Butterworths
Property Law Newsletter
March 2012
Vol 4 Issue 3
NEWS UPDATE FOR PROPERTY LAW PROFESSIONALS

Insurance strife for flood risk properties

A quarter of the UK's properties that are at risk of flooding could be left uninsured this year, according to property search firm SearchFlow.

Conveyancers need to be alert to the "bleak" insurance prospects of properties at risk of flooding, Searchflow has warned.

The company has reminded conveyancers that on the 30 June 2013, the "statement of principles" between the Association of British Insurers and the government, which commits insurers to continue to provide flood insurance under certain scenarios, is being withdrawn. This could leave property worth £214bn uninsured and potentially uninsurable.

Insurers may be reluctant to offer policies after summer 2012 as they will expire after the principles agreement. Consequently, mortgage contracts may be breached and properties may be hard to sell. According to reports, some insurers are already demanding excesses of £20,000 and above on new policies.

Richard Hinton, business development director at SearchFlow, said: "The end of the principles agreement between the ABI and the government could make flooding a hugely contentious issue during the conveyancing process when professional conveyancers have to consider the potential risks a property faces. Although buyers will be able to obtain flood insurance for the next few months, the long-term prospects of properties at risk of flooding are potentially bleak."

Initiatives to boost housing market announced

Measures to help first-time buyers onto the housing ladder, support those on social housing waiting lists and kickstart construction have been announced by the government.

Housing minister, Grant Shapps, has also announced the launch of a new £20m fund which aims to help homeowners who are behind on their mortgage payments to keep their homes.

Shapps announced details of the NewBuy Guarantee scheme to help those wanting to buy newly built properties to do so with a fraction of the deposit normally required, and said he has identified enough government land to build 80,000 homes and is working with the BBC and Royal Mail to find more unused sites for housebuilding.

He also confirmed £432m in bonuses for 353 councils that have built new homes or brought properties back into use and pledged £45m in funding to help unlock 18 of the country's most difficult stalled sites to get workers back on-site and get 1,301 homes built.

The Preventing Repossessions Fund allows councils to offer small interest-free loans of up to £5,000 to homeowners at risk of being repossessed. Small grants will also be made available.

Some £1m from the fund is being given to county courts to ensure that homeowners receive free on-the-day legal advice.

Recent figures from the Council of Mortgage Lenders (CML) show the number of repossessions was lower than forecast – 36,200 as opposed to the predicted 40,000 . However, experts feel they are falling due to the low interest rates now available on mortgages, and that when rates begin to rise more homeowners could struggle.

Shapps said: "The pattern of the past has been to produce endless policies and initiatives that gather dust on Whitehall shelves and lead to inaction and inertia. But with the prime minister putting housing centre stage on the road to economic recovery, I am determined that we shall not repeat these mistakes of the past."

Sale and rent-back market shut down after damning FSA report

Most sale and rent back (SRB) transactions were either unaffordable or unsuitable and never should have been sold, according to a new Financial Services Authority (FSA) report.

The entire SRB market is temporarily shut following the review of all 22 regulated SRB firms, which led to the FSA referring one firm to its enforcement division while others have either stopped taking on new business or cancelled their permissions.

The most common failings identified by the FSA were: firms did not correctly assess appropriateness and affordability, and customers were not given enough time to consider the agreement; disclosure of key facts of an SRB agreement was insufficient and not given at the right time; agreements contained incorrect information and did not meet the FSA's requirements for tenancy agreements; sales processes were inadequate; financial promotions breached FSA rules; and training and competence, compliance monitoring, and record keeping were all inadequate.

Nausicaa Delfas, the FSA's head of mortgage and general insurance supervision, said: "The temporary closure of this market could have been avoided if sale and rent-back firms had taken the time to fully understand their regulatory responsibilities and customers' needs. It seems most were more focused on their own commercial success rather than the welfare of the customers, with one firm even resorting to fraud."

Contents

Editor:
Lucy Trevelyan
lucy.trevelyan@lexisnexis.co.uk

Designer & Typesetter:
Heather Pearton
heather.pearton@lexisnexis.co.uk

Customer Services:
0845 370 1234
customerservices@lexisnexis.co.uk

Publishing Director: Simon Collin

Published by LexisNexis, Halsbury House, 35 Chancery Lane, London WC2A 1EL

Printed by Headley Brothers Ltd.

ISSN: 2040-0128

LexisNexis®

Back to first principles

A recent Court of Appeal case surveys some of the fundamental principles of landlord and tenant law. ***Cecily Crampin*** *reports*

TANFIELD CHAMBERS

A recent decision in enfranchisement has required the Court of Appeal to undertake an in-depth analysis of fundamental principles of landlord and tenant law similar to that of the Supreme Court in *Berrisford v Mexford Housing Co-operative Ltd* [2011] UKSC 52. In *Smith v Jafton Properties Limited* [2011] EWCA Civ 1251, LJ Lewison's answer to the question of whether assignees of parts of a building could be qualifying tenants when the original lease was of the building as a whole required recourse to 16th, 17th and 19th century case law, and has illuminated the landlord/ tenant relationship which results from part assignments.

Facts

The facts in *Smith v Jafton* are unusual, although what the claimants, Mr Smith and Mr Dennis, did seems on its face to be a good development model with the added benefit of potentially allowing acquisition of the freehold. In 2004 their company, City Apartments Limited, (of which they were the majority shareholders and only directors) acquired a long lease of a building granted in 1926. The lease included no restriction on assignment or subletting. The building was dilapidated so the company undertook extensive works, and converted it so that after conversion it contained four separate flats, plus storage areas and common parts. The company then executed the following assignments: flats 1 and 2 were assigned to Mr Smith, flats 3 and 4 were assigned to Mr Dennis, and the common parts were assigned to them both jointly, all without the landlord's agreement. Following registration of these assignments, Mr Smith and Mr Dennis served on their landlord an initial notice under the Leasehold Reform, Housing and Urban Development Act 1993 (LRHUD 1993), s 13 exercising their right to acquire the freehold.

Decision at first instance

The preliminary issue that came before HHJ Dight sitting in Central London County Court was whether Mr Smith and Mr Dennis were, individually, qualifying tenants of flats 1 and 2, and flats 3 and 4 respectively. Section 5(5) of LRHUD 1993 excepts from having qualifying tenant status of one flat anyone who is the qualifying tenant of each of two or more other flats in the same premises. Thus if Mr Smith and Mr Dennis should both be considered to be qualifying tenants of all four flats, because the lease granted by the freeholder was of the whole building, then they would not have the right to enfranchise.

At first instance, HHJ Dight found that s 5(5) did apply; there could be no enfranchisement. He followed a case on enfranchisement under the Leasehold Reform Act 1967 (LRA 1967), *Lester v Ridd* [1990] 2 QB 430, in which a claim to enfranchise failed because the house in question was held under assignment of part only of what had originally been comprised in a contract for an agricultural tenancy; a house comprised in an agricultural holding is excluded under LRA 1967, s 1(3).

Court of Appeal ruling

The Court of Appeal disagreed with HHJ Dight's decision. LJ Lewinson distinguished *Lester v Ridd* because the test there, of whether the house had been comprised in a contract for an agricultural tenancy, was dependent on the original contract, not the landlord tenant relationship resulting from the assignment of part only of the demised property. By contrast, LRHUD 1993, s 101(1) states that "lease" and "tenancy" have the same meaning within the Act. It cannot be said that what is being referred to by both is the original contract only. Hence the question arising from LRHUD 1993, s 5(5) is not what the original lease said, but whether Mr Smith was a tenant of flats 3 and 4 as well as 1 and 2, and whether Mr Dennis was a tenant of flats 1 and 2 as well as 3 and 4.

What is key to the Court of Appeal's decision is the difference between privity of contract and privity of estate. An assignee is not a party to an original lease, but the landlord can sue the assignee for breach of covenants touching and concerning the land because of privity of estate (*Spencer's Case* (1583) 5 Co Rep 16a). This is also true where part only of the property is assigned.

The landlord can sue for breach of the repairing covenant in relation to that part (*Congham v King* (1631) Cro. Car 221), and for the appropriate proportion of the rent (*Gamon v Vernon* (1678) 2 Lev 231). The key principle is that there is no privity of estate in relation to the whole of the property, as between the landlord and the assignee of part only (*Dooner v Odlum* [1914] 2 Ir R 411 (affirmed on appeal), and *United Dairies Ltd v Public Trustee* [1922] 1 KB 469 in which Greer J stated (at p 472): "Where the leased property has been physically divided amongst two or more assignees it is clear that the obligations of the lease, so far as they affect the assignees, become separate, and each of the assignees is liable, while he is assignee, to perform the covenants so far as they affect his divided part of the leased property.").

The result is that physical severance of leased property gives the assignee of the severed part, and the landlord, privity of estate only with respect to that severed part. Thus, at common law, Mr Smith was the tenant of flats 1 and 2 only, and Mr Dennis of flats 3 and 4 only. "Tenant" refers to someone holding land from another whether by contract (which was not so here) or by privity of estate. Mr Smith had no privity of estate with the landlord in relation to flats 3 and 4, and hence could not be said to be a qualifying tenant of them. He was a qualifying tenant of flats 1 and 2 only, and similarly Mr Dennis was a qualifying tenant of flats 3 and 4 only. The original lease was not a bar to enfranchisement.

Application to more recent leases

The original lease in this case was granted in 1926, and hence this common law analysis of privity of estate as the way in which covenants bind assignees, and hence how the landlord and tenant relationship continues, relies on the principles of privity of estate first set out in the 16th century. The Landlord and Tenant (Covenants) Act 1995 (LT(C)A 1995) is now the basis of this aspect of landlord and tenant law for leases granted after its commencement. LT(C)A 1995 annexes the benefit and burden of covenants to each

and every part of the premises (s 3(1)(a)) and passes those covenants on assignment of the whole or any part (s 3(1)(b)). Moreover, on assignment of part, s 5(3) releases the tenant from covenants only to the extent that they fall to be complied with in relation to that part; s 9 and s 10 deal with apportionment of rent and covenants. Thus, unsurprisingly, LT(C)A 1995 appears entirely consistent with LJ Lewinson's analysis that on assignment of part of the property, the landlord and tenant relationship between landlord and assignee is in relation to that part only. LJ Lewinson's conclusion in *Smith v Jafton* would surely have applied just as well if the original lease had been granted considerably more recently that 1926.

Unusual facts make interesting law

This unusual set of facts has resulted in an interesting case and a survey of some of the fundamental principles of landlord and tenant law. Both LJ Lewinson and LJ Aikens, echoing counsel, doubted that the parliamentary draftsman could have had such facts in mind in drafting LRHUD 1993. However, as they observed, much law is made from factual scenarios which few would predict, especially when it comes to statutory interpretation. It could also be said that such a lack of predictability is the basis of the common law when a decision which sets out a principle is revisited in the light of an unusual set of facts. Unusual facts can also be the source of statute law itself. As LJ Lewinson noted at para 17 of *Smith v Jafton*, the original source of the right of the assignee of a reversion to sue a tenant, now to be found in the Law of Property Act 1925, s 140 and in LT(C)A 1995, s 3 and s 4, was the Grantees of Reversions Act 1540, which was a result of Henry VIII's dissolution of the monasteries.

Cecily Crampin
Barrister, Tanfield Chambers

Lies, damned lies and selling property

Replies to enquiries are a familiar part of the conveyancing process for both residential and commercial property sales. Answering the questions accurately is important and especially so in what is a difficult property market. Imprecise answers can have severe consequences for sellers. ***Ed Cracknell*** *looks at the law of misrepresentation.*

The problem

The basic principle that underpins the sale of real property is *caveat emptor*, or "buyer beware". That is, the buyer takes the property as he finds it and the seller is under no duty to disclose defects. A well-advised buyer will therefore want to find out as much as possible about the property to ensure he is getting what he is paying for.

A lot of the facts that the buyer will want to know are researchable. Physical inspections, structural surveys and enquiries of the local authority will reveal a great deal about the property. However, there are usually a number of important matters that are only known by the seller, such as whether notices have been served in relation to the property or whether disputes with neighbours have arisen.

CPSEs and SPIFs

The property industry sought to better manage the exchange of pre-contractual information by standardising the conveyancing process. In relation to commercial property, the standard commercial property conditions (SCPCs) are widely used, although often subject to modification. These are based upon the standard terms for residential property known as the standard conditions of sale (SCS).

It is also common practice for the buyer to ask the seller a standard series of questions such as the commercial property standard enquiries (CPSEs), for commercial property, and the seller's property information form (SPIF) and seller's leasehold information form (SLIF) for residential property.

The seller is under no obligation to answer the enquiries, but if he does not, that will no doubt raise suspicions in the buyer's mind and he may choose not to proceed with the transaction or to negotiate a better price.

If the seller does provide answers to the enquiries, it is possible that the buyer will rely upon them in entering into the contract. This is where the law of misrepresentation becomes an issue, and the reason why sellers must take great care in making representations about the property during pre-contractual discussions.

Misrepresentation

If the seller makes a false statement of fact relating to the property and that statement is relied upon by the buyer, and causes him loss, the seller can be said to have made a misrepresentation.

A misrepresentation can be fraudulent (where it is made knowingly, or without belief in its truth, or recklessly as to its truth – see per Lord Herschell in *Derry v Peek* [1889] 14 App Cas 337, at 374); negligent (where a statement is made carelessly or without reasonable grounds for believing its truth); or innocent (where the seller had reasonable grounds for believing his statement was true).

Where fraud or negligence is proved, the buyer may seek rescission (treat the contract as not existing) or damages, or both. The measure of damages is that which will put the buyer into the position he was in before the misrepresentation took place. Unlike most damages claims, the recoverable losses are not restricted to those that are reasonably foreseeable. In this way, losses caused by a general fall in the market are recoverable. If the buyer can prove negligence, but not fraud, the court has a discretion to award damages in lieu of rescission (Misrepresentation Act 1967, s 2(2)).

In the case of an innocent misrepresentation, the buyer may only seek rescission although the court can award damages in lieu of rescission – ie, the buyer cannot be awarded both rescission and damages.

There are not many reported cases on property-based misrepresentation but a notable case is that of *McMeekin v Long* [2003] 29 EG 120. The seller had stated that he was no longer in dispute with a neighbour, alleging that relations were friendly. The judge held that, in reality, the dispute was continuing and

the seller was found liable for fraudulent misrepresentation. The judge commented that the SPIF "is not a lawyer's form, but one that is designed for everyone to be able to understand". It is reported that damages and costs of £67,500 were awarded to the buyer.

In *Clinicare Ltd (formerly known as Strasbourgeoise UK Private Health Insurance Services Ltd) v Orchard Homes & Developments Ltd* [2004] EWHC 1694 (QB); [2004] PLSCS 176, a case involving a transfer of commercial property, the seller had made a fraudulent misrepresentation in knowingly failing to disclose dry rot in response to a specific enquiry in the CPSEs. In this case, it was not a defence that the buyer had obtained a report into the problem.

Contracting out

It is common practice to limit the seller's liability for misrepresentations in the terms of the contract. Indeed the SCS provide that the buyer may only rescind the contract in the case of a fraudulent or reckless misrepresentation or where the buyer "would be obliged, to his prejudice, to accept property differing substantially (in quantity, quality or tenure) from what the error or omission had led him to expect". The SCPCs contain a similar provision.

However, sellers often seek to go further than this, for example by including a non-reliance statement in the contract to the effect that the buyer has not entered into the contract in reliance upon any statement made by the seller. If this term appears in the contract, an estoppel arises and any misrepresentation claim by the buyer is likely to fail. A buyer may sensibly seek to restrict the ambit of the non-reliance statement to representations other than those made in the standard property information forms.

There are often arguments about whether clauses restricting the buyer's remedies are enforceable. They may be subject to challenge, for example, under the Unfair Contract Terms Act 1977 or the Unfair Terms in Consumer Contracts Regulations 1999 and each case will be decided on its own facts. In *Schyde Investments Ltd v Cleaver* [2011] EWCA Civ 929, for example, the standard provision referred to above that restricts rescission to particular circumstances was held to be an unfair term, despite it having been endorsed by the Law Society. The court stressed, however, that the clause would not necessarily be unfair in all cases.

Protective answers

Sellers may be able to limit their liability by answering pre-contract enquiries by using phrases such as "not as far as the seller is aware, but the buyer must make their own enquiries". To ensure that such phrases do not give rise to an implication that the buyer has made reasonable enquiries, the seller should only use this type of response where a provision in the contract recites that no such enquiries have been made (see *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016 and *Morgan v Pooley* [2010] EWHC 2447).

Despite the availability of protective contractual provisions, the best way to avoid a claim is to give full, accurate answers to pre-contract enquiries. The property information forms are set out in laymen's terms. Unless specifically stated in the question, there is no limit to the type of matters that may be contemplated by the question. For example, in relation to disputes, potentially any type of disputes or complaints could be caught, no matter when they occurred as long as they relate to the property or a property nearby. If in doubt, more, rather than less, information should be given.

Representations made outside of the conveyancing process may also be relied upon. This includes statements made by the seller and statements made by the seller's agent, whether in estate agents' particulars or otherwise.

Buyers should ensure that they supplement the standard enquiries with specific questions on matters about which they are concerned. If, after completion, they consider they have a claim for misrepresentation they should take legal advice immediately. Their remedies can be lost if they do not act quickly and/or if they inadvertently take steps to affirm the contract.

Ed Cracknell, Solicitor
Contentious property department
Russell-Cooke LLP

Cut-off point

A tenant was liable to pay gas charges as part of its service charge. The liability of the management company to pay arose more than 18 months before the service charge demand was made, but the costs were incurred less than 18 months before

The Landlord and Tenant Act 1985, s 20B(1) provides that tenants under long leases of dwellings are not liable to pay service charges to the extent that the costs were incurred more than 18 months before the demand is made.

In *OM Property Management v Burr* [2012] UKUT 2 (LC), a management company had been paying the wrong gas provider (EDF) from April 2001 until late 2007 (this was eventually reimbursed after a dispute) in respect of gas to heat a swimming pool. EDF had been undercharging and when the correct gas provider submitted an invoice in November 2007 it was for £135,000 (although it agreed to reduce it to £100,000). The management company demanded this amount from the tenants in the service charge accounts for 30 April 2008. Mr Burr's share, as tenant, was £313.90.

The Upper Tribunal (Lands Chamber), allowing an appeal against the decision of the Leasehold Valuation Tribunal (LVT), held that Mr Burr was liable to pay it. The cost of the gas had not been incurred, at least until the bill was presented in November 2007. It was included in the service charge demanded in April 2008 which was well within the 18-month time limit.

The crucial issue was the proper interpretation of the words "costs… incurred" in s 20B(1). The statute confirms that it is "costs" that are incurred. There was no authority to suggest that a cost is incurred when the liability is incurred. A cost and a liability are separate things and Parliament chose to use the word "cost".

Liability to pay may have been incurred when the gas was used, but the costs had not been. Costs are incurred on the presentation of an invoice or on payment. It will depend on the facts of a particular case as to which applies. The LVT was well placed to decide such

matters. It may find that where there is a delay in payment due to a justified dispute, the costs are not incurred until it is settled and the bill paid. Conversely, it may be reluctant to postpone the running of the 18-month time limit if the delay in payment is due to deliberate evasion.

Intention of Parliament

The management company had been told by the developer that EDF was the gas supplier for the pool and EDF had been billing the management company. On the other hand, the decision could be seen as harsh on Mr Burr, who had only acquired his interest in September 2006. In *Gilje v Charlgrove Securities* [2004] 1 All ER 91, the judge commented that the policy behind s 20B was to ensure that a tenant is not faced with a bill for expenditure of which s/he was not sufficiently warned to set aside provision.

However, the tribunal confirmed that the intention of Parliament was clear from the wording of the statute, so policy considerations did not come into play. In any event, the comments in *Gilje* were not made about a situation where the landlord (or management company) could not warn the tenant to set aside provision because the landlord did not appreciate that the costs were likely to be incurred. The landlord can only give "sufficient warning" or "adequate prior notice" of something of which he is aware. The tribunal could not read the comments "as giving any support for the proposition that the 18-months limit is an absolute cut-off point that operates regardless of any fault on the landlord's behalf".

Joanna Bhatia

Offer not agreement

A letter was no more than a counter-signed offer to sell a property. It did not set out in writing the obligation to buy the property and so did not contain all the express terms agreed between the parties.

A contract for the sale of land, or of any interest in land, is void unless it complies with Law of Property (Miscellaneous Provisions) Act 1989, s 2 (LP(MP)A 1989). It must:

- be in writing;
- contain or incorporate all of the terms expressly agreed by the parties (in one document or where contracts are exchanged, in each); and
- be signed by or on behalf of the parties.

The terms may be incorporated in a document either by being set out in it or by reference to some other document.

In *Francis v F. Berndes* [2012] All ER (D) 05 (Jan), the High Court dismissed an appeal against a summary judgment dismissing a claim for breach of a contract to sell premises comprising a club, flat and workshop. The "agreement" (a letter which the "buyer" (Mr Francis) alleged comprised the contract for sale) did not contain all of the terms expressly agreed.

Meaning of "set out"

Even assuming that Mr Francis's evidence was correct, meaning that there must have been an express agreement for him and another party to buy the property, there was no written record of that term in the letter. "Set out" in the context of s 2 must mean set out in writing.

The letter was no more than a counter-signed offer which did not set out in writing the obligation to buy the property.

Policy behind LP(MP)A 1989

There was a distinction between what the parties actually agreed (ascertained in the usual way by a process of construction of the letter in light of the surrounding circumstances and admissible extrinsic evidence) and the whether the letter set out in writing all the express terms of the agreement. This was important.

One of the main purposes of LP(MP)A 1989 was to produce certainty in relation to contracts for the sale of land and reduce as far as possible the need for extrinsic evidence to establish the terms of the contract (*Firstpost Homes v Johnson* [1995] 4 All ER 355).

Both parties had also been represented by solicitors and detailed negotiations to resolve a dispute had been in progress for at least a year. In those circumstances, it was difficult to understand why they left something as important as the drawing up of a formal agreement for the sale of the property to be dealt with in such an informal manner and without the benefit of legal advice.

Rectification

Any application by Mr Francis for permission to amend the claim to rectify the letter "so as to make it conform to the contract for sale of the property actually agreed between the parties" would be dismissed.

The rectification argument was misconceived. Leaving aside unilateral mistake, the function of rectification is to correct a common mistake in the way in which a transaction has been reduced to writing. The essence of the doctrine of rectification for common mistake is a discrepancy between what the parties have agreed, or an outwardly manifested common intention which they continue to share, and the terms of the written document by which they intend to record or implement their agreement or accord. The mistake is usually one of fact, but can be a mistake about the legal effect of the language used.

The failure of the letter to comply with the formal requirements of s 2, with the consequence that the agreement was ineffective, could not be characterised as a mistake about the legal effect of the language used in the letter. There was nothing in the letter that needed correcting and no mistake about the factual or legal nature of the bargain which the parties intended to record.

In *Oun v Ahmad* [2008] All ER (D) 270 (Mar), the court distinguished between cases where rectification is sought on conventional grounds, to correct a mistake in the drafting of a document and those where it is sought to make the document compliant with s 2 by inserting an express term which the parties agreed to exclude from the document. It held that rectification in the former was contemplated and catered for in s 2(4). Rectification in the latter was not available. It would make an unjustifiable inroad into the policy of LP(MP)A 1989. Ignorance of the Act, or a misapprehension about its operation, was not sufficient.

In *Oun* the parties had expressly agreed to exclude the term in question. However, the same result should follow whatever the reason for omission of an express term (unless rectification of conventional grounds is available).

Joanna Bhatia

Split decision

A beneficial joint tenancy was severed by a course of dealing. The parties, who were divorcing, had been proceeding on the clear basis of a 50/50 split of the property at the time one of the joint tenants died.

Under Law of Property Act 1925 (LPA 1925), s 36(2), a beneficial joint tenancy can be severed by statutory notice. It can also be severed by:

- an act operating on a tenant's joint share;
- mutual agreement;
- mutual conduct/course of dealing.

In *Burgess v Rawnsley* [1975] 3 All ER 142, the Court of Appeal confirmed that a course of dealing is not just a subheading of mutual agreement. It covers only acts of the parties, including negotiations which, although not otherwise resulting in any agreement, indicate a common intention that the joint tenancy should be regarded as severed. The court confirmed that the current policy of the law, having regard to LPA 1925, s 36(2), was to facilitate severance at the instance of either party and that the court should not be over-zealous in drawing a fine distinction from the pre-1925 authorities.

In *Davis v Smith* [2012] All ER (D) 55 (Jan), the Court of Appeal confirmed that these were the principles to be applied to ascertain whether severance of a beneficial joint tenancy had occurred.

Mr and Mrs Smith commenced divorce proceedings. Both parties instructed solicitors and both solicitors advised their respective clients to serve a notice severing the beneficial joint tenancy in the house they owned. However, no notice had been served before Mrs Smith died suddenly.

Equal division

The Court of Appeal held that the beneficial joint tenancy had been severed. They had embarked on an exercise whereby they had not merely indicated to each other, but had actually acted on the basis that the various assets that they owned, in particular the policy and the house, would be sold and the proceeds divided equally between them. An endowment policy had been surrendered with the majority of proceeds going to Mr Smith on the clear basis that an equalisation payment would be made to Mrs Smith from the sale of the house. They must have understood and assumed between themselves, irrespective of what they knew or did not know about the law, that they had negotiated and acted on the basis that their assets would be realised and the proceeds divided equally between them.

The only admissible evidence was what was known to and what passed between the parties, by way of words or actions, and what they did to the knowledge of the other. What was in a party's mind (there was evidence that Mrs Smith was about to serve a notice of severance) or what was communicated between one of the parties and his or her solicitor or other third party was irrelevant to what the parties intended or understood.

Joanna Bhatia

Case digests

City of London Corporation v Samede and others
[2012] All ER (D) 88 (Jan); [2012] EWHC 34 (QB)
18 January 2012

Public order – Public place – Premises or place to which public have or are permitted to have access – Defendant protestors setting up camp outside St Paul's Cathedral – Claimant seeking order for possession of land including highway and injunctive relief – Whether claimant entitled to order for possession – Whether injunction should be granted – Highways Act 1980, s 137 – Town and Country Planning Act, s 55 – European Convention on Human Rights, arts 9, 10, 11.

The defendants were all members of an unincorporated association (Occupy) which had organised a protest in central London. The first defendant was appointed a representative defendant of Occupy under CPR 19.6. In October 2011, the defendants established a protest camp in the churchyard of St Paul's Cathedral which consisted of between 150 and 200 tents, some used as accommodation and others for activities such as meetings, a library, a first aid facility and a welfare facility. For all of the land in respect of which these proceedings related, and the surrounding land, the claimant (the City) was both the local planning authority under the Town and Country Planning Act 1990 (TCPA 1990) and a local authority under the Local Government Act 1972 (LGA 1972) and the Local Government Act 2000. In respect of some of the land, the City was also the highway authority in accordance with the Highways Act 1980 (HA 1980) and that land vested in the City by virtue of s 263(1) of HA 1980. The City had not given a licence or consent for the protest camp, for which no end date had been set. On 15 October, the crypt door of St Paul's Cathedral was closed by the Church of England (the Church), except for emergency use. On 21 October, the cathedral was temporarily closed. On 25 October, the City undertook a survey of pedestrian movements in the local area. On 28 October, the cathedral was re-opened. On 4 November, the City sent a without prejudice proposal for an agreed settlement to the defendants' solicitors. On 11 November, that proposal was rejected. On 15 November, the City's planning and transportation committee resolved to take legal action against the protest camp. On 16 November, the City served notice on the camp requiring the removal of all tents and other structures by 6pm on 17 November. The camp was not removed. On 18 November, proceedings were issued by the City and served, together with evidence and a document setting out a broad legal analysis. On 23 November, the first directions hearing took place at which a date was set for trial and the appropriate procedural steps were laid down. On 24 November, the first defendant was given details of the person with whom to negotiate or discuss the claim on behalf of the City. On 29 November, the Church formally offered the defendants an alternative forum for their protest and repeated its

request that the camp be removed. On 30 November, an enforcement notice under TCPA 1990 was served on the defendants. These proceedings concerned the City's application for possession of the highway and other open land that was being used as the protest camp. The disputed land comprised three areas: highway land (area 1); open land owned by the Church (area 2); and a large area vested in the City which encircled the cathedral and included footpaths and a carriageway (area 3). Area 1 was wholly contained within area 3. The proceedings did not include the public open space within the precincts of the cathedral which was owned in part by the City and in part by the Church. The claimant sought possession of areas 1 and 3. The City further sought injunctions in respect of areas 1 and 3 under HA 1980, s 130 and a further injunction in respect of area 2 pursuant to TCPA 1990, s 187B. Furthermore, the City sought a declaration that it might use its power at common law and, if necessary, its power pursuant to HA 1980, s 143 to remove the tents from area 1 and any tents erected in area 3 and a further injunction preventing the defendants from interfering in the removal of the tents from areas 1 and 3.

The issues for determination were: (i) whether the City had established that it was entitled to possession of areas 1 and 3 so that, subject to any interference with the defendants' rights under arts 10 and 11 of the European Convention on Human Rights, an order for possession ought to be granted; (ii) whether, subject to arts 10 and 11 of the convention, the City was entitled to injunctive relief in respect of areas 1, 2 and 3 and declaratory relief for areas 1 and 3; and (iii) whether the interference with the defendants' rights under arts 10 and 11 of the convention was lawful, necessary and proportionate. Consideration was given to HA 1980, s 137, to TCPA 1990, s 55 and to the rights of others to worship at the cathedral pursuant to art 9 of the convention.

The application would be allowed.

(1) Neither under HA 1980 or the common law was there a right to occupy, control or take possession of highway land from the highway authority. The statutory scheme could not be reconciled with the concept of third parties occupying, controlling and taking possession of the highway. To impose upon the highway a substantial encampment of tents was inimical to the statutory scheme.

On the facts, the requirements for a claim for possession had been met. Both area 1 and most of area 3 were highway, vested in the City and maintainable at public expense. It was sufficient that there were public rights over the highway even though they were limited to use by those travelling on foot. It was incontestable as a matter of fact that the defendants were in actual possession of area 1. They had entered and remained on the land without the permission of the City, the body lawfully entitled to possession. No licence or consent had been granted that allowed the defendants to occupy the land. They had not complied with a formal notice to vacate. On the facts, the City had, in reality, been ousted from possession of area 1 by the defendants. In establishing its claim the City had not had to prove an unreasonable obstruction of the highway by the defendants' occupation of area 1. Other than their rights under arts 10 and 11 of the convention, the defendants had had no arguable right to occupy, control or take possession of highway land from the City as highway authority. Subject to arts 10 and 11 of the convention, the City had been entitled to an order for possession of area 3, of which area 1 was a part. The inclusion of area 3 in an order for possession was a necessary precaution against the defendants moving from areas 1 and 2 onto adjacent highway and open space.

(2) An assembly on the highway was not necessarily unlawful provided it was reasonable and non-obstructive and did not contravene the criminal law of wilful obstruction of the highway. The requirements for the offence of wilful obstruction of the highway pursuant to HA 1980, s 137 were: (i) that there was in fact an obstruction of free passage along the highway; (ii) that the obstruction was wilful; and (iii) there was no lawful authority or excuse for the obstruction. Whether a particular use of the highway was reasonable was for the court to determine on the facts.

Applying established principles, there had been an unreasonable obstruction of the highway. The defendants' protest camp had occupied and obstructed a substantial portion of the highway, consequently depriving the public of its use. An encampment of between 100 and 200 tents which accommodated a large community of protesters, and which seemed likely to remain until and unless the court intervened, could not have been regarded as reasonably transitional. On the evidence, some 80% of the highway had been denied to the public for the purposes of passing to and fro along it. It was also clear that the effect, both direct and indirect, on pedestrian movement through and around the cathedral had been significant. There had been no doubt that the presence of the tents themselves, whether they were occupied or not, had brought about a material change of use of the land in areas 1 and 2. Section 55 of TCPA 1990 required planning permission to be granted for such development and, in this case, it had not been nor were any temporary permitted development rights available.

(3) The interference with the defendants' rights under arts 10 and 11 of the convention had been both necessary and proportionate. The factors for granting relief in these proceedings outweighed the factors against. Parliament had legislated to give highway authorities powers and duties to protect public rights over the highway land vested in them and had given local planning authorities powers to enforce planning control in the public interest. For Parliament's intention in enacting those statutory schemes to have been given effect, it had been necessary for the relief sought by the City to have been granted. It had been impossible to reconcile the presence of the protest camp with the lawful function and character of the disputed area as a highway. The effects of the protest camp had been such as to interfere seriously with the right, under art 9 of the convention, of those who desired to worship in the cathedral. It was clear the presence of the camp constituted a nuisance to the Church as well as a serious interference with the art 9 rights of those who wished to worship at the cathedral. In addition to the obstruction of the effects of the camp on the routes available to pedestrians and the loss of accessible open space to the public, the camp had made a material change in the use of the land for which planning permission had not been and would not be granted. A further factor of weight had been the increased crime and disorder in the area where the camp was situated. The camp had been in place for more than two months by the time of these proceedings. If the camp were not removed by order of the court, it seemed likely to remain, possibly for months more. No date had been given for its removal.

The City had established a pressing social need not to permit the defendants' protest camp from remaining in St Paul's Churchyard and to prevent it being located elsewhere on any of the land to which the proceedings related. It would not have been disproportionate to grant the relief sought by the City. Consequently, the relief sought by the City would be granted.

Legislation update

Royal Parks and Other Open Spaces (Amendment) Regulations 2012	**Enactment citation** SI 2012/98 **Commencement date** 14 January 2012 **Legislation affected** SI 1997/1639 amended **Enabling power** Parks Regulation (Amendment) Act 1926, s 2(1)	Add Canning Green to the list of parks, gardens and other land vested in or under the control or management of the Secretary of State for Culture, Olympics, Media and Sport specified in Sch 1 to the Royal Parks and Other Open Spaces Regulations 1997, SI 1997/1639 (the principal regulations). Removes Abingdon Street Garden, which is not under the control of the secretary of state, from Sch 1 to the principal regulations.
Localism Act 2011 (Commencement No 2 and Transitional and Saving Provision) Order 2012	**Enactment Citation** SI 2012/57 **Commencement date** 15 January 2012 **Enabling Power** Localism Act 2011, ss 37, 240(2)(7)(8)	Brings into force on 15 January 2012 various provisions of the Localism Act 2011 (so far as not already in force) in relation to England and Wales. The provisions are: Chapter 4 of Pt 1 (transfer and delegation of functions to certain authorities), s 68 (business rates supplement) (England only), s 69(1) to (7) (non-domestic rates; discretionary relief) (partially) (England only), s 71 (cancellation of liability to backdated rates), s 115 (use of community infrastructure levy), ss 116 and 121 and Schs 10, 11 and 12 (neighbourhood planning) (partially), s 124(2) (enforcement) (partially), s 145 (allocation of social housing) (partially), ss 146 and 147(2)–(5) (allocation of social housing) (partially), s 147(1)(6) (allocation of social housing), s 150 (social housing tenure: tenancy strategies) (except subs (3)), ss 151 and 152 (social housing: tenancy strategies), s 153 (social housing: tenancy strategies) (partially), s 154 (flexible tenancies) (partially), s 158 (transfer of tenancies) (partially), s 165 (assured short-hold tenancies: rights to acquire) (partially), s 176 (housing mobility), s 187 (new housing and regeneration functions for GLA) (partially), s 190 (transfer of property of Homes and Communities Agency), s 191(2)-(5) (abolition of London Development Agency and transfer of its property etc), ss 193 and 194 (transfer schemes: general provisions); s 195 (consequential amendments) (partially), s 197(3)(e)(f)(5) (designation of Mayoral development areas); Sch 16 and s 178 (transfer of functions from Office for Tenants and Social Landlords to HCA) (partially), Sch 24 and s 233 (transfer and transfer schemes: tax provisions) (partially) and Sch 25 and s 237 (repeals and revocations) (partially). Brings into force on 15 January 2012, in relation to England, Wales and Scotland, s 128 and Sch 13 (abolition of Infrastructure Planning Commission) (partially), s 129 (transitional provision in connection with abolition – partially), s 138(5) (procedural changes relating to applications for development consent) (partially), s 142(3) (changes to notice requirements for compulsory acquisition) (partially).