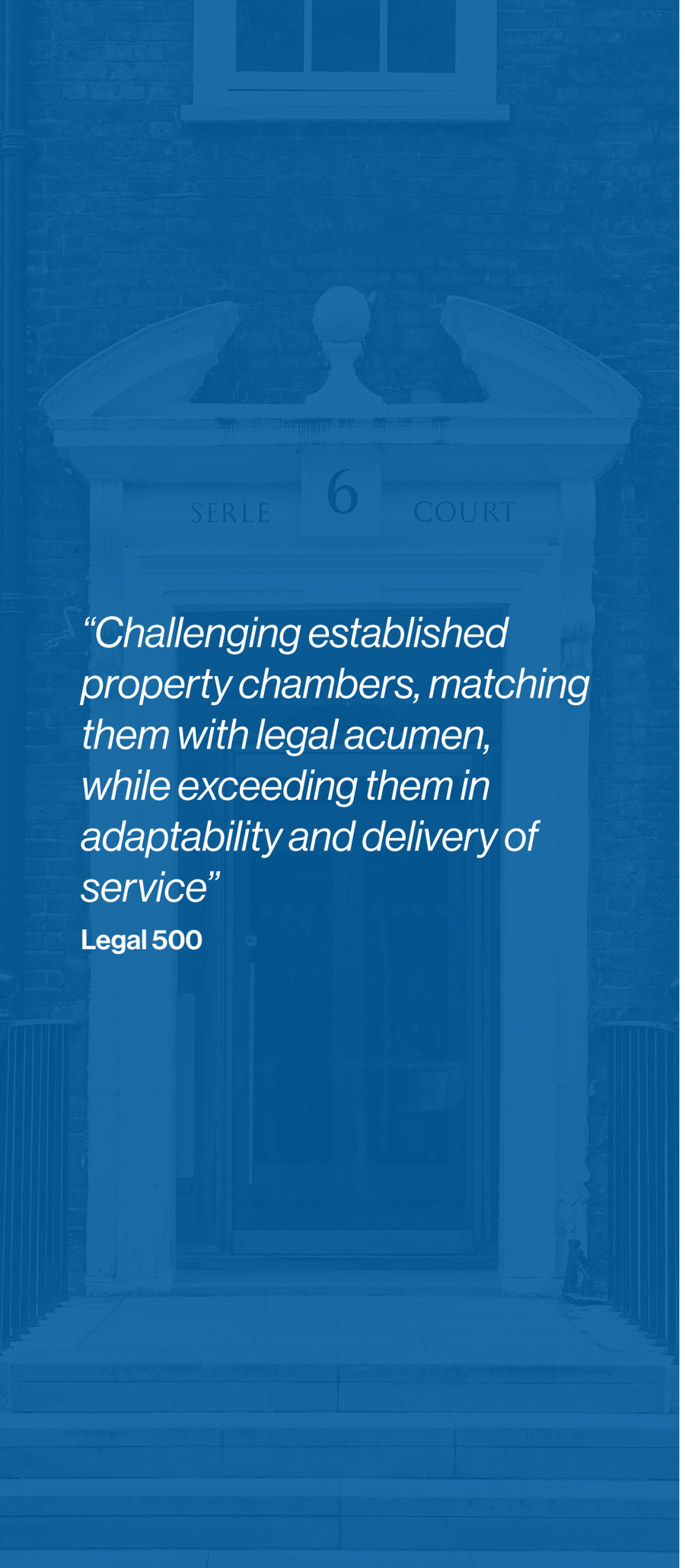
ISSUE 28

serlespeak

RAISING THE BAR IN CHANCERY & COMMERCIAL

Property Litigation



"Challenging established property chambers, matching them with legal acumen, while exceeding them in adaptability and delivery of service"

Legal 500

I am delighted to introduce this special Property Litigation edition of Serlespeak. In my article 'How not to say *"No"* – or how to say *"Yes"* ', I consider Four Golden Rules of approval when deciding whether to grant or refuse consent. Andrew Bruce then goes on to evaluate modification and discharge of restrictive covenants under section 84 of the Law of Property Act 1925 by the Upper Tribunal. Thomas Braithwaite looks at 'allodial land' in a company law context and the recent decision of Chief ICC Judge Briggs in *Pall Mall 3 v Network Rail* [2021] EWHC 1835 (Ch). Finally, Amy Proferes discusses the effect of the pandemic on the relationship between landlords and their tenants and the renewal and modification of pre-existing leases in her article *"O brave new world, that has such clauses in it!"*

Andrew Francis

Chambers News & Events

People

Chambers is pleased to announce that Elizabeth Jones QC has been elected as our new Head of Chambers, following the retirement of Alan Boyle QC earlier this year. Liz is a leading silk at the Chancery Commercial Bar, and also sits as a deputy High Court Judge and a mediator. Her practice spans a number of Chambers' core practice areas, in particular civil fraud, contentious trusts and commercial litigation, and extends to some of the key jurisdictions in which Serle Court barristers appear and advise. Liz also brings a great deal of management and administrative experience to the role, having been a member of the management and strategy committees within chambers, and having been Chair of Trustees of a charity, SAPERE, for the last 10 years. She has combined this busy career with being a mother of three children. Commenting on her appointment which started on 1st April, Liz said that she is *"...looking forward to leading a chambers which is particularly known for its teamwork, its excellence, its friendliness..."*

In May 2021, Zoe O'Sullivan QC was admitted as a barrister of the Eastern Caribbean Supreme Court in the Territory of the British Virgin Islands. Zoe has an established and busy commercial practice as counsel and arbitrator in and outside the UK and this appointment will greatly compliment her international practice.

We would like to congratulate John Machell QC and former Serle Court member John Whittaker with contributions from Thomas Braithwaite, Jennifer Haywood, Matthew Morrison, James Mather, Adil Mohamedbhai, Emma Hargreaves, Amy Proferes, Gregor Hogan, Tim Benham-Mirando and Max Marenbon, also from Serle Court, on the publication of the fifth edition of 'The Law of Limited Liability Partnerships'. This leading partnership text is an indispensable guide to those who advise on the legal and taxation aspects of incorporating and running an LLP. It combines concise description, practical guidance, and penetrating analysis of problem areas. It also offers an international perspective through a comparative analysis of the UK LLP structure and those being enacted overseas.

International Insolvency & Restructuring Report 2021/22

We are pleased to introduce the 2021/22 edition of the IIR Report, an essential guide to the international insolvency and restructuring marketplace. This edition focuses on developments and changes to the law during the Covid-19 pandemic.

Lance Ashworth QC, David Drake and Matthew Morrison have contributed to the report with an article on the suspension of wrongful trading under the Corporate Governance and Insolvency Act 2020 which was introduced to allow directors to trade during the pandemic without the unwanted distraction of potential liability. Their article titled *'Keeping directors in suspense: Wrongful trading under the UK Corporate Governance and Insolvency Act 2020'* can be found at pp 92 - 96 of the report. We are pleased to be able to share the article with you on our website under 'News and Events'.

Remote events programme and Virtual Hub

To meet the challenges that the global pandemic has presented, Serle Court reinvigorated its business development programme and instead of in-person seminars and conferences we have been delivering an extensive bespoke webinar programme across all of chambers' practice areas. In 2021 we have so far presented around 60 bespoke sessions to clients.

In response to the increased demand for online events and webinars, Serle Court launched a 'Virtual Conference Hub' in May 2021 to host its online events. You can access the Virtual Hub via Serle Court's website, by clicking the 'Virtual Hub' icon in the top right of the webpage and by completing a short registration form. The Hub's purpose is to ensure that all content relating to our online events and digital media is readily available to clients and followers.

Our property barristers have been delivering a series of bespoke online webinars titled 'Commercial Property & Real Estate Litigation: The Future'. These practical sessions explore topical issues and developments in chancery and property litigation enabling our clients to select the talks which relate most closely to their practices and knowledge development programmes. For more information of the talks on offer please visit the events page of our website.

ThoughtLeaders4

We are pleased to announce that Serle Court has partnered with ThoughtLeaders4 Disputes and ThoughtLeaders4 HNW Divorce. The Disputes Community is a specialist disputes platform connecting private practice lawyers, in-house counsel, barristers and industry experts involved in complex, cross-border commercial litigation and international arbitration. On 19May 2021, Stephanie Wickenden spoke on a virtual TL4 Disputes webinar titled 'To Hear or Not to Hear, That is the Question – Challenging Jurisdiction and Service: The Defendant's Toolkit'. This was the first webinar in an innovative new series, taking participants through the lifecycle of a dispute from the principal vantage point of the defendant's lawyer.

On 12 May 2021, Jonathan Harris QC (Hon.) spoke at the virtual Thought Leaders 4 HNW Divorce event *'Planning for and Implementing a Divorce Award'.* The event explored the best practice in planning for enforcement at the outset of a divorce proceeding, as opposed to only at the point of award when the other side refuses to pay up. The TL4 recordings are available to watch on our Virtual Hub.

External Events

We were a Silver Sponsorship Partner at the Transcontinental Trusts: International Bermuda Forum 2021. The conference connected with the entire breadth of the offshore industry and included three days of panel sessions, including panel discussions from Jonathan Harris QC (Hon.), Kathryn Purkis and Professor Suzanne Rab.

In May, Constance McDonnell QC, Giles Richardson and Amy Proferes spoke at Simon Gore's Contentious Probate Seminar 2021. The interactive

Contentious Probate Lawyers, administrators, and litigators took place virtually.

Kuldip Singh QC was invited to speak at the ACTAPS Spring Seminar on 'Developments in the Law of Legal Professional Privilege'. The seminar included talks on all aspects of confidentiality and disclosure and privilege correspondence.

In March, Constance McDonnell QC spoke at the first panel session discussion of ConTrA's 2021 programme alongside James Lister and Jack Bailey of Stevens & Bolton and Louise Woolrich of Carey Olsen presenting a talk titled '*Applications by Trustees for a blessing of their decision*'. The webinar was a practical 'how to' discussion based on recent cases and experience, from both trustees and beneficiaries' point of view.

International and Offshore events

We asked our clients to complete a short survey to tell us whether they would feel comfortable travelling to New York for the next conference in November 2021. After carefully considering the results and the latest government guidance on travel, we have decided to postpone this year's conference. Members of chambers will continue to deliver an extensive bespoke webinar programme across all of chambers' practice areas to clients both in the UK and internationally and we hope to be able to be back in New York in November 2022.

Following the success of the DIFC Courts Practice webinar series presented in 2020, the editors, Rupert Reed QC and Tom Montagu-Smith QC (XXIV Old Buildings) hosted an update session on Wednesday, 7th July 2021 titled *DIFC Courts Practice: A Year On*, to discuss developments in DIFC law since the book's publication in May 2020. Rupert and Tom were joined by contributors, James Weale (Serle Court), Gregor Hogan (Serle Court), and Matthew Watson (XXIV Old Buildings) who discussed specific cases in the region. Please contact our BD team if you would like to receive the recording.

Serle Court has teamed up with lawyers from Maples and Calder to present the Cross Border Private Client & Trusts Series. The first panel session was launched in April 2021 as an on-demand session (available to download on the Virtual Hub) and discussed 'Trustee decision-making in light of *Grand View v Wong*'. The session was chaired by John Machell QC (Serle Court) alongside speakers Jennifer Haywood (Serle Court), Ray Davern (Partner at Maples Group, London), and Alex Way (Of Counsel at Maples Group, London).

All the above events are supported by our Business Development team and Clerks who organise and deliver the events. The success of this programme has been such that webinars will continue to be part of the business development programme in the post-COVID world.

Awards and Directories

We are delighted to announce that Serle Court has been awarded a 'Gold' award for Chambers of the Year at Citywealth's Magic Circle Awards 2021. In their winners' review, Citywealth described Serle Court as *"the chambers of the future"* and "*forward-looking and quick to react"*. The review continues to highlight Serle Court's involvement within *Wong v Grand View Private Trust Company Ltd & Ors*, the largest contentious trusts case in Bermuda's history, with four silks and six junior counsel appearing on both sides of the case. We also congratulate James Brightwell who was awarded 'Silver' in the Barrister of the Year category.

Liz Jones QC has been selected for inclusion in the 10th Edition of The Best Lawyers in the United Kingdom for her work in Chancery and has been named as the 2022 *"Lawyer of the Year"* for her leading Chancery work in London. Only a single lawyer in each practice area is honoured with a "Lawyer of the Year" award. Elizabeth Jones QC became Serle Court's Head of Chambers in April 2021 and is acknowledged by Chambers and Partners as *"superlative and top of the tree"* and a "*renowned trial advocate"*.

In June, Serle Court was awarded a Silver Award for 'Best Events Programme' at the prestigious Citywealth Brand Management & Reputation Awards 2021. The award recognises Serle Court's remote events programme which aims to offer topical legal content to chambers' clients across all core chancery and commercial practice areas.

We are delighted to announce that Serle Court has been shortlisted for 'UK Set of the Year' at the Chambers High Net Worth Awards 2021. The awards recognise pre-eminence in key jurisdictions in the region and reflect achievements over the past 12 months including outstanding work, impressive strategic growth and excellence in client service. The virtual awards ceremony will take place on 7th October 2021. Chambers was recently recognised as a Band 1 set in Chancery: Traditional in the Chambers HNW Guide 2021 noting that *"It's a set of exceptionally intelligent specialists who undertake the highest level of traditional chancery and commercial litigation."*

Beverly-Ann Rogers is recognised in the Spotlight Table as one of 7 Trust mediators nationwide with expertise in mediating trust disputes, Andrew Bruce is ranked in Art & Cultural Property Law and is described as *"very good on detail and is not afraid to take difficult points,"* and Zahler Bryan is ranked as 'Up and Coming' *"an absolute quality junior."*

Rupert Read QC and James Weale have been named in the Legal 500 Middle East: The English Bar, which recognises leading lawyers in litigation and arbitration in the Middle East region. Rupert is described as *"extremely calm under pressure, personable and has strong analytical and drafting skills...and he has in-depth knowledge of English and DIFC law and DIFC Court procedural issues."* James *"demonstrates strong work ethic and is solutions orientated. He manages to focus on the relevant issues and address them in a simple manner in the arbitration papers."*

SerleShare

SerleShare is a new marketing initiative for Serle Court that came to life in July 2020 when we spotted an opportunity to deliver focused thought leadership content direct from Serle Court's Barristers, Arbitrators and Mediators. The initiative aligns chambers' marketing strategy with the current working environment and the evolving demand for quality and informative digital legal content. The articles focus on Commercial Chancery content in the form of Legal Insights, Case Updates and Practice Area Analysis. Since its launch, SerleShare has published 40 articles and has generated over 40k views. Please visit the SerleShare page of our website and follow #SerleShare on LinkedIn to stay up to date with our latest cases and updates.

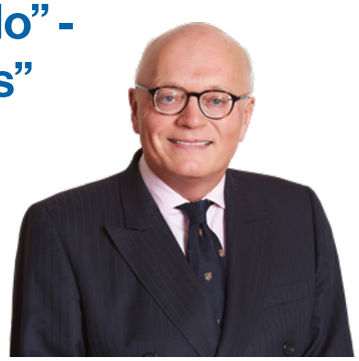
Social Media

We have six designated discussion groups on LinkedIn to enable Serle Court members and clients to discuss topical issues. These groups are Contentious Trusts and Probate, Fraud and Asset Tracing, Intellectual Property, Middle East and Arab Law, Competition Law, and Partnership and LLP Law Please join us.

P*lease follow us on Twitter: @Serle_Court.*

Serlespeak is edited by Sophie Holcombe

How not to say "No" - or how to say "Yes"



Decision, decisions, decisions! We are all asked to make them every day. In many cases we have to advise our clients on the basis upon which their decisions should be made, whilst we cannot decide matters for them. In property matters, and in particular restrictive covenants, where they are qualified by conditions as to approval for buildings, or uses of land, for example, we have to advise either on the basis upon which the approving party should grant, or refuse approval, or consent, or on the merits of the refusal, or conditions.

This article deals with how that task should be approached and what to avoid.

In the space available, this article cannot deal with the preliminary questions such as what is the meaning of the covenant, whether it is enforceable and by whom, or now extinguished, or whether a condition as to reasonableness is, or is not to be implied (this article assumes that it will be) or whether the dispute is one for the Court, or for the Upper Tribunal (Lands Chamber) where the covenant may be discharged, or modified under s. 84(1) Law of Property Act 1925; the latter being the topic of an article by Andrew Bruce in this edition of Serlespeak. Nor does this article consider the questions arising from qualified covenants in landlord and tenant cases, although much of the law there will be relevant where qualified covenants between freeholders are in issue. I will refer to the various types of qualified covenants under consideration under the generic heading of "the Covenant".

Distilling the many issues which can arise is hard, but the author suggests that there are four "Golden Rules" to apply when advising clients on the question of how to or not to grant approval, or consent, or whether the decision can, or should be challenged. These golden rules inform not only how the decision maker (covenantee) should carry out the task, but also how far the applicant (covenantor) can challenge either the refusal, or conditions attached to an approval considered to be unreasonable.

Golden Rule No. 1. Each application must be treated as fact-specific. Even where there are "Estate Guidelines" or "Policies", or terms within the covenants, or other documents, which set out criteria for determining applications under the Covenant, the decision maker must treat the application as one which is not to be forced into a pre-set formula.

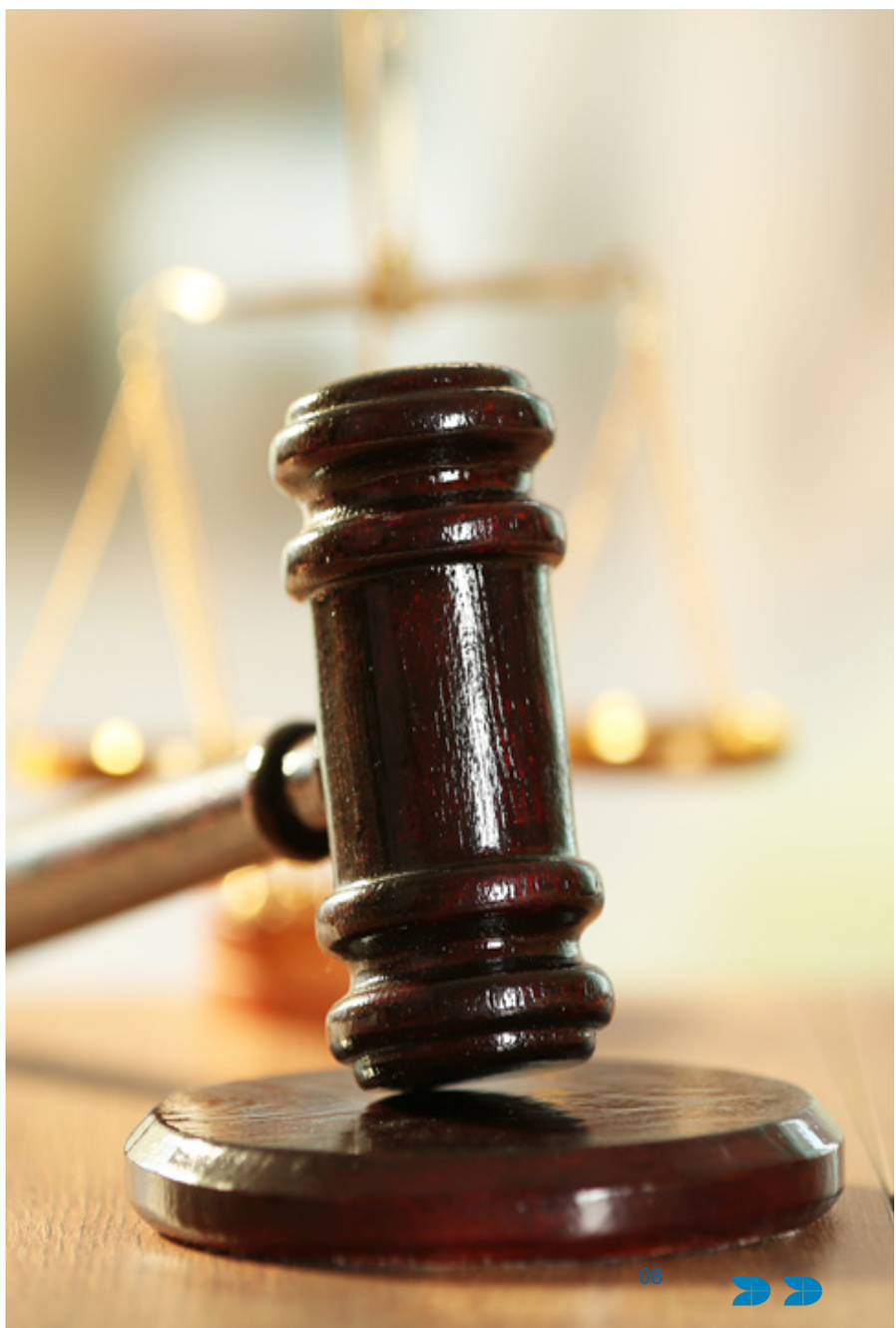
Golden Rule No. 2. The decision maker must only take into account matters which are relevant to the application and must not take into account those which are irrelevant to it. This is where the public law "Wednesbury" test must be applied. So property lawyers need to advise that this test is to be observed by the decision maker when exercising its discretion under the Covenant.

Golden Rule No. 3. Rationality is not the same as reasonableness. The former refers to a mental process. The latter refers to the objective standard which applies to the outcome of the mental process. The former is relevant as it imports a duty of good faith and excludes capriciousness in the decision making process. True reasons for the decision, as opposed to those expressed, may be in issue; so transparency by the decision maker will be important and pre-formed "strategies" by it can be dangerous.

Golden Rule No. 4. The decision maker must take care when determining the application. The author's experience in these cases shows that decision makers can be inclined to rush into saying no, almost as an automatic default position, or impose conditions which have nothing to do with the application and the Covenant; eg. demanding a release fee payment. Equally the covenantor must be prepared to present a full set of evidence for the application, to enable inspections to take place and co-operate generally.

Finally, for those wishing to undertake some "bedside reading" there has been a quartet of recent decisions which are a "must read" for anyone advising on the points raised in this article. These are, *Braganza v BP Shipping Ltd.* [2015] 1 WLR 1661, *Sequent Nominees Ltd. v Hautford Ltd.* [2020] AC 28, 89 *Holland Park Management Ltd. v Hicks* [2020] EWCA Civ 758 and *Hicks v 89 Holland Park Management Ltd.* [2021] EWHC 930 (Comm).

Andrew Francis



Taking Advantage in the Upper Tribunal

Restrictive covenants relating to land are not set in stone. They may be modified or discharged by the Upper Tribunal in accordance with its jurisdiction under s.84 of the Law of Property Act 1925. Most usually a developer, having obtained planning permission for their works, seeks a modification from the Tribunal to permit the development (in accordance with the planning permission) on ground (aa) of s.84(1). This ground applies where the covenant impedes the reasonable user of the land and the restriction does not secure to the persons entitled to the benefit any practical benefits of substantial value or advantage to them. Many cases turn on the Tribunal's assessment of "practical benefits" and its quantification of their "value". Three recent cases have, though, emphasised that "value" is not the sole jurisdictional criteria under ground (aa). If the covenant secures practical benefits of substantial "advantage" that will defeat the application for modification.

In *Palmer v. Harrison* [2021] UKUT 93 (LC) the Applicants (Mr & Mrs Palmer) wanted to erect a side extension and re-configure their front lawn into a parking area. However, covenants imposed by the builders of their housing estate prevented this. The case in the Upper Tribunal pitted the Palmers against their neighbours, Mr Harrison & Ms Sweetman. Both sides appeared as litigants-in-person and neither relied upon any expert evidence. The Tribunal found that the proposed extension would dominate the objectors' garden and give it a significantly more enclosed feel. As the Tribunal could not put any figure on the potential diminution in value to the objectors' property, it simply concluded that the ability to prevent this loss of amenity to the objectors' garden was a practical benefit of substantial advantage. Thus the Palmers' application failed.

In *Nathwani v. Kivlehan* [2021] UKUT 84 (LC) the application involved the replacement of a bungalow with a modern three-storey house in potential breach of a covenant which limited development to a single private dwellinghouse of one-storey. The Tribunal found that the restriction secured the objector neighbours practical benefit in that it protected them from an overbearing structure right next to their boundary which structure would adversely affect their light. The Tribunal considered that the diminution in value of the neighbours' property would be £70,000 - £80,000 (being some 5.8% - 6.7%), which was substantial. The Tribunal emphasised that substantial value and substantial advantage were different matters, but that in this case the restriction clearly secured the objectors a practical benefit of substantial value and advantage.

In *Morris v. Brookmans Park Roads Limited* [2021] UKUT 125(LC) the Tribunal gave a more reasoned consideration to "substantial advantage". Here the Applicant wanted to modify covenants which prevented the conversion of a house into five flats. The Tribunal accepted that the covenants did not secure a benefit of substantial value to the objectors because the nearest properties would, at most, be devalued by something less than 5%. However, the Tribunal found that the effect of the relaxation of the covenants would be to give a a perceived green light for other developments of flats and hence the likely proliferation of future applications, and the manifest likelihood that more applications would succeed. Ultimately the Tribunal accepted that whether it took two years or twenty, the current character of the estate would be lost. That character was a practical benefit of substantial advantage that was secured by the covenants on the individual houses.

The analysis of "substantial advantage" in *Morris* is helpful and demonstrates that it is a separate consideration from "substantial value". Whilst it is likely the case that wherever practical benefits are of substantial value they will also be of substantial advantage, the converse is not true. Substantial advantage encompasses substantial value but also includes something more. As *Morris* exemplified a successful "thin end of the wedge" argument will engage a consideration of substantial advantage. But, to use a finding of substantial advantage as a substitute for a finding of substantial value (as was done in *Palmer*) is questionable. The fact that there was no expert evidence in that case from which to quantify the substantial value (and hence assess any compensation) did not mean the Tribunal could not have found the practical benefits to have been of substantial value. Similarly, in Nathwani it is unclear what the Tribunal found distinguished the substantial value from the substantial advantage, other than its quantification. It is conceivable that the Tribunal considered that freedom from fear of construction of an overbearing neighbouring property constituted an unquantifiable "substantial advantage" but this is not spelled out in the judgment.

Andrew Bruce

Advance to Pall Mall

There is no such thing as the absolute ownership of land in English law. This is a consequence of the feudal principle that all land is held in tenure, ultimately derived from a Crown grant. Since 1926, such tenure has either been a freehold or leasehold estate. Allodial land – that is to say land over which no tenure exists – is rarely encountered. It is therefore incongruous to find its intricacies subject to detailed consideration in a company law context. Yet Chief ICC Judge Briggs had to grapple with them in the recent case of *Pall Mall 3 v Network Rail* [2021] EWHC 1835 (Ch).

In *Pall Mall 3,* a company was dissolved whilst owning freehold land. When a company is dissolved, any land it owns passes under the Companies Act 2006 to the Treasury Solicitors as bona vacantia (i.e. 'unowned property'). For obvious reasons, companies are rarely dissolved owning valuable land: and in such a case steps will ordinarily be taken to restore the company to life so the land can be returned to the shareholders or creditors. Alternatively, if no one reclaims it then the land may be sold to a third party. But where the land is not valuable, or is considered burdensome, it may be disclaimed by the Treasury Solicitors. Where a freehold estate is disclaimed, it is extinguished, leaving the land entirely unencumbered, as allodial land. Such land is said to 'escheat' to the Crown.

Bona vacantia is therefore a form of purgatory, where property awaits its fate – either to be returned to life on the restoration of its corporate owner or on its sale to a third party, or to face eternal obliteration by disclaimer and (in the case of freehold land) escheat.

In the *Pall Mall 3* case, the freehold in question was subject to a 999-year lease in favour of Pall Mall. From Pall Mall's perspective, the fact that the freehold was allowed to escheat was not, of itself, a particularly intractable problem: the escheat of a freehold does not extinguish any adverse interest in the land, so Pall Mall could have continued to hold its lease unconcerned with the demise of the freehold. However, the freehold also had the arguable benefit of an easement of drainage over neighbouring land owned by Network Rail. Pall Mall wished to retain the benefit of that easement by acquiring the freehold. But when the freehold escheated, what happened to the easement?

No issue would have arisen had Pall Mall taken a transfer of the freehold from the Treasury Solicitors whilst the land remained *bona vacantia* and before it was disclaimed. But it did not. Instead, Pall Mall sought to acquire a freehold estate from the land's allodial owner, the Queen (or at least her representatives in matters proprietary, the Crown Estate), after the freehold had been disclaimed. The Crown Estate was happy to take what it could get for a 999-year reversion, and duly executed a conveyance of the freehold to Pall Mall. But could the Crown Estate also give Pall Mall the benefit of the easement, or had that been extinguished for all time when the freehold escheated?

The case for Network Rail was simple: the easement was extinguished when the freehold was extinguished. So whilst the Crown Estate could, by its conveyance to Pall Mall, grant a brand new freehold, it could not include in that grant rights over third party land it did not possess. The Treasury Solicitors had destroyed the old freehold, and the Crown Estate had granted a new one.

But is that right? This was a question apparently bereft of authority: that is, until now. Judge Briggs held that the benefit of the easement does indeed survive escheat. His reasoning appears to have been that escheat was to be regarded as a form of transfer. That conclusion allowed him to hold that the benefit of the easement simply passed (under s 62 LPA 1925) along the chain of title – from the old owner to the Crown, and from the Crown to Pall Mall. So Pall Mall got its easement.

In support of this conclusion he observed that if the burden of property rights over land survived the escheat of a freehold estate – as they undoubtedly do – then property rights benefiting the escheated freehold should do too. He was also able to draw some support from observations in a Court of Appeal authority (Wall v Collins), in which Carnwath LJ had held (obiter) that an easement attached to a leasehold estate was not extinguished when the leasehold was merged with the freehold, on the basis that the easement was attached to the land itself, rather than a particular estate in the land.

Neither of these points is terribly convincing. The fact that third party interests in a freehold should survive its escheat can hardly explain why rights attached to the freehold should also survive, and the judgment does appear to treat interests in land (that are adverse to the estate) and interests attached to land (that benefit the estate) as if they were the same thing. Furthermore, the part of the Court of Appeal's conclusion in *Wall v Collins* relied upon by the judge is just plain wrong. As the Law Commission observed in 2008:

"...as a matter of principle an easement is attached to an estate in the land (either freehold or leasehold), and that it follows as a matter of logic that termination of that estate must extinguish the easement."

Ultimately, pragmatism appears to have won the day. It would obviously be highly inconvenient for landlocked closes and so forth if rights that were necessary for the enjoyment of land could be blown away in a feudal maelstrom. But right or wrong, the case serves as a reminder of how the feudal origin of Property law has an exasperating habit of rearing its head in the most unlikely of places.

Thomas Braithwaite

O brave new world, that has such clauses in it!

The coronavirus pandemic has had a dramatic effect on the already precarious world of commercial real estate, leaving many arguing for a more collaborative relationship between landlords and tenants. For tenants negotiating an unopposed lease renewal in this tenants' market, it is tempting to seek to introduce new terms or modify the existing terms of the lease. If not agreed with the landlord, the court will determine the terms of the new tenancy pursuant to s35 of the Landlord and Tenant Act 1954, having regard to the terms of the current tenancy and all relevant circumstances, and in keeping with the principles set out in *O'May v City of London Real Property Co Ltd* (1983) 2 AC 726. Notably, the burden of persuading the court to change a term falls on the party seeking the new term, which must be fair and reasonable in all the circumstances.

The courts have traditionally resisted imposing new terms, as this would interfere with the position negotiated between the parties at the start of their relationship. Nevertheless, tenants have increasingly sought to introduce clauses providing some level of protection from the effects of government lockdowns or other restrictions affecting their ability to trade profitably. It appears that many landlords are proving amenable to such changes, but two recent decisions provide useful guidance for the approach that the courts are taking when the parties cannot agree.

WH Smith Retail Holdings Limited v Commerz Real Investmentgesellshaft MBH (2021) (unreported) related to a WH Smith outlet in the Westfield Shepherd's Bush shopping centre.

The premises were classed as essential as they contained a post office, and thus had remained open throughout lockdowns. However the majority of shops and restaurants at the centre did not enjoy such luck, and footfall was significantly reduced. HHJ Richard Parkes QC, having made a site visit to a *'largely empty and echoing'* Westfield, concluded the benefit to WH Smith in remaining open in such circumstances was more notional than real.

Before trial the parties had agreed a new term whereby rent would be reduced by 50% (accounting for any government support received in respect of rent) during certain periods, but could not agree on the trigger for such a reduction. The tenant sought the reduction during any period when non-essential retailers were required by law to remain closed; the landlord argued that it should only apply during any period when the tenant itself was prevented from opening. After carefully analysing the rather unusual factual position, HHJ Richard Parkes QC agreed with the tenant, saying:

'I cannot imagine what competitive advantage the tenant could gain in circumstances of such restricted trading. Matters might be very different on the high street, but in my judgment the reality is that if the non-essential retailers which surround the tenant at Westfield, and which provide the necessary footfall, are closed, there is no advantage of any substance to the tenant in remaining open.'

He further accepted that the landlord's suggested trigger was effectively empty, as the tenant had not been required to close during any previous lockdown and it was improbable that this would change in future.

A different result was reached in *Poundland Limited v Toplain Limited* (2021) (unreported). Here the claimant tenant, located in high street premises in Twickenham, sought to introduce various 'pandemic clauses' under which, during any restrictions preventing the retailer from trading from the property:

a) Rent and service charges would be reduced by 50%;
b)The tenant would be relieved of its obligation to comply with insurer's requirements (for example, it would not be required to have staff attend the premises to run fire drills); and
c)The landlord would be prohibited from forfeiting the lease.

The landlord opposed the introduction of any of these terms, arguing that the tenant was sufficiently protected by steps taken by the government.

DJ Jenkins rejected the proposed pandemic clauses, on the basis that they would unfairly require the landlord to share the tenant's risks despite the tenant being the one benefiting from government assistance and legislative protection. Although the pandemic qualified as a 'relevant circumstance' to which he must have regard, it was not the role of the court to alter the balance of power between the parties (see [7]):

'It is not therefore the purpose of the legislation (and so the court in exercising its discretion) to approve (opposed) amendments to the lease which would result in a change to the respective risks, obligations and benefits carried and enjoyed, nor to insulate the tenant against the commercial and trading risks they may face in a way that would either prejudice the landlord or interfere with their long term interests.'

The tenant did however succeed in introducing an entirely new term requiring the landlord to meet the cost of any works which must be carried out in order to comply with the Domestic Minimum Energy Efficiency Standard Regulations 2018 (MEES regulations). These regulations had not existed when the original lease was negotiated, and the costs position was unclear. The new term provided clarity and as such it was appropriate and reasonable to introduce it.

The effects of the pandemic are far from over, and the future of commercial real estate remains uncertain. It appears the best strategy for renewing tenants is to agree as many terms as possible, rather than relying on the court to 'pandemic-proof' a new lease, and to carefully draft any proposed Covid clauses to ensure their efficacy.

The judgment in *Poundland v Toplain* is available here.

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