Quarterly Real Estate Disputes Update

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Case 1: The Manchester Ship Canal Company Ltd v United Utilities Water Ltd

Supreme Court considers whether a private landowner may bring claims in nuisance or trespass when its waterway is polluted by discharges of foul water maintained by a statutory water company.

What was it about?

- The United Utilities sewerage network has around 100 'outfalls' from which material emanating from sewers, sewage treatment works and pumping stations is discharged into the Manchester Ship Canal (the **Canal**). The Canal is privately owned by The Manchester Ship Canal Company Ltd (**MSCC**).
- When the sewage network is operating within capacity, the discharges into the Canal contain surface water or treated waste water, but when the network capacity is exceeded the outfalls discharge foul water into the Canal causing large amounts of pollution.
- MSCC threatened to bring a claim against United Utilities for trespass and nuisance. In response, United Utilities sought a declaration that any such cause of action would be barred by the Water Industry Act 1991 (the **1991 Act**). Both the High Court and Court of Appeal granted United Utilities the declaration. MSCC appealed to the Supreme Court.

What did the court say?

- The Supreme Court unanimously allowed MSCC's appeal and held that the 1991 Act does not prevent private landowners from bringing claims in nuisance or trespass against statutory undertakers when a watercourse is polluted by discharges of foul water from sewerage networks, even if there has been no negligence or deliberate misconduct.
- An owner of a watercourse has a right to use or enjoy it, including a right to preserve the quality of the water. If that right is interfered with, it may give rise to an actionable nuisance. The court found that the polluting discharges could be avoided if United Utilities invested in improved infrastructure and treatment processes.
- Whilst the court did not consider the merits of any claim for nuisance or trespass, it did consider potential remedies and accepted that injunctions requiring upgrades to infrastructure are unlikely to be appropriate as they may undermine the specific statutory regime and interfere with the operation of the network itself. However, this does not in any way exclude damages and the court referred to its power in equity to award damages for future or repeated invasions of rights.

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Why is it important?

- The Supreme Court endorsed the principle that fundamental common law rights to the peaceful enjoyment of property can only be overridden by clear and unambiguous words in a statute.
- The decision is likely to be seen as a triumph for environmentalists. It will have significant repercussions for water companies who have faced much media attention and pressure to reduce the impact of sewage discharges into canals and rivers throughout the UK. However, water companies may argue that the decision could open the floodgates for claims in private nuisance and/or trespass, which could divert resources away from investing in the necessary improvements to avoid future discharges.

> **There is no doubt that the discharge of polluting effluent from sewers, sewage treatment works and associated works into a privately-owned watercourse is an actionable nuisance at common law, if the pollution is such as to interfere with the use or enjoyment of the relevant property.**
>
> [2024] UKSC 22 [109]

Case 2: Tanfield and others v Meadowbrook Montessori Ltd

The court dismissed a winding up petition brought by a landlord against its tenant, on the basis of the tenant's "strongly arguable" cross claim for damages for unlawful forfeiture.

What was it about?

- The landlord of the company that ran the Meadowbrook Montessori School brought a winding up petition for alleged rent arrears in February 2023, with a view to recovering possession of the school premises as soon as possible. The school disputed the rent arrears.
- Impatient with the delays in the winding up proceedings, the landlord purported to forfeit the lease in April 2023, changing the locks on a Friday morning during the school term, causing significant disruption to the students and the school.
- The school argued that the forfeiture was unlawful and that it had a counterclaim for damages against its landlord exceeding the petition debt, so the winding up petition should be dismissed.

What did the court say?

- The court had to consider the merits of the tenant's potential cross claim for damages for the alleged unlawful forfeiture.
- Unusually, the lease's re-entry clause did not dispense with the need for a formal demand of rent prior to forfeiting the lease.
- As a result, the common law pre-conditions to exercise forfeiture applied, requiring a demand:
  (a) for the rent to be made on the day that the right to forfeit arose;
  (b) to be served at a convenient time, at a "proper place";
  (c) stating the precise sum payable; and
  (d) for the last quarter's rent only.
- It was accepted that the landlord never complied with the above conditions.
- The court found that the school had a good arguable case that the landlord had unlawfully forfeited its lease. An award of damages for such unlawful forfeiture would likely include lost school fees, the rental value of the school and damages for conversion of the school's contents that were seized and sold by the landlord. There may also be an award of exemplary damages given the landlord's clear intention to get rid of the lease as quickly and cheaply as possible with a view to selling the premises for personal gain.
- The court dismissed the winding up petition on the basis that the school had demonstrated genuine, substantial grounds for disputing much of the petition debt and also a strongly arguable cross-claim for a sum comfortably exceeding the petition debt in its entirety.

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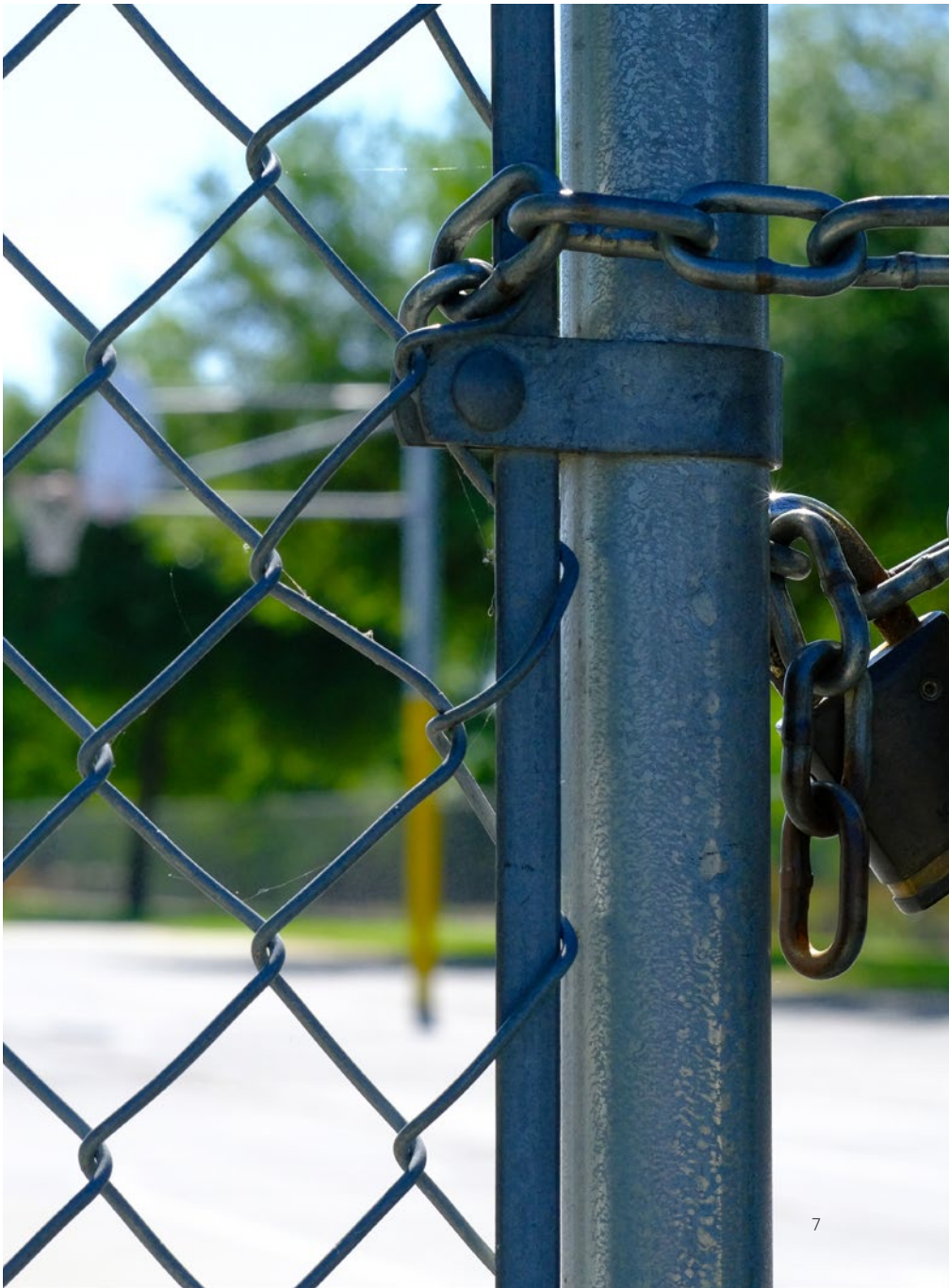
In my judgment the Company has raised a strongly arguable case that the purported forfeiture of the Lease by physical re-entry on 21 April 2023 was unlawful, on the grounds that no formal demand at common law was made for rent prior to re-entry and the Lease did not dispense with the need for a formal demand.

[2024] EWHC 1759 (Ch) [86]

Why is it important?

- The case is a stark warning to review the wording of re-entry clauses carefully. Without the usual caveat that gives the landlord a right to forfeit a lease for rent arrears, "*whether formally demanded or not*", the forfeiture in this case was found to be unlawful, resulting in a potentially substantial damages claim.
- More generally, this case highlights to landlords the need to consider carefully the different options available when faced with a tenant that has not paid its rent as pursuing multiple avenues in tandem may cause unanticipated problems.



Case 3: A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd

Failing to serve a claim notice on an intermediate landlord in accordance with the Commonhold and Leasehold Reform Act 2002 will not necessarily invalidate the exercise of a right to manage.

What was it about?

- The Commonhold and Leasehold Reform Act 2002 (**CLRA**) enables tenants who hold long leases of flats in a self-contained building to acquire the right to manage (**RTM**) the building.
- In this leapfrog appeal from the Upper Tribunal to the Supreme Court, the tenants of 240 flats, who wished to take over the management of their block of flats, failed to serve a notice of claim (to exercise the RTM) on the intermediate landlord of the building's communal areas, as required by CLRA.
- CLRA does not stipulate in terms what the effect of non-compliance should be, so the court had to infer Parliament's intention in this regard.

What did the court say?

- The Supreme Court found that the correct approach is to examine the whole structure within which the requirement arises, and ask what the most appropriate consequence of non-compliance would be.
- The RTM structure requires a two-stage notice procedure: first, a participation notice must be sent to all qualifying tenants, followed 14 days later by a claim notice served on all relevant stakeholders (defined in CLRA) – to afford them an opportunity to object to the proposed transfer of the RTM to the tenants.
- To determine the consequence of failure to comply with the notice procedure, the key question is whether a relevant stakeholder (who should have been served) has been deprived of a significant opportunity to have their opposition to the making of an RTM order considered.
- To answer this, the court must have regard to (a) whether the relevant stakeholder could have raised a substantively valid objection to the transfer of the RTM, and (b) whether, despite the procedural omission, they nevertheless had the opportunity to have their objection considered.
- In this case, any objection to the proposed RTM scheme that was available to the intermediate landlord (who was not served as it should have been) had been considered by the tribunal; and the appellant had also had an opportunity to present its objections to the tribunal in spite of not being served.
- The appellant had therefore lost nothing of significance by the procedural omission, and the failure to serve the claim notice on the intermediate landlord was not fatal to the tenants' acquisition of the RTM.

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Why is it important?

- Many statutes do not spell out the consequences of a failure to comply with statutory notice (or other procedural) requirements, which the Supreme Court commented has been "the source of a great deal of litigation".
- The Supreme Court endorsed the approach in *R. v Soneji* [2006] 1 A.C. 340 (HL), that focusses on the effect of non-compliance and involves (1) a detailed consideration of the relevant statutory structure (and its effect on property and contractual rights), (2) an analysis of the specific facts and any prejudice that would be caused to the party directly affected by the failure to comply, and (3) in the light of all these considerations, a weighing up of the most appropriate consequence of non-compliance.
- And whereas previously there was a different approach to public and private law statutes (the former requiring "substantial compliance", the latter requiring strict compliance with the relevant statutory procedure), there is now a uniform approach to determining the consequences of a failure to comply with a statutory framework that involves a detailed consideration of the particular factual circumstances of each case.

> **...the purpose of the legislative scheme... includes the objective that opportunities for obstructive landlords to thwart the transfer of the right to manage should be kept to a minimum. The procedural requirements have not been included to create traps for the unwary, nor to afford unwarranted opportunities for obstruction on the part of objecting landlords who have not themselves been significantly affected by any particular omission to comply with them.**
>
> [2024] UKSC 27 [98]

Case 4: Cleveland Potash Ltd v Drummond and others

The High Court had to decide whether a mines and minerals reservation clause in a lease covered potash and rock salt.

What was it about?

- This case relates to four parcels of land in a mining area of North Yorkshire. When they were sold in 1946/7, the vendor reserved to himself and his successors "*the mines beds and quarries of ironstone and iron ore and other metals*" (the Reservation).
- The Applicant mine operator, who now owns the parcels of land, claimed to own the tunnels and the beds of potash and salt beneath the land.
- The daughter of the original vendor disputed this, saying she, as successor, owned the tunnels and potash and salt beds because her father reserved ownership under the Reservation.
- The Court had to determine the meaning of the Reservation and specifically the meaning of "other metals".

What did the court say?

- Applying the principles of construction, the Court held that "*other metals*" in the Reservation means "other minerals which are a source of metallic elements", which includes potash and salt.
- In the absence of any direct evidence of the vernacular meaning of "*other metals*", the Court drew inferences based on what the parties' objective intention would have been at the date of the 1946/7 conveyances based on what people in the mining, commercial, and landowning community in that area would have considered it to mean.
- Another piece of extrinsic evidence was the 1946 auction sale particulars that referred to all minerals being excepted from the sale of the parcels. The Court found that any reasonable person reading the particulars would have understood that the sale was subject to a wide reservation covering rights to mine all minerals (including potash and salt).

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Why is it important?

- Mines and minerals cases are of heightened interest, with claims on the rise. With some coining it the "new" rights of light, we are seeing an increased awareness of these reservations and their ransom value, with certain businesses being known to actively purchase the benefit of mines and minerals reservations in order to hold developers to ransom.
- Often, the beneficiaries of these reservations will threaten injunction proceedings preventing a proposed development if they are not paid a substantial sum of money based on a share of the profit anticipated to be realised by the developer.
- It is an area that requires careful consideration of the specific rights and reservations together with expert input as to the types of minerals that might be found beneath the surface in any given location.
- As a result, in a similar way to rights of light insurance, we have seen the insurance market for mines and minerals cover harden over the past couple of years, with underwriters assessing the risk more carefully than previously. However, insurance generally remains available to developers and remains an important element of a robust risk mitigation strategy.
- In some circumstances, where injunction proceedings are threatened and settlement discussions are unsuccessful we may see more defendants attempting to neutralise the injunction threat by asking their local authority to either compulsorily purchase the rights or acquire the development site so as to engage section 203 of the Housing and Planning Act 2016.

It is therefore advisable to carefully review these reservations and adapt a suitable risk mitigation strategy.

> **The meaning and effect of the Reservation was to reserve (and except) ironstone, iron ore and other minerals which are a source of metallic elements… Potash and salt are minerals which are a source of metallic elements.**
>
> [2024] EWHC 1291 (Ch) [122]

New law: Renters' Rights Bill

The Renters' Rights Bill was published on 11 September 2024 and will extend rights for tenants further than its Conservative predecessor, the Renters (Reform) Bill.

Key changes for the private rented sector

- Assured fixed-term tenancies will be abolished. They will be replaced with periodic (rolling) tenancies, with rent periods not exceeding one month.
- So-called "no fault" evictions will be a thing of the past. Landlords will no longer be able to evict tenants, without the need to specify a particular possession ground, under section 21 of the Housing Act 1988. This will apply to both existing and future assured tenancies.
- There will be an expanded set of possession grounds, reliant on evidence, to evict tenants. These are not limited to acts of tenant breach and include landlord intent to redevelop, occupy themselves or sell. The threshold for the rent arrears eviction ground will be three months' arrears (up from two).
- Landlords will only be able to increase rents once a year, to market rent, under a set procedure. Rent review clauses within tenancy agreements will become unenforceable.
- There is a strong focus on making homes safe, with the application of Awaab's Law (which will require landlords to resolve health hazards promptly) and the Decent Homes Standard, as well as abolishing discriminatory practices for tenants with children or on benefits.

Further takeaways for landlords

- Private landlords will be required to register with and provide information to a centralised regulated database and join a new Ombudsman service. The Ombudsman will provide for landlord-initiated mediation to resolve disputes outside of the court process.
- While rent controls are not proposed, the practice of rental bidding will be prohibited. Landlords and agents will need to publish an asking rent, and will not be able to encourage or accept higher offers.
- Landlords cannot unreasonably refuse a tenant's request to keep a pet in their home.

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Section 21 evictions banned to protect renters from key driver of homelessness and empower them to speak up against discriminatory treatment.

Ministry of Housing, Communities and Local Government and
The Rt Hon Angela Rayner MP, press release 11 September 2024

How and when will the Act come into force?

- The Bill is expected to move through Parliament quickly and, unlike its Conservative predecessor, will be enacted in one stage.
- While this will avoid having to navigate a confusing two-stage system and fiddly transitional provisions, landlords, tenants and the courts will have to learn and adapt quickly.
- The Ministry of Housing, Communities and Local Government is working with the judicial system to prepare the County Court for what's to come, including digitising the possession process – a welcome change... if it works!
- Improving the court system will take time. In the meantime, as landlords will be required to prove a possession ground, more court hearings will be required to decide disputed cases. This aspect cannot be digitised. Until there is more court resource, the practical reality is that possession claims will take longer.

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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