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CASE LAW UPDATE

Alero Orimoloye
19th April 2016

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The main cases we will cover



- *Cain v Islington London Borough Council [2015] UKUT 542 (LC)*
 - Agreement or admission of service charges
- *Waler v London Borough of Hounslow [2015] UKUT 0017 (LC)*
 - Approach to liability for improvements

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The main cases we will cover



- *Post Box Ground Rents Limited v The Post Box RTM Company Limited [2015] UKUT 0230 (LC)*
 - Costs and the Tribunal
- *Avon Ground Rents Limited v 51 Earls Court Square RTM Company Limited [2016] UKUT 0022 (LC)*
 - Describing the premises in the Model Articles

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The main cases we will cover



- *Jewelcraft Ltd V Pressland [2015] EWCA Civ. 1111*
 - Right to enfranchise mixed use building
- *West End Investments (Cowell Group) Ltd V Birchlea Ltd [2015] EWHC 33819 (Ch)*
 - Exclusion of overlapping premises

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The main cases we will cover



- *Tibber V Buckley [2015] EWCA Civ 1294*
 - Leasebacks in an enfranchisement claim
- 36 Harrington Gardens Headlease Ltd V Cadogan Holdings Ltd
 - Dispute arising under S48(3) of the 1993 Act

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Relevant legislation



- Landlord and Tenant Act 1985
 - SS18-30
- Commonhold and Leasehold Reform Act 2002
- Chapter 1, Part 2
- Leasehold Reform Housing and Urban Development Act 1993
- Chapter 1 and 2
- Leasehold Reform Act 1967

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Cain v Islington LBC



- Upper Tribunal (Lands Chamber)
- Decision dated 25 September 2015

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The central issue

- When challenging service charges does making payment without protest over many years make any difference?
- What constitutes admission or agreement of service charges?
- S27A(4)(a) and (5) Landlord and Tenant Act 1985

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LTA 1985-S27(A)(4)(a)

- No application under subsection (1) or (3) may be made in respect of a matter which -
- has been **agreed or admitted** by the tenant

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LTA 1985 - S27(A) (5)

- But the tenant is not to be taken to have agreed or admitted any matter **by reason only of having made any payment**



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The facts



- 2002: Lessee bought flat
- July 2014: application to FTT (PC) to decide reasonableness of service charges
 - dating from 2002 to 2013

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What happened at the FTT (PC)



- Decided could not challenge service charges more than six years old as admitted/agreed them
 - Paid them
 - Waited long time before challenge
- Lessee appealed to Upper Tribunal (LC)

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What did the Upper Tribunal decide?




- Agreement/admission may be
 - Clear-cut, or,
 - Objectively understood from facts and circumstances
- Single payment on its own not enough to prove agreement/admission
- Multiple payments over time might suffice especially if made without complaint
- Each case depends on its facts

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What did the Upper Tribunal decide?

- FTT (PC) entitled to conclude lessee agreed/admitted charges for years 2001/02 to 2007
- Series of payments following demands during period
- Long time elapsed before challenge made



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Discussion

- What are the implications of this decision for your
 - a) Collection practices
 - b) Relations with leaseholders?

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Waler v LB Hounslow

- Upper Tribunal (Lands Chamber)
- Decision dated 26 January 2015

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Waller v LB Hounslow



- New test for improvements
- Discretion to undertake works
- Take particular account of
 - Lessees' interests
 - Views on proposals
 - Financial impact
 - Availability of alternative and less expensive remedies



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Waller v LB Hounslow

- **Going to the Court of Appeal**
- **Listed for hearing by 24 & 25 January 2017**



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Post Box Ground Rents Limited

- Upper Tribunal (Lands Chamber)
- Decision dated 1 June 2015



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2002 Act-SS 87 and 89



- RTM company liable for reasonable costs incurred by landlord or others consequent on giving claim notice if decides no longer wishes to acquire RTM either where
- Withdraws claim notice or
- Counter-notice served and decides not to apply to tribunal or withdraws the application

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O Twelve Baytree



- Judicial review proceedings
- Claim Notice given
- Negative counter-notice served
- Tribunal application made by RTM company

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O Twelve Baytree



- Hearing fixed
- Preparation costs incurred
- Prior to hearing date RTM company indicated no longer wished to pursue claim and wished to withdraw tribunal application
- High Court decided this communication not enough to conclude the proceedings

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O Twelve Baytree



- Withdrawal takes place only when tribunal consents
- Until then tribunal continues to have jurisdiction for purpose of
 - Deciding substantive dispute or
 - Dismissing application and
 - Ordering costs

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2002 Act-S88 (3)



- A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before a tribunal **only if the tribunal dismisses an application by the company** for a determination that it is entitled to acquire the right to manage the premises

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Consequence of Baytree



- Under S88 (3) clear that costs liability incurred as a party to tribunal proceedings only comes about if tribunal dismisses application
- Without more withdrawal of application does not bring it to an end
- Only ends when formally dismissed by tribunal

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What did Upper Tribunal decide?

- Letter withdrawing application plus landlord's consent not enough to be liable for landlord's S88 costs
- Tribunal should have considered whether it should have dismissed application

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What did Upper Tribunal decide?

- Dismissed application itself
- RTM company liable for landlord's costs


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51 Earls Court Square

- Upper Tribunal (Lands Chamber)
- Decision dated 11 January 2016

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2002 Act-S73 (2)



- A company is a RTM company **in relation to premises if-**
- (a) it is a private company limited by guarantee, and
- (b) its memorandum of association states that its object, or one of its objects, is the acquisition and exercise of the right to manage the premises

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The facts



- Block of 13 flats
 - Leases for 125 year term from 25 December 1983
- 5 December 2014: Leaseholders incorporated the purported RTM company
 - Comprised all 13 flats
- 8 January 2015: Claim Notice served
- Negative counter-notice served
- Application to the FTT(PC)

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What was the landlord's argument?



- Model Articles stated object was to manage "Flat 1-13 ,51 Earls Court Square"
- Argued not premises to which RTM applied but only flat(s) within them
- FTT (PC) found for the RTM company
- Landlord appealed

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What did the Upper Tribunal decide?

- Upheld FTT (PC) decision
- Model Articles had to state object of RTM company was to manage the premises falling within S72 meaning
- From viewpoint of reasonable reader clear that "Flat 1-13 51 Earls Court Square" referred to premises containing the flat

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Jewelcraft Ltd/question on appeal

- Whether premises at 373 Upper Richmond Road, London, SW15 qualify as a house for the purpose of S2(1)?

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Jewelcraft Ltd/the facts

- Premises consist of a ground floor purpose-built shop with residential accommodation on the floor above
 - Part of a parade of shops of similar construction and appearance constructed in the 1920's
 - Ground floor shop could be accessed via an internal staircase

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Jewelcraft Ltd/the facts

- First floor comprised a sitting room, two bedrooms, bathroom and W.C with access to the ground floor kitchen through the internal staircase.
- Alterations to the internal layout undertaken in 1970 to remove ground floor kitchen and scullery. Internal staircase removed as well
- First floor flat became self contained with external staircase in the backyard

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Jewelcraft Ltd/the facts

- Premises initially let on a 99 year lease
- Sublease granted in Oct 1978 restricting the use of the upstairs flat to employee of the tenant


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What did the county court decide?

- Held the premises were not a house for the purpose of S2(1)
 - *"The question that I have to address is not whether it is possible to call the building in this case, a house. I have had regard to the history of the property, the physical appearance of it, the layout, the terms of the lease and the user of the premises over the years. The starting point as far as I am concerned is that the building does not look like a house. It is part of a parade of shops with living accommodation over it...it was not built as a house. Nor is it now a physically mixed unit. The two units have been separate for the last 40 years." per HHJ Dight*

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What did the C/A decide?



- Considered the following;
- It is a question of law and not a purely factual issue whether a particular property is a house within S2(1)
- Parliament's intention is to include certain recognisable types of property
 - Right should not depend on particular physical characteristics
 - Eg whether various parts of the premises were linked internally/externally
- Correct interpretation of S2(1) should promote consistency of treatment if driven by considerations of policy

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The Outcome



- Endorsed H/L decision in the *Tandon* case that shops with accommodation above are, as a matter of law, reasonably to be described as houses for the purpose of S2(1) provided that a material part of the building is designed/adapted for and used for residential purposes on the relevant date
- Appeal allowed

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West End Investments (Cowell Group) Ltd/ the facts



- Premises known as 3 Grosvenor Gardens Mews East, London SW1
- Lessee obtained a declaration that it was entitled to acquire the freehold interest
- Landlord appealed on the ground that premises not a house by virtue of S2(2) of 1967 Act

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The facts



- The house was at the back of No.3 Grosvenor Gardens
- Adjoining the house to the North was 1/1A Grosvenor Gardens
- The house and 1/1A Grosvenor Gardens are divided by a single wall (designated a party wall)
- Nos. 1/1A was several storeys higher than the house and at the higher levels was an overhang of a width of one brick between the premises not comprised in the house

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What did the county court decide?



- The judge at first instance decided there was no relevant overhang/underhang
- Even if there was, it was de minimis

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What did the High court decide?



- Landlord's appeal dismissed
 - S2(2) 1967 Act was not engaged because this was not a case where there was in reality a "kink" or "dog-leg"
 - S2(2) is concerned with a significant deviation from the vertical such as a room(s) extending horizontally
 - To engage S2(2) there must be a significant deviation from the division of the building in the vertical plane

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What did the High court decide?



- Part of the single vertical wall divided the house from 1/1A Grosvenor Gardens
 - This did not comprise any of the floor area of the house
 - Position different if it comprised a substantial part of the living room, bedroom, kitchen or bathroom
- The thickness of a single brick above/below the level of the roof as an overhang/underhand was de minimis

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What did the High court decide?



- Inconsistent with the purpose of 1967 Act to allow the legal division of a party wall to disqualify the house from enfranchisement
 - Landlord's interest protected by S2(5) of 1967 Act (where applicable)

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Tibber V Buckey/the facts



- The Building is a five floor terraced house comprised of
- 3 flats at 32 Petherton Rd
- Flats A and B were held on long leases
- Flat C was let on an assured shorthold tenancy
 - No evidence of shorthold tenancy agreement
 - Difficult to determine description of premises comprising Flat C

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Tibber V Buckey/the facts



- Applicants served a claim notice to acquire the freehold
- Landlord served a counter notice admitting their right with proposal for a leaseback of her flat
 - Landlord wished to retain right to convert the flat into two units

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Landlord's position



- Landlord contended for a leaseback of Flat C with its physical limits including;
 - External walls, roof, roof structure, windows, part of the mezzanine landing formerly partitioned off and the front garden area
 - Landlord desirous of redevelopment to convert flat into two units
- Landlord claimed in the alternative rights of easement over mezzanine area for the storage of bicycles and other items
- Claimed easement for the storage of dustbins and bicycles in garden area

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Landlord's position



- Landlord had not expressly asked for mezzanine landing and whole of front garden in the counter notice/identify these areas in her attached plans
- She did not ask for exterior walls to be included also

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Tenants' Position



- The amended draft lease excluded from the leaseback premises the external walls, roof and roof structure and window frames

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Application to the LVT



- Parties could not agree the terms of the leaseback and applied to the LVT to resolve the differences

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S36 & Sch.9 of the Act



- S36 requires nominee purchaser to grant a leaseback in accordance with schedule 9
- Sch.9 sets out who is entitled to a leaseback and on what terms
- Leaseback of unit or flat includes:
 - Any yard, garden, garage, outhouses and appurtenances belonging to or usually enjoyed with it and let with it immediately before the appropriate time

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Issue for the LVT



- LVT concerned with the physical extent of premises to be comprised in the leaseback
- How does leaseback proposal differ from Part IV Sch.9 to the Act?

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What did the LVT decide?



- Decided that premises to be demised by leaseback were Flat C in its current state with rights over common parts and front garden
- Decided that terms of leaseback to accord with Part IV
 - Terms to include a covenant against the making of alterations by lessee without landlord's consent
- Rejected landlord's proposals to depart from certain Part IV provisions

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What did the Upper Tribunal decide?



- Agreed that LVT erred in its approach
- Decided the proper approach was that the limit of the entitlement by way of leaseback was as set out in landlord's counter notice
 - Landlord not entitled to identify physical limits of her flat more broadly than she had in the counter notice

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What did the Upper Tribunal decide?

- Decided that landlord not entitled to propose departures from the Part IV provisions if not specified in counter notice
- Appeal dismissed

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Issues for the Court of Appeal

- Whether it is open to a landlord to ask for -
- The premises to be demised by a leaseback to include parts not specified in the counter notice and /or
- The terms of the leaseback to depart from the Part IV provisions when such departures have not been identified in the counter notice


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What did the Court of Appeal decide?

- Decided that the statutory language of S21(3) does not require the reversioner to spell out in the counter-notice any proposed departures from Part IV
- Confirmed that the reversioner's task is simply to make clear in the counter-notice the identity of the flat or other unit that is the subject of the leaseback claim

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What did the Court of Appeal decide?



- Decided that leaseback premises should be confined to the flat comprising the second and third floors
 - Exclude exterior walls, window frames, roof and roof structure and or airspace contiguous to the roof
- The starting point for identifying the premises will be derived from the tenancy agreement
 - No copy of tenancy agreement produced to court so difficult to disprove supposition
 - Improbable that tenancy agreement would include any part of the exterior premises

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What did the Court of Appeal decide?



- Concluded that landlord failed to produce any evidence to justify finding that walls, window frames, roof and roof structure and exterior were comprised in the letting of flat C/formed any part of Flat C
- Agreed with tenants that the mezzanine landing was/is part of Flat C and was not an appurtenance for the purpose
- Agreed that the front garden was not an appurtenance let with Flat C

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What did the Court of Appeal decide?



- Accepted landlord's proposal to leave one bicycle on the mezzanine landing
- Accepted the proposal to store two bins in the bin storage area
- Appeal succeeded in part

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36 Harrington Gardens Headlease Ltd V Cadogan Holdings Ltd/facts



- Judgment delivered on 23 October 2015 by Mr Recorder Murray Rosen QC

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36 Harrington Gardens Headlease Ltd V Cadogan Holdings Ltd/facts



- Landlord was ready to complete a lease extension within a month of the terms and price being agreed
- He requested a completion date from tenant
- Tenant failed to respond
- Tenant made an application under S48(3) of the Act

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S48(3)



- Where -
- (a) the landlord has given the tenant such a counter-notice or further counter-notice as is mentioned in subsection (1)(a) or (b), and
- (b) all the terms of acquisition have been either agreed between those persons or determined by [the appropriate tribunal] under subsection (1),
- but a new lease has not been entered into in pursuance of the tenant's notice by the end of the appropriate period specified in subsection (6), the court may, on the application of either the tenant or the landlord, make such order as it thinks fit with respect to the performance or discharge of any obligations arising out of that notice

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Landlord's position



- Landlord argued an abuse of process for tenant to seek an order compelling landlord to grant a new lease when landlord was willing to do so without a court order
- Alternatively court should order obligations created by the notice to be discharged

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Tenant's Position



- Tenant argued legitimate for tenant to make an application under S48(3) when needed more time to complete the new lease

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What did the court decide?



- Held that not an abuse for tenant to apply to court in the circumstances
- Ordered that once a reasonable period for completion has passed, tenant to pay interest and landlord's costs as a condition of grant of new lease
- Ordered that 2 months after the end of the 4 month period was reasonable to allow for completion

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What did the court decide?




- Decided that if within 21 days tenant paid agreed premium and statutory costs, new lease to be completed at the end of 21 days
- If tenant failed to pay within 21 days, but paid within the following 28 days with additional interest at 10% per annum for further delay, then new lease to be completed when money paid
- Otherwise obligations under the notice would be discharged at the end of the 28 day period, and notice deemed withdrawn


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Questions?

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Next webinar: 17 May 2016



- Shared Ownership - 2016
 - How is it different?
 - The different types of shared ownership lease
 - Staircasing - what does it involve?
 - How far can the lease be varied?
 - Rent and rent review
 - The implications of "Richard v Midland Heart Limited"
