



PROPERTY GROUP NEWSLETTER



With only half of 2010 gone, the Property Group at Tanfield has already achieved more than could have been hoped for in twelve months. Top of the list comes the recognition - at a tender age - of Philip Rainey's extraordinary talent by his elevation to the rank of Queen's Counsel. We are all delighted for him and wish him every success in his new status. For the second year running, Tanfield was named Chambers of the Year, and I was delighted to be named Barrister of the Year, at the Enfranchisement and Right to Manage Awards. Ellodie Gibbons and James Wilson of W A Ellis have published their book *Leasehold Enfranchisement Explained*. Christopher Maynard, who was called to the Bar in 1988, has joined Chambers and will continue to practice in the areas of landlord and tenant and real property law. In this edition, Ellodie reviews the recent decision of the Court of Appeal in *Hosebay*, Carl Fain analyses the principle of surrender by operation of law and Paul Stevenson considers *Paddington Basin*.
Christopher Heather

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UNCONDITIONAL SURRENDER!

Carl Fain reviews the principles involved in surrender by operation of law

The Court of Appeal recently considered the law in relation to surrender in *QFS Scaffolding Ltd v Sable & other* [2010] EWCA Civ 682. In this case, Mr. and Mrs. Sable, the landlords of a builders' yard, granted a lease to LDC who carried on two businesses from the property. Receivers were appointed in relation to LDC. Prior to that appointment, two companies had been created, one of which, QFS, was incorporated with a view to taking over the scaffolding business of LDC.

After the appointment of receivers, there were lengthy negotiations between Mr. Sable and QFS in respect of a possible new lease of the property to QFS. The negotiations failed and QFS approached the receiver of LDC who executed a deed purporting to assign the lease to QFS. The Sables then brought possession proceedings against QFS on the basis that the lease was surrendered by operation of law by LDC, QFS had remained in occupation during the negotiations as a tenant at will which had been determined and thus the Sables were entitled to possession.

QFS defended on the basis that the lease to LDC had not been surrendered and indeed it had been validly assigned to QFS. The issue at trial was whether the lease had been surrendered by operation of law. The judge at first instance found that it had and ordered possession.

On appeal, Morgan J helpfully summarised propositions the following propositions:

1. There is no legal distinction between a surrender by operation of law and an implied surrender;
2. The term surrender by operation of law is applied to cases where a landlord or tenant has been a party to some act, the validity of which he is afterwards estopped from disputing, and which would not be valid if the tenancy had continued to exist;
3. The principle does not depend upon the subjective intentions of the parties but upon estoppel;

UNCONDITIONAL SURRENDER

WHAT IS A HOUSE?

QLTAS IN THE CONTEXT OF ESTATE MANAGEMENT

CONTINUED OVERLEAF



ELLODIE GIBBONS

Ellodie was called in 1999 and started life at the Bar as a commercial chancery pupil. Having moved to Tanfield to undertake a commercial second-six pupillage, Ellodie began taking on residential landlord and tenant work, principally for large social landlords and local authorities. Described by the Legal 500 in 2008 simply as “fantastic”, Ellodie has since developed a specialist property practice dealing mainly with all aspects of commercial and residential leases (both short and long) including service and administration charge disputes and leasehold enfranchisement, but also a certain amount of real property work. Ellodie is a contributor to both the first and second editions of *‘Service Charges and Management: Law and Practice’* (Sweet & Maxwell) and co-author of the recently published *‘Leasehold Enfranchisement Explained’* (RICS Publishing).

4. In this context, there is no estoppel by mere verbal agreement; there must in addition be some act which is inconsistent with the continuance of the tenancy;
5. In point of time, the surrender is treated as having taken place immediately before the act to which the landlord or the tenant is a party;
6. The conduct of the parties must unequivocally amount to an acceptance that the tenancy has ended; there must be either a relinquishment of possession and its acceptance by the landlord, or other conduct consistent only with the cesser of the tenancy;
7. It has been said that the circumstances must be such as to render it inequitable for the landlord or the tenant to dispute that the tenancy has ended;
8. An agreement by the landlord and the tenant that the tenancy shall be put an end to, acted upon by the tenant’s quitting the premises and the landlord by some unequivocal act taking possession, amounts to a surrender by operation of law; the giving and taking of possession must be unequivocal;
9. Where the tenant requests the landlord to let the property to a third party, and the landlord does so, the lease is surrendered at the time of the new letting; the surrender does not take place before the time of the new letting; it is essential that the new letting is effected with the consent of the original tenant; if the original tenant does not consent or know of the new tenancy, there is no surrender; the original tenant’s consent may be inferred from conduct or from long acquiescence in the new arrangement;
10. A surrender by operation of law may take place where the landlord, with the original tenant’s consent, accepts a new tenant as his direct tenant; the consent of the landlord and the original tenant is needed.

Morgan J further held that the authorities in this area “*all say that the underlying principle is one of estoppel*”.

The appeal was allowed. The Court held that LDC acting through its receivers was not a party to an unequivocal act which would not be valid if the lease had continued to exist. The only act which was alleged to have taken place was the alleged grant of a tenancy at will to QFS – not a new lease. Thus the parties never reached the point immediately before the grant of a new lease at which time the question of an implied surrender might have arisen. While the landlord negotiates a new lease with a prospective new tenant, even one who is in occupation of the property, it will not give rise to an implied surrender.

This case is a very useful summary of the law of implied surrender and also a warning to a landlord who negotiates with a prospective tenant who is in occupation of the premises whilst the original tenancy is still in existence.

CARL FAIN

OUR AUTHORS



WHAT IS A HOUSE?

Ellodie Gibbons considers another appellate decision on the ve

The Court of Appeal has recently handed down its decision in the joined appeals in (1) *Hugo Benjamin Day* (2) *Lady Hilary Maureen Greenslade Day v. Hosebay Ltd : Howard De Walden Estates Ltd v. Lexgorge Ltd* (2010) [2010] EWCA Civ 748. The decision confirms that the right to enfranchise under the Leasehold Reform Act 1967 extends to buildings that are exclusively used for business purposes, provided the buildings amount to a “house” within the meaning of s.2(1) of the Act. By virtue of section 2(1), “house” includes any building designed or adapted for living in and reasonably so called.

Whilst many property practitioners may think that the ‘67 Act is of little importance to them, given the relatively few claims which are brought under the Act, in my view, it is an Act which anyone practising in the field ought to have at least a passing knowledge of. Most practitioners will be aware that the ‘67 Act relates to houses, but few are familiar with what may be a “house” for the purposes of the Act, and in particular do not appreciate that buildings containing commercial premises can qualify. I have recently been involved in two cases, which illustrate this. In the first case, the purchaser of a freehold of mixed use premises had not been advised that the freehold was liable to be acquired under the ‘67 Act and as a result paid significantly more for the property than he was subsequently obliged to transfer it to the tenant for. In the second case a head lessee had made claims for extended leases of residential units within a building on the basis of the House of Lords’ decision in *Howard de Walden Estates Ltd v. Aggio* [2009] 1 AC 39, but had not been advised, prior to the expiry of the head lease, that he could have potentially acquired the freehold of the entire building, including the commercial units.

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I have provided below an extract from my recently published book ‘Leasehold Enfranchisement Explained’ which deals with the issue of business tenancies and the first instance decision in *Hosebay*. The landlords did not appeal against the finding that the underleases were not shams and therefore the law as set out below remains good.

It being common ground on appeal that the relevant leases were not business tenancies within the meaning of the *Landlord and Tenant Act 1954*, the Court of Appeal considered whether the properties which the tenants sought to acquire were (1) designed or adapted for living in and



CARL FAIN

Carl has been a member of chambers since completing his pupillage in October 2003. He specialises in all the main areas of litigious property law and, as well as courts, has experience in the LVT and before the adjudicator to the Land Registry. His recent cases include *Idealview Ltd v Bello* [2010] 4 EG

118 (described by the Estates Gazette as a 'heartening decision for landlords'), and *The New Northumbria Hotel Limited v Maymask (148) LLP* [2010] EWHC (Ch) 1273 in which he was led by Philip Rainey Q.C. Carl was a co-contributor to the second edition of *Service Charges and Management*. In his spare time, when allowed by his wife, he heads off to watch Spurs beat their arch rivals and then lose to the worst teams in the league.



PAUL STEVENSON

Paul is a junior tenant with a diverse property practice incorporating both landlord and tenant and real property work. He is frequently instructed to advise and to appear on behalf of both landlords and tenants and appears regularly in the county court, High Court and in the LVT and

RPT in interim and final hearings. Paul has also drafted and appeared in Land Registry adjudications. Paul has a growing real property practice and has advised regarding boundary disputes, easements and the enforcement of covenants. He is also developing a contentious probate practice and has advised on the administration of estates. Paul has a wider interest in cultural property and the recovery of unique and high value items. When not in chambers or court, Paul enjoys photography, travel and reading.

Key question under the Leasehold Reform Act 1967.

The question whether a building is a "house...reasonably so called" is to be determined essentially by reference to its external and internal physical character and appearance."

(2) houses reasonably so called. Lord Neuberger MR in relation to the first issue held that in order to determine whether premises are adapted for living in, one looks at the most recent works of adaptation, and assesses objectively, whether they resulted in the property being adapted for living in. On this basis he concluded that the works carried out to convert the houses in *Hosebay* were works which "adapted" each of the houses for living in. In relation to the second issue, Lord Neuberger held that the question whether a building is a "house...reasonably so called" is to be determined essentially by reference to its external and internal physical character and appearance and on that basis found that all the subject properties were houses reasonably so called.

EXTRACT FROM RECENTLY PUBLISHED BOOK 'LEASEHOLD ENFRANCHISEMENT EXPLAINED'

- Business tenancies – as a general rule, tenants of business tenancies within the meaning of Part II of the *Landlord and Tenant Act 1954* do not have a right to acquire the freehold. There are exceptions to this and regard should be had to sections 1(1ZC) and (1ZD) where those exceptions are set out in full. However, in short, if the business tenancy is for a term of more than 35 years, either by the grant of a fixed term of more than 35 years or otherwise, and, at the relevant time, the tenant has been occupying the house, or any part of it, as his only or main residence (whether or not he has been using it for other purposes), for the last two years or for periods amounting to two years in the last ten years, then the tenant will have the right to acquire the freehold (ss.1(1ZC) and (1B)).

It is important to note that whilst a house may consist of business premises, for example, a house which is a shop with a flat above, the lease of the house will not necessarily be a business tenancy. If the tenant sub-lets the business premises, then he is not occupying them for the purposes of a business carried on by him and therefore the lease does not fall within Part II of the *Landlord and Tenant Act 1954*. As such, sub-letting is a useful means by which a business tenant may become entitled to acquire the freehold and this is something which a landlord ought to be alive to when considering any request to sub-let.

EXAMPLE

The tenant under each of three leases of houses was *Hosebay Ltd*. *Hosebay* occupied the houses for the purposes of a business, 'Astons



Apartments', which provided short term accommodation for tourists and other visitors to London. Upon legal advice, and for the purposes of making a claim to acquire the freehold of the houses, *Hosebay* sub-let the houses to *Hindmill Ltd*, an associated company, and thereafter *Hindmill Ltd* ran 'Astons Apartments'.

Prior to the sub-letting, *Hosebay's* leases of the houses would have fallen within Part 2 of the *Landlord and Tenant Act 1954*. However, following the sub-letting, *Hosebay* was no longer occupying the houses for the purpose of a business carried on by it as *Hindmill* was occupying the houses and carrying on the business. Consequently, Part II no longer applied to *Hosebay's* leases and *Hosebay* was able to make a claim under the Act.

The underleases were not shams as they took effect absolutely according to their purported terms and there was no pretence or secrecy about them. Further, whilst the underleases were artificial transactions in the sense that they were only entered into for a particular artificial purpose that did not prevent their being effective. *Hosebay Ltd v Day* (2009) PLSCS 318, CC.

ELLODIE GIBBONS

QLTAS IN THE CONTEXT OF ESTATE MANAGEMENT

Paul Stevenson considers a recent decision which raised questions over the impact of the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations") and the recovery of service charges, where the management of a mixture of services is farmed out to a third party.

In *Paddington Basin Developments and Ors v. (1) West End Quay Management Ltd (2) Alan Sharr* [2010] EWHC 833 (Ch), Lewison J has provided clarification on the scope of a "qualifying long term agreement" ("QLTA") and the consequences for the consultation requirements which follow under section 20 of the Landlord and Tenant Act ("LTA") 1985 and the Regulations. Complex arrangements for the management of mixed-use developments in the Paddington Basin were held to fall within the requirements of service charge consultation under the LTA.

The Paddington Basin apartments in question are subject to long leases which provide for an estate service charge to be paid to an estate management company, namely West End Quay Management Ltd ("West End Quay"). West End Quay is in turn a party to an estate management deed ("EMD") which procures services for the entire Paddington Basin development from a third party, Paddington Basin Management Ltd ("Paddington Basin Management") in return for payment. Although the fundamental question in the dispute is whether or not West End Quay is required to account for sums collected from service charges to Paddington Basin Management, as a preliminary issue the court considered whether or not the EMD was a QLTA vis-à-vis the under-leases with individual tenants.

Given the extended meaning of "landlord" in the service charge context (which includes any person who has the right to enforce payment of a service charge) it is perhaps unsurprising that Lewison J held that the EMD (and potentially, therefore, West End Quay as a "landlord") was caught since, ultimately, any sums payable under the EMD would be sought from leaseholders and, of course, the "protection of the individual resident is the primary object" of service charge provisions: per Jonathan Parker LJ in *Heron Maple House Ltd v. Central Estates Ltd* [2002] 1 EGLR 35. It was sufficient for the purpose that West End Quay was entitled to enforce the payment of a service charge because it was a party to the leases under which lessees covenanted to pay it the estate management charge.

Ruddy v. Oakfern Properties Ltd [2007] 3 EGLR 30 suggests that the Paddington Basin decision is well decided in principle. There the Court of Appeal confirmed that the consultation requirements did apply to a head lease with the consequence that a sub-tenant could make an application to the LVT directly against a freeholder (in addition to his immediate landlord, the so-called "head-tenant").

Paddington Basin provides a warning for those who develop and manage property, particularly where schemes are mixed use. It is now clear that an agreement which relates to a plurality of services can be a QLTA. The upshot of the decision is that it may now be necessary for developers, landlords and their managers to give tenants notice of their intention to enter into estate management agreements and to enter into the necessary prior consultation. Absent proper consultation, developers, landlords and managers might find themselves unable to recover the cost of very large items of expenditure from lessees. Lewison J expressly rejected the suggestion that this is an "absurd" consequence of his decision.

Advisers should be clear: this is not a foregone conclusion. This case hinged on its facts, particularly the detail of the covenants within the long leases in question and the link to the management company in Paddington Basin hinges ultimately on an implied term. As Lewison J made clear, the relevant provisions of the LTA 1985 do not prevent a "landlord" from entering into whatever contract he pleases for the carrying out of works or the supply of services. They simply prevent those costs from being passed onto lessees unless consultation

requirements have been complied with. What is clear, therefore, is that the devil will be in the detail of the estate management schemes put in place by developers and managers. Advisers need to be aware of the need to set out the express obligations of all parties in any relationship or possibly to set up an leasehold structure where any third party involved with estate management is a party to each lease so that each lessee would have the right to challenge individual items of expenditure.

PAUL STEVENSON

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