ROCK FERRY WATERFRONT TRUST and ROCK FERRY SLIPWAY TRUST

V

PENNISTONE HOLDINGS LIMITED

INTERESTING CASE ON FUNDAMENTAL ISSUES IN LAND LAW

1. The decision of the Chancery Division in *Rock Ferry Waterfront Trust v Pennistone Holdings Limited [2020] EWHC 3007* has just appeared on *Bailli*. In this matter, instructed by *Johnson & Boon* solicitors of Wallasey, I represented the successful Claimants. The facts of the case involving *the Land Charges Act*, proprietary estoppel, the equitable doctrine of notice and overriding interests under *the Land Registration Act 2002* could easily have come out of a University land law examination.

2. Unusually for a case involving notice and "actual occupation", the case did not involve either a house or a mortgage and instead involved the purchase of commercial land of substantial area.

3. The land in question was quite extensive and involved a disused oil facility in Rock Ferry, Wirral. The land was divided into three parts, each of a different nature and physically separate from each other, namely a slipway used by members of the public and in particular by the Royal Mersey Yacht Club ("the Slipway"), a dilapidated pier ("the Pier") and an enclosed area of land which had previously been an oil storage facility, but by the time of the dispute had been largely cleared ("the Vestor Oil Site").

4. Prior to 2015 all three parts of the land had been registered under the one title in the name of Toluca Limited, an Isle of Man company associated with a Mr Dennis Murphy. By a Transfer dated 17th November 2015 ("the 2015 Transfer") the land was transferred for £2,750 to the Defendant, Pennistone Holdings Limited, an English company controlled by Mr Murphy ("Pennistone").

5. Mr Murphy deliberately chose not to register the 2015 Transfer because as the Judge found, he wished not to advertise his involvement in the Land which had onerous environmental liabilities. The result was that Toluca Limited remained the registered proprietor.

6. In 2016 Toluca Limited was dissolved in the Isle of Man, with the effect that the legal title passed by escheat to the Crown. It was common ground that the Crown taking by escheat was not a "purchaser".

7. For some time, the Royal Mersey Yacht Club had wished to assist in the regeneration of the area and to this end, the First Claimant, a not for profit company, was incorporated. By a Transfer dated 25th April 2019 ("the April 2019 Transfer") the First Claimant purchased the Land from the Crown and proceeded to register its title. Subsequently the First Claimant sold the Slipway to the Second Claimant, which was another not for profit

company set up by members of the Royal Mersey Yacht Club and the Second Claimant was duly registered as proprietor of the Slipway under a separate title.

8. After registration of the Claimants, Pennistone claimed to have an equitable interest under the 2015 Transfer binding upon the Claimants pursuant to *para 2 Schedule 3 Land Registration Act 2002* and asserted that it was in possession of the Vestor Oil Site. The Claimants sued for possession of all three parts of the Land and Pennistone counterclaimed for rectification of the register to give effect to its overriding interest in respect of all three parts. Neither party claimed monetary relief, such as mesne profits, which simplified the litigation.

9. The case came on for trial on 6th October 2020 before HH Judge Hodge QC in Liverpool County Court. On that morning, newly instructed Counsel for Pennistone, Mr Wilson Horne, submitted that the effect of escheat was to create an entirely new unregistered title and that therefore the matter was governed by the provisions of *para 2 Schedule 1 Land Registration Act 2002* which set out overriding interests upon first registration of title and had a wider definition of "actual occupation" than *para 2 Schedule 3*. Mr Horne's analysis of the effect of escheat was accepted and upon the basis that the consequences were matters of law, Pennistone was given permission to amend to rely upon *para 2 Schedule 1*. Further the case was transferred to the High Court.

10. The effect of escheat giving the Crown a new unregistered title was the issue of whether Pennistone's equitable interest bound the Claimants had to be considered under three different regimes, namely:
    (a) In relation to unregistered land, the equitable doctrine of notice and *the Land Charges Act 1972* were applicable. The burden of proof of lack of notice and lack of registration as a land charge was upon the Claimants (although this matter was not mentioned by the Judge) and the relevant time was the date of the April 2019 Transfer;
    (b) Upon the first registration of title by the First Claimant, whether Pennistone was in "actual occupation" within *para 2 Schedule 1 Land Registration Act 2002*. The burden of proof of "actual occupation" was upon Pennistone and the relevant date was the date of the First Claimant's registration as proprietor;
    (c) Upon the sale of the Slipway by the First Claimant to the Second Claimant whether Pennistone was in "actual occupation" within the differently worded *para 2 Schedule 1 Land Registration Act 2002.* The burden of proof of "actual occupation" was upon Pennistone and the relevant date was the date of the Transfer from the First Claimant to the Second Claimant.

11. It was argued that Pennistone was estopped from asserting its rights against the First Claimant because it deliberately chose not to register the 2015 Transfer and thereby represented that Toluca Limited was still the registered proprietor. Judge Hodge rejected this argument upon the basis that one could not have a proprietary estoppel upon the basis of an omission and because the April 2019 Transfer expressly stated that the First Claimant took subject, inter alia, to overriding interests.

12. It was further argued that Pennistone's equitable rights should have been registered as a C(iv) land charge-an estate contract and hence the First Claimant took free of Pennistone's

interests because no C(iv) land charge was registered. The argument was advanced that under *Walsh v Lonsdale* equitable rights falling with the definition of an "estate contract" included not only a contract to grant a lease, but also an actual lease which did not take effect as a legal lease because it was not under seal as required by *s52(1) Law of Property Act 1925*. It was therefore argued that a Transfer of registered land which took effect in equity because it was not substantively registered in accordance with *s27(1) Land Registration Act 2002*, was equally an "estate contract". This point interested Judge Hodge, but ultimately, he rejected it. At *para 59* of the judgment he distinguished between a defective lease which was a new interest and needed equity to fill the void. This was to be distinguished from a defective Transfer of an existing estate where statute in the form of *s27(1)* decreed the consequences of the defect in formality as opposed to *Walsh v Lonsdale*.

13. If Pennistone is granted permission to appeal, the Claimants will serve a Respondents' Notice seeking to uphold the overall decision of Judge Hodge QC upon the grounds that their arguments upon proprietary estoppel and the *Land Charges Act* should have been accepted.

14. In relation to the doctrine of notice, outside the sphere of houses, there is a dearth of cases of what constitutes constructive notice by reason of a person being in occupation of land. The supposed leading case of *Hunt v Luck* was in fact a case concerning the receipt of rents where the courts went to some lengths to limit the operation of constructive notice.

15. The facts as found by the Judge were that at the relevant time the Vestor Oil Site was enclosed by secure fencing and access to the site was only obtained through two gates. It was common ground that one gate was never opened. The Judge found that Pennistone did not carry on any activity on the Vestor Oil Site. In December 2018 a director of the First Claimant replaced an existing padlock on the other gate. This padlock was itself replaced by a padlock by Mr Robertson (who had acted as a "caretaker" for Mr Murphy's companies) before the April 2019 Transfer, although this was only observed by the First Claimant after completion. The director of the First Claimant considered at the time that the original padlock had been installed by Mr Robertson in the belief that Toluca Limited still owned the Land. Judge Hodge held that the First Claimant should have inspected the Land before purchase and that if he did so, he would have seen Mr Robertson's new padlock and this would have led him to enquire of Mr Robertson which would have led to Mr Murphy. Accordingly, the First Claimant had notice of Pennistone's equitable interest. The reasoning is a reminder that the division between actual and constructive notice is not clear cut and that many cases involve both concepts (compare *Kingsnorth Finance Co. Ltd v Tizard [1986] 1 WLR 783*). Had not the director made the connection between the first padlock and Mr Robertson, it must be very doubtful whether the mere existence of a padlock could constitute notice.

16. The next issue which the Judge had to decide was whether Pennistone was in "actual occupation" within *para 2 Schedule 1 Land Registration Act 2002*. The Judge had no hesitation in finding that Pennistone was not in any way in "actual occupation" of either the Pier or the Slipway and accordingly the Claimants had good title to these parcels of land. In requiring the Court to examine actual occupation of each and every part of the

registered title, *the Land Registration Act 2002* is different to the position under *the Land Registration Act 1925* as laid down by the Court of Appeal in *Walcite Ltd v Ferrishurst Ltd [1999] Ch 355*.

17. As regards the Vestor Oil Site, the position was that this parcel was securely fenced and Pennistone (arguably) maintained control of the one relevant gate. As found by the Judge, Pennistone carried out no or minimal acts on the land which was otherwise vacant. The question of whether enclosure with no or only minimal acts of user is sufficient to constitute "actual occupation" within *para 2 Schedule 1 Land Registration Act 2002* inevitably led to consideration of another trial in Liverpool 19 years previously in which I was involved, namely *Malory v Cheshire [2002] EWCA Civ 151; [2002] Ch 216*. There the Court of Appeal controversially affirmed Judge Maddocks to hold that enclosure with minimal acts of user was sufficient to constitute "actual occupation" within *s70(1)(g) Land Registration Act 1925*.

18. It is not widely known that as Counsel for the unfortunate Defendant in *Malory v Cheshire*, I obtained permission to appeal to the House of Lords, upon a variety of grounds including the question of "actual occupation", see *[2002] 1 WLR 3016*. Interestingly, one of the members of the Appellate Committee which granted permission to appeal was Lord Nicholls of Birkenhead, who grew up about 1½ miles from the Land. The appeal was settled about two and half weeks before it was due to be heard upon the basis that the Chief Land Registrar paid all parties an Indemnity. Leading Counsel for the Chief Land Registrar in the House of Lords was to be Mr David Hodge QC.

19. In the present case the Judge set out in some detail my submissions about the ratio of *Malory v Cheshire*, namely the maintenance of an existing fence was different from an existing fence, Arden LJ in her judgment did not say that previous authorities to the effect that enclosure was not sufficient were wrong, *Malory v Cheshire* turned upon the precise acts done upon the land and that ultimately *Malory v Cheshire* turned upon the reluctance of the Court of Appeal to interfere with a finding by the trial judge. Judge Hodge found that Pennistone was not in "actual occupation" of the Vestor Oil Site and accordingly the First Claimant took free of its interest. The judgment set out in detail the acts or lack of them by Pennistone on the Vestor Oil Site (including a re-iteration of *Strand Securities Ltd v Caswell [1965] Ch 958* that acts done by a licensee for his own benefit did not constitute "actual occupation"), but did not explain which parts of the submissions upon the effect of *Malory v Cheshire* were accepted.

20. As the Claimants had succeeded upon *Schedule 1 Land Registration Act 2002*, it was not necessary to consider *Schedule 3*.

Richard Oughton

24th November 2002