.

The novelty of virtual assignments means that there is no case law on the circumstances in which a refusal of consent might be reasonable and the well-established principles on unreasonable refusal set out in *International Drilling Ltd v Louisville Investments* [1986] 1 All ER 321, [1986] 1 Ch 513, and *Mount Eden Land v Straudley Investments* (1996) P&CR 306, will not necessarily apply as the consent will not relate to an undesirable use or occupation of the premises (cf. the first two of Balcombe LJ's principles are in *International Drilling*). Also, because a virtual assignment is not an assignment, underletting, charging or parting with possession, the statutory duties under the Landlord and Tenant Act 1988 will

not apply such that a tenant faced with an unreasonable refusal of consent will be able only to seek a declaration in advance of the proposed transaction or proceed with the transaction and thereafter defend any forfeiture claim. Neither of these courses of action will be particularly attractive to most tenants. Further, and in any case, the attraction of the virtual assignment is speed and certainty, the very things that are lost if the landlord's consent is required.

The decision in *Clarence House* leaves still other matters unresolved. No consideration was given to the situation that would arise when the sublease ended. If the virtual assignment was to permit the virtual assignee to go into occupation in the absence of a sublease or, possibly, if the agreement provided for the virtual assignee to control the choice of the new subtenant, it would seem (following on from the decision of the Court of Appeal in *Clarence House*) that there would be a breach of the alienation covenant because, in such a situation, the virtual assignee having secured physical control of the premises, there would be a parting with possession. Careful drafting on the part of the tenant/virtual assignor will be necessary to avoid this situation arising.

It thus remains to be seen whether the Court of Appeal's decision in *Clarence House* is the final word on the subject of virtual assignments. The market will ultimately decide whether this "new beast" flourishes, becomes extinct or simply evolves in a way which generates further litigation.

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