selborne
CHAMBERS

NEWSLETTER

SUMMER 2016

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Welcome to the Selborne Chambers Summer Newsletter

Welcome. The summer has brought Chambers annual participation in the Legal Charities Walk. The accompanying photo shows our "merry band" of walkers, just before we set off. The photo includes a new member, Julia Beer. Julia has joined us from 10 Old Square. She is an acknowledged expert on trusts, company law and contentious probate, and expands our skills in those areas.

This newsletter includes a number of articles, on a variety of current topics. Richard Clegg writes on good faith in contracts. Duncan Kynoch on Murdoch v Amesbury, a case relating to the jurisdiction of the First Tier Tribunal, that has already caused "waves". Simon McLoughlin writes upon Hardy v Griffiths, and the doctrine of discharge of contracts by breach, and the recovery of deposits. Paul de la Piquerie offers important practical insights into the participation of a party in a case, when that party's defence has been struck out. Finally, I comment upon the impact of Moorjani v Durban Estates, and the measure of damages where a tenant sues his landlord.

As always, our Clerks are available to offer assistance for those seeking a home for legal problems, great and small.

Very Kind Regards,

MARK WARWICK QC
Head of Chambers

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Back to the future? Discharge by breach, recovery of deposits and the aborted sale of a 19th century manor on the South Downs

Written by,
Simon McLoughlin

The consequences of a purchaser failing to complete a contract for the sale and purchase of land can be expensive. Following service by the vendor of a notice to complete, the Law Society's Standard Conditions of Sale (5th edn) ("**the SCS**") provide (at clause 6.8.3) that the buyer must on receipt of the notice pay a deposit of 10% of the purchase price (if no deposit has already been paid) or, if a deposit of less than 10% has already been paid, pay forthwith a further deposit such that the total sum paid to the vendor equates to 10% of the purchase price. The SCS further provides (at clauses 7.4.1 and 7.4.2(a)(i)-(iii)) that if the purchaser fails to complete the purchase as required by the said notice to complete, the vendor may "*rescind*" the contract and, if he does, the vendor may forfeit and keep any deposit, re-sell the property and claim damages.

What is the position following the vendor's service of a notice to complete, if the purchaser fails to complete and the vendor thereafter 'rescinds' the contract, but no (or not all of the) deposit has been paid? There is no (full) deposit sum to retain, but is the vendor entitled to recover as damages or a debt a sum equivalent to the unpaid (portion of the) deposit?

The answer requires an understanding of what is meant here by use of the word 'rescind'. In *Johnson v Agnew* [1980] AC 367 Lord Wilberforce opined (at 392H-393B) that the use of the term 'rescission' in this context was "*a fertile source of confusion*"[1] because:

> "*…although the vendor is sometimes referred to in [this] situation as 'rescinding the contract, this so-called 'rescission' is quite different from rescission ab initio, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence… In cases of an accepted repudiatory breach the contract has come into existence but has been put to an end or discharged.*"

What we are concerned with here is termination of the contract by the acceptance by B of A's repudiatory breach (or 'discharge by breach'). The legal effect of B's election to treat the contract as discharged was explained by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] 2 WLR 283 (at 849):

> "*(a) there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (b) the unperformed primary obligations of that other party are discharged.*"

The purchaser and vendor may be discharged from <u>further</u> performance of the contract (see *Johnson v Agnew* (above, at 392E-H), but rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach continued unaffected.

The orthodox analysis above suggests that because the obligation to pay the (full) deposit will have arisen before the contract has been terminated (but because the contract will <u>not</u> be treated as <u>never</u> having existed (it is not 'rescinded' *ab initio*)), the vendor ought to be entitled to sue the purchaser either (i) for damages for breach of an obligation from which the purchaser is not discharged by reason of the termination of the contract (which is effective to discharge the parties from only their <u>future</u> obligations), or (ii) for a debt, the obligation to pay the deposit having already arisen.

However, in the case of deposits payable under contracts for the sale and purchase of land, the courts have not always observed the above orthodoxy. In *Lowe v Hope* [1970] Ch 94 the vendor sought the balance of a deposit payable under a contract later treated as discharged by reason of the purchaser's failure to complete. Pennycuick J (in reliance on and approving the academic view in *Williams on Vendor and Purchaser* (4th edn, 1936)) refused the vendor's claim, holding that:

> "*…the vendor having elected to bring the contract to an end by rescission is not entitled to insist on the performance of the contract in relation to the deposit… It would…be quite contrary to principle that a vendor having rescinded a contract so that the contract is at an end should at that stage be entitled to insist that the purchaser shall hand over to him a contractual pledge with a view to its forfeiture*"

Lowe v Hope is, of course, contrary to (though pre-dated) the orthodox analysis in *Johnson v Agnew* and *Photo Productions v Securicor*, but has since been followed in two commonwealth cases (*Johnson v Jones* [1972] NZLR 313 and *Lyon v Magnet Nominees Pty Ltd* [1978] VR 673). In *Millichamp v Jones* [1982] 1 WLR 1422 Warner J doubted the correctness of *Lowe v Hope*, but declined to reconcile the authorities, considering it was a matter for the Court of Appeal.

The point arose again in the context of land contracts in the relatively recent case of *Hardy v Griffiths* [2015] Ch 417, which concerned the aborted sale and purchase for £3.6m of Laughton Manor, "*a substantial country residence…*[in] *Italian style*" situated near Lewes on the South Downs and boasting, among other features, "*…a tower… small lake, a helicopter pad and 12 acres*". Having paid part only (£150,000) of the total deposit payable (£360,000), the purchasers refused to complete (on the basis they had been misled about the presence of damp and rot at the property) and the vendor sought declarations that the contract had been brought to end and that the £150,000 paid was forfeit and claimed £210,000 by way of damages for breach of clause 6.8.3(b) of the (then 4th edition of) SCS. In resisting the claim for the balance of the deposit, the purchaser relied on *Lowe v Hope*.

The deputy judge (Amanda Tipples QC) rejected the purchaser's defence. Quite apart from the statements of high authority in *Johnson v Agnew* and *Photo Productions v Securicor* as to the general effect of repudiatory breach, the deputy judge drew the parties' attention to two shipping cases (*The Blankenstein* [1985] 1 WLR 435 and *The Griffon* [2014] 1 All ER (Comm) 593) in which the Court of Appeal had expressly held that *Lowe v Hope* was wrongly decided[2]. Though *Lowe v Hope* had thus in fact been regarded as incorrect (at least in authorities outside the realm of land contracts) since at least 1984 (a point made in terms by the deputy judge (at 444)), the heresy it introduced to the law on the vendor's recovery of unpaid deposits has now finally been destroyed once and for all.

Hardy v Griffiths is thus a helpful reminder of the applicable (first) principles in this area. It is also timely: the property market remains uncertain and, with that uncertainty likely to continue, practitioners will doubtless encounter cases of purchasers with 'post-exchange cold feet'. Indeed, taken together with the courts' hardening line on the availability to purchasers of relief from forfeiture of the deposit under s. 49(2) of the Law of Property Act 1925[3], the position of the innocent vendor may now appear much more secure.

[1] See, for example, Howard-Jones v Tate [2011] EWCA Civ 1330 where the judge at first instance correctly found that the purchaser was entitled to treat the contract as at an end by reason of the vendor's repudiatory breach of a (post completion) contractual condition, but proceeded wrongly to assess damages on the basis that the contract had thereby been rescinded ab initio (restoring the parties to the position they were in had the contract never come into existence).

[2] In fact, The Blankenstein had been recently considered in Samarenko v Dawn Hill House Ltd [2013] Ch 36 (which was a case concerning deposits in the specific context of land contracts) and in which Lewison LJ made clear (at 46D-E) that "in this respect there can be no distinction in principle between a contract for the sale of ships and a contract for the sale of land".

[3] See the stricter approach of the Court of Appeal in Omar v El Wakil [2001] EWCA Civ 1090 and Midill (97PL) Ltd v Park Lane Estates Ltd [2008] EWCA Civ 1227, more recently applied in Cohen v Teseo Properties Ltd [2014] EWHC 2442 and TBAC Investments Ltd v Valmar Works Ltd [2015] EWHC 1213 (Ch).

THE ASSESSMENT OF A TENANT'S CLAIM FOR DAMAGES AGAINST HIS LANDLORD – A PRINCIPLED APPROACH

Written by,
Mark Warwick QC

INTRODUCTION

1. Predicting which cases might become important precedents is far from easy. It is unlikely that when Mr Mansing Moorjani began his claim for modest damages against his landlord, Durban Estates Limited, he appreciated that his case would proceed to the Court of Appeal and result in a detailed review of the law on the assessment of damages by Briggs LJ, and a ruling upon an issue of principle on which there was no reported authority, see **Moorjani v. Durban Estates Limited** (2015) EWCA Civ 1252.

2. The issue of principle formulated by Briggs LJ in paragraph 1 of his judgment was:

   "Whether the lessee under a long lease of a residential flat can claim to have suffered loss arising for a period of disrepair affecting both the flat and the common parts in the building attributable to the lessor's breach of its obligations to the lessee if, during that period, and for reasons unconnected with the disrepair, the lessee chooses to live elsewhere, leaving the flat vacant."

As Briggs LJ went on to explain: *"Although he was concerned with the lessee under a long lease, the principle arising would seem to be the same regardless of the nature of the tenancy"*. I would add that the reasoning in the case could probably be extended to include lettings for business purposes.

3. In the circumstances, the **Moorjani** case deserves close attention. Hereafter this article examines the leading cases on damages for breach of landlords repairing covenants, prior to **Moorjani**, then **Moorjani** itself, and then offers some brief reflection on the current position.

THE PRE-MOORJANI AUTHORITIES

4. Briggs LJ identified four leading cases, namely **Hewitt v. Rowlands** (1924) 93 LJKB 1090, **Calabar Properties v. Stitcher** (1984) 1 WLR 287, **Wallace v. Manchester City Council** (1998) 30 HLR 1111 and **Earle v. Charalambous** (2007) HLR 8. All four cases were decisions of the Court of Appeal.

5. In **Hewitt v. Rowlands** the Court was concerned with a statutory tenancy of a cottage suffering from pervasive dampness. Briggs LJ noted that: *"The case had a disastrous procedural history"*. He explained however that: *"It is best remembered for the concise statement of the fundamental principle for quantification of damages stated by Bankes LJ."* This statement was as follows:

   "Prima facie the measure of damage for breach of obligation to repair is the difference in value to the tenant during that period between the house in the condition in which it now is and the house in the condition in which it would be if the landlord on receipt of the notice had fulfilled his obligation to repair".

6. In **Calabar Properties v. Stitcher** the Court was concerned with a top floor flat held on a long lease, where the landlord was in breach of its repairing obligation, resulting in ongoing water penetration. The effects upon the occupants were serious, with bouts of ill health. Eventually the occupants vacated the flat for good. The case is, partly, an object lesson in the need to properly formulate and particularise special damage. In his judgment, Griffiths LJ explained that: *"If breach of the landlord's repairing covenant forces a tenant to find alternative accommodation, because the demised premises have become uninhabitable, then in principle such a claim is recoverable."* Unfortunately, in that case, this head of claim had not been pleaded.

7. Griffiths LJ explained that:

   "The object of awarding damages against a landlord for breach of his covenant to repair is not to punish the landlord but, so far as money can, to restore the tenant to the position he would have been in had there been no breach. This object will not be achieved by applying one set of rules to all cases regardless of the particular circumstances of the case. The facts of each case must be looked at carefully to see what damage the tenant has suffered, and how he may fairly be compensated by a monetary award".

8. In the same case, Stephenson LJ stated as follows:

   "In measuring and assessing any tenant's damages for breach of a landlord's repairing covenant, the Court must, I think, always start with the fundamental principle that they are "so far as is possible by means of a monetary award, to place the Plaintiff in the position which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach in contract".

9. In **Wallace v. Manchester City Council** the Court was concernedwith a secure tenancy of a councilhouse. There was a long period of appalling disrepair, forwhich the landlord was responsible. Nonetheless the tenant and her children remained in occupation. Morritt LJ helpfully set out four propositions to be applied in the approach to the assessment of damages.

10. In **Earle v. Charalambous** the Court was concerned with the long lease of a top floor flat, where progressive deterioration, due to a leaking roof, forced out the lessee, who then went to live with his parents. The judgment of Carnwath LJ contained an analysis of the preceding authorities. At paragraph 31 in the judgment of Briggs LJ in **Moorjani** he said as follows:

    "The critical part of that analysis for present purposes is Carnwath LJ's conclusion that "distress and inconvenience caused by disrepair are not freestanding heads of claim, but are symptomatic of interference with the lessee's enjoyment of that asset". I would not, for my part, limit that observation to long leases, so as to exclude periodic, secure or even statutory tenancies. In each case, the lessee or tenant enjoys a recognisable species of property right, in return for payment, either in the form of a premium, a rack rent or a fair rent. If in any of those cases the amenity or value of that bundle of rights to the lessee or tenant is impaired by the lessor's or the landlord's breach of covenant, then that is a loss of which discomfort, inconvenience or distress (or the breakdown in health of a loved one) are all symptoms."

The above passage shows the wide reaching importance of Briggs LJ's analysis.

THE MOORJANI CASES

11. In **Moorjani**, Mr Moorjani took a long lease (for 150 years) in 1977 of a flat in a Central London mansion block known as Ivor Court, Gloucester Place, London NW1. He paid a substantial premium. The lease had a modest ground rent, together with a provision for the payment of a service charge. The lease included covenants on the part of the lessor to maintain and repair the common parts, plus an insurance and reinstatement obligation, requiring the building to be insured against insured risks, with all monies received in respect of insurance to be *"laid out with all convenient speed in rebuilding, repairing or otherwise reinstating the building ..."* Briggs LJ pointed out that: *"It is well known, and common ground in this case, that a covenant of that kind places an implied obligation on the lessor to pursue its rights under such a policy, so as to generate payment by the insurers for whatever works of rebuilding, repair and reinstatement are necessary because of the occurrence of an insured risk."* He cited **Vural Limited v. Security Archives Limited** (1989) 60 P&CR 258.

12. In the **Moorjani** case the lessee had almost completed works of refurbishment to his flat when there was a serious leak above it, causing damage to his own flat and to the flats below it. Briggs LJ called this *"the 2005 flood"*. It was a feature of the case that the Judge at first instance had found that the lessor's agent had assured Mr Moorjani that the landlord would liaise with the insurers, and put in train proper procedures for identifying and dealing with defects caused by the flood and covered by the insurance policy. At the trial the Judge found that the contractor's works were seriously inadequate, both because there were of poorquality and because of omissions. Nonetheless the Judge found that the deficiencies were essentially decorative, and the flat was not rendered uninhabitable.

13. In view of his complaints with the quality of the work, Mr Moorjani himself engaged contractors, and the defects were made good. The noteworthy point in **Moorjani** is that prior to the 2005 flood he had not been living in the flat, but living with his sister. He continued to live with his sister until 2008. At the trial various heads of claim were advanced. The Trial Judge made various rulings. One was the subject of an appeal which did not raise any

point of general principle. It is therefore not appropriate to consider that aspect herein. However, under the heading "*The Question of Principle*" at paragraph 25, Briggs LJ then considered this question. After reviewing the four cases identified above, together with certain other cases, the Judge said he had "*reached the following tentative conclusions*". In view of their importance it is worth reproducing the same below. Beginning at paragraph 35, the Judge said as follows:

35. "..... *First, although the language of the Calabar and Wallace cases speak of discomfort, inconvenience and distress as if they were the very losses caused to the lessee by the lessor's breach, the better view is that the loss consists in the impairment to the rights of amenity afforded to the lessee by the lease of which discomfort/inconvenience and distress (and even the deterioration of the health of a loved one) are only symptoms. The lessee pays a premium for the assignable right to the enjoyment of occupation of a specific property for a period usually longer than his own lifetime, the quality of which is underpinned the lessor's repairing and reinstatement obligations. It is nothing to the point that the lessor incurs no cost in their performance (since that is met either from insurance or service charge). The quality of enjoyment is underpinned by the lessor's promise to carry out those obligations diligently and in due time rather than to neglect or delay in their performance.*

36. *Secondly, it is therefore not a fatal obstacle to a claim for damages for that impairment in the lessee's rights that the lessee may have chosen not to make full use, or even any use, of them during part or even all of the relevant period for reasons unconnected with the disrepair itself. The use which the lessee chooses to make, or not to make, of those rights is, at least in principle, res inter alios acta, in just the same way as the profitable re-letting of premises prior to the quitting of possession by an earlier tenant in breach of his repairing obligations.*

37. *But thirdly, it by no means follows that the use, or non-use, of the lessee's property rights during the period of disrepair is irrelevant for all purposes. It may for example be relevant as mitigation of loss. Thus in the Earle case, the lessee mitigated the consequence of having his premises rendered uninhabitable by lessor's default by living for part of the relevant period with his parents. Prima facie the loss of his rights of use and amenity at his flat was total and should have entitled him to a 100 per cent notional rent by way of damages. But the Court of Appeal was content to limit his damages to 50 per cent of a notional rent. At [41], Carnwath LJ said this:*

"With regard to period (ii), I begin from the position that the lessee was deprived of the entire enjoinment of his property throughout this period. Whether one treats rental value as a measure of that loss, or one looks to the cost of renting equivalent accommodation, that would suggest a potential ****78*** *award of the order of £21,000. The lessee was able to mitigate his loss by living with his parents for this period, but that does not mean that the compensatable loss is confined to his transport problems. That would leave him with nothing for the loss of enjoyment of his property for almost two years."*

38. *Where, by contrast, a lessee has to rent alternative premises, then that cost may be the best measure of the lessee's loss, as is I think implicit in the conclusion of the Court of Appeal in the Calabar case that, had it been pleaded, that loss would have been recoverable in full.*

39. *Fourth, it would be strange if mitigation were the only principle by reference to which the limited use or non-use of leasehold premises during the period of disrepair was relevant. In the present case, Mr Moorjani had vacated Flat 67 to live with his sister rent-free sometime before the 2005 flood for reasons which were, necessarily, unconnected with any breach of covenant by Durban Estates, and the judge concluded that he continued to live with his sister (rent-free) after the 2005 flood for reasons unconnected with that breach. Suppose that the disrepair had (contrary to the judge's findings) rendered Flat 67 uninhabitable. It would be strange indeed if, in those circumstances, Mr Moorjani was entitled to recover 100 per cent of the rent value of the flat during the period of disrepair, whereas Mr Earle (who vacated by way of mitigation) was entitled to a mere 50 per cent, for an equivalent impairment of his rights as lessee. It may be that non-use for reasons unconnected with the disrepair should be regarded as a form of mitigation of loss, even if there is no intention to mitigate, but it will not wholly cancel out the loss constituted by the impairment of amenity, for which the tenant has paid rent, and the lessee a premium, even if he lives elsewhere rent-free.*

40. *Fifth, and finally, the court is entitled and, I would say, obliged to temper the rigour of those rules which seek to implement the compensatory principle which lies at the heart of the law of damages, where particular circumstances make it just to do so, see generally County Personnel (Employment Agency) Ltd v Alan Pulver & Co [1987] 1 W.L.R. 916. In particular circumstances, as was acknowledged in the Shine case, this may admit quantification of damages in excess of the current rental value. In Calabar v. Stitcher the lessee recovered compensation on account of the damage to her husband's health occasioned by the disrepair. In other cases, its seems to me perfectly legitimate to treat the particular circumstances of the claimant lessee as tending to reduce rather than aggravate his damage, and not merely where the relevant conduct consists of what may conventionally be described as mitigation."*

14. Although the above conclusions were stated to be "*tentative*", the other two Judges agreed with them. Furthermore, the conclusion of the Court was to allow the lessee's appeal. At paragraph 42 of the judgment of Briggs LJ, he stated as follows:

"In my view, the Judge was wrong to treat Mr Moorjani's non-occupation of his flat during most of the period of disrepair as fatal to his claim for his compensation for loss of amenity. In my judgment he suffered precisely the same loss as would have been suffered by a lessee who, in comparable circumstances, had remained in the flat throughout, namely a serious although temporary impairment of the rights in relation to that flat conferred upon him by the lease, for which he had paid a full premium. The starting point for the valuation of that impairment ought to be by reference to the rental value of the flat during the relevant period, with a very substantial percentage discount to reflect the Judge's conclusion that the disrepair in the flat was cosmetic and did not render it uninhabitable, and that the disrepair in the common parts was not, by reference to other cases with which he was familiar, of a particularly severe kind. The damages should then be further substantially reduced by reference to the fact that, unusually, Mr Moorjani chose not to occupy the flat for most of the relevant period, so that the effect upon him of the impairment of his rights was very much less than it would have been upon a lessee who, as is usual in such cases, remains in occupation throughout".

15. Following the above comment, the Court of Appeal set aside the Trial Judge's "*nil award*" and produced a calculation for damages which resulted in an award of about £4,000 for impaired amenities.

"a reminder that the Courts place heavy emphasis upon property rights, and even absent proof of actual damage, are prepared to make awards of damages if those property rights are interfered with."

CONCLUSION

16. Although the judgment of Briggs LJ does not say so, it has some similarities to the assessment of damages for interference with a property right, where the damages are not assessed on the basis of loss to the property owner. Examples of such cases are **Inverugie Investments v. Hackett** (1995) 1WLR 713, where the Privy Council was concerned with loss of the use of apartments (in a hotel on Grand Bahama) and **Enfield Borough Council v. Outdoor Plus Limited** (2012) EWCA Civ 608, where the Court of Appeal was concerned with an advertising hoarding that partly trespassed upon the Claimant's land. **Moorjani** is in line with these cases, and is a reminder that the Courts place heavy emphasis upon property rights, and even absent proof of actual damage, are prepared to make awards of damages if those property rights are interfered with.

Beware of the Jurisdiction of the First-Tier Tribunal Property Chamber (Land Registration)

Written by,
Duncan Kynoch

It is often the case that a property dispute (e.g. an application for adverse possession, or a boundary dispute) first surfaces by an objection to an application for registration made before HM Land Registry. In the absence of a resolution of that dispute, the Land Registry will "refer" the dispute to the First Tier Property Chamber (Land Registration) ("First Tier Tribunal") for a determination. The parties to the dispute before HM Registry are not given a "choice" of whether to litigate, or have their dispute referred to the First Tier Tribunal. HM Land Registry will always refer the matter to the First Tier Tribunal absent agreement or settlement. This article examines the essential jurisdictional pitfalls for the uninformed that await in the First Tier Tribunal.

Advisers should appreciate that, because the First Tier Tribunal is a "create of statute", and so has no jurisdiction beyond that which has been conferred on it by Parliament, its jurisdiction is, in many respects, limited. Most significantly, the First Tier Tribunal has no equity jurisdiction at all. So, in a determined boundary dispute, where one party claims the land in dispute by, for example, proprietary estoppel the First Tier Tribunal simply cannot determine that issue, because it has no jurisdiction so to do. The First Tier Tribunal cannot grant a declaration, make an order for specific performance, award an injunction, or make an award of damages, for the same reason. The First Tier Tribunal cannot made a declaration as to the true construction of a lease term, or declare a notice invalid, nor can it restrain conduct infringing a property right by an interim or final injunction.

SO WHAT IS FIRST TIER TRIBUNAL'S JURISDICTION?

The source of the tribunals jurisdiction is determine "matters" referred to it under LRA 2002, s 73(7): see LRA 2002, s 108(1)(a).

The Court of Appeal has confirmed that, in performing its function, the Tribunal must determine the "underlying merits" of the substantive dispute between the parties in a judicial capacity: Chief Land Registrar v Silkstone [2011] EWCA Civ 801, [37], CA, [2012] 1 WLR 400, [2011] 2 P & CR 258, approving Jayasinghe v Liyanage [2010] EWHC 265 (Ch), [2010] 1 WLR 2106, [2010] 1 EGLR 61. In the High Court decision in Silkstone it was disputed whether the Adjudicator had the power to refuse permission for one of the parties to withdraw their objection to the application once the matter had been referred to the Adjudicator. This involved consideration of whether the role of the Adjudicator was to deal with applications to which objections had been made, or whether it was to determine the existence or otherwise of the substantive rights in dispute. Mr Justice Floyd made the following comments about the jurisdiction of the Adjudicator (which is now the jurisdiction of the Tribunal):

> *"I think that the reference to the Adjudicator is better viewed as a proceeding whose purpose it is to determine the underlying right, quite unlike the administrative procedure in the Land Registry. That is illustrated by the fact that one way in which the Adjudicator may carry out his function is by ordering a party to commence court proceedings, which would also have the effect of determining underlying rights. Proceedings before the Adjudicator are triggered precisely because it is necessary to determine those rights in order to dispose of the objection"*

This decision was upheld at the Court of Appeal, where Rimer LJ similarly said:

> *"A reference to an adjudicator of a "matter" under section 73(7) confers jurisdiction upon the adjudicator to decide whether or not the application should succeed, a jurisdiction that includes the determination of the underlying merits of the claim that have provoked the making of the application. If the adjudicator does not choose to require the issue to be referred to the court for decision, he must determine it himself"*

In Jayasinghe v Liyanage, Mr Justice Briggs noted that section

73(7) requires the objection to be "disposed of". Mr Justice Briggs held that the Adjudicator had jurisdiction to hold a trial in order to determine the existence of the beneficial interest in question. The reasoning of the court in Jayasinghe was therefore closely tied to the wording of the underlying provision of the LRA 2002 under which the dispute had arisen. Notably, Mr Justice Briggs made it clear that the nature of the Tribunal's jurisdiction will vary in each case relating to restrictions, depending on "the precise restriction sought, the nature of the claim or right thereby sought to be protected, and the basis of the objection which has led to the reference". In particular at para 18 and 19 of his judgment Briggs J concluded:

> *"It follows from that analysis that the precise nature of the adjudicator's function on any particular reference under section 73(7) will be significantly affected by an examination of the precise restriction sought, the nature of the claim or right thereby sought to be protected, and the basis of the objection which has led to the reference. It is plain from section 110(1) that the adjudicator is given a broad discretion, on a reference under section 73(7), whether to decide "a matter" himself, or to require it to be decided in a competent court, and it is equally plain from the panoply of procedural powers given to the adjudicator under the Practice and Procedure Rules that a decision to decide a matter himself may properly involve a trial, rather than merely a summary review directed merely to the question whether an asserted claim is reasonably arguable.*
>
> *It follows that to the extent that this appeal is based upon the argument that the adjudicator had no jurisdiction to conduct a trial of the question whether the applicant had a beneficial interest in the property under a resulting trust, that argument must be rejected. None the less Mr Maynard submitted that, even if the adjudicator had a power to take that course, his decision to adopt it involved an inappropriate exercise of his discretion. To that question I now turn, bearing in mind that it requires a fact intensive analysis of "the matter" referred to him under section 73(7)".*

> **"The issue for [the judge] was whether the plan was accurate, she had no power, in my judgement to go on to consider the position where the plan was not accurate."**

Briggs J in Jayasinghe then analysed the parties' respective Statements of Case before the Adjudicator in order to determine "the matter" referred under s.73(7).

Murdoch v Amesbury (Murdoch) [2016] UKUT 3 (TCC) has caused considerable debate in the profession. In Murdoch Judge Dight held that, in an application to determine a boundary where the plan relied on to support the application was inaccurate, the Tribunal did not have jurisdiction to decide where the boundary did lie. There was therefore no jurisdiction to determine the underlying boundary dispute. Judge Dight held that

> *"The issue for [the judge] was whether the plan was accurate, she had no power, in my judgment, to go on to consider the position where the plan was not accurate".*

Judge Dight held at [81]:

> *"The essence of Mr Justice Briggs' decision was that it was open to the Adjudicator to conduct a full trial where appropriate. It is not authority for the proposition that the Adjudicator has jurisdiction to resolve issues which had not been referred to him. The issue before the learned Judge in the instant case was not whether there should have been a summary determination or a trial. In the instant case the boundary dispute was not referred to the learned Judge to determine, whereas the plan dispute was: the boundary dispute was not part of the "matter" referred".*

Therefore, applying Murdoch, the First Tier Tribunal must limit itself to the particular application "referred", and therefore before it, and not determine ancillary disputes between the parties.

It is notable that in two recent decisions by Professor Elizabeth Cooke, Bean v Katz (UT/2016/0042; handed down on 6th April 2016) and Smith v Davis (2015/0447/44;448/450; handed down on 5th April 2016) Murdoch was not followed. Professor Elizabeth Cooke held in these two cases that where issues of title fall within the "reasons" of matter referred to the First Tier Tribunal then it is open to the Tribunal to determine such issues, including the position of a boundary.

It would appear therefore that Murdoch's scope is already been limited to own facts (viz. that where the application is for a determined boundary then there is no jurisdiction to determine the underlying boundary dispute).

CONCLUSION

It is evident from the above that there are serious jurisdictional questions as to the types of dispute that the First Tier Tribunal can adjudicate on. Ordinarily, there are no such jurisdictional issues circumscribing claims in the Courts. It is therefore imperative that, where a dispute is about to be "referred" to the First Tier Tribunal, advisors must carefully consider whether the above jurisdictional limitations will prevent determination of the whole dispute between the parties. Advisers will want to avoid a situation where, in the Chancery Division their clients would have succeeded by deploying some equitable doctrine, but lose the case because of the more limited jurisdiction of the First Tier Tribunal. If there is any doubt as to jurisdiction then the author suggests that the best approach is to issue proceedings in the Chancery Division, or County Court, and to seek a stay of the "referral" to the First Tier Tribunal.

The extent to which a party that has been struck out is able to participate at trial

Written by,
Paul de la Piquerie

1. The decisions of the Court of Appeal in *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537 and *Denton v TH White Ltd* [2014] EWCA Civ 906 made the obtaining of relief from sanctions under CPR 3.9 substantially more difficult than had previously been the case. The most simple and draconian such sanction is striking out.

2. The decisions also appeared to lead to an increase in the number of instances of parties to litigation actually being struck out in the first place. One reason for this is that under CPR 3.4(2)(c), according to which the Court may strike out a party's statement of case where there has been *"a failure to comply with a rule, practice direction or court order"*, the Court is entitled, when considering whether to strike out, to have regard to CPR 3.9 and the *Mitchell/Denton* guidance (per Richards L.J at paragraph 44 in *Walsham Chalet Park Ltd v Tallington Lakes Ltd* [2014] EWCA Civ 1607). Another such reason is that in cases where the Court considers what sanction (if any) to impose upon a party for a failure to comply with a direction or rule, the Court will usually consider whether to grant an extension of time for compliance under CPR 3.1(2)(a). But this analysis also involves, if the deadline for compliance has already passed, application of the *Mitchell/Denton* guidance.

3. It had been thought that the guidance given in *Denton* about the application of the *Mitchell* test would soften the impact of *Mitchell*. If this has happened then the result has been less marked than anticipated. There is an impression being given at the moment, at least in certain county courts, that the new toughness of the CPR 3.9 test is being usefully employed as part of a new focus on robust case management which has the result (quite fair and probably intended) of reducing the workload of a strained court system.

4. The increased instances of parties being struck out naturally begs the question what role, if any, a party that has been struck out can play in the remaining litigation. One would be forgiven for thinking that the answer to this question might be no role at all. However, this is not necessarily the position and it is a question the answer to which is frequently far less obvious than might be expected. It is a question which is increasingly relevant.

TERMS OF ORDER

5. This, of course, is the starting point. If a Claimant is struck out then plainly there can be no judgment in the Claimant's favour because there is no positive case remaining. If a Defendant is struck out under an order which additionally provides that judgment be entered against the Defendant then the result is equally clear. But what is the position in respect of an order that does not have the effect of disposing of the proceedings in their entirety? For example, a claim in which the Order provides that the Defendant is struck out but does not state that judgment for the Claimant be automatically entered, or a claim in which the Claimant is struck out but a Defendant's counterclaim remains?

THEVARAJAH V RIORDAN [2014] EWCA CIV 14

6. The Court of Appeal gave guidance on this point in the above case.

7. *Theverajah* was a case in which the Claimant sought a variety of relief including specific performance, damages and a declaration. The Defendants counterclaimed for substantially the same relief.

8. The First, Second and Fourth Defendants were made the subject of an "unless order" by Mr Justice Henderson which provided that unless they gave certain specific disclosure they would be *"debarred from defending the Applicants' claim and any Defence that they might have shall be struck out"*.

9. The Defendants failed to comply with the above order and subsequently brought an application for relief from sanctions under CPR 3.9. The application was refused by Mr Justice Hildyard who made an order which a) struck out the defence and counterclaim, b) set down the determination of the Claimant's remaining heads of relief for what was described as a 'disposal hearing', and c) stated that the Defendants were *"debarred from defending the First Claimant's claim"*.

10. The Defendants then made a second application for relief from sanctions under CPR 3.9. This application was heard by Deputy Judge Sutcliffe QC and was granted. What is of note for present purposes were the statements made by the Deputy Judge when granting relief:

    "notwithstanding the fact that they are currently debarred from defending the claim and subject to the court's inherent jurisdiction to regulate its own process, the Defendants are entitled at trial to require the Claimant to prove his claim, to cross-examine and to make submissions" and: *"whilst not entitled to challenge the issue of liability, the Defendants would be entitled to make submissions to the court on the appropriate form of relief as well as challenging the Claimant's liquidated claim."*

11. The Court of Appeal subsequently overturned the Deputy Judge's decision to award relief. Richards L.J also specifically referred to the statements of the Deputy Judge above and commented (at para.38):

    "…we are troubled by the deputy judge's observation that even if the respondents remained debarred from defending the claim they would be "entitled at trial to require the Claimant to prove his claim, to cross-examine and make submissions" (see para 16 above). The cases to which he referred in that connection, namely Culla Park Ltd v Richards [2007] EWHC 1687 and JSC BTA Bank v Ablyazov (No. 8) [2013] 1 WLR 1331 , do not appear to us necessarily to support so sweeping a proposition. This issue, however, will be a matter for decision by the judge who hears the trial; and, having put down a marker in relation to it, we think it better to say no more on the subject at this stage."

12. Shortly before the trial of the above matter there was a further hearing before Mr Justice Sales. In answer to the question what was the purpose of the hearing, counsel for the Claimant stated that the issue was what the Defendants could and could not do given that they had been struck out. The Claimant submitted that the Defendants were unable to contest anything the Claimant said and were not entitled to participate at trial at all. The Claimant did, however, concede that this would not mean that the Claimant could simply have any order sought and that the Claimant had to persuade the Court on the pleadings and the evidence that he was entitled to the relief claimed.

13. Mr Justice Sales disagreed. He ordered that the Defendants were a) entitled to call expert evidence as to the value of the property in issue in the claim, b) permitted to participate fully in matters of quantum where such quantum was pleaded as damages to be assessed and c) allowed to file and serve a list of points of dispute pertaining to the damages to be assessed where they took issue with the Claimant's case. However, the Defendants were not:

    a) *"permitted to participate in any matters of liability pleaded in the Claimant's Particulars of Claim save for assisting the Court in understanding the Claimant's case if necessary"*; or

    b) Allowed to *"take any steps to challenge any parts of the Claimant's claim as pleaded in his Particulars of Claim or evidence adduced in support thereof"*.

14. Mr Justice Sales further stated:

    "Mr Bailey for the Claimant submitted that the Defendants have no right of participation at all in relation to liability. In my view that goes too far. If, for example, in relation to a judgment entered in default of defence (a position analogous to that achieved by the sanction in Henderson J's order) it later emerges that the trial judge had misunderstood the claim and granted excessive relief, that would provide grounds for an appeal, and the defendant would be entitled to bring and maintain such an appeal. That being so, the judge at a hearing at first

instance faced with a claim for judgment to be entered in default would likewise potentially be assisted by submissions from counsel for the defendant directed solely to understanding the extent of a claim set out in the particulars of claim. To that limited extent, counsel for the Defendants in this case will have a right of participation in the further hearing in so far as it relates to the claim already set out in the pleading in the Particulars of Claim. I emphasise how limited that role is. It is confined to assisting the court in understanding the case pleaded, which the Defendants have been debarred from defending."

15. The Court of Appeal questioned the analogy drawn by Sales J to the entry of judgment in default, but did not otherwise criticise his approach above.

16. *Thevarajah* was applied by the Chancery Division in *Apex Global Management Ltd v F1 Call Ltd & Ors* [2015] EWHC 3269. This was a case in which by order dated 18 December 2014 the *'Apex Parties'* had been debarred from defending the Counterclaim of the Second Defendant: 'Global Torch'. Hildyard J stated (para.63):

"What I apprehend is required of me is to determine whether Global Torch is entitled to the remedies it seeks by reference to such of the facts in the Counterclaim as it is able to prove (or which the Defendants have admitted)."

17. Counsel for the Apex parties conceded that he was not allowed to "*trespass in any way on the counterclaim*" including by cross-examination or submissions. Hildyard J agreed with this concession and stated of *Thevarajah* (para.70):

"As I read the Court of Appeal's decision, the debarred party's pleadings may and usually should be taken into account for the purposes of defining and confining the ambit of the real dispute; and, for example, admissions may be taken as rendering proof of the admitted matters unnecessary. However, that is not to say that the proceeding party is entitled to seek adjudication of the debarred party's case: only to adjudication of its own case, and only then insofar as the court considers requisite in order to determine whether to grant relief and in what terms".

18. It is suggested that the points below follow logically from the above:

    1) The question what a struck-out party can and cannot do is ultimately a matter for the trial Judge, but the Court of Appeal have laid a "*marker*" that they do not believe there is binding authority for allowing a struck out party to cross-examine or make submissions as one usually would;

    2) Absent an order to the contrary, one would expect any skeleton argument filed by a struck-out party to be restricted to clarifying any ambiguity as to the extent of the dispute;

    3) Any submissions by a struck-out party, whether on paper or oral, ought to be restricted to clarifying any ambiguity as to the extent of the dispute. Without more, they should not advance any positive case.

    4) Subject to the discretion of the Judge in 1) above, a proceeding party would have a fairly compelling argument that *if* (which would be unusual) a struck-out party were allowed to cross-examine, then such cross-examination should be limited to testing internal inconsistencies in the witness' evidence rather than advancing any form of positive case by referring to extraneous documents or challenging the witness' version of events.

19. Of course, if a struck-out party is allowed to play any substantive role at trial then the potential injustice that arises is very significant. If such a party can cross-examine a witness in the usual fashion then it can advance its case safe in the knowledge that the non-defaulting party will actually be denied the opportunity to do the same in return *precisely because the defaulting party's failure* means that no witness will be tendered for cross-examination. That would be obviously unfair and wrong. Equally, if the defaulting party is allowed to make submissions then it advances a positive case in the absence of a pleading. That is equally unfair and wrong.

20. This writer suspects that these were precisely the sorts of worries that left the Court of Appeal *'troubled'* by the statements of Deputy Judge Sutcliffe QC in *Thevarajah* above.

Who needs good faith when you have a contract?

Written by,
Richard Clegg

Even in the context of discretions and powers a duty of good faith will not necessarily be implied if the terms of the contract do not justify it.

It was generally thought that there were but a few well defined categories of contract that required the parties to deal in good faith (partnership and insurance being prime examples) and in all others *laissez-faire* prevails. In 2013 all that changed. Or did it?

The refusal to recognise a general duty of good faith between contracting parties – in contrast to the approach in most European Civil Law jurisdictions[1] – was described by Leggatt J as "*swimming against the tide*" in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), and an underlying duty of "*good faith and fair dealing*" was applied as the touchstone for construing the contract. The decision was described extra-judicially by Arden LJ at the time as "*a welcome tour de force on good faith, and an important case to watch*"[2] albeit with the caveat that the analysis "*treats somewhat too lightly the problems of diminished certainty or the amount of time that might have to be spent in some cases in resolving disputes as to the application of the good faith clause*". Whilst raising academic controversy[3], and being regularly deployed by parties seeking implied obligations of 'good faith' (often in extravagant terms), its effect has since been diminished, and it appears now to have been repackaged as an application of existing principle merely expressed in different language. At least this is the explanation of the case given, *obiter*, by Beatson LJ in a recent Court of Appeal decision.

In *Yam Seng* the result of interpreting the contract with an underlying duty of good faith firmly in mind was that the Judge found that two terms reflecting that duty should be implied. That fundamental starting point has already changed. The approach of implying terms as an element of interpreting the contract was possible at the time, following *Attorney General of Belize v Belize Telecom* [2009] UKPC 10. However, the orthodoxy that the implication of terms is a different process and governed by different rules has since been restored by *Marks and Spencer v BNP Paribas* [2015] UKSC 72. The implication of terms (other than those implied at law) is once again limited to the established categories of business necessity and obviousness. As Lord Neuberger emphasised in *Marks and Spencer* "*a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them*". Indeed in *Yam Seng* itself the implied terms were entirely uncontroversial under existing principles, despite the language and methodology used. The contract was an exclusive distribution agreement for the sale of duty free products in certain territories. The implied terms were, first, not knowingly to provide false information on which the other party was likely to rely, and secondly, not to authorise the sale of those products in the domestic market of those territories at a price lower than the 'duty free' prices. Existing principles already provide a solution for unexpressed contractual inequity, in the form of implied terms against the prevention of performance and for co-operation, as well as such other implied terms as may be necessary to give business efficacy to a contract. Existing principles would provide basis enough for the terms implied in that case. Indeed it was because the *Yam Seng* implied terms could equally have been implied under existing principles that Arden LJ did not expect the decision to be appealed: "*It is not clear whether it will be appealed as the critical terms were in fact specific terms which could be implied in any event under the general principles applying to the implication of contractual terms.*"[4]

In the aftermath of *Marks and Spencer,* even the language used in *Yam Seng* is now being repackaged and relabelled as existing principle. In a judgment given on 20 April 2016 in *Globe Motors v TRW* [2016] EWCA Civ 396, Beatson LJ referred to the 'duty of good faith' in *Yam Seng* as being merely "*the language used by Leggatt J*" to refer to a duty to co-operate[5], and whilst acknowledging that "*in certain categories of long-term contract, the court may be more willing to imply a duty to co-operate…Even in the case of such agreements, however, the position will depend on the terms of the particular contract*". For good measure, he went on to give two examples where even prior to *Marks and Spencer* such implied terms were rejected in relation to a long-term franchising contract and a distribution agreement[6]. The comments of Beatson LJ are *obiter* but telling.

The language of 'good faith' does of course already feature in the context of contractual powers and discretions. In that context the Courts are prepared to imply a duty expressed (literally) in terms of good faith, so as to place some boundary on otherwise ostensibly unfettered contractual powers or discretions by which one party places itself in the hands of another[7]. However, this is again by applying existing principles rather than any special principle:

> "*...this conclusion does not involve an inadmissible extension of the duty of good faith in insurance law or of the consequences of breach of any such duty. The qualification that I have identified does not arise from any principles or considerations special to the law of insurance. It arises from the nature and purpose of the relevant contractual provisions.*"[8]

Indeed, whilst the language of 'good faith' is used, the limits imposed are ordinarily of limited scope, requiring only that the discretion or power be exercised honestly, rationally and for the purpose for which it was conferred. The requirement of rationality is broadly equivalent to the public law test of Wednesbury unreasonableness rather than being an objective test[9]. Even in the context of discretions and powers a duty of good faith will not necessarily be implied if the terms of the contract do not justify it[10].

Whilst no doubt *Yam Seng* will continue to be deployed creatively, it perhaps now amounts to no more than evidence that "*in certain categories of long-term contract, the court may be more willing to imply a duty to co-operate or, in the language used by Leggatt J in Yam Seng…a duty of good faith*"[11].

[1] For example, the requirement to perform a contract in good faith contained in section 242 of the German Civil Code and in article 1175 of the Italian Civil Code.

[2] Speech to the Singapore Academy of Law, 26 April 2013, "Coming to Terms with Good Faith".

[3] No less than 19 learned articles in the first year alone.

[4] Speech to the Singapore Academy of Law, 26 April 2013, "Coming to Terms with Good Faith".

[5] Paragraph 67.

[6] *Carewatch Care Services v Focus Caring Services Ltd and Grace* [2014] EWHC 2313 (Ch) and *Acer Investment Management v The Mansion Group* [2014] EWHC 3011 (QB).

[7] For example, *The Product Star* [1993] 1 Lloyd's Rep 397 (a right giving the charterer a choice of ports was to be exercised in good faith and not arbitrarily, capriciously or irrationally) and *Gan v Tai Ping* [2001] Lloyd's Rep IR 667 (a reinsurer's discretion to approve a settlement was to be exercised in good faith and not arbitrarily).

[8] Per Mance LJ in *Gan* at para 68, with whom Latham LJ agreed.

[9] *Braganza v BP Shipping* [2015] UKSC 17.

[10] E.g. *Mid Essex Hospital Services NHS Trust v Compass Group* [2013] EWCA Civ 200.

[11] Beatson LJ at para 67 of *Globe Motors*.

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