

# CASE LAW KALEIDOSCOPE

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

*by*

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It is neither possible nor practicable to review in a single talk every property case decided in the last year. Nor is that desirable, given that most cases do not actually decide anything new, as opposed to applying well-established principles to a particular set of facts (although it is fair to say that even then, they can provide a helpful insight into the way the relevant law is applied in practice).

With the above in mind, this paper is divided into two parts. The first part contains a selection of cases decided in the last year with brief accompanying notes. It does not pretend to be in any sense definitive. The second part looks at five cases in more detail, namely: Cobbe v Yeomans Row Management Co. [2008] 1 W.L.R. 1752; Newham LBC v Van Staden [2008] EWCA Civ 1414; [2009] 05 EG 108; Hutchison v B & DF [2008] EWHC 2286 (Ch.); Scottish & Newcastle v Raguz [2009] 1 W.L.R. 2494; and Artworld Corporation v Safarian (unreported decision of the Court of Appeal dated 27<sup>th</sup> February 2009)

## **PART I**

### ***Service charges***

Leonora Investment Co. v Mott MacDonald [2008] EWCA Civ 857 (Lease provided that the landlord would “(unless prevented by causes beyond its control) prepare and send to the Tenant a statement of the actual Service Costs and Service Charge for each Service Charge Year as soon as practicable after the end of such year and in the event of the Service Charge for the Premises exceeding the aggregate amount paid by the tenant for such year the tenant will pay the balance due to the landlord within fourteen days of demand”. Held that the landlord's claim for the cost of works invoiced to the tenant failed in the absence of a statement relating to the works. The relevant provision prescribed “the contractual route down which the landlord must travel to be entitled to payment”)

Morshead Mansions v Leon di Marco [2008] EWCA Civ. 1371 (contributions payable by a tenant to a management company (in which all the tenants were shareholders) in his capacity as a member of the company under separate

contracts made in and pursuant to the company's Articles of Association to establish and recover contributions to a fund were not a "service charge" for the purposes of the Landlord and Tenant Act 1985)

King v Udlaw [2008] 2 E.G.L.R. 99 (Lands Tribunal) (Holiday bungalows not "dwellings" within the meaning of the 1985 Act)

Buckley v Bowerbeck Properties [2009] 01 EG 78 (LVT) (premises comprising a ground floor, let for use as consulting rooms for medical or dental practitioners, and a basement flat or maisonette, which were connected internally and had a common doorbell and which could not be occupied separately under the terms of the lease, not a "dwelling" for the purposes of the 1985 Act.)

### ***Rent review***

McDonalds Real Estate v Arundel Corporation [2008] 2 E.G.L.R. 53 (The relevant part of the review clause required the valuer to assume that the premises were "a modern single storey warehouse comprising 20,000 net useable square feet of which 15% in area were useable as ancillary offices and constructed to a high standard in accordance with all statutory and other relevant consents with all usual amenities including adequate care parking and loading facilities". Held, the word "warehouse" merely described the type of building as opposed to the uses to which it could be put, and that "modern" meant modern at the review date not the date of grant)

### ***Breach of covenant against assignment***

Clarence House v National Westminster Bank [2009] EWHC 77 (Ch.) ("virtual assignment" under which all the economic benefits and burdens of a lease together with all management responsibilities were transferred to a third party but without any actual transfer or change in occupancy held to be a breach of a covenant against parting with or sharing the occupation of the premises but not of a covenant against assignment, underletting or declaring a trust).

### ***Consent to assign***

The Royal Bank of Scotland v Victoria Street (No. 3) [2008] EWHC 3052 (Ch.) (Landlord's refusal of consent to an assignment on the grounds of the proposed assignee's covenant strength held to be reasonable)

Landlord Protect v St Anselm Development Co [2009] EWCA Civ 99 (Head landlord's requirement, as a condition of the grant of consent to the assignment of the head lease, that a guarantee to be provided in respect of the assignee's obligations should be released upon any future assignment only if reasonable alternative security was provided by the future assignee held to be unreasonable. Held that it is in general unreasonable for a landlord to require a guarantee of the liabilities of an assignee to extend beyond the period during which the assignee is liable to the landlord by privity of estate)

### ***Delivery up of possession***

Jones v Merton [2008] EWCA Civ 660 (retention of keys by former tenant not enough to constitute failure to give up possession. Dictum in *John Laing Construction v. Amber Pass* [2004] 2 E.G.L.R. 128 applied)

### ***Rights of entry***

Risegold v Escala [2008] EWCA Civ 1180 (right conferred by deed of transfer to enter adjoining property for the purpose of carrying out "any maintenance repair rebuilding or renewal" of the transferred property held not to permit entry in connection with the demolition of the existing buildings on the transferred property and their replacement with different buildings)

Heronlea (Mill Hill) v Kwik-Fit Properties [2009] EWHC 295 (Q.B.) (provision entitling the landlord to enter the demised premises for the purpose of "making surveys or drawings of the Premises" held not to permit entry for the purpose of carrying out an environmental survey involving drilling boreholes and taking samples)

### ***Forfeiture***

Greenwood Reversions v World Environment Foundation [2009] EWCA Civ 47 (Letters written by the landlord's solicitors to the tenant held not to amount to a waiver of the right to forfeit because, viewed objectively, they were not sufficiently unequivocal as to

be consistent only with the lease continuing. The judge at first instance had been entitled in the exercise of his discretion to refuse relief from forfeiture)

Osibanjo v Seahive Investments [2008] EWCA Civ 1282 (The landlord banked a cheque from the tenant for £10,000, retaining that part of it which had been tendered in payment of a bankruptcy debt (which related to bankruptcy proceedings begun, and arrears of rent due, prior to the landlord's knowledge of the relevant breach of covenant) and returning that part which represented arrears of rent. It was held that it had not waived its right to forfeit)

### ***Oral tenancy***

Hutchison v B & DF [2008] EWHC 2286 (Ch.) (See below)

### ***1954 Act***

Fowles v Heathrow Airport [2008] EWCA Civ 1270 (new tenancy refused under section 30(1)(c) where the tenant had continually and persistently flouted planning controls)

Newham LBC v Van Staden [2008] EWCA Civ 1414 (see below)

### ***Leasehold enfranchisement***

Earl Cadogan v 26 Cadogan Square; Howard de Walden Estates v Aggio [2008] 3 W.L.R. 244 (Lessee under a long lease of a block of flats, none of which were subject to long underleases, held to be entitled to individual lease extensions under the 1993 Act in respect of each flat at the same time irrespective of whether the lessee was a property investor or a resident and of the nature or extent of other property included in the demise)

Earl Cadogan v Sportelli [2008] UKHL 71 (Whether hope value can be taken into account when assessing the price payable for the freehold)

Nailrile v Earl Cadogan (2008) (Lands Tribunal 22<sup>nd</sup> December 2008) (Principles to be followed when valuing the intermediate leaseholder's interest under Schedule 13 to the 1993 Act).

### ***Insolvency***

Innovate Logistics v Sunberry Properties [2008] EWCA Civ. 1321 (Landlord refused permission to commence proceedings against a company in administration for a mandatory order for the immediate termination of an occupational licence granted to a

purchaser of the company's business. Guidelines in Re Atlantic Computer Systems Limited applied)

### ***Easements***

Barton v Church Commissioners for England [2008] EWHC 3091 (Ch.) (Church Commissioners held to have established by prescription a right of fishery in gross without stint)

### ***Repayment of deposit***

Midill (97PL) v Park Lane Estates [2008] EWCA Civ 1227 (In order for the court to exercise its discretion under s. 149(2) of the Law of Property Act 1925 to order the repayment of a deposit, there needs to be something special or exceptional to justify overriding the ordinary contractual expectations of the parties. The cases at first instance should not be seen as altering that principle, but as illustrations of how it had been applied in particular circumstances).

NB for a recent example of the latter, see Aribisalas v St James' Homes (Grosvenor Dock) [2008] 2 E.G.L.R. 65.

### ***Rights of light***

Forsyth-Grant v Allen [2008] 2 E.G.L.R. 16 (claim for damages for (among other things) nuisance for interference with a right of light. Held, the standard remedy for trespass and nuisance is an award of common law damages. An account of profits can only be awarded in exceptional circumstances, if at all. NB Note that this was not a claim for damages in lieu of an injunction, in respect of which different considerations apply: see [27])

Salvage Wharf v G & S Brough [2009] EWCA Civ 21 (an agreement under which the dominant owner agreed that the demolition of an adjacent factory by the servient owner might have adverse effects on its rights to light and undertook not to take any action to enforce those rights did not constitute a consent or agreement within the meaning of s. 3 of the Prescription Act 1832)

### ***Rectification***

Hicklane Properties v Bradbury Investments [2009] 1 P. & C. R. 2 (Pre-emption clause which mistakenly provided that the open market value of the freehold was to be valued with vacant possession rectified so as to delete the words “with vacant possession” notwithstanding that there was no evidence as to precisely what valuation formula the parties had intended)

### ***Estoppel***

Cobbe v Yeomans Row Management Co. [2008] 1 W.L.R. 1752 (see below)

Thorner v Major (no proprietary estoppel held to have arisen in favour of a claimant who worked on P's farm for 30 years with no remuneration in the belief, encouraged by the owner, that he would inherit the farm when the owner died: [2008] EWCA Civ 732. Appeal heard by HL in January 2009. Judgment awaited)

### ***Trespass***

Field Common v Elmbridge BC [2008] EWHC 2079 (Ch.) (A local authority which improved the access to its industrial estate by laying tarmac on the claimant's land was liable for the trespass on that land by its tenants and their visitors, because in the circumstances it was to be taken to have permitted their use of the land. Damages were to be assessed by reference to the hypothetical negotiation approach)

## **PART II**

### **Cobbe v Yeomans Row Management Co. [2008] 1 W.L.R. 1752**

D owned a block of flats ripe for redevelopment. It entered into an oral agreement in principle with C (an experienced property developer) under which (i) C would apply for planning permission for demolition of the flats and the construction of 6 houses; (ii) upon the grant of planning permission and the obtaining of vacant possession, the property would be sold to C for £12m; (iii) C would develop the property in accordance with the planning permission; and (iv) C would sell the 6 houses and pay D 50% of the amount by which the gross proceeds exceeded £24m. Both parties envisaged that there would in due course be a formal written contract, which would be negotiated by lawyers and which would contain additional terms to those agreed. Neither party believed their agreement to be legally binding. C nonetheless believed that the agreement contained all the critical commercial terms; that it was binding on him in honour; that if he obtained planning permission, D was bound in honour to enter into a contract containing the agreed terms; that if D decided not to proceed before the grant of planning permission, he would be reimbursed his reasonable expenditure; and that if planning permission were refused he would not be reimbursed. In those beliefs he spent time and money in pursuing a planning application. The judge found that his beliefs and reliance were encouraged by D, who intentionally gave him the impression that she intended to carry through the agreement into a formal binding contract if planning permission were obtained. A resolution to grant planning permission was passed on 17<sup>th</sup> March 2004. The following day D sought to renegotiate the financial terms of the agreement. C initially agreed but then changed his mind and insisted on adherence to the original agreement. D refused to proceed on those terms.

Etherton J held that a proprietary estoppel had arisen in C's favour which ought to be satisfied by the payment to C of one half of the increased value of the property attributable to the grant of planning permission. The Court of Appeal agreed. The House of Lords allowed D's appeal, holding that he had no claim in proprietary estoppel or constructive trust, and that he was entitled only to a quantum meruit in respect of his services in obtaining the planning permission.

The speeches were given by Lord Scott (with whom Lords Hoffmann, Mance and Brown agreed) and Lord Walker (with whom Lord Brown agreed).

As to proprietary estoppel, Lord Scott held that (i) it was not enough to establish a proprietary estoppel that D had behaved unconscionably; (ii) proprietary estoppel required a proprietary claim and an answer to that claim based on some fact or facts or some point of mixed fact and law that the landowner could be estopped from asserting; (iii) there was nothing that D could be estopped from asserting that would help C: D could not be estopped from asserting that the agreement was unenforceable for want of writing, for C did not claim that it was enforceable; nor that the agreement covered all the terms that needed to be agreed, for C did not claim that it did; nor from denying that, prior to March 2004, C had acquired a proprietary interest in the property, for he never alleged that he had; (iv) proprietary estoppel requires an expectation of a certain interest in land, and C's expectation that a contract would be negotiated was not enough; and (v) it was not necessary to decide whether a proprietary estoppel can be prayed in aid to render enforceable an agreement that is void for want of compliance with section 2 of the 1989 Act, because the agreement was incomplete and was therefore unenforceable anyway, but (obiter) a proprietary estoppel cannot be so used. He went on to reject C's claim to a constructive trust on the ground that (i) D already owned the property before C came on the scene; (ii) both parties knew the agreement was legally unenforceable; (iii) an unenforceable promise to honour a legally unenforceable agreement can give no greater advantage than the unenforceable agreement; (iv) C's expectation of an enforceable contract was inherently speculative and contingent on D's decisions; and (v) C never expected to acquire an interest other than under a legally enforceable contract.

Lord Walker began his speech by pointing out that proprietary estoppel is not "a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side". Instead, it is to be "formulated and applied in a disciplined and principled way". He regarded Ramsden v Dyson LR 1 HL 129 as laying down a general principle that "conscious reliance on honour alone will not give rise to an estoppel". Hopes by themselves are not enough. He agreed that no proprietary estoppel had arisen: C's expectation was of a contract to be negotiated, not an interest in land; both parties knew that there was no legally binding contract so that both were free to discontinue their negotiations without legal liability; and C was taking a commercial risk with his eyes open.

The emphasis in Yeoman's Row on the nature of proprietary estoppel as a species of estoppel (as opposed to an independent means by which a property right can be acquired) and the requisite nature of the claimant's belief/expectation, has given rise to a view in some quarters that proprietary estoppel has been considerably limited in its scope (see e.g. Ben McFarlane's article 'The Death of Proprietary Estoppel'). However, the important feature of Yeoman's Row was that it concerned experienced, commercial parties who deliberately and knowingly did not intend to enter into a legal relationship at the relevant time but to do so only at a later date once detailed terms had been negotiated and incorporated into a formal written contract. It is not clear to what extent Yeoman's Row will affect other types of case, particularly "domestic"-type cases. No doubt the forthcoming decision in Thorner v Major will clarify matters.

### **Newham LBC v Van Staden [2008] EWCA Civ 1414; [2009] 05 EG 108**

On 9<sup>th</sup> January 2004 the landlord granted to the tenant a lease of commercial premises for a fixed term from 1<sup>st</sup> January 2003 to 28<sup>th</sup> September 2004. An order dated 11<sup>th</sup> December 2003 was made by the Watford County Court excluding the provisions of ss 24 to 28 of the Landlord and Tenant Act 1954 from the lease. The tenant remained in possession following the expiry of the term. The landlord sought possession on the basis that the tenancy had been validly contracted out of the 1954 Act and had therefore ended on 28<sup>th</sup> September 2004. The sole issue on the appeal was whether that was correct.

Under what was then s. 38(4) of the Act, the only tenancy that could validly be contracted out of the Act was a tenancy for "a term of years certain". That remains the position under what is now s. 38A(1). The lease in question demised the premises "from and including [1<sup>st</sup> January 2003] to [28<sup>th</sup> September 2004] (hereinafter called "the term" *which expression shall include any period of holding over or extension of it whether by statute or at common law or by agreement*" [emphasis added]). The Court of Appeal identified two possible meanings of the italicised words. The first was that the term created was the term certain expiring on 28<sup>th</sup> September 2004 plus any such indefinite period of holding over or extension. If so, the tenancy was not for a term of years certain. The second possibility was that, as at the date of grant of the lease, any

purported extension to the initial fixed term by any holding over or extension was a matter of uncertainty, so that the tenant could have vacated the premises on 28<sup>th</sup> September 2004. On that basis, the tenancy would have been successfully contracted out.

The Court of Appeal held that the first interpretation was the correct one. The lease created “a tenancy for a term of years certain until 28 September 2004 plus, by the words of extension, any further period of holding over or extension of it on one or other of the bases referred to” (Rimer LJ). The lease was therefore within the 1954 Act notwithstanding the court order.

On any view, the decision is a surprising one. The parties must be taken to have been aware of the statutory requirement for the lease to be for a term certain. It is therefore to be inferred that they intended the lease to be for a term certain and not something else. The language used was consistent with that intention. The operative part of the demise was limited to the grant of a fixed period ending on 28<sup>th</sup> September 2004. The italicised words were clearly not intended to confer on the tenant any further interest or right to possession after 28<sup>th</sup> September 2004. At most, they were intended to ensure only that the covenants of the lease continued to apply during any period of holding over or extension that there might (for whatever reason) happen to be. But (absent the possible application of the 1954 Act) no right to hold over existed under statute or at common law, and such right would not in any event have prevented the original grant from being a term certain. And any extension or holding over by agreement would have required a new agreement which would in turn have created a fresh interest. Moreover, the usual purpose of the relevant words is to ensure (following City of London Corporation v Fell [1994] 1 A.C. 458) that the original tenant or guarantor remains liable during any holding over period. There is much to be said for the view that in the context of the lease in question they were simply inappropriate and ought to have been disregarded, or at any rate, that they did not have the effect of preventing the lease from being for a term of years certain.

### **Hutchison v B & DF [2008] EWHC 2286 (Ch.)**

The claimant entered into discussions for the grant of new leases of six units on an industrial estate to the defendant (who already occupied three of them under existing leases). In the course of those discussions draft leases were sent out but were never executed. The defendant remained in possession of the three units of which it was already the tenant and went into occupation of the other three units and paid rent. It contended that it had made it clear in the discussions that it could not agree a new lease of any of the units until planning permission had been obtained for a new odour control system, and therefore that it occupied the units of which it was already the tenant on statutory continuation tenancies under the 1954 Act and the other units as a tenant at will.

Peter Smith J found that in all cases there had been binding oral agreements for the grant of new leases. He further held that (i) since the agreements for 3 year leases took effect in possession and were at the best rent reasonably obtainable without taking a fine, they created legal leases by virtue of s. 54(2) of the Law of Property Act 1925; (ii) they were not therefore affected by the requirement in section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 for a contract for the disposition of an interest in land to be in writing; (iii) the agreement for a 5 year term fell foul of section 2; (iv) the claimant could not rely on an estoppel to overcome the effect of section 2; but (v) a yearly periodic tenancy had come into being when the defendant took possession and paid rent.

Note 1: the judge's holding at (iv) was based on the dictum of Lord Scott in Yeomans Row referred to above.

Note 2: Compare and contrast *Looe Fuels Ltd v Looe Harbour Commissioners* [2008] EWCA Civ 414 (in which the same conclusion was reached in relation to an oral agreement for a 3 year lease of a fuel tank) and *Fitzkriston LLP v Panayi* [2008] L&TR 26 (in which the agreement did not take effect as a lease by virtue of s. 54(2) because it was not at the best rent reasonably obtainable)

**Scottish and Newcastle v. Raguz [2008] 1 W.L.R. 2494 (HL)**

C was the original tenant under two underleases. He assigned to D who assigned to A1 who assigned to A2. Implied covenants for indemnity pursuant to s. 24 of the Land Registration Act 1925 were given on the assignments from C to D and from D to A1. Both underleases provided for rent review every 14 years. In both cases the reviewed rent was determined some time after the review date. Rent at the old rate remained payable on and after the review dates, and the difference between that amount and the reviewed rent (back-dated to the review date) became payable on the quarter day following the date of determination. A2 failed to pay rent at the pre-review level and the additional rent consequent upon the determination of the reviews. The landlord served various notices under s. 17(2) of the Landlord and Tenant (covenants) Act at various times. Some included and some deleted para. 4 in Form 1 of the relevant Regulations. In order to facilitate the assignment of the underleases by A2 so that the business could be sold as a going concern, C agreed to pay the landlord the unpaid rent. C claimed reimbursement against D. D argued that the relevant notices did not comply with the Act, and therefore that it was not liable to indemnify C.

The two issues were therefore: (1) whether C had been liable to make the payments to the landlord, and (2) if not, whether D was nonetheless liable to indemnify C.

On issue (1), the Court of Appeal had held that 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 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.

The House of Lords disagreed. Lord Hoffmann thought that the Court of Appeal's approach produced "some remarkably silly consequences". The House held that where the rent is subject to review but has not been determined by the review date, the fixed charge that becomes due on each payment date after the rent review date is the rent at the level before the review date; the additional rent does not become "due" until the reviewed rent is agreed or determined and is then a new and separate fixed charge. So

all that is necessary prior to the determination of the reviewed rent is a notice under s. 17(2) specifying the pre-review rent. A further notice under s. 17(2) must be served when and if the tenant fails to pay the post-review rent. The majority thought that the deletion of para. 4 from the notices did not matter. However, Lords Walker and Hope accepted D's fall-back position that a section 17(2) notice in respect of any arrears of pre-review rent must include para. 4 or any instalments of the balance of the reviewed rent that have already notionally accrued will be irrecoverable.

On issue (2), the House of Lords agreed with the Court of Appeal that D was liable to indemnify C. The scope of the indemnity was not limited to sums which C was legally liable to pay. The only limitation was that the sums must have been fairly and reasonably incurred. The payments made by C satisfied that test because on the facts C had good commercial reasons for paying.

**Artworld Corporation v Safarian (unreported decision of the Court of Appeal dated 27<sup>th</sup> February 2009)**

The tenants took a 3 year lease of a large furnished house in West London at a rent of £390,000 per annum. It was let subject to obligations on the part of the landlord to maintain and repair the heating and electrical systems and to maintain and regularly service the mechanical equipment serving its lift and swimming pool. The tenants vacated the property in May 2006, with 15 months of the tenancy remaining, contending that the property was uninhabitable by virtue of serious defects in the electricity and heating systems, and the workings of the equipment that operated the swimming pool and lift. They returned the keys to the landlord at the end of May 2006. Correspondence took place between the parties' solicitors between late May and August 2006 in which the tenants contended that the lease had been repudiated and the landlord asserted that the tenants remained liable for rent.

HHJ Marshall QC at first instance found that in early June 2006 the landlord took possession of the property for its own beneficial use, and that the tenancy was thereby surrendered by operation of law. She relied on the following acts which she found to have occurred: (i) the redecoration of the master bedroom to the taste of Mr and Mrs

Tatanaki (the beneficial owners of the landlord); (ii) the re-hanging of curtains and the moving back of furniture removed from the property at the tenants' request at the start of the tenancy; (iii) the removal of a garden shed; (iv) the parking of two cars; (v) the occupation of the property by Mr Tatanaki (junior) for his own convenience and that of other family members, together with housekeeping staff, furniture and IT equipment; and (vi) the staying at the property by Ms Tatanaki, his sister.

The landlord relied (among other things) on the correspondence as showing that it had not intended to accept a surrender. As to that, the judge held as follows:

“The question whether there has been a deemed surrender by operation of law does not depend on the landlord's stated intention, but on the intention demonstrated on an objective basis by its conduct as a whole. Of course this includes both what it says and what it does, and what it says may assist in interpreting the true effect of acts which might otherwise be equivocal, but it is not open to the landlord to turn black into white merely by assertion. Just as one cannot “approbate and reprobate”, where aspects of the landlord's conduct are contradictory the court must look at that conduct as a whole, and decide what is its real effect. Whilst the essential nature of a surrender is consensual, that consensus would be demonstrated sufficiently by acts of the landlord which were, unequivocally, consistent only with such an intention.”

She went on to hold that the following propositions could be derived from the cases, or applied as a matter of principle:

- (1) The issue of whether there has been a surrender by operation of law after a tenant's abandonment of the leased premises must be determined by evaluating the effect of the landlord's conduct as a whole (cf *London Borough of Brent v Sharma* (1992) 25 headline rent 257 at 259). I accept [counsel's] argument that the totality of such acts can amount to a resumption of possession even though individual acts might each be only equivocal. With this in mind –
- (2) The test is whether the landlord's conduct is “so” inconsistent (*Oastler v Henderson* 1877 QBD 575 at 577) with the continuation of the tenant's lease that it could only be justified as being lawful on the basis that the landlord has accepted the tenant's implied offer to give back possession, and has taken possession of the premises beneficially for himself.
- (3) Accepting back the keys without more will always be equivocal. As a matter of practicality and common sense, one party has to hold the keys to prevent

an absurd situation in which they are passed back and forth because neither party wants to risk it being suggested that it has made an admission by holding them.

- (4) Any act of the landlord which is consistent with its rights under the lease, such as entering the premises to inspect or to repair them, will not in itself give rise to a surrender because, by definition, it is not inconsistent with the lease continuing.
- (5) Any further act of the landlord which amounts to protecting or preserving the property, such as taking security measures or doing necessary repairs, will not in itself give rise to a surrender because such self-help, necessary to preserve the landlord's interest in the value of his property, is a reasonable response to the tenant's evinced intention not to perform the obligations of the tenancy: cf *McDougalls Catering Foods Ltd v BSE Trading Ltd* 1998 P&CR 312; *Relvok Properties Ltd v Dixon* (1996) 25 P&CR 1, at p 7.
- (6) Similarly, an act of the landlord which amounts to the landlord's performing the tenant's covenants under the lease, such as keeping the garden tidy, would not necessarily amount to a resumption of possession as it is not inconsistent with holding the defaulting tenant to performing the lease.
- (7) Any further act of the landlord referable to the landlord's seeking to re-let the premises will not necessarily give rise to a surrender by operation of law, as it is no more than what the landlord might reasonably be expected to do in the circumstance for the potential benefit of all parties: *Oastler v Henderson* (above). The landlord must be entitled to seek to mitigate damage caused in reality (even if not yet technically in law so long as the lease remains extant) by the tenant's abandoning the lease, by seeking to obtain another tenant, without thereby losing his rights against the original tenant if he is unable to do so.
- (8) However, if the landlord goes further and uses the premises for his own benefit beyond the totally trivial – and certainly, in my judgment, if such use amounts to occupation of the premises, then he re-takes possession of the premises inconsistently with the continuance of the lease. This will give rise to a surrender by operation of law, since it is only on the basis of having accepted such a surrender that the landlord's acts would be lawful.

The landlord's appeal was dismissed by the Court of Appeal. The judgments were extempore and no transcript is available at the time of writing. However, Dyson LJ held that the judge's summary of the relevant principles correctly represents the law.