

## CASE LAW KALEIDOSCOPE

– a review of some of the year’s significant cases

*by*

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We live in a saturation culture in which new cases are brought to our attention on a daily, sometimes hourly, basis. However, the newest case is not always the most important: recent developments need to be set in context – does the case really decide something new, or is it merely an application of well established principles?

It is not possible in the time available to look at every single property case decided in the last year, or even all the significant ones. Instead, this paper examines an across the board selection of some of the more important or interesting (mostly landlord and tenant) – but it does not pretend to be definitive even in relation to those.

## INTERPRETATION

### *The admissible material*

#### **KPMG v. Network Rail Infrastructure** [2007] EWCA Civ 363 (Court of Appeal)

The rent review provisions in an office lease “read literally, [did not] make any sense” and it was “obvious .... that something [had] gone wrong”. It was held that a prior agreement for lease with the attached draft lease was admissible in deciding what the parties must have intended.

Note 1: Cf. Holding & Barnes Plc v. Hill House Hammond (No 1) [2002] L. & T. R. 103 (where the repairing provisions in one of seven leases granted between the same parties on the same day were an “obvious nonsense on [their] face” and the Court looked at the other leases to see what must have been meant).

Note 2: JIS (1974) v. MCP Investment Nominees [2003] EWCA Civ 721, in which the Court of Appeal arguably took a stricter approach to the question of the correction of mistakes by construction, is not referred to in the judgments.

## RENT

### *Section 17 notices*

#### **Scottish and Newcastle v. Raguz** [2007] 2 All E.R. 871 (Court of Appeal)

The original tenant (OT) under two underleases assigned to A1 who assigned to A2. A2 defaulted and the landlord (L) claimed the arrears from OT who paid up. Part of the arrears arose as a result of rent reviews. In each case the amount of the reviewed rent was determined after the relevant review date, and the difference between that amount and the (lesser) rent actually paid since the review date became payable on the quarter day following the date of determination. Two principal issues arose: (1) whether OT was liable to make the payments to L; and (2) if not, whether A1 was nonetheless liable to indemnify OT pursuant to the covenant implied by s.24(1)(b) of the Land Registration Act 1925.

The Court of Appeal held as follows:

- (1) Where the rent is subject to review but has not been determined by the review date, a landlord who wishes to preserve the possibility of claiming the reviewed rent against the original tenant must serve two notices, namely, (a) a notice under s.17(2) within 6 months of each rent day on which the reviewed rent becomes payable, specifying in the Schedule to the prescribed form that the sum intended to be recovered is nil, but subject to para. 4 of the notice (which warns the tenant that “There is a possibility that your liability in respect of the fixed charge(s) detailed in the Schedule will subsequently be determined to be for a greater amount”) and the possibility of the rent being determined to be a higher sum, and (b) a further notice under s.17(4) for the increased amount following the completion of the review. Although that approach “will be a burden on landlords and could seem pointless and inconvenient for original tenants” (per Lloyds LJ) and represents “a true, unintended, anomaly of the legislation as it stands” (per Rix LJ), nonetheless it was “the result of the legislative language chosen”;
- (2) A1 was nevertheless liable to indemnify OT pursuant to the covenant implied by s.24(1)(b) of the 1995 Act. The scope of the indemnity was not limited to sums which OT was legally liable to pay. The only limitation was that the sums must have been fairly and reasonably incurred. The payments made by OT satisfied that test because on the facts OT had good commercial reasons for paying.

Note: an appeal to the House of Lords is due to be heard in July this year.

### *Enforcement*

**The Prudential Assurance Co. v. Ayres** [2008] EWCA Civ 52 (Court of Appeal).

L granted a lease of office premises to T who underlet to ST (a firm of US lawyers). T agreed to an assignment of the underlease to A (another US law firm). A licence to assign was entered into between L, T, ST and A, in which (1) A covenanted with L and T to pay the rent and perform the covenants in the underlease, and (2) ST guaranteed to T that A would pay the rent and perform the covenants of the underlease. A covenanted with ST in the assignment to pay the rent and perform the covenants of the underlease. On the same day T and A entered into a supplemental deed providing that the liability of the tenant under the underlease (and any AGA) should be limited to the assets of the partnership and should not extend to the personal assets of individual partners and that consequently “any recovery by [T] against [ST] or any previous tenant under the [underlease] for any such default” should be so limited.

A became insolvent and T claimed arrears of rent from ST. ST contended that the effect of the deed was to prevent T from recovering against ST any greater sum than it could recover from A. At first instance Lindsay J upheld that claim on the basis that (i) on the true construction of the deed T was entitled to nothing more from either A or any previous tenant than was derived from the partnership assets, and (ii) ST was entitled to enforce the deed against T under the Contracts (Rights of Third Parties) Act 1999.

The Court of Appeal allowed T’s appeal. The purpose of the deed was not to reduce A’s rental liability but to limit T’s recourse for unpaid rent to the partnership assets. The parties could not have intended to alter the legal relationship between T and ST established by the licence. The deed was to be construed as assimilating the position of ST to that of T as regards claims against A (i.e. the relevant words were to be read as “any recovery by [T] *or any previous tenant* against [ST] under the [underlease] for any such default”). Nor were ST’s guarantees in the licence avoided by sections 16 and 25 of the 1995 Act.

## SERVICE CHARGES

### *Right to enforce payment*

#### **Wembley National Stadium v. Wembley (London)** [2007] 2 E.G.L.R. 115

L granted a lease to T for 125 years of certain parking, access and other rights over L's retained land. The lease provided for the payment of a service charge. L transferred the freehold to G, which declared that it held the freehold as nominee and trustee for L absolutely and would deal with the same in accordance with the directions of L.

L claimed from T service charges due under the lease. The principal issue was whether T's contention that G and not L was to be treated as the landlord for the purposes of the lease was correct.

Sir Andrew Morritt CVO found in favour of L for the following reasons: (1) the original contractual entitlement of L had not been discharged by the 1995 Act because there had been no release under section 8; (2) as the absolute beneficial owner of the reversion, L was entitled to sue either in its own name, if necessary joining G as a defendant, or in the name of G; (3) G's declarations of trust amounted to assignments within section 28(1) of the 1995 Act and entitled L to enforce T's covenants under section 15(1); and (4) the terms of section 23 indicated clearly that an equitable assignee is entitled to the benefit of a tenant's covenant, at least after its assignment to it and before if it expressly so provides.

A number of other issues arose concerning the service charges themselves. One was whether L was entitled to recover the cost of in-house management as part of "the aggregate of all costs fees expenses and outgoings whatsoever properly incurred by the Lessor in complying with its obligations in respect of the Lessor's Services". The Court held that (i) the cost of providing the relevant service through L's own staff was recoverable and (ii) the recoverable amount included both the in-house cost of the actual service and the in-house cost of arranging for it to be provided. The Chancellor said in the course of his judgment: "The further from actual compliance with the Lessor's obligations the incurring of the cost or expense lies the less likely it will be that such expenditure was incurred "in" such compliance. But I see no reason in principle to exclude indirect costs of management and corresponding 'overhead' expenses."

*Reserve funds***Brown's Operating System Services v. Southwark Catholic Diocesan Corporation**

[2007] EWCA Civ 164 (Court of Appeal).

The service charge provisions of a lease entitled L to include "such sum as the Landlord shall in its reasonable discretion think fit as being a reasonable provision for expenditure likely to be incurred in the future" in respect of, inter alia, repairs and maintenance. The lease also provided that (a) the landlord could retain any surplus of monies paid to it as service charges to cover future expenditure, and (b) that where the landlord "in the reasonable exercise of its discretion" desired to make any authorised expenditure, it could only levy a further service charge if the monies it held as money "in reserve" or as an excess of service charge payments proved insufficient.

L built up a substantial surplus from the service charges. T terminated the lease by a break notice. It refused to pay the service charges for the last two quarters, arguing that the surplus held by L was more than enough to cover the outstanding amounts, and it counterclaimed for the balance. The judge at first instance held that L was entitled to retain the surplus at the end of the lease.

The Court of Appeal allowed T's appeal. There is no principle of law that in the absence of an express provision for the return of a reserve fund, the money belongs to the landlord. The question is one of construction in each case. The lease required only that the tenants pay for works reasonably required during the lease. There was no obligation upon them to contribute to future works. The lease was not to be construed as creating a fund to cover the expenses which the landlord would have to meet at any future time. It was to be inferred that any unspent money at the end of the lease belonged to T. It was possible (although it was not necessary to decide) that if the lease were terminated by forfeiture by reason of T's breach of covenant, L might be able to recover, as damages, the money it was holding in anticipation of works to be carried out during the currency of the lease.

Note: Contrast Secretary of State for the Environment v. Possfund (North West) [1997] 2 EGLR 56 in which the lease was construed as creating a depreciation fund intended to cover a specific replacement whenever it took place, whether before or after the

termination of the lease, so that any unspent sums at the end of the lease belonged to the landlord.

## REPAIRS

### *Subject matter*

#### **Patrick v. Marley Estate Management** [2007] EWCA Civ 1166

T covenanted to repair the demised premises “other than the parts thereof comprised and referred to in clause 6”. By clause 6 the landlord covenanted to maintain repair decorate and renew the main structure and also decorate the exterior including the wood and ironwork. The building contained 25 typical Georgian sash windows. T argued that L was liable (i) to redecorate the outside of the windows as the surface of the windows formed part of the exterior and (ii) was liable to repair the frames generally on the basis that the windows formed part of the main structure of the building.

The Court of Appeal held:

- (1) The external surface of the windows were part of the exterior of the building, so that L was liable to decorate them; but
- (2) L was not liable to repair any other part of the windows (including the woodwork and glass) and T was so liable. Although in some cases windows can form part of the “main structure”, that was not so in this case. The definition of “demised premises” included the “floors and windows” but excluded “the main structural parts”, which showed that the parties thought that the windows were something other than structural parts. Moreover, clause 6 specifically included as part of the main structure items which would not ordinarily be regarded as part of the main structure, e.g. gutters, but it did not include the windows.

### *Liability*

#### **Alker v. Collingwood Housing Association** [2007] 1 W.L.R. 2230

The landlord of a housing association flat agreed to keep it in good condition and to repair and maintain the structure and exterior. T was badly injured when her arm accidentally went through a glass panel in her front door. The panel consisted of ordinary annealed glass, not safety glass, but was intact and undamaged before the

accident and had probably complied with the building regulations when it was installed. T sued L for damages for breach of the L's statutory duty under section 4 of the Defective Premises Act 1972.

At first instance the judge found in favour of T. The Court of Appeal allowed L's appeal. The duty under section 4 only arises where the landlord owes an obligation for the maintenance or repair of the premises and the reach of the duty is no longer than the reach of the obligation. The door was not in disrepair and there had been no failure to maintain it. L's obligation did not extend to making it safe. Nor did L's duty to keep in good condition encompass a duty to make safe a potential hazard (such as a steep stairway).

**Carmel Southend v. Strachan & Henshaw** [2007] 3 E.G.L.R. 15

T's lease expired in December 2004. T had sublet to M who remained in occupation following the termination of T's lease. The premises had an asbestos roof. At the expiry of the lease the roof was in disrepair, with defective roof lights and seals and isolated cracked sheets. The surveyors for L and T agreed that the roof was capable of being repaired. However, M (who took a new lease in July 2005) required as a term of taking the new lease that the roof be overclad. L carried out the overcladding and sought to recover the cost from T as damages for disrepair. T contended that (i) the appropriate remedial work was patch repairs, but (ii) the cost of the repairs to the roof lights was to be deducted because those works had been superseded by the overcladding and the cost was therefore irrecoverable by virtue of the second limb of s.18(1) of the Landlord and Tenant Act 1927 which provides that:

“. . . and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.”

Coulson J. held:

- (1) Although M's insistence on overcladding was a material factor in determining whether the overcladding was repair, both parties' surveyors had agreed that patch repairs was an appropriate form of repair, and the cost of overcladding was therefore irrecoverable;

(2) T was liable for the whole of the cost of patch repairs. The overcladding was a form of repair, albeit that T was not liable for anything more than the lesser patch repair scheme. The fact that L undertook a more extensive and expensive repair scheme did not trigger the second limb of s 18.

### *Quantum*

**Lyndendown v. Vitamol** [2007] 3 E.G.L.R. 111.

L granted to T a full repairing lease of premises on an industrial estate expiring in January 2002. T sublet with consent, and ST covenanted with L to perform the covenants in the headlease. By a side letter between T's parent company and ST, T's parent company agreed with ST that the latter's obligations to repair would be limited to making the property wind and watertight and that any surplus repairs would be carried out at the expense of the parent company.

Upon the expiry of the headlease L sued T for damages for disrepair. ST remained in occupation holding over under the 1954 Act. L accepted that, unless the side letter altered the position, any damage to the reversion was nil or nominal since, as at the date the lease expired in January 2002, a subtenant was in occupation, holding under a sublease, to which the 1954 Act applied, containing the same or similar repairing covenants, which L could enforce directly by virtue of section 65(2) of the 1954 Act. The judge at first instance accepted the evidence of T's expert that the side letter had no effect on value. The Court of Appeal refused to disturb his findings.

### *Release*

**Business Environment Bow Lane v. Deanwater Estates** [2007] 2 E.G.L.R. 51 (CA)

L and T entered into negotiations for the surrender of an existing lease of business premises and the grant of a new short lease of part. The negotiations were conducted "subject to contract". T expressed concern at certain provisions of the draft lease provided by L, including in clause 2.6 a Jervis v. Harris clause. L's solicitor told T that "My client has already indicated to your client that a terminal schedule of dilapidations will not be served and this should be satisfactory comfort for your client." A lease was finally executed in the terms of the draft save that clause 2.6 had been amended but not in terms which precluded a claim for dilapidations at the end of the term.

At first instance Briggs J. held that the parties had entered into a collateral contract that exonerated the tenant from all liability for terminal dilapidations under the lease. The Court of Appeal disagreed. The continuance of the negotiations showed that the tenant was not relying upon the assurances given during the discussions. The evidence did not show that the parties intended to make any contract other than that arising from the grant of the lease itself.

## **ASSIGNMENT OF CAUSES OF ACTION FOR DAMAGES**

### *Black holes*

**Bizspace v. Baird Corporatewear** [2007] 1 E.G.L.R. 55.

L sued T for damages for dilapidations amounting to some £335,000. T had no assets having assigned the business (but not the lease) to the occupying company, which had agreed to indemnify T against all breaches of covenant under the lease. L took an assignment of the indemnity and sued the occupying company. The company resisted L's claim on the ground that L was not entitled to recover any more than T could have done and that T had suffered no loss because it had not paid anything by way of dilapidations.

The Court found in favour of L. On the expiry of the lease, T was liable in respect of the breaches of covenant and was entitled to be indemnified by the occupying company in respect of those liabilities. Following the decision of the Court of Appeal in Technotrade v. Larkstore [2006] 3 E.G.L.R. 5, the correct principle was that "the court should strive to ensure that a wrongdoer does not escape liability merely because the cause of action lies in the hands of someone other than the person who suffered the loss".

## **CONSENT TO ASSIGN**

### *Pre-requisites*

**Level Properties v. Balls Bros.** [2007] 2 E.G.L.R. 26

A lease provided that the landlord's consent to assignment was "subject to compliance with the following requirements" not to be unreasonably withheld. The "following requirements" included a direct covenant by the assignee with the landlord, provision of information to identify the assignee and the assignee's financial standing, and the

provision of a surety if the assignee was a company. Wyn Williams J. rejected the tenant's argument that the requirements were avoided by s. 19(1) of the 1927 Act. On the true construction of the lease, the requirements were not intended to prescribe in advance what would be reasonable but were requirements with which the tenant was obliged to comply as a condition of being able to apply for consent in the first place.

Note 1: The relevant distinction is between (a) a provision which specifies in advance what is or is not reasonable (which is avoided by s. 19 of the 1927 Act, subject only to the operation of the 1995 Act in relation to new leases) and (b) a provision which prescribes conditions that must be fulfilled before the tenant can apply for consent. It is a question of construction into which category a particular clause falls. The issue of construction "does not admit of lengthy useful elaboration": per Lightman J in Crestfort v. Tesco Stores [2005] 3 E.G.L.R. 25.

Note 2: The judge considered two further points arising in relation to the rent review provisions, namely, (1) whether the market rent was to be determined by reference to separate hypothetical lettings of parts if that produced a higher figure than a single hypothetical letting of the whole, and (2) whether the parties were bound by the independent expert's determination of the reviewed rent if that had been made on the basis of a mis-construction of the lease. As to (1), on the true construction of the lease the reference to a hypothetical "letting" was to be read as hypothetical "lettings" in the plural, and as to (2), the parties were not so bound.

## 1954 ACT

### *Section 38*

#### **Ultimate Leisure v Tindle** [2007] EWCA Civ 1241 (Court of Appeal)

A granted an option to B for the sale of freehold land. Part of the land was occupied by C under a business tenancy. C was a wholly owned subsidiary of A. The option agreement provided that immediately prior to completion and conditional upon the same, C would surrender that part of its demise which was subject to the option. B exercised the option. A contended that its obligation to complete the sale was conditional on the surrender by C, that such condition could not be enforced because

the requirement for C to surrender was void under s.38(1) of the 1954 Act and therefore that A was entitled to terminate the option agreement.

One of the arguments raised at first instance was that the s.38(1) was to be construed as applying only to those parts of the “holding” within s.32 of the 1954 Act. As C was not in fact in business occupation of the parts of the demise subject to the option the requirement to surrender was enforceable. This argument was rejected by the judge at first instance and there was no appeal on this aspect of the decision.

The judge went on to hold that A was not entitled to terminate the agreement. The Court of Appeal agreed. On its true construction the option agreement did not make completion conditional on the surrender taking place. Section 38(1) had no effect on the rights of the parties to the option agreement. If A was unable to comply with its obligation to sell free from the lease, then it was in breach of the contract of sale arising under the option.

#### *Inclusion of existing rights on renewal*

#### **Picture Warehouse v. Cornhill Investments** [2008] EWHC 45 (Q.B.)

A business tenant under a lease granted in 1980 agreed in 2000 to take a new lease of a different floor of the building. It was agreed that it would give up 2 of its existing 3 spaces on the first floor of the building and would instead be provided with two designated parking spaces on land at the front of the building and that the rent would be reduced by £500. A dispute then ensued with the local authority over the use of the relevant land for parking. As a result, although the new lease included one parking space within the building (and the rent was reduced by £500), there was no express provision for parking at the front of the building. The landlord nonetheless agreed by letter to permit the tenant and its customers to park outside the building for up to 30 minutes.

The tenant applied for a new lease under the 1954 Act. It contended that the new lease should include a right to park on the forecourt. HHJ Simpson held that no such right should be included. On appeal, Jack J agreed. As it was, the tenant had only a revocable permission (which the landlord was prepared to continue) and enjoyed a

reduced rent in consequence. It would be a wrong exercise of the discretion to include any greater right in the new lease.

## EASEMENTS

### *Parking*

#### **Moncrieff v. Jamieson** [2007] 1 W.L.R. 2620 (House of Lords) (Scotland)

The grantee of a right of way was unable to park on his own land because it was at the bottom of a cliff, with access and egress being by means of a stairwell leading to a gate at the top of the cliff. Parking elsewhere would have involved a walk of 150 yards in all weathers at all times of the day and night and a steep descent or climb in exposed countryside. The House of Lords held that in the particular and unusual circumstances a right to park on the right of way was to be implied as being reasonably necessary to the comfortable use and enjoyment of the right of way.

The following points (among others) emerge from the speeches:

- (1) Where there is an express grant of an easement, the test of what, if any, ancillary rights are to be implied is whether any such rights are necessary for the comfortable use and enjoyment of the right;
- (2) While an express grant must be construed in the light of the circumstances that existed at the date of grant, it is not necessary for it to be shown that all the rights that are later claimed as necessary for the comfortable use and enjoyment of the right were actually in use at that date. It is sufficient that they may be considered to have been in contemplation at the time of the grant, having regard to what the dominant owner might reasonably be expected to do in the exercise of his right;
- (3) A right to park vehicles can exist as an easement in its own right;
- (4) For the purposes of deciding whether a right can exist as an easement, Lord Scott rejected the test that asks whether the landowner is left with any reasonable use of his land in favour of the test that asks whether the landowner retains possession and, subject to the reasonable exercise of the right in question, control of his land. Lord Neuberger saw “considerable force” in that view. On that test, Batchelor v Marlow [2003] 1 W.L.R. 764 (where the court held

that the parking of 6 cars for 9½ hrs per day was not capable of existing as an easement) was probably wrongly decided;

(5) (Per Lords Scott and Neuberger) Whilst the law in England and Wales would not necessarily be the same in every respect, there was no difference between the law of Scotland and that of England and Wales on the relevant points.

### *Rights of way*

**Adealon International Proprietary Limited v. Merton LBC** [2007] EWCA Civ 362  
(Court of Appeal)

C sought a declaration that his 525 sq m plot of land adjacent to the A24 in Merton benefited from a right of way of necessity over Merton Council's adjoining land. C had sold the adjoining land to Merton but did not reserve a right of way over it. The retained plot fronted the highway but planning permission for access via the highway had been consistently refused. C claimed a right of way over the Council's land by necessity. The Court of Appeal dismissed his claim. The principle on which easements of necessity arise is one of implication from the circumstances of the grant, not a free-standing rule of public policy. The presumption is that the grantor of land will have expressly reserved any rights that he requires and the burden lies on him to establish an exception. The existence of other realistic possibilities of access over third party land, even if not legally enforceable at the time of the grant, is relevant to that issue. On the facts no implication was to be made.

### *Right of Light*

**RHJ v. FT Patten (Holdings)** [2008] EWCA Civ 151 (Court of Appeal)

C was the freeholder of an office building. D owned the properties adjoining and across the road from the offices, namely a building and two car parks. All four properties had, until 1989, been owned by Liverpool City Council. In 1980, the council had granted a 99-year lease of C's building on terms that reserved to the landlord the "full and free right" at any time to "build rebuild and/or alter as they may think fit... any buildings or bays or projections to buildings on any land adjoining the demised property and/or on the opposite sides of the adjoining streets and access ways". It was common ground that C's building had enjoyed 20 years' light between the date of construction and the date of registration of a light obstruction notice under the Rights of Light Act 1832.

The Court of Appeal held that C had not acquired a right to light by prescription. The 1980 lease, reserving to the landlord the right to build on adjoining land, prevented such a right from arising. The effect of the reservation on its proper construction was that the light had been enjoyed “by some consent or agreement expressly made or given for that purpose by deed or writing”, within the meaning of section 3 of the Prescription Act 1832, such as to prevent the right to light from being deemed absolute and indefeasible under that section.

Two points from the judgments may be noted:

- (1) Section 3 does not require there to be an express reference to light. The phrase “expressly made or given for that purpose” can be satisfied by an express provision in a document which, on its true construction according to normal principles, has the effect of rendering the enjoyment of light permissive or consensual, or capable of being terminated or interfered with by the adjoining owner, and is therefore inconsistent with the enjoyment becoming absolute and indefeasible after 20 years.
- (2) There is no principle of construction to the effect that if a provision relied on as amounting to a consent or agreement within section 3 is capable of being read as referring to something other than light, then it should be so read. The question whether a document is a consent or agreement within section 3 depends on its proper construction in accordance with ordinary principles.

## RESTRICTIVE COVENANTS

### *Meaning of “Transferor”*

#### **City Inn (Jersey) v. Ten Trinity Square** [2008] EWCA Civ 156 (Court of Appeal)

A transfer of land imposed on the transferee a number of restrictive covenants. One prohibited the carrying out of alterations etc. except in accordance with plans approved by the Estate Officer of the Transferor. Another prohibited the use of the land for any purpose other than a specified purpose without the consent of the Transferor. The term “the Transferor” was defined to mean the Port of London Authority. It was held that on

the true construction of the transfer the reference in the covenants to “the Transferor” meant the Port of London Authority and did not include its successors in title.

## **SECTION 2**

### *Rectification*

#### **Ali Oun v. Ishfaq Ahmad** [2008] EWHC 545 (Ch.)

An intending buyer and seller of land signed a document entitled “Contract to sell”. It did not include all the terms which the parties had agreed because it omitted an agreed term as to apportionment of the price. It did not therefore comply with section 2. The term as to apportionment had been deliberately and intentionally excluded from the document. The buyer claimed to be entitled to have the document rectified so as to include the term in question, on which basis the document as rectified would then comply with section 2.

Morgan J dismissed the buyer’s claim. Rectification is about setting the record straight so as correctly to record the parties’ true intentions. It is not available where the parties have executed the document they intended to execute and their mistake is as to its legal consequences. It was not enough that the parties intended to make a legally binding agreement but by reason of the omission of the term had failed to do so. The omission was deliberate. It was not necessary to set the record straight. Rectification could not be ordered.

Note: See also Allnutt v. Wilding [2007] WTLR 941, in which the parties created a discretionary trust, mistakenly believing it would be a potentially exempt transfer for the purposes of inheritance tax, and the Court of Appeal held that rectification was not available so as to turn it into an interest in possession trust, which would have been exempt and which the parties would have created had they appreciated the point.

### *Compromise*

#### **Orton v. Collins** [2007] 2 E.G.L.R. 147

One party to a partnership dispute made an offer under CPR 36 offering to settle the action on terms which included the disposition of an interest in land. The other party accepted the offer. The party who made the offer then challenged the validity of the settlement on the basis that since it consisted of two documents (the offer and the

notice of acceptance), it was void under section 2. His claim was rejected. It was held that Part 36 creates substantive, sui generis obligations which do not depend on contract law. A Part 36 settlement can therefore be enforced by the Court under its inherent jurisdiction to administer justice, even where it does not create a contract. The Court has power to order the parties to sign a single document incorporating the terms of the settlement in order to comply with section 2.

## CONTRACTS FOR SALE

### *Reasonable endeavours*

#### **Yewbelle v. London Green Developments** [2007] EWCA Civ 475

The buyer contracted to purchase from the seller the site of a tower block, with vacant possession save for certain leases, for £13.75m under an agreement whereby the buyer was to develop the land and then lease part of it back to the seller. The local council had resolved to grant planning permission for a mixed-use development on the site, incorporating a public library, subject to a satisfactory agreement being concluded under section 106 of the Town and Country Planning Act 1990. It was a term of the contract that the seller would use all reasonable endeavours to obtain a section 106 agreement in substantially the form of an attached draft, and that the buyer would not be bound to complete until that agreement had been obtained. Following exchange of contracts in May 2005, the council made additional demands regarding the library, and it became apparent that part of the land needed for the library was in the ownership of a third party. In February 2006, the seller wrote to the buyer informing it of the third-party-land problem and stating that it was unable to procure the requisite section 106 agreement and was unwilling to complete without one. In May, the seller stated that it was treating the contract as being at an end. In the course of proceedings between the parties, the buyer indicated that it would after all be willing to complete without a section 106 agreement. At first instance Lewison J found in favour of the buyer.

The Court of Appeal (Buxton LJ dissenting) allowed the seller's appeal. The contract did not end automatically if the buyer was unable to obtain a section 106 agreement within a reasonable time despite using reasonable endeavours. However, it was appropriate to imply a term entitling the seller to terminate it once it became clear, after

the exercise of all reasonable endeavours by the seller, that the necessary section 106 agreement could not be obtained.

The seller's obligation to secure the s. 106 agreement was a single obligation. The problem of the third-party land was an insuperable obstacle that made it irrelevant that other obstacles, such as the situation with the library, might have been overcome. The seller was not obliged to lay out the significant funds required to attempt to buy the third-party land itself, and to adapt the proposed development to fit the site without the third-party land was not consistent with the contract. By February 2006, there was nothing that the seller could have done to resolve the problem by its own reasonable endeavours. The buyer might then have been entitled to see for itself whether it could resolve the problem, for example, by purchasing the land itself, within a reasonable period of being given notice of its need to choose whether or not to waive the requirement for a section 106 agreement. However, even assuming that it had been so entitled, it would have been required to inform the seller of its intentions, which it did not do. Accordingly, by May 2006, the seller had been entitled to treat the contract as having been discharged. By the time the buyer expressed its willingness to complete without a section 106 agreement, the contract had already ended.

## MERGER

### *Effect on easements granted by the lease*

#### **Wall v. Collins** [2007] 3 W.L.R. 459 (Court of Appeal )

A 999 year lease conferred on the lessee a right of way over a passageway. The tenant acquired the freehold so that the lease merged. The judge at first instance held that the right of way attached to the lease was extinguished and that section 62 of the 1925 Act did not operate to attach the right of way to the freehold. The Court of Appeal allowed the tenant's appeal. The merger of the lease did not destroy the right of way, at least to the extent of the grant. In any event, section 62 operated to convert the right of way into a right attached to the freehold.

## RIGHTS OF ENTRY

### *Construction of right*

**Risegold v. Escala** [2008] EWHC 21 (Ch.).

A transfer conferred on the claimant a right to enter the defendant's adjacent land for "rebuilding or renewal" of its property. The claimant claimed to be entitled to enter in exercise of the right. The defendant contended that the right had not arisen. The Court held that the term "rebuild" allowed a new building to be in some ways different in perhaps every respect from the original yet still be identifiable as substantially a rebuilding of the original. The question was one of fact and degree. A comparison of the claimant's existing buildings with its proposed development demonstrated that the latter was not just a "rebuilding or renewal", and there was abundant internal evidence in the clause itself that the claimant's right to enter the defendant's land for those purposes was intended to be strictly limited. The claimant was not therefore entitled to access.

## INSOLVENCY

### *Voluntary arrangements*

**Prudential Assurance Co. v. PRG Powerhouse and others** [2007] EWCA 1002 (Ch.)

A tenant whose liability had been guaranteed by its parent company entered into a voluntary arrangement containing a provision that payment in accordance with the arrangement would be in satisfaction of all debts, liabilities or obligations "including obligations and liabilities of the Company . . . that have been guaranteed or indemnified by [the parent company]" and a further provision that any guarantee given by the parent company should be treated as having been released. It was held that:

- (1) The voluntary arrangement did not operate to release the liability of the parent company under its guarantees; but
- (2) The relevant provisions were enforceable by the company as an obligation of the landlords not to claim against the parent company under the guarantees; and

- (3) In all the circumstances the arrangement was unfairly prejudicial to the landlords within the meaning of s.6 of the Insolvency Act 1986 because it left them in a less advantageous position than they were in prior to the arrangement by depriving them of the benefit of guarantees that were of value and would have been enforceable.

## DAMAGES

### *Trespass*

#### **Sinclair v. Gavaghan** [2007] EWHC 2256 (Patten J.)

C owned land which formed part of the access, the remainder of which was owned by D, to developable land. D commenced development of the land but encroached in obtaining access on C's land. C obtained an injunction to stop the trespass which was found to be occurring. C claimed damages for the trespass which had occurred. The land owned by C was never used by him but was retained solely for the purpose of preventing or hindering the development. The evidence was that the land suffered no physical damage by the use of it by D's construction vehicles. D accepted that in calculating damages regard could be had to any profit which D derived from making use of the land. C argued that the appropriate figure for damages should be £125,000. D contended that the damages should be £5000.

Patten J found in favour of D. He held that the proper approach was to consider (i) what the acts of trespass were; (ii) what were their purpose and effect in relation to the development of the development land; and (iii) what alternatives D had to using C's land in order to carry out those works of which complaint was made. In the light of its findings on those matters, the Court then had to assess what payment would have been agreed for the temporary use of C's land. It was not open to D to say that it would (if confronted with a demand for payment) have avoided making any use of C's land. The purpose of the assessment was to calculate a sum to compensate C for the financial benefits which D actually made from using the land. But the alternative possibilities open to D were highly relevant as factors which would have influenced the hypothetical negotiations. D would not have been prepared to pay and C would not have been able

to demand a fee which was disproportionate to the actual financial advantages of using the land as opposed to postponing the works or creating an alternative access point.

*Past breaches*

**WWF – World Wildlife Fund for Nature v. World Wrestling Federation Entertainment** [2008] 1 W.L.R. 445.

Where the Court grants an injunction restraining future breaches of a restrictive covenant, damages for past breaches can be awarded notwithstanding that the covenantee cannot establish actual financial loss. Such damages can be assessed by reference to the amount which it would have been reasonable for the covenantor to pay and the covenantee to accept for the hypothetical release of the covenant, assessed on the basis that the hypothetical release would have taken effect from a date immediately before the covenantor was first in breach and continued no later than the date on which the injunction took effect. Damages will be awarded on that basis where the Court is satisfied that this is the just response to circumstances in which the compensation which is the claimant's due cannot be measured or solely measured by reference to identifiable financial loss.

(Per curiam) The Court's power to award damages on this basis arises even where there is no claim for an injunction and there could be no such claim. The power exists at common law and does not depend on Lord Cairn's Act.

## LEASEHOLD ENFRANCHISEMENT

*House*

**Boss Holdings v. Grosvenor West End** [2008] 1 W.L.R. 289

A property was occupied for many years as a single residence. Subsequently, the lower floors were used for commercial purposes, although they remained structurally laid out substantially as they had been when the property was in single occupation. Residential use of the upper floors was discontinued and they subsequently became dilapidated and incapable of use as residences. The House of Lords held that the property was a "house" as defined by section 2(1) of the Leasehold Reform Act 1967 (i.e. "designed or adapted for living in"). It had been designed for living in as initially built in the 1730's. Nothing that had happened subsequently detracted from that fact.

*Redevelopment***Majorstake v. Curtis** [2008] 2 W.L.R. 338

The tenant was the lessee of a flat on the 7<sup>th</sup> floor of a block of flats owned by the landlord. The landlord served a counter-notice under section 45 of the Leasehold Reform, Housing and Urban Development Act 1993 admitting the tenant's right to a new lease but stating that it intended to apply for an order under section 47 declaring that the right should not be exercisable by reason its intention to redevelop premises in which the tenant's flat was contained. The proposed work involved combining the tenant's flat with the flat immediately below to form a single duplex apartment.

The House of Lords held that for the purposes of section 47, the "premises in which the flat is contained" means an objectively recognisable physical space which the landlord, the tenant, a visitor and a prospective buyer would recognise as "the premises" at the time when the tenant receives the counter-notice. On that test, the premises in question were the block. The landlord's claim therefore failed.

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