Commentary

Whilst this case may appear superficially to be of interest to only a very narrow group of pracitioners, in fact, the taking of up-front rent is a common practice in residential tenancies. All the more so, in recent times, with many tenants who struggle with poor credit history.

The ruling establishes that the practice carries no danger with it in regard to the landlord's right to seek repossession under s.21, provided that the up-front rent is actually used as rent and is not a deposit under another name. In *Johnson*, it was clear from the facts that the rent paid in advance was precisely that. It was not a deposit under a different name. The courts have a long tradition of examining the real nature of the agreement in landlord and tenant matters. For example, in questions over whether a lease is indeed a lease as opposed to a license, it is the substance and not the label that is decisive: see, *Street v Mountford* [1985] A.C. 809 where Lord Templeman stated memorably that "the manufacture of a five pronged implement for manual digging results in a fork."

The decision in *Johnson*, as a matter of law, must certainly be right. It is a decision that will be welcomed by landlords and their professional representatives. It further has the advantage of bringing a good deal of certainty to this particular question and certainty, of course, is of great value to a practising lawyer. Had the Court of Appeal decided otherwise, then a further flood of litigation may have followed with many tenants advancing similar arguments. It would have prompted the inevitable decline of up-front rental payments with all the consequential problems for landlords and agents. It is worth noting, however, as an aside, that the tenancy agreement in this case was poorly drafted. If it had been clearer, it is possible that no litigation would have ensued, or at the very least, not required the voice of the Court of Appeal to be heard.

However, residential landlord and tenant law, in reality, is rarely only about the actual law—it is also, of course, concerned with people's actual homes. There is almost always the issue of policy lingering behind the law and the same is true in this judgment. It is arguable that the practice of requiring rent up-front is a symptom, not of avaricious landlords, but rather economically disenfranchised tenants. The reason why landlords in the private sector frequently seek rent in advance is because there is a perception that many tenants, particularly those on lower incomes, are likely to default. From the tenants' perspective, however, the practice of demanding many thousands of pounds up-front—simply to secure an assured shorthold tenancy which (by definition) gives only very limited security—only seeks to increase their housing problems. This, however, is a question for politicians and not lawyers.

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Thinking Positively: Preserving Positive Obligations When Selling a Property

Ridgewood Properties Group Ltd v Valero Energy Ltd [2013] EWHC 98 (Ch)

℄ Agreements for lease; Breach of contract; Burdens of covenants; Conditional contracts; Encumbrances; Implied terms; Indemnities; Options; Positive covenants; Repudiation; Sale of land; Service stations

This commentary considers the implications of Ridgewood Properties Group Ltd v Valero Energy Ltd *[2013] EWHC 98 (Ch), and asks whether solicitors need to make any changes to their documents and procedures as a result.*

Facts

Between March 2001 and June 2004, Ridgewood Properties Ltd (Ridgewood) entered into a number of development agreements with Valero Energy Ltd, then known as Texaco Ltd (Texaco).

Texaco owned petrol filling stations and the plan was to develop flats and offices above and around each petrol station. The development agreements were referred to as "airspace agreements".

In essence, the terms of the agreements required Ridgewood to apply for planning permission to redevelop each site and, once satisfactory planning permission had been granted (provided this occurred before the long stop date), Ridgewood would be granted a building lease to develop the site. Some of the airspace agreements were drafted as agreements to grant a building lease, whereas others were in the form of an option to take a building lease. All the agreements were conditional on obtaining satisfactory planning permission and included positive obligations by Texaco to assist in the planning process, execute s.106 agreements and grant access to the sites. The intention was that once each development was completed, Texaco would transfer freehold to Ridgewood and take back a lease of the petrol station part.

The dispute came about as a result of the sale by Texaco of all the sites to Somerfield Stores Ltd (Somerfield) on June 21, 2005. Following the sale, Somerfield claimed that it was not bound by the airspace agreements. As a result, Ridgewood was prevented from gaining access to the sites and also, without Somerfield's co-operation, it could not pursue the planning applications and was, therefore, unable to call for the building leases under the terms of the airspace agreements.

Ridgewood alleged that Texaco had breached an implied term in the airspace agreements not to dispose of the sites without reserving to itself the ability to comply with the airspace agreements. As a result, Texaco had put it out of its power to perform the agreements and Ridgewood claimed that this amounted to a repudiatory breach. It said it had elected to accept this breach, so terminating the airspace agreements and giving rise to a claim in damages.

Texaco, on the other hand, argued that any implied term in the airspace agreements was much more limited. It did not prevent Texaco from disposing of the sites. It only required Texaco not to put the agreements out of its power to perform. Furthermore, it had not breached this implied term because it was able to compel Somerfield to comply with the airspace agreements.

The agreement for sale between Texaco and Somerfield provided that the sites were sold "free from encumbrances (sic) other than any disclosed matters", which included the airspace agreements. Additionally, each of the transfers contained a covenant by Somerfield "to observe at all times hereafter the covenants, restrictions and stipulations … referred to in the registers of title … so far as they are subsisting … and to indemnify the transferor against all actions cost claims and proceedings … in respect of any breach … of the covenants … "

Ridgewood had protected some of the airspace agreements by registering notices against Texaco's registered titles to the sites.

The High Court's decision

In January 2013, the case came before Proudman J. Following the principles for implication of terms into contracts laid down in *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC

10; [2009] 1 W.L.R. 1988, she could find nothing in the agreements, on their true construction, that prohibited Ridgewood from disposing of the sites. She held that the true question was whether Texaco had, by selling the sites, breached the implied term not to do anything that would prevent Texaco from performing the agreements.

Texaco relied on a number of arguments to show that it was not prevented from performing the agreements. First, it argued that the positive covenants in the airspace agreements bound its successor in title, Somerfield, by virtue of s.3 of the Landlord and Tenant (Covenants) Act 1995. Section 3 annexes the benefit and burden of all landlord covenants of a tenancy to the premises so they will pass automatically on the assignment of the reversion. A landlord covenant is defined by s.28 as a covenant falling to be complied with by the landlord of the tenancy. A "tenancy" for these purposes means any lease or tenancy and includes an agreement for a tenancy. Although the Act refers to an agreement for a tenancy, it is generally accepted to mean one that is specifically enforceable in equity.

Proudman J. had no difficulty in deciding that the 1995 Act did not apply to the seller's obligations in the option agreements that had not been exercised. Such an option agreement was not within the definition of "tenancy". The position in respect of those airspace agreements that were conditional agreements for lease was more complex. Proudman J. held that conditions precedent to the grant of the lease were not covenants that were part of the agreement for a tenancy. Thus, obligations that related to matters prior to the grant of the lease could not fairly be described as landlord covenants.

So, the 1995 Act did not apply to any of the airspace agreements. However, that did not dispose of the issue of whether Texaco could require Somerfield to perform the airspace agreements pursuant to provisions in either the contract between them or the transfer between them.

Texaco pointed first to the terms of the sale contract with Somerfield, which included a statement that the property was being sold subject to (among other things) the airspace agreements. However, Her Ladyship held that, although land may be sold subject to incumbrances, this was (in the absence of unusual circumstances) to satisfy the seller's duty of disclosure rather than to confer fresh rights on those third parties with the benefit of such incumbrances. In the present case, there was no implication that the parties intended Somerfield to become bound by Ridgewood's rights under the airspace agreements.

The final point concerned the indemnity covenant. Proudman J. held that the indemnity covenant did not give Texaco the power to compel Somerfield to perform the obligations in the airspace agreements. Despite the fact that the indemnity clause included the conventional phrase "to observe and perform the covenants [within the airspace agreements]", Her Ladyship concluded that this was not a separate covenant that imposed new obligations on Somerfield. To place an assignee under a specific obligation to perform going beyond a mere indemnity would require clear and unequivocal terms.

Despite Texaco being unable to show that it could require Somerfield to comply with the obligations in the airspace agreements, Ridgewood did not succeed in its damages claim—because Proudman J held that, on the evidence, it had not accepted Texaco's repudiatory breach.

Commentary

The case raises four different legal issues that have been concerning practitioners.

(1) Protecting positive covenants. The principal issue that this decision has revealed is a misunderstanding among practitioners about the effect of the registration of a notice at the Land

Registry. The purpose of a notice is to preserve the priority of an interest. Typically, this will be a sale contract, an agreement for lease or an option agreement. These are all equitable interests and will lose their priority unless they are protected either by notice or by being a right protected by occupation.

However, the notice protects only the estate contract itself. It does not have any effect on the entirely separate rule that a positive covenant will not bind a future freehold owner. In this case, the agreements by Texaco to assist in the planning process, execute s.106 agreements and grant access to the sites constituted positive covenants and, therefore, did not bind Somerfield in the absence of some conveyancing mechanism. This is similar to the need to bind a successor into paying overage, which is also a positive covenant. The most common method is to require the seller to ensure that, before completing a sale, the buyer enters into a direct deed of covenant with the third party, covenanting to comply with the positive obligations. In effect, those obligations are being novated. This agreement is then protected at the Land Registry by means of a restriction. In this respect, this part of the decision ought not to have caused the consternation that it clearly has done.

(2) Landlord and Tenant (Covenants) Act 1995. A second area where this case has not made any new law is the decision that the covenants by Texaco did not constitute "landlord covenants" under the Landlord and Tenant (Covenants) Act 1995. This follows the earlier case of *Edlington Properties Ltd v JH Fenner & Co* [2006] EWCA Civ 403; [2006] 1 W.L.R. 1583 although that case was not referred to in the judgment—and, indeed, there is very little discussion of this important issue. At [55], Her Ladyship merely observed

> "conditions precedent to the grant of a lease are not in my judgment covenants which are part of the agreement for a tenancy nor are they comprised within landlord or tenant covenants within the meaning of s.28(1) of the 1995 Act."

The effect was that the burden of Texaco's covenants remained positive covenants and the Landlord and Tenant (Covenants) Act 1995 did not apply to them.

(3) Selling a property subject to incumbrances. A third area where this case has not made any new law relates to the sale of the property "subject to" the airspace agreements. Over 30 years ago, the court made clear in *Lyus v Prowsa Developments Ltd* [1982] 1 W.L.R. 1044 that selling a property subject to encumbrances does not normally entitle the third party to enforce the agreement against the new covenantor. Curiously, the same point was raised recently (equally unsuccessfully) in the case last year of *Grovehold Ltd v Hughes* [2012] EWHC 3351 (Ch); [2013] 1 P. & C.R. 20.

(4) Indemnity wording. The final point to note about this case concerns the wording of the indemnity covenant. This was in conventional terms and included the phrase "to observe and perform". Proudman J. held that such wording did not entitle Texaco (in this case) to require Somerfield to comply with the provisions of the airspace agreements for the benefit of Ridgewood.

On this point, solicitors were perhaps entitled to be surprised. Effectively Her Ladyship was saying that the words do not mean what they quite clearly appear to say. The issue was considered over a century ago in *Harris v Boots, Cash Chemists (Southern), Ltd* [1904] 2 Ch. 376, a case concerning an indemnity covenant on the assignment of a lease. In that case Warrington J. said:

> "I think the true object of the covenant entered into on the assignment of the lease is to indemnify and protect the original lessee against breaches of covenant contained in the lease under which he holds."

In other words, one has to look at the purpose of the indemnity covenant and not its wording. As in *Lyus v Prowsa Developments Ltd*, if the parties wish to ensure that fresh obligations are created, this needs to be made abundantly clear.

Conclusion

This case has generated a great deal of excitement and discussion, but much of it was not justified. In particular, a notice at the Land Registry has never been an effective method of protecting positive covenants. A separate deed of covenant, backed up by a restriction, is the most common mechanism for this. Where solicitors are entitled to be surprised, perhaps, is the court's decision to follow *Harris v Boots, Cash Chemists (Southern), Ltd*, a case that few lawyers will have previously encountered.

The moral is clear. When selling any property, investigate what obligations with third parties the seller has agreed to discharge; then ensure that, where appropriate, the buyer clearly agrees to discharge them. On occasions, the best way to ensure this is by setting out in full the obligations that the buyer is agreeing to perform.

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Claiming Damages in Trespass Claims—Is It Worth Throwing in the Kitchen Sink?

Eaton Mansions (Westminster) Ltd v Stinger Compania De Inversion SA [2012] EWHC 3354 (Ch); [2012] 49 E.G. 66 (C.S.)

LT Aggravated damages; Air conditioning; Compensatory damages; Exemplary damages; Flats; Measure of damages; Mesne profits; Restitutionary damages; Trespass to land

The latest episode in the Eaton Mansions v Stinger *story (see earlier decisions:* Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA *[2010] EWHC 1725 (Ch) and* Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA *[2011] EWCA Civ 607; [2011] L. & T.R. 24) assessed the damages payable following an earlier judgment that air conditioning equipment placed on the roof of a residential block of flats constituted a trespass. The case involved consideration of the claimant's assorted claims for damages.*

Facts

The case concerned a dispute between a (former) tenant, Stinger (Stinger), and its residents' management company and immediate landlord, Eaton Mansions (EM).

The property was a residential block of flats called Eaton Mansions, Cliveden Place, SW1—a short distance from Sloane Square. EM held a headlease of the block of flats from the freeholder, Grosvenor Estate. Stinger held underleases of two of the flats (Nos 8 and 10). Stinger's leases contained no ability for it to place air conditioning equipment on the roof. It, therefore, required