Neutral Citation Number: [2015] EWCA Civ 804

Case No: B5/2014/1670

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LUTON COUNTY COURT
Her Honour Judge Lindsay Davies
Case No: 3S100209

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2015

Before :

LORD JUSTICE LAWS
LORD JUSTICE BURNETT
and
SIR COLIN RIMER

- -

Between :

SPIELPLATZ LIMITED	**Appellant**
- and -	
(1) JOHN PEARSON	**Respondents**
(2) MAUREEN PEARSON	

- -
- -

Mr John de Waal QC and **Mrs Andy Creer** (instructed by **Gateley LLP**) for the **Appellant**
Mr Gary Blaker QC (instructed by **Photiades Solicitors**) for the **Respondents**

Hearing date: 2 July 2015

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Judgment

Sir Colin Rimer :

Introduction

1. The claimant/appellant is Spielplatz Limited, the freehold owner of a woodland naturist resort at Spielplatz, Lye Lane, Brickett Wood, St Albans ('the resort'). The defendants/respondents are John Pearson and his wife Maureen, who have occupied the resort's Plot 44A since 1992 as Spielplatz's tenants under a tenancy agreement dated 14 August 1992.

2. By proceedings issued on 2 July 2013 in St Albans County Court, Spielplatz claimed possession of Plot 44a from the Pearsons, asserting that they had no more than an unprotected common law tenancy of the plot which it had determined by a notice to quit. The Pearsons' defence was that their tenancy was an assured tenancy under the Housing Act 1988, which Spielplatz had not determined in accordance with that Act, nor had it shown any ground entitling it to possession.

3. The claim was tried before Her Honour Judge Lindsay Davies at Luton County Court over two days in April 2014. By her reserved judgment, of which we have an agreed draft, and an oral addendum to it of which we have an agreed note, the judge explained her reasons for finding that the Pearsons had an assured tenancy of Plot 44A which Spielplatz had not determined. Her order of 7 May 2014 dismissed both Spielplatz's claim and the Pearsons' counterclaim. She refused Spielplatz permission to appeal but Sir Timothy Lloyd granted permission on 1 July 2014. We are not concerned with the dismissed counterclaim. The appeal turns primarily on whether the judge was right to find that the tenancy was one under which a dwelling-house was let as a separate dwelling for the purposes of section 1 of the Housing Act 1988 and so gave the Pearsons an assured tenancy.

4. Mr de Waal QC (who did not appear below) and Mrs Creer (who did) represented Spielplatz. Mr Blaker QC (who also appeared below) represented the Pearsons.

The background facts

5. I take these from the judge's judgment, supplemented in minor part by agreed matters derived from the documents. The naturist resort was established in about 1930 and was developed over subsequent years. Spielplatz acquired the freehold in about 1946 and its title was registered at HM Land Registry in 1997. The resort comprises about 12 acres of green belt land and includes 64 plots. Spielplatz lets the plots only to its members (i.e. its shareholders). Originally the expectation was that the tenant would put a caravan or pitch a tent on his plot, which he would own. As time went by, the tenants developed a taste for more substantial accommodation and many constructed cabins or chalets on the plots.

6. Some of the 64 plots are designated by Spielplatz as for holiday or seasonal use only, and Spielplatz owns two chalets which it lets for holiday use: the resort has a clubhouse, swimming pool, tennis courts and other games facilities. Other plots are designated as for all year round occupation. Of the latter, some are occupied permanently; others are used mainly as weekend homes. Spielplatz is not, and never has been, involved in the installation or construction of the accommodation that tenants put on their plots, nor is it or has it been involved in their sale to, or purchase

by, successor tenants. Its view has always been that its only proprietary interest is in the plot and that the accommodation installed or constructed on any plot is a chattel that belongs to the tenant who installs or constructs it or who buys it when he takes over the plot.

7. The judge explained the history of Plot 44A. A single-storey wooden chalet was constructed on it in 1975. It was occupied by Mr Caffari and Ms Crossley, the tenants of the plot. On 11 August 1980, the planning authority (St Albans District Council) gave a renewed permission for the use of the chalet, specifying that 'the bungalow shall only be occupied on an occasional basis and at no time as a permanent dwelling'. On 17 December 1980, the District Council gave permission for the construction of 'an extension and carport to weekend chalet' at Plot 44A, a permission that was duly implemented. On 3 October 1988, Mr Caffari and Ms Crossley wrote to Spielplatz that they had received a copy of the District Council's letter to Spielplatz 'stating that [the District Council had] transferred the Residential Status from 19B to Plot 44A…' and saying that they had paid the occupier of Plot 19B £10,000 for the transfer. That transfer meant that from then on the chalet on Plot 44A could lawfully be occupied on a permanent basis.

8. Mr Caffari died in 1992. On 14 August 1992, Spielplatz granted an annual tenancy of Plot 44A to the Pearsons. At about the same time the Pearsons bought from Mr Caffari's personal representatives his interest in the chalet on the Plot 44A for £36,000.

9. The material provisions of the Pearsons' tenancy agreement are as follows. The demised premises were described as 'the plot or clearing in the grounds of Spielplatz' known as Plot 44A. Clause 1 provided that the tenancy was for a term of one year from 30 June 1992 at the rent of £800 per year, exclusive of rates, payable quarterly in advance on the usual quarter days and thereafter in each year. There was a usual form of proviso for re-entry upon 'the said Plot or clearing' in the case of a breach of the obligation to pay rent or of any other condition of the tenancy agreement. Clause 2 prohibited the cutting down of trees or bushes without Spielplatz's permission and required the tenant's effects to be confined to the plot. Clause 3 required the tenant to 'keep the exterior of any Cabin Hut or other building in GOOD repair and properly painted or creosoted'. Clause 3 prohibited any sub-letting of the plot, assigning of the tenancy or parting with possession of the plot without Spielplatz's prior written licence. Clause 5 gave Spielplatz a right to inspect the plot at reasonable times, but not more than once a week. Clause 7 banned dogs from the resort. Clause 9,'Visitors', provided that the plot was 'let for the habitual use by the two Pearsons and their son Terry, but:

> '… the Tenant shall be entitled subject to the conditions set out in this agreement and to previous arrangements with the Landlord to introduce not more than three persons being personal or family acquaintances as free visitors each month. Additional visitors may be introduced by previous arrangement with the Landlord and will be subject to charges for admission on the appropriate scale and to the conditions aforesaid.'

Clause 10 permitted the tenant to keep one motor vehicle at the resort. Clause 11 imposed rules about sunbathing. Clause 13 was an ill-spelt clause imposing rules as to when dress must (and must not) be worn at the resort. Clauses 14 and 15 were about

photography and rubbish. Clause 17 required the tenant to 'discharge all general rates payable in respect of the said Plot and any rateable building thereon' and to produce the current receipt to Spielplatz on request.

10. The Pearsons remained in occupation of Plot 44A as yearly tenants. Their rent increased over the years and by April 2006 it was £1,863 per year. At first they used Plot 44A only at weekends but later began to use it all the year round as they were entitled to do following the 1988 transfer of residential status to the plot.

The judge's summary of the material evidence

11. The evidence was materially devoted to the question whether the chalet was a chattel (and so not part of the land demised by the tenancy agreement) or was part and parcel of Plot 44A (and so *was* demised by the tenancy agreement: *quicquid plantatur solo, solo cedit*). The resolution of that issue was crucial to the decision as to whether the Pearsons had an assured tenancy of the plot.

12. The judge said the Pearsons' evidence was that in 2008 they put breeze blocks around the outside of the chalet and rendered it. In 2011, they put on a new roof. In 2012, they refurbished or 'virtually rebuilt' much of the building following a leak into the bathroom. They estimated they spent about £100,000 on the works. Spielplatz was aware of the works and wrote to the District Council on 2 April 2012 expressing its concern that the Pearsons 'could be changing an essentially wooden dwelling into a larger and more permanent brick/block structure.' The outcome of some unfriendly correspondence between Spielplatz and the Pearsons was that on 25 September 2012 Spielplatz sent the Pearsons a six-month notice to quit.

13. The judge summarised the evidence of Fred Nicholls, who is in the business of moving static caravans and mobile homes. He said it was impossible to move a building of the size of that on Plot 44A in either one or two pieces. It could only be moved 'by being taken back to its constituent parts'. The building measured 37 x 40 feet and fell outside the dimensions of a mobile home.

14. The judge also referred to the report dated 9 April 2014 of a jointly instructed expert chartered building surveyor, David Turner, and said of his evidence:

> '19. … He considered the original plans for the building that was erected in 1975. He noted that much of the original construction was concealed so it was difficult to provide an opinion of how all the various elements of the original part was constructed. The original walls were timber framed which could have been manufactured off site or on site. The roof trusses were prefabricated and would have been brought to the site already formed. The roof covering would have been fitted on site. The asbestos cement boards finishing the external walls would have been fitted on site. The foundation of the floor would have been created on site. It was his opinion that the original construction would have been intended to be permanent and was not mobile or movable at any point in its life.
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> 20. The current building, following its major refurbishment in 2012 he describes as resembling a bungalow. He noted that the external walls were thickened in 2011 with a render finished block wall outside the original property.

> 21. From the information he saw he believed the floor and foundation comprise one element and are formed as a raft foundation. They have not been constructed separately.'

15. Whilst the judge did not say so expressly, I understand her to have accepted the evidence as to the nature of the original building given by Mr Turner, as to the Pearsons' refurbishment of it and as to the problems explained Mr Nicholls with regard to moving it.

The issue before the judge and her decision

16. Spielplatz's case was that all it owned, and had ever owned, as regards Plot 44A was the land upon which the chalet stood; that the chalet belonged to the Pearsons and that it had no interest in it; and that all it had let to the Pearsons by the 1992 tenancy agreement was the land. The Pearsons' tenancy was not, therefore, a 'tenancy under which a dwelling-house is let as a separate dwelling' and so was not an assured tenancy within the meaning of the Housing Act 1988. The Pearsons had likewise believed, and were adamant in their evidence, that they owned the chalet. The judge observed that whilst, therefore, both parties were denying that Spielplatz had any interest in the chalet, it might be that they were both wrong. Despite their claimed belief, the Pearsons' case, however, was that the chalet in fact formed part of Plot 44A and that the 1992 tenancy agreement had given them an assured tenancy of the plot and chalet. Their case was that, whilst the parties did not realise it, the 1992 letting was a 'tenancy under which a dwelling-house [was] let as a separate dwelling'.

17. The critical question for the judge was therefore whether, at the date of the 1992 tenancy agreement, the chalet was part and parcel of Plot 44A. She derived guidance as to when a structure becomes part of the land upon which it stands from the decision of the House of Lords in *Elitestone Ltd v. Morris and Another* [1997] 1 WLR 687, a case with features similar to those of this case. Substantive speeches were delivered by Lord Lloyd of Berwick and Lord Clyde, with both of whose speeches Lord Browne-Wilkinson, Lord Nolan and Lord Nicholls of Birkenhead simply agreed. The judge said that the decision showed that the answer to the question depended on the degree and the object of the annexation to the land; and that, assessed objectively, a house built in such a way that it could not be removed except by destruction could not have been intended to remain a chattel and must have been intended to form part of the realty. After referring to Lord Lloyd's speech, she said:

> '31. Looking at these two factors in relation to the evidence in the present case, the degree of annexation is that this building was erected on the plot to be used as a place in which to reside. It was designed as a residence for initially part time occupation and latterly full time occupation. It was annexed to mains water and electricity. It could not be removed except by being taken apart into its component parts – timber by timber or roof truss by roof truss. Thus the building would have been destroyed just as much as a brick built house which could be taken down brick by brick and re-erected elsewhere ….
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> 32. Applying then the analogy as Lord Lloyd did, I have no doubt that when the building was built and as each original timber frame was placed in position it became part of the structure which was itself part and parcel of the land. The object of bringing the individual timbers and roof trusses onto the land is so clear

> that whether or not the foundations are all of a piece is irrelevant. In fact the evidence of Mr Nicholls, as far as it went was that the foundations were all part of the same structure.'

18. The analogy there referred to was one that Lord Lloyd drew from this example given by Blackburn J in *Holland v. Hodgson* (1872) LR 7 CP 328, at 335:

> 'Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each in the form of a wall would remain chattels.'

19. The judge referred in paragraph 33 to an argument whose essence I take to have been that the parties' subjective beliefs that the chalet was not, and was not intended to be, part of the land were of relevant weight in deciding whether it was in fact part of the land. She disposed of it by referring to the observation of Lord Lloyd ([1997] 1 WLR 687, 693F) that 'the subjective intention of the parties cannot affect the question whether the chattel has, in law, become part of the freehold'. She also referred, in paragraph 34, to this statement of Lord Clyde at [1997] 1 WLR 687, 699A:

> 'If one considers the object or purpose which the structure serves by being placed where it is, it was clearly placed there to enable the amenity of Holt's Field to be enjoyed through the establishment of a residence. The bungalow was built there in order that people could live in what is represented as being an idyllic rural environment. The Court of Appeal, however, had regard to the belief of Mr Morris that he owned the bungalow as evidence of his intention. But his belief cannot control the operation of the law in relation to accession and the matter of intention has to be judged objectively.'

20. The judge then said:

> '35. I find precisely the same issue in the present case. I am satisfied that the belief of both parties that [the Pearsons] owned the building but [Spielplatz] owned the land cannot control the operation of the law. Judging the matter of intention objectively, I must conclude that the building has acceded to the land.'

21. The judge's conclusion was, therefore, that:

> '37 … the nature of this building is such that it is part and parcel of the land, and must therefore belong to [Spielplatz] notwithstanding the belief of [Spielplatz and the Pearsons] that it did not. It must therefore have been let as a dwelling and consequently the Housing Act applies. The Notice to Quit that was served in September 2012 was not a notice pursuant to the Housing Act. The claim for possession must therefore fail. If [Spielplatz] wish to pursue a claim for possession they must start afresh with a notice to quit served under the Housing Act on Housing Act grounds.'

22. The judge dealt in the oral addendum to her judgment with Spielplatz's submission that if, contrary to its primary case, the chalet did form part of the land, the tenancy was excluded from the status of an assured tenancy because it was a 'holiday letting' for the purposes of section 1(2) of, and Part 1 of Schedule 1 to, the Housing Act. She

rejected that argument, saying it was clear that there had been permission to occupy the chalet as a residential dwelling all year round and so the 'holiday letting' exception did not apply.

The decision in Elitestone

23. Of the five grounds of appeal, two challenge the judge's conclusion that the chalet on Plot 44A was, at the date of the 1992 tenancy agreement, part and parcel of the plot and so was let with the land as a separate dwelling. Before coming to the arguments, I shall summarise the decision of the House of Lords in *Elitestone*, the authority most directly relevant to that challenge.

24. Elitestone owned the freehold of Holt's Field, a site divided into 27 lots of which Mr Morris had occupied lot 6 upon which a chalet or bungalow had stood since at least 1945. Elitestone wanted to develop the site and made claims for possession against all the occupiers. The claim against Mr Morris was one of them. It failed in the county court on the grounds that he was a yearly tenant of lot 6, occupied the bungalow as his residence and so was protected by the Rent Act 1977. The recorder had identified the key question as being whether the bungalow formed part of the realty and had held that it was. The Court of Appeal reversed that decision, Aldous LJ being impressed by the fact that the bungalow simply rested by its own weight on concrete pillars to which it was not attached. He inferred that the common intention of the parties was that, whilst the ownership of the sites of the lots remained in the freeholders, the occupiers should own the bungalows, which had not been sufficiently annexed to the soil to become part of the land.

25. The House of Lords reversed that decision. Lord Lloyd said that photographs the House had seen, but the Court of Appeal had not, showed that the bungalow was not like a Portakabin or mobile home. It could not be taken down and re-erected elsewhere but could only be removed by a process of demolition. That was a factor of great importance. He said ([1997] 1 WLR 687, at 690B):

> 'If a structure can only be enjoyed in situ, and is such that it cannot be removed in whole or in sections to another site, there is at least a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty at that site, and therefore cease to be a chattel.'

26. Lord Lloyd referred to the then recent decision of the House of Lords in *Melluish v. B.M.I. (No. 3) Ltd* [1996] AC 454, which established that the terms expressly or impliedly agreed between the fixer of a chattel and the owner of the land cannot affect the determination as to whether, in law, the chattel has become part of the land. The only question was whether the bungalow had become part of the land or had remained a chattel since its construction. Lord Lloyd noted that the component parts of the bungalow were chattels when they were brought onto the site. Whether they ceased to be chattels when they were built into the composite structure depended, as Blackburn J had said in *Holland v. Hodgson* (1872) LR 7 CP 326, on the circumstances of the case 'but mainly on two factors, the degree of annexation to the land, and the object of the annexation' ([1997] 1 WLR 687, at 692A).

27. Dealing first with the degree of annexation, Lord Lloyd said its importance will vary from object to object, although 'in the case of a large object, such as a house, the

question does not often arise. Annexation goes without saying.' He said that because of this there was little recent authority on the point but he did refer to the decision of the High Court of Australia in *Reid v. Smith* (1905) 3 CLR 656, which raised the question of whether a dwelling-house erected upon an allotment, but not fastened to the soil, remained a chattel or became part of the freehold. The High Court, reversing the Supreme Court of Queensland, held that it became part of the freehold, treating the answer almost as a matter of common sense. The High Court held that the absence of any attachment did not prevent the house forming part of the realty. Lord Lloyd also cited from an American authority, *Goff v. O'Connor* (1855) 16 I11 421, at 423, where the court said:

> 'Houses, in common intendment of the law, are not fixtures to, but part of, the land. … This does not depend, in the case of houses, so much upon the particular mode of attaching, or fixing or connecting them with the land upon which they stand or rest, as it does upon the uses and purposes for which they were erected and designed.'

28. Lord Lloyd turned to consider the purpose of annexation in any case. He said that tests suggested in relation to objects such as a tapestry which had been fixed to a house were less useful when considering the house itself. He said ([1997] 1 WLR 687, at 692H):

> 'A house which is constructed in such a way so as to be removable, whether as a unit, or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity. But a house which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel. It must have been intended to form part of the realty. I know of no better analogy than the example given by Blackburn J in *Holland v. Hodgson*, LR 7 CP 328, 335:
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> > "Thus blocks of stone placed on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on top of each other in the form of a wall, would remain chattels."
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> Applying that analogy to the present case, I do not doubt that when Mr Morris's bungalow was built, and as each of the timber frame walls were placed in position, they all became part of the structure, which was itself part and parcel of the land. The object of bringing the individual bits of wood onto the site seems to be so clear that the absence of any attachment to the soil (save by gravity) becomes an irrelevance.'

29. The final aspect of Lord Lloyd's speech to which I should refer is his return to the question of 'intention' in relation to whether a chattel has or has not become part of the land. He explained that the House of Lords in *Melluish* had put beyond question that ([1997] 1 WLR 687, at 693F):

> '… the intention of the parties is only relevant to the extent that it can be derived from the degree and object of the annexation. The subjective intention of the parties cannot affect the question whether the chattel has, in law, become part of

> the freehold, any more than the subjective intention of the parties can prevent what they have called a licence from taking effect as a tenancy, if that is what in law it is: see *Street v. Mountford* [1985] A.C. 809.'

30. Lord Clyde delivered the only other substantive speech, which included an illuminating discussion of principles relating to the accession of chattels to land and the right (to the extent that there is one) for limited owners and others to remove them. The latter considerations are not in point in this appeal. He noted that it had not been suggested that, if the bungalow *was* real property, it could be regarded as distinct from the site so as to be excluded from the property let to Mr Morris, an observation which has resonance in relation to Spielplatz's fifth ground of appeal (see [1997] 1 WLR 687, at 696E). The only question was whether the bungalow had become part of the land. Lord Clyde noted the parties' agreement that it could not be removed in one piece, nor was it demountable for re-erection elsewhere, which he said was 'one powerful indication that it is not of the nature of a chattel' ([1997] 1 WLR 687, 696H). As to whether it had become, by accession, part of the land, Lord Clyde noted that it was not attached to or secured to the land, but said that accession can operate even where there is only a juxtaposition without any physical bond between the article and the freehold. He too referred to *Holland v. Hodgson* and noted Blackburn J's remark at (1872) LR 7 CP 328, 335 that '… even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land', which was followed by the dry stone wall illustration.

31. Like Lord Lloyd, Lord Clyde emphasised that intention in this context is to be assessed objectively and not subjectively. He continued as follows in an important passage ([1997] 1 WLR 687, 698E to 699B):

> 'Indeed it may be that the use of the word intention is misleading. It is the purpose which the object is serving which has to be regarded, not the purpose of the person who put it there. The question is whether the object is designed for the use or enjoyment of the land or the more complete or convenient use or enjoyment of the thing itself. …
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> Regard may not be paid to the actual intention of the person who has caused the annexation to be made. In *In re De Falbe; Ward v. Taylor* [1901] 1 CH 523, 535, Vaughan Williams LJ said that there was not to be an inquiry into the motive of the person who annexed the articles, "but a consideration of the object and purpose of the annexation as it is to be inferred from the circumstances of the case." As Lord Cockburn put it in *Dixon v. Fisher* (1843) 5 D. 775, 793 "no man can make his property real or personal by merely thinking it so." The matter has to be viewed objectively.
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> If one considers the object or purpose which the structure serves by being placed where it is, it was clearly placed there to enable the amenity of Holt's Field to be enjoyed through the establishment of a residence. The bungalow was built there in order that people could live in what is represented as being an idyllic rural environment. The Court of Appeal, however, had regard to the belief of Mr Morris that he owned the bungalow as evidence of intention. But his belief cannot control the operation of the law in relation to accession and the matter of intention has to be judged objectively. Indeed the fact that the freeholders may have believed and reminded the occupants that their rights to remain could be

terminated, which was also a factor on which the Court of Appeal relied, cannot affect the operation of the law.'

The grounds of appeal

32. Of the five grounds of appeal, grounds 1 and 2 were implicitly premised on the basis that the judge was correct to find that the chalet was part of the land, as also was the new ground 5 for which we gave permission at the hearing. Grounds 3 and 4 challenged the correctness of the judge's finding that the chalet was part of the land. Although those grounds were developed in the skeleton argument, Mr de Waal devoted most of his oral submissions to the new fifth ground and barely developed grounds 3 and 4. This approach perhaps tacitly reflected Spielplatz's recognition of the difficulty it faces in challenging the judge's conclusion that the chalet was part of the land. Since, however, that is logically the first question in the appeal, I shall take grounds 3 and 4 first.

33. They are to the effect that the judge wrongly failed to consider and attach proper weight to the purpose for which the chalet was annexed to the land and the relevant intention of the parties. It is said that, had she done so, she would have held that it was not part of the land. The relevant intentions are those in place when the tenancy agreement was entered into in August 1992. It is said, however, that the judge apparently also had regard to, and was influenced by, events that happened later, including the 'virtual rebuilding' of the chalet in 2012 and its dimensions as rebuilt. It is said that these influenced her conclusions on the 'purpose of annexation' element of the test. She is also criticised for drawing on what Lord Clyde said was the purpose of the bungalow in *Elitestone*, namely to enable the amenity of Holt's Field to be enjoyed through the establishment of a residence, and finding that the like consideration applied in the present case.

34. In development of this submission in the skeleton argument, Mr de Waal identified various features of the present case which he said pointed away from the legitimacy of the judge's finding. First, in *Elitestone* Mr Morris had what was called a licence which permitted him to keep a bungalow on his plot and reside in it. New licences had been granted over the years which increased the annual fees and the court was considering the nature of the bungalow in 1985 when the last licence was granted. There was no evidence in *Elitestone* as to the circumstances surrounding the bungalow's construction. It was appropriate, therefore, for the court to emphasise its physical qualities and its degree of annexation to the land.

35. By contrast, the circumstances of the present case were different. The Pearsons' tenancy was merely of 'the plot or clearing in the grounds'. The renewed planning permission granted in 1980 limited its user to being 'occupied on an occasional basis and at no time as a permanent dwelling.' Mr de Waal invited the drawing of an inference from this that the chalet had not been built with the intention of being used as a full-time residence. In addition, plot tenancies were only granted to Spielplatz's members: the object of the Spielplatz scheme was not to provide low cost housing but to promote naturism, which was the object of the resort.

36. Whilst Mr de Waal accepted that *Elitestone* made clear that reliance could not be placed on the subjective intentions of the parties as a guide to the purpose of the annexation, he nevertheless submitted that their subjective intentions were evidence

from which the objective intention as to the purpose of annexation may properly be inferred. In this connection, he relied on the evidence that the practice was for the members to arrange their own accommodation on the plot and the common understanding that such accommodation was theirs to sell to successor occupiers of their plot. He said in his skeleton argument that on any objective analysis of these facts, the Plot 44A chalet cannot have been constructed with a view to effecting a permanent improvement of the plot. Rather, it was constructed as something that could be enjoyed in itself and traded and thus could properly be regarded as a chattel. In his oral argument, however, Mr de Waal departed somewhat from that submission, saying instead that the purpose behind the construction of the chalet was the better enjoyment of the facilities of the naturist club. That is, of course, close to what the judge had found in paragraph 35 of her judgment.

37. I do not accept that any of these points, whether taken severally or collectively, undermine the judge's finding that the chalet on Plot 44A became part of the land. I regard that finding as plainly open to her on the evidence. Indeed, given the evidence relating to the construction of the chalet, I consider it was probably the only finding she could properly have made.

38. It is correct that the judge referred to the evidence of the Pearsons' refurbishment works carried out between 2008 and 2012 and to Mr Nicholls's evidence as to the impracticability of moving a building of its current size in one or two pieces, i.e. that it could only be moved by dismantling it to its constituent parts. I do not, however, accept that she placed any reliance on that evidence in making her finding as to the annexation of the chalet to the land. When she made her findings as to that, she was clearly referring to the nature of the chalet as it was in 1992, when the tenancy was granted. As to that, she had the report of Mr Turner who had explained as best he could the original construction of the chalet and who had given his view that the original building, when constructed, would not then have been movable at any point in its subsequent life.

39. It is worth referring to the central part of Mr Turner's expert report. He had been instructed to give his opinion as to whether the building was permanent or mobile at various different dates, including 1975 (when the chalet was constructed), 1980 (when it was extended), and 1992 (when the Pearsons commenced their occupation of it under the tenancy agreement). Following his explanation of the construction of the original building, he expressed his opinion as follows:

> '9.7.1 It is my opinion that the original building was intended to be permanent.
>
> 9.7.2 The construction is typical for permanent houses built at that time.
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> 9.7.3 It is my opinion that the property was constructed to be permanent and was not intended to be mobile or moveable at any point in its life. The construction of the property at the various stages of its life is, in my opinion, consistent with a permanent building, albeit of lower quality.'

40. The heart of the judge's reasoning is in her paragraphs 31 to 35, in which she found that the original building could not be removed except by being taken apart into its component parts. It was designed for residential occupation. A point is taken in

ground 1 of the grounds of appeal that in paragraph 31 (see paragraph 17 above) the judge referred to it as having been 'designed as a residence for initially part time occupation and latterly full time occupation', which is said to be wrong. In my view, it is at worst a slightly inaccurate recording of the fact that originally the building was only used for part time occupation, although later, following the transfer to it of full-time residential status in 1988, it became lawfully used for full-time occupation. The judge went on to find not only that the chalet was immovable save by destruction, but that the plain inference as to the purpose for which it was placed there was to enable its occupiers the better to enjoy the amenities offered by Plot 44a and the resort. In light of the guidance in *Elitestone*, these findings led inevitably to the conclusion that the chalet was part of the land.

41. As for Mr de Waal's other points, I do not regard them as adding up to anything material. The fact that the tenancy agreement described the demised premises simply as 'the plot or clearing' does not compel a conclusion that the chalet was not part and parcel of the land demised. It reflects at most that the parties did not realise that it was. Nor did M. Jourdain realise he was speaking prose. The restriction on user in the 1980 planning permission is immaterial. By 1988, a right had been acquired to use the chalet all the year round and that was the position at the date of the tenancy agreement. There is no suggestion of there being any feature of the construction of the chalet that somehow confined it to use during only part of the year. I cannot see what relevance there is in the fact that the plots were let only to members of Spielplatz. Nor is it material that both parties may have believed that the chalet belonged to the Pearsons and was theirs to sell to successor tenants. That amounts to nothing more than evidence of their subjective beliefs and intentions upon which *Elitestone* shows no reliance can be placed. Such evidence is not then given legitimacy by saying, wrongly, that it amounts to admissible objective evidence of the parties' intentions that can be adduced in relation to whether the chalet did or did not become part of the land.

42. In my judgment, the judge was therefore correct to conclude on the evidence that the chalet, when constructed, was part of the land. I would reject Spielplatz's case under grounds 3 and 4.

43. Ground 5 raises a new point that was not run before the judge, but to which Mr de Waal devoted most of his energy before us. It is that, if she was right that the chalet became part of the land, the tenancy agreement should nevertheless not be interpreted as creating a letting of both soil and chalet. The proposition is that the court should hold that the premises let under the tenancy agreement were confined to the soil of Plot 44A and that, as regards the chalet, Spielplatz is to be regarded as having impliedly given the Pearsons a gratuitous licence to occupy it. It is said that such an interpretation would fairly reflect the social purposes underlying the grant of the tenancy in 1992. The objective of such suggested interpretation is of course to enable the avoidance by Spielplatz of having unwittingly created an assured tenancy of the chalet. It would in turn also enable Spielplatz to escape the repairing obligations that would be imposed upon it by section 11 the Landlord and Tenant Act 1985.

44. I regard this as an impossible argument. There is no evidential basis for attributing to the parties the intention to create such a bizarre scheme. The submission is simply a *cri de coeur* to the court to fashion a legal relationship between Spielplatz and the Pearsons which will be as painless to the former as possible. The court is not,

however, in the business of making contracts for the litigants before it. If, as I consider she was, the judge was right to hold that the chalet was part of the land forming Plot 44A, it followed that it was automatically demised to the Pearsons under the tenancy of that plot which Spielplatz granted in 1992 and there is no basis for a conclusion that it was not. Moreover, as the letting was of a separate dwelling the tenancy was, subject to grounds 1 and 2, an assured tenancy. I would reject ground 5.

45. I come finally to grounds 1 and 2 (although I have already referred to the particular point raised in ground 1: see paragraph 40 above). They are together devoted to the assertion that the judge was wrong in declining to find that the tenancy was excluded from being an assured tenancy by being 'a tenancy the purpose of which is to confer on the tenant the right to occupy the dwelling-house for a holiday', an exclusion provided by section 1(2) of, and paragraph 9 of Part 1 of Schedule 1 to, the Housing Act 1988. I have explained why the judge rejected that argument in the addendum to her judgment.

46. I regard the judge's short reasoning for rejecting that case as unanswerable and could derive nothing from Mr de Waal's submissions that came close to answering it. There was no evidence upon which she could find that the purpose of the letting was to give the Pearsons the right to occupy the chalet for a holiday. When they took on the tenancy, they were entitled to occupy it all the year round, clause 9 described Plot 44A as being for 'the habitual use' by the Pearsons and the letting was a tenancy from year to year. I do not understand on what basis it is said that the court could or should find that the letting was for the purposes of a holiday. It was not.

Disposition

47. I would dismiss Spielplatz's appeal.

Lord Justice Burnett :

48. I agree.

Lord Justice Laws :

49. I also agree.