# QUARTERLY REAL ESTATE DISPUTES UPDATE

## BRIEFCASE

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# Case 1: Blackhorse Investments (Borough) Ltd v Southwark London Borough Council

**The Upper Tribunal found that an alienation covenant, a keep open covenant and a best endeavours covenant were outside of its jurisdiction to modify.**

## What was it about?

- The long leaseholder of the Black Horse pub was granted planning permission to demolish the pub and replace it with a predominantly residential building of six storeys with commercial premises, including a new pub, on the ground floor.
- There were covenants in the lease that prevented the implementation of this planning permission, so the long leaseholder applied to the Upper Tribunal (Lands Chamber) ("**UT**") under section 84 of the Law of Property Act 1925 to modify the relevant leasehold covenants to enable the planning permission to implemented.
- The UT ordered the modifications without a hearing. The landlord – Southwark Borough Council - challenged the UT's jurisdiction to order the modifications, claiming that the covenants were positive in nature.

## What did the Tribunal say?

- The UT acknowledged that section 84(1) allows the modification or discharge of a **restriction** affecting land where the restriction concerns the user thereof or the building thereon. Section 84 does not allow the UT to discharge or vary **positive** covenants.
- Accordingly, the UT found that it had no jurisdiction to vary the following covenants in this case:
  - the alienation covenant in the lease restricting assignment, as this is concerned with ownership of land rather than the activity that is conducted upon or the use that is being made of the land; and
  - the covenants to use best endeavours to renew licences and use and keep the premises open as a pub, as these were positive obligations rather than restrictions on the use of the land or buildings thereon.
- Where a covenant included both restrictive obligations (to use as a pub only) and positive obligations (to trade and keep open), the UT would only modify the restrictive elements.

## Why is it important?

- This case provides some welcome guidance on what leasehold covenants the UT considers within its power to modify.

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**…a restriction on assignment or letting is of a type which is not concerned with the activity conducted on the land or with what it is being used for, but only with the ownership of one interest in the land, which may not be the interest of the person using the land at all.**
[2024] UKUT 33 (LC) [70]

# Case 2: IAA Vehicle Services Limited v HBC Limited

**The High Court decided that even though payment of a deposit was required when an option to purchase was exercised, the fact that time was not of the essence meant that the option was validly exercised in spite of the failure to pay the deposit.**

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## What was it about?

- IAA, the tenant of three commercial leases, held options under each lease to acquire the landlord's freehold reversion for a price specified in the leases. Serving option notices resulted in binding sale contracts which incorporated the standard commercial property conditions of sale (SCPCS). The SCPCS required IAA to pay a 10% deposit no later than the date of the sale contracts (i.e. the date of service of the option notices).
- The parties agreed that the option notices were validly served, but the landlord (HBC) claimed that the resulting sale contracts were to be treated as terminated because IAA had failed to pay the deposits on the date it had served the option notices.
- The key issues for the High Court were whether IAA was obliged to pay the deposits on or before the date the options were exercised, whether non-payment of those deposits amounted to a repudiatory breach of the sale contracts and whether HBC was therefore entitled to treat the sale contracts as terminated.

## What did the court say?

- The SCPCS were clear as to the timing for payment of the deposits, requiring payment before midnight on the date each option was exercised.
- In the ordinary case, the requirement to pay a deposit, including the time of payment, is considered to be a condition of the contract and time is of the essence of the date for payment. The court held, however, that this was not an "ordinary case" of a contract for the sale/purchase of land, but rather the exercise of a tenant's option to purchase the landlord's reversionary interest. The pre-existing contractual and proprietary relationship between the parties took this case outside the "ordinary" principles, and on the true interpretation of the option provisions, time for payment of the deposit should not be treated as being of the essence.
- IAA's failure to pay the deposits on time was therefore not a fundamental breach, and HBC was not entitled to treat the sale contracts as at an end - the options were validly exercised and remained binding on HBC.

## Why is it important?

- This decision highlights the need to carefully scrutinise terms of an option before it is exercised, in particular any incorporated terms that are not clear on the face of the contract. It appeared that the SCPCS requiring payment of a 10% deposit on or before the date the options were exercised was simply overlooked, and the tenant was fortunate to end up on the right side of the court's ruling.

> **What I consider to be the commercial 'elephant in the room' is… the value of [the defendant's] interests has increased significantly since 2013 when the option prices were fixed and it is very much in the [claimant's] interest to secure the sales to it pursuant to the option agreements whereas it is very much in the defendant's interest to avoid that.**
> [2024] EWHC 1 (Ch) [para 35]

# Case 3: Alistdair Barclay Brown v Richard John Ridley and Sarah Louise Ridley

**The Upper Tribunal has held that applicants in adverse possession cases must reasonably believe that the application land belonged to them for a continuous period of ten years ending on the date of their application to be registered as proprietor.**

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## What was it about?

- The Ridleys applied to be registered as proprietors of a strip of registered land owned by Mr Brown, on the basis of adverse possession.
- As the relevant strip of land was a registered estate in land, to be successful with their application the Ridleys had to meet a number of requirements and conditions set out in Schedule 6 of the Land Registration Act 2002.
- A dispute arose between the parties as to the meaning of one of these conditions, namely: "for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him" (Schedule 6, paragraph 5(4)(c)).
- Mr Brown argued that the period of ten years referred to in paragraph 5(4)(c), during which the reasonable belief had to exist, was the period of ten years **ending on the date of the application**. As the Ridleys' reasonable belief had ended months before making the application, they did not satisfy the paragraph 5(4)(c) condition.
- The Ridleys argued that, to satisfy the paragraph 5(4)(c) condition, they could rely on any period of ten years **within the period of their adverse possession** of the relevant land, with the consequence that it did not matter if their reasonable belief ended months before making the application.

## What did the Tribunal say?

- The Tribunal considered that it was bound by the 2011 Court of Appeal decision in Zarb v Parry, which constitutes binding authority that the period of ten years, during which the required reasonable belief in ownership must exist, is the period of ten years **ending on the date of the application for registration** (factoring in a short grace period), as contended by Mr Brown.
- The Ridleys were unable to persuade the Tribunal that they held the requisite reasonable belief at (or very shortly before) the time of making the application for registration. Consequently they did not meet the requirements to be registered as proprietors of Mr Brown's land on the basis of adverse possession.

> **...it seems to me that Arden LJ in Zarb, with the agreement of Lord Neuberger and Jackson LJ, proceeded on the basis that the period of ten years in paragraph 5(4)(c), during which the reasonable belief in ownership had to exist, was the period of ten years ending on the date of the relevant application for registration.**
> [2024] UKUT 14 (LC) [93]

## Why is it important?

- The case is interesting because the Tribunal carried out its own detailed analysis to construe the meaning of paragraph 5(4)(c) and agreed with the Ridleys' interpretation - that the period of ten years during which the reasonable belief in ownership must exist can be any period of ten years **within** the relevant period of adverse possession. The Upper Tribunal was nevertheless bound by Zarb.
- The wording of paragraph 5(4)(c) is clearly vague, as evidenced by the diametrically opposed interpretations of the Court of Appeal in Zarb and the Upper Tribunal in this case. Had the Upper Tribunal found that it was not bound by Zarb, this case would have gone the opposite way.
- Nevertheless the law is settled for now, so applicants in adverse possession claims must act quickly and make the necessary application for registration as soon as their belief that they own the relevant land is displaced.

# Case 4: Neil John Mackenzie v (1) Sharon Shac-Yin Cheung and (2) Infinity Homes & Development Limited

**Court of Appeal decision allows original vendor to release the developer from a build restriction benefiting the claimant neighbour.**

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## What was it about?

- A number of plots were sold out of an estate in Croyden owned by the Whitgift Foundation. The first plot, number 444, was sold in 1947 and the conveyance contained a building restriction for the benefit of the unsold Foundation land stipulating that only a single detached dwelling house could be built on plot 444. Importantly, the Foundation reserved the right in the conveyance "to allow a departure from [the restriction] in any one or more cases" ("**the Reservation**").
- The Foundation subsequently sold plot number 432, with the benefit of 444's build restriction, and with its own similar building restriction.
- A subsequent owner/developer of plot 444 wished to develop her plot and negotiated a deed of modification with the Foundation which, in return for a payment, released her and her successors in title from the 1947 build restriction and permitted the construction of nine flats in place of the single detached dwelling.
- The owner of plot 432 objected on the basis that his plot benefitted from the build restriction in the 1947 conveyance, and the wording of the Reservation did not permit the Foundation to release the owner of plot 444 from the build restriction. Instead, the Reservation meant that the Foundation did not have to apply the same build restriction to subsequent plot sales.

## What did the court say?

- The court considered the syntax and meaning of the Reservation and held that it did give the Foundation the ability to waive, modify, or release historical restrictions on a plot by plot basis.
- This interpretation made "commercial common sense". It allowed the Foundation to retain control of any development on the estate and meant that a plot owner only had to negotiate with the Foundation as opposed to all neighbours on the estate who benefitted from the restrictions.

## Why is it important?

- In a restrictive covenant scenario, one would usually be required to approach all the benefitting parties to negotiate a release to de-risk the proposed development. This can be cumbersome especially where, like here, there would potentially be multiple beneficiaries to deal with.
- Albeit fact specific, this was a welcome decision for the owner/developer in this case as the court's finding on the interpretation of the Reservation meant that it only had to negotiate with one party. The case highlights that restrictive covenant wording should always be carefully reviewed to mitigate development risk.

> **the second part of paragraph 11… empowers the foundation to waive or release covenants… so that… [the] development of number 444… [wouldn't] involve a breach of covenant**
> [2024] EWCA Civ 13 [39]

# Case 5: Messenex Property Investments Limited v Lanark Square Limited

**Could a mixed-use building's landlord refuse licence to add floors and convert the ground floor from business to residential use? Yes!**

## What was it about?

- The long leasehold tenant of a four storey mixed-use building wished to to add three floors to the building and undertake works to convert the ground floor from business to residential use.
- The tenant was obliged under its lease to seek its landlord's prior written consent (not to be unreasonably withheld or delayed) to carry out the proposed works.
- Following just under three years of negotiations, the landlord refused to consent to the tenant's proposed alterations. The tenant issued proceedings, asserting that the landlord was unreasonably withholding consent to the alterations.

## What did the court say?

- The landlord relied on four grounds for withholding consent to the tenant's proposed works, namely: (1) the tenant had failed to provide detailed structural engineer's drawings for the proposed works; (2) the tenant refused to provide unconditional undertakings for the landlord's costs of documenting the licence for the works; (3) the works would necessarily involve a trespass on the landlord's property; and (4) the scope of the tenant's proposed alterations was not clear.
- The court found that the landlord's refusal to consent on grounds (1) and (2) was reasonable, but considered that the landlord's concerns about trespass and its assertion that the scope of the tenant's works wasn't clear (grounds (3) and (4)) were not reasonable grounds to refuse landlord consent.

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## Why is it important?

- This case affirms that:
  - The reasons on which a landlord relies as grounds for withholding consent must be the actual reasons that influenced the landlord's decision at the time – this involves a "a subjective enquiry" into what was in the mind of the landlord at the time.
  - The judge must then objectively consider whether the reasons in the landlord's mind were reasonable or unreasonable and whether the landlord was acting reasonably in relying upon them. The key principles for establishing this are set out at paragraph 101 of the judgment (taken from the case of Iqbal v Thakrar (2004)).
  - Where a landlord is relying on several stand alone grounds for refusing consent, it does not matter if some of those grounds are unreasonable, as long as the decision to refuse consent was reasonable in the circumstances.
- If the structural integrity of the building might be affected by the proposed alterations, it is highly likely to be considered reasonable for the landlord to require some assurance in the form of preliminary structural drawings before consent is given, even if more detailed drawings and reports are to be prepared after consent had been given.
- Whilst there is "no formal process of application and decision" for consent to alterations applications, it is good practice for tenants to make a written application for consent that clearly sets out the scope of the works for which consent is requested. The scope of the tenant's application need not remain fixed – the tenant may subsequently modify its application, as long as the scope of the works to which the landlord is being requested to give consent is ultimately sufficiently clear at the time the landlord is making a decision.

> **…the decision to withhold consent was reasonable… the reasons given are self-standing and I have found that two of them are reasonable. This relates particularly to the request for structural drawings to provide some assurance as to the effect of the proposals on the structural integrity of the building.**
> [2024] EWHC 89 (Ch) [154]

## Getting in touch

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.


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