Chancery & Commercial

Case Law Update

Summer 2013

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The Chancery and Commercial Department at Cobden House provides expertise in every area of Chancery and Commercial law, including company law, construction, contract, insolvency, landlord and tenant, private client taxation, probate and family provision, property, partnerships, professional negligence and trusts.

For complex intellectual property matters, Matthew Kime (door tenant), is a leading junior who is happy to attend conferences in London, at Cobden House or at any solicitor's office in England and Wales.

The Department prides itself on delivering accurate legal analysis, practical advice and a high standard of advocacy. Members can also deliver CPD accredited seminars at solicitors' offices on request.

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Commercial Property - *Day v Hosebay Limited* [2012] UKSC 41

In the conjoined appeals against a decision of the Court of Appeal in *Day v Hosebay Limited* and *Howard de Walden Estates Ltd v Lexgorge Ltd*, the Supreme Court examined the meaning of a 'house' within Section 2 of the Leasehold Reform Act 1967.

The Court of Appeal had held that the buildings in question were 'houses' within the meaning of the 1967 Act, and the lessees were thus entitled to acquire the freeholds under the 1967 Act. The appeals in both cases were allowed, the Supreme Court holding that neither building was, on the relevant date, a 'house' within the meaning of Section 2 of the 1967 Act.

Lord Carnwath, delivering a speech with whom Lord Phillips, Lord Walker, Lord Mance, Lord Clarke, Lord Wilson, and Lord Sumption agreed, stated in respect of *Hosebay* that a building which is wholly used as a 'self-catering hotel' is not 'a house reasonably so called' within the meaning of the 1967 Act. The fact that buildings might look like houses, and might be referred to as houses for some purposes (for example, in the English Heritage list), was not sufficient to displace the fact that their use was entirely commercial. Similar reasons were given for allowing the appeal in *Lexgorge*; a building wholly used for offices, whatever its original design or current appearance, is not a house reasonably so called.

Katherine Ballinger

Contract - *Yam Seng PTE Ltd v Int. Trade Corp Ltd* [2013] EWHC 111 (QB)

A recent decision of the High Court has gone some way in signalling the start of a judicial-shift from historical English law principles concerning commercial contracts. Historically, the courts have been reluctant to interfere with such contracts and recognise a general duty to perform the same in good faith save other than in certain circumstances, such as in contracts of insurance. A closer reading of Mr Justice Leggatt's judgment suggests the emergence of a European-style approach to commercial contracts and leaves the door very much open to such arguments.

The case concerned an international distribution agreement between a supplier of Manchester United branded fragrances and a Singaporean distributor. The distributor alleged that the supplier was in breach of contract for, amongst other things, failing to make products available and providing false information. The distributor argued that there was an implied term in the agreement that the parties would deal with each other in good faith.

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In his judgment, whilst Mr Justice Leggatt stopped short of recognising a requirement of good faith to be implied by law into all commercial contracts, he found "no difficulty" in implying the duty where it was based on the "presumed intention of the parties", particularly in the case of long-term contractual relationships which he considered would require "a high degree of communication, cooperation and predicable performance based on mutual trust and confidence" and would involve "expectations of loyalty" which would not necessarily be set out in the express contractual terms but would be implicit in the parties' understanding and necessary to give business efficacy to such agreements. He gave examples of such agreements as joint venture agreements, franchise agreements and long term distributorship agreements. He found on the facts before him that the duty of good faith should be interpreted to mean there was an implied duty of honesty which would be breached by a party giving false information to the other.

Gary Lewis

Pre-emption and Perpetuity - *Taylor v Couch [2012] EWHC 1213 (Ch)* & *Cosmichome Ltd v Southampton City Council* [2013] EWHC 1378 (Ch)

Reported cases on rights of pre-emption and s9 Perpetuities and Accumulations Act 1964 are like proverbial buses, one waits for a professional lifetime for a definitive answer as to how s9 applies to rights of pre-emption and then two cases come along within 12 months of each other. Unfortunately the two cases give completely opposite answers to the question.

S9 (2) Perpetuities and Accumulations Act 1964 provides that the perpetuity period for an option is 21 years. S10 provides that if a right is void for perpetuity, it ceases to be enforceable as a contract.

The question whether a right of pre-emption creates an interest in land and hence binds third parties is susceptible of three answers. Firstly, a right of pre-emption creates an interest in land from the date of the instrument creating the right. As such the right operates like any other interest in land and all parties know where they are. This approach was probably the majority view of most practitioners until 1979 and arguably had been implicitly assumed by Parliament in various Statutes which treated rights of pre-emption as interests in land. Secondly, a right of pre-emption creates an interest in land, but only from the date of the triggering event, such as

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the decision of the vendor to sell. This conclusion leads to a multiplicity of situations, in some cases enabling rights of pre-emption to be enforced against third parties and in some cases not. Thirdly, a right of pre-emption does not create an interest in land and hence can never bind third parties.

In *Pritchard v Briggs* [1980] Ch 388 the majority of the Court of Appeal (to a large part rejecting received wisdom) held that the second answer was correct and that a right of pre-emption did create an interest in land, but only from the triggering event. Before that event the right of pre-emption was not an interest in land and could not bind third parties. It will readily been seen that *Pritchard v Briggs* created a problem for 9(2), namely whether the 21 year period ran from the date of the instrument creating the right of pre-emption or from the triggering event.

In *Wilson v Truelove* [2003] EWHC 750 (Ch); [2003] 2 EGLR 63 Mr Simon Berry QC sitting as a Judge of the High Court held that an option exercisable after the survivor of two named persons lapsed 21 years after the date of the creation of the option by reason of s9(2). While the reasoning is not as full as might be hoped, it may be that the experienced Judge and Junior Counsel from Lincoln's Inn both accepted that the 21 years ran from the date of creation and then proceeded to deal with other issues.

In *Taylor v Couch* [2012] EWHC 1213 (Ch) HH Judge Hodge QC sitting as a Judge of the High Court in Manchester went into the matter in greater detail. The case was fully argued and earlier case law (such as *Wilson v Truelove*) and textbooks were fully discussed. Judge Hodge held that upon grounds of policy and the wording of the proviso to s9(2) which referred to certain rights of pre-emption conferred on local authorities that "option" in this section included rights of pre-emption. It was forcefully put to the Judge that *Pritchard v Briggs* required the 21 years to run from the triggering event. Judge Hodge came to the conclusion that s9(2) was intended to give certainty and this was better served by the 21-year period commencing from the date of creation rather than the date of the triggering event. An appeal in *Taylor v Crouch* was subsequently compromised, the compromise being based more upon the asymmetry of the parties' economic interests rather than a consideration of the merits.

Taylor v Crouch was widely publicised in the electronic and professional press and was not the subject of any adverse comment. It also accords with the tentative conclusion of the Law Commission (lead Commissioner Dr Charles Harpum) in Report No 251 The Rule Against Perpetuities and Accumulations para 3.46 (which is not referred to in any judgment on this subject). The Perpetuities and Accumulations Act 1964 was the result of the Fourth Report of the Law Reform Committee (1956 Cmnd 18). This

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Committee, which included the future Lords Cohen, Devlin, Diplock and Parker, Mr R. E. Megarry QC and Dr J.C.H. Morris, did not mention rights of pre-emption at all in its discussion of options. However, the discussion of options was couched in pure policy terms of tying up land and was not in any way predicated upon what was and was not an interest in land.

In *Cosmichome Ltd v Southampton City Council* [2013] EWHC 1378 (Ch) the matter was considered by Sir William Blackburne sitting as a Judge of the High Court. In a passage which is difficult to understand the Judge appeared to hold that s9 (2) did not apply to rights of pre-emption, at least until the triggering event. Further he held that remorselessly applying *Pritchard v Briggs*, the 21 years only ran from the triggering event. He rejected the argument (which had attracted Judge Hodge) that s9 (2) pointed to a clear starting point.

Sir William Blackburne noted that the judgment of Judge Hodge was ex tempore and appeared to rely upon this as a reason for not following *Taylor v Couch*. With respect this is not an appropriate criticism since that Judge Hodge's judgment fully addressed the issues and indeed paid greater attention to such previous case law and commentary as existed than did Sir William Blackburne. If the process of reasoning is fully set out, concision should not distract from the authority of the decision. It is implicit in the judgment of Sir William Blackburne that he was not swayed by the argument that in the area of conveyancing, certainty is desirable and hence a decision of a High Court Judge (or counting *Wilson v Truelove* decisions of two High Court Judges) on a point which is fairly arguable either way should be followed.

The end result is that the law on the application of rights of pre-emption to s9(2) is in a state of complete uncertainty, which is unlikely to be resolved by a further decision of the High Court, and will only be resolved by the Court of Appeal. However, the real villain of the peace is the decision of the Court of Appeal in *Pritchard v Briggs*. The solution adopted by the Court of Appeal is academically unconvincing (see the discussion in Barnsley's Land Options 5th ed para 6-10-21) and, perpetuity apart, creates enormous practical problems, leaving such rights enforceable in some situations but not in others. Land owners do not know how whether such rights bite and much work is produced for the Chancery Bar. S115 Land Registration Act 2002 declares that rights of pre-emption "in relation to registered land" are interests in land capable of binding successors in title from the date of creation, but this is only prospective. Retrospective legislation or a decision of the Supreme Court reversing *Pritchard v Briggs* (which will be retrospective in its effect) is desirable.

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The position governing the rule against perpetuities and the rights of pre-emption would appear to be as follows:

Before 16th July 1964

> The Common Law Rights of pre-emption were subject to the common law rule against perpetuities. Accordingly they were only valid if they could not be exercised beyond a period of lives in being and 21 years. There was no "wait and see" and no "statutory lives". However, if the right was void for perpetuity, it was still enforceable as a matter of contract. Further a remorseless application of *Pritchard v Briggs* (as exemplified by *Cosmichome Ltd v Southampton City Council*) would lead to the conclusion that the perpetuity period did not commence until the triggering event. Thus, if a right of pre-emption were limited to a period of 20 years after the triggering event, the right would not be void even if it arose very many years after the creation of the right.

Between 16th July 1964 and 5th April 2010 (unregistered land) and 12th October 2003 (registered land) - S9 (2) Perpetuities and Accumulations Act 1964

> The right of pre-emption is subject to a 21-year period and there is "wait and see". If the right is void for perpetuity, it ceases to be enforceable as a contract. If *Taylor v Crouch* is correct, the 21 years runs from the date of creation. If *Cosmichome Ltd v Southampton City Council* is correct, the 21 years runs from the triggering event.
>
> There is a further argument alluded to in the judgment of Sir William Blackburne (para 45, 62) but not fully worked out. The commencement provisions of the Perpetuities and Accumulations Act 1964 are to be found in s15 (5), (6) and are as follows:
>
> (5) The foregoing sections of this Act apply… only in relation to instruments taking effect after the commencement of this Act…
>
> (6) This Act shall apply in relation to a disposition made otherwise than by an instrument as if the disposition had been contained in an instrument taking effect was made.
>
> Again, a remorseless application of *Pritchard v Briggs* would lead to the conclusion that the interest in land only arose at the time of the triggering event and until this occurred, the 1964 Act did not bite. If

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the right of the pre-emption was created during the period when 1964 Act was in force, but the triggering event occurred only after the Perpetuities and Accumulations Act 2009 came into force, there would be no perpetuity period applicable.

Between 12th October 2003 and 5th April 2010 (registered land)- S9(2) Perpetuities and Accumulations Act 1964 and s115 Land Registration Act 2002

> The right of pre-emption is subject to a 21 year period and there is "wait and see". If the right is void for perpetuity, it ceases to be enforceable as a contract. Because the right of pre-emption is by virtue of s115 Land Registration Act 2002 an interest in land, the 21 years starts to run from the date of creation.

After 6th April 2010 - Perpetuities and Accumulations Act 2009

> The rule against perpetuities does not apply at all to rights of pre-emption created after the 2009 Act comes into force.

Richard Oughton

Break Clauses and Rent Obligations – *Marks & Spencer Plc v BNP Paribas Securities Services* [2013] EWHC 1279

There has been a series of recent cases concerning the important question of rental obligations in the context of the exercise of break clauses. With the ever-increasing pressures upon, in particular, commercial tenants, the exercise of break clauses is becoming far more routine. Those break clauses which are currently being exercised are likely to be five-year break options in respect of leases granted at the height of the recession in 2008. Anyone who deals with lease renewals or acquisitions on a frequent basis will know that since 2008 the introduction of break clauses has become far more widespread and also that as the market has increasingly become a tenant's market, there has been a substantial rebalancing of the interests of landlord and tenant, one of the effects of which is that tenants are in much stronger positions now to bargain away conditionality in relation to the exercise of break clauses. Nevertheless, one of the prevalent conditions is that of the payment of rent and it is likely that whatever else happens to other forms of conditions precedent to the exercise of a valid break option, the rental obligation is likely to remain a stalwart.

The first decision to hit the headlines was the decision of Mr Justice Morgan in the case of *Avocet Industrial Estates LLP v Merol Ltd* [2011]

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EWHC 3422 (Ch), [2012] L. & T.R. 13 which put tenants into turmoil when he held that the tenant had lost its right to break because of a history of late payments of quarterly rent which had automatically generated the grand total of £130 of contractual interest which had never been demanded. The judgement operates upon the clear premises that (1) absolute strict compliance is required in order to exercise a conditional break clause and (2) it is for the tenant to know what he owes and therefore what he must pay in order to fulfil that conditionality.

In *PCE Investors Ltd v Cancer Research UK* [2012] EWHC 884 Ch Mr Justice Peter Smith held that where a break clause condition required that a tenant was to pay rent up to the termination date, the tenant was required to pay a full quarter's rent on the last quarter day preceding the break date notwithstanding that the exercise of the break clause would have the effect of terminating the relevant lease term before the end of the quarter period. Importantly in that case there was no requirement for the judge to consider what would happen in the event that the full quarter's rent was paid and whether or not, after the event, the final quarter's rental payment could be apportioned so as to give the terminating tenant a pro rata rent rebate.

That question arose, however, for determination in the most recent case of *Marks & Spencer plc v (1) BNP Paribas Securities Services Trust Co (Jersey) Ltd (2) BNP Parisbas Securities Services Trust Co Ltd* [2013] EWHC 1279, once more a decision of Mr Justice Morgan. It is perhaps not altogether surprising that having set this particular hare running and placing a heavy onus upon tenants seeking to exercise a break option, the same judge has now held that where a commercial tenant exercises a break clause, although normally the tenant will not be entitled to a refund of sums paid in advance which relate to a period after the break date in the absence of an express right to do so in the lease, circumstances existed in that case which were sufficient for the court to imply a term in favour of repayment of sums paid in respect of the period after the break date so as to give business efficacy to the lease.

The court acknowledged and in part relied upon the earlier decision of Mr Justice Peter Smith in *PCE* for the proposition that the basic rent payable as a condition of the exercise of the break clause was the payment of a full quarter's rent regardless of whether or not it later turned out that the lease in question would determine before the end of the particular rental quarter. The judge rejected a wide proposition that there was a general principle that because rent was consideration for use and occupation of the premises and because the use and occupation would cease upon the break date, there was therefore a failure of consideration giving rise to a restitutionary claim for repayment. Nevertheless the judge went on to consider the context of the

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break clause and the other conditions attached to the break clause and held that a reasonable person reading the lease in question would expect that where a break clause took effect, rent would only be payable for the period leading up to the break date but not for any period after the break date.

That proposition is likely to be of general application since it is based upon an objective assessment of the context rather than a subjective assessment of the terms of the particular lease in question.

One of the additional factors in favour of apportionment by reference to an implied term was the fact that in the lease under consideration the parties had already negotiated for a particular payment to be made to the landlord as compensation for the gaining of vacant possession on an accelerated basis. The judge commented that this factor made it even more unlikely that there had been any intention on the part of the parties that the landlord should not only take this negotiated payment but also the full amount of the quarter's rent after the break date. The court adopted the approach to implied terms set out in the speech of Lord Hoffmann in the Privy Council in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 where he said that the question of implication arises in circumstances where an instrument does not expressly provide for what is to happen in some particular set of circumstances. Lord Hoffmann indicated that in many cases the most usual inference to be drawn is that if the parties have not expressly provided what is to happen if something occurs then the logical consequence is that nothing is to happen but he went on to comment that in some cases, the reasonable recipient or reasonable addressee would understand the instrument to mean something else; he would consider that the only meaning consistent with the other provisions of the instrument read against the relevant background is that something is to happen and it is in such a case that the court implies a term as to what will happen if the event in question occurs.

Adopting this approach, Mr Justice Morgan felt able in the circumstances to imply an apportionment obligation so that the tenant could recoup the overpayment of rent in relation to the period following the break date.

Only time will now tell whether or not courts in the future are going to be willing to apply the wide approach based upon what a reasonable observer would expect the lease to do and whether the case is to be treated as one of general application so as to avoid the perceived injustice if the tenant is required to pay a full quarter's rent as a precondition of the exercise of the break clause or whether other tenants seeking to adopt the same argument are likely to fail in the absence of some express provision in the lease

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(such as the financial compensation package payable to the landlord in the *Marks & Spencer* case) which highlights the unfairness and the windfall nature of the post break date rent payment.

It is to be hoped, particularly bearing in mind that both the decision in *Avocet* and *PCE* went as far as the Court of Appeal but were compromised, that the Court of Appeal will have the ability to rule upon this particular issue in the near future.

For the time being, however, the advice to tenants remains that in the absence of express provisions to the contrary in the lease, the tenant who is desirous of terminating the lease early should pay any rent due in advance of the break date even though that rental payment is likely to cover a period following the break date and should then seek to recoup the "overpayment" utilising the implied term route as per the decision in the Marks & Spencer case. A unilateral apportionment in advance will not allow the break to operate.

Stephen Pritchett

Beneficial Interests - *Pankhania v Chandegra* [2012] EWCA Civ 1438

Long before the House of Lords created the foundations of beneficial interest claims moving forwards in *Stack v Dowden*, for those of us old enough to remember the law as it stood under *Gissing v Gissing* and *Pettit v Pettit* there was one fundamental principle which could be taken as read – that all of the law relating to contributions, reliance, constructive or implied trusts could be simply ignored if the parties had declared their respective beneficial interests either contemporaneously with the relevant transaction or in a separate document.

It appears however that the continued relevance of this principle has been masked by the new entitlement of the Court to approach the issue of beneficial interests in a holistic way – chancery practitioners might somewhat disparagingly say that the old chancery approach has been elided to a very large extent with principles heretofore far more prevalent in the Family Division than in the hallowed corridors of the Chancery Division.

In a comment towards the end of his judgment in Nilesh Pankhania, Lord Justice Mummery had cause to say this:

Finally, reliance on *Stack v Dowden* and *Jones v Kernott* for inferring or imputing a different trust in this and other similar cases which have recently

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been before this court is misplaced where there is an express declaration of trust of the beneficial title and no valid legal grounds for going behind it.

The suggestion is clear. Despite the clear law which existed prior to *Stack v Dowden*, litigants are apparently still chancing their arm on an application of the holistic approach even in the face of a clear and unequivocal declaration of trust.

The Facts

The property in question had been transferred into the names of P and C as tenants in common in equal shares with an express declaration of trust to that effect. The judge found that C had insufficient income to obtain a mortgage. P had therefore agreed to become a joint mortgagor so that his salary would be taken into account. The judge held that P had never sought to live in the property, nor to derive any income from it, and had only recently paid some £2,500 towards the mortgage. The judge decided that the transfer had been a sham, that the property had been bought for C, and held that the beneficial interest was C's absolutely.

Analysis

As long ago as *Pettit v Pettit* in the House of Lords, Lord Upjohn said:

"… the beneficial ownership of the property in question must depend upon the agreement of the parties determined at the time of its acquisition. If the property in question is land there must be some lease or conveyance which shows how it was acquired. If that document declares not merely in whom the legal title is to vest but in whom the beneficial title is to vest that necessarily concludes the question of title as between the spouses for all time, and in the absence of fraud or mistake at the time of the transaction the parties cannot go behind it at any time thereafter even on death or the break-up of the marriage."

Although that statement being in the highest court and being deserving of being afforded the greatest respect, the authority which most practitioners of a certain vintage cite in support of the self-same proposition is *Goodman v Gallant* [1986] 1 FLR 513.

In that case a couple purchased what had been the claimant's former matrimonial home in which she believed she had enjoyed a 50% beneficial interest. The property was conveyed to them jointly but the conveyance also contained a declaration that they held the property upon trust for sale to hold the net proceeds of sale upon trust for themselves as joint tenants.

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The Court held two things which have since been unchallenged and of universal application. Firstly, that the express declaration is binding in the absence of a vitiating factor such as fraud or undue influence. Second, that where there is a beneficial joint tenancy, a severance gives rise to a beneficial tenancy in common in equal shares. Thus Slade LJ said on the former issue

If, however, the relevant conveyance contains an express declaration of trust which comprehensively declares the beneficial interests in the property or its proceeds of sale, there is no room for the application of the doctrine of resulting implied or constructive trusts unless and until the conveyance is set aside or rectified; until that event the declaration contained in the document speaks for itself.

Those wholly unequivocal statements of principle appear to rule out any application of constructive or implied trust principles where there is an express declaration of trust.

It is somewhat surprising therefore that the Court of Appeal appears to have been bothered with numerous appeals which appear to have involved questioning [or ignoring] these principles in favour of opening up the whole issue afresh, no doubt to seek to persuade the Court that the express declaration has turned out [in the view of one or other party] to be a bad deal in hindsight and that the whole relationship should be looked at so as to determine what implication if any should be made as to the parties' respective beneficial interests applying these holistic principles we now hear so much about.

In fact, the need for the Court of Appeal to re-state the sanctity of the rule in *Goodman v Gallant* is all the more surprising bearing in mind that Baroness Hale commented, in her seminal speech in *Stack v Dowden* at paragraph 49:

In the olden days, before registration of title on certain events, including a conveyance on sale, became compulsory all over England and Wales, conveyances of unregistered land into joint names would in practice declare the purchasers' beneficial as well as their legal interests. No one now doubts that such an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel: see *Goodman v Gallant* [1986] Fam 106. That case also establishes that severance of a beneficial joint tenancy results in a beneficial tenancy in common in equal shares. Lord Denning MR's attempt in *Hine v Hine* [1962] 1 WLR 1124, to use section 17 of the Married Women's Property Act 1882 to interfere even

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with express declarations of trust was firmly rejected by this House in *Pettitt v Pettitt* [1970] AC 777; his suggestion, in *Bedson v Bedson* [1965] 2 QB 666, that severance might not automatically lead to a tenancy in common in equal shares was rightly rejected in *Goodman v Gallant* [1986] Fam 106. The effect of such a conveyance is clear, irrespective of why the property was conveyed into joint names and of the parties' later dealings in relation to it.

Far from suggesting that *Goodman v Gallant* should be sidelined, Lady Hale embraced its correctness.

The problem of course was that *Goodman* emanated from a time of unregistered conveyancing and was determined by reference to conveyances containing express declarations as opposed to the position under the land registration system where the relevant forms did not always make it easy to include an express declaration of trust on the face of the transfer itself.

Nevertheless, I would suggest that to seek to draw a distinction between a situation where an express declaration had been concluded in registered land and one where it had been concluded in unregistered land was bound to fail. The issue here is not one of form but of substance. The nature of an express declaration in whatever context, made by deed, ousts the role of constructive or implied trusts because in searching for the underlying agreement which existed between the parties, the Court needs go no further than the parties' own executed deed declaring those interests.

In its Discussion Paper "Sharing Homes" in November 2002 (Law Com No 278) the Law Commission said at 2.22

We support the robust approach of the court in *Goodman v Gallant*. We believe that those sharing homes should be given every encouragement to stipulate expressly for their beneficial entitlement. If that is to be the case, it is essential that courts strictly enforce declarations of trust which have been freely and fairly made by the parties.

It is therefore with no great surprise that the Court of Appeal has re-affirmed that despite everything which has been said in *Stack* and *Kernott*, if parties do expressly declare their beneficial interests either at the time or subsequently, like any other contract, that will be binding upon the parties absent an appropriate vitiating factor.

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Unregistered Land – *Turner v Land Registrar* [2013] EWHC 1382

It is with increasing infrequency that the Chancery Division is asked to rule upon basic propositions of land law. It is well known that property law is far from the most dynamic area of practice. When in pupillage it was a requirement to be able to recite the gist of section 1 of the Law of Property Act 1925 but, in the light of the now overwhelming precedence of the registered land system, there may be many property lawyers who have never even had to grapple with the intricacies of unregistered land let alone appreciate the important distinction and fundamental basis of the 1925 property legislation enshrined in section 1.

It is, therefore, somewhat refreshing to see section 1 of the Law of Property Act 1925 at the heart of the argument and the decision of Mr Justice Roth in the Chancery Division on 24 May 2013 upon an application by Mr Jimmy Turner, a self-styled gypsy, who wished to register a caution against first registration of the land which he occupied as a squatter until such time as his occupation crystallised into an entitlement to apply for first registration himself based upon a sufficient period of adverse possession.

Mr Turner would only be entitled to register a caution against first registration of the unregistered land if he came within one of the two categories set out in section 15 (1). Mr Turner argued that he was the owner of a "qualifying estate" but in seeking to defend the application the Registrar accepted that Mr Turner had an estate in land but that it was in fact a freehold estate and therefore not one which was susceptible of supporting an application for the registration of a caution against first registration. The question arose, head-on, therefore, as to the status of Mr Turner and the nature and extent of his "estate in land".

Mr Turner had been in occupation as squatter of the land in question since 2007 and accordingly his squatter's rights were currently inchoate. The interesting part of the judgement in the case relates not to the procedural aspects as to why Mr Turner was not entitled to register his caution but rather to the discussion by the judge of the effect of adverse possession in the context of unregistered land, particularly, in the period prior to the extinguishment of title of the paper title owner.

Citing from Megarry & Wade at paragraphs 4-008 and 4-009 the court explained that a squatter's possession immediately gives him all the rights and powers of ownership for the purposes of the civil law. The squatter has a legal estate, a fee simple absolute in possession but so also does the paper title owner until such time as his title is extinguished by limitation.

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The judge noted that it is a fundamental concept of English land law, especially in the unregistered land context, that title is relative not absolute. The squatter and the paper title owner may both hold an absolute freehold title but the paper title owner is always entitled to eject the squatter until such time as the paper title owner's own freehold estate has been barred by limitation.

Limitation does not confer title. In the course of the judgement and citing from numerous authorities, the judge made it clear that the operation of the limitation statute is negative. It extinguishes the right and title of the dispossessed owner and leaves the squatter or occupant with a title gained by reason of his possession and which rests upon the inability of any other person higher up the title chain to eject him.

In the intervening period before the expiration of the statutory 12 years, the squatter whilst having a title susceptible of being defeated by the paper title owner, is nevertheless himself protected by his possession; possession itself being recognised by the civil law as entitling the person in possession to the benefits of the property and to eject others including the right to convey the land and including the right to pass his possessory interest under his will or intestacy.

Mr Turner therefore had a freehold estate albeit one susceptible of defeat by the paper title owner. His application was accordingly dismissed.

Stephen Pritchett

Articles in this edition have been provided by Richard Oughton, Stephen Pritchett, Katherine Ballinger and Gary Lewis.