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CHANCERY - COMMERCIAL NEWSLETTER

In this, our ninth newsletter, Jonathan Ferris takes us on a legal walk along the foreshore, Philip Kremen guides us through the intricacies of vesting orders in cases where there are multiple sub-tenants and Richard Clegg shows us the way in the statutory forest of assured and assured shorthold tenancies. We hope you enjoy the journey.

Romie Tager Q.C.

The Law of the Sea Shore

A winter break in West Britain? Anxious about your carbon footprint and another winter longhaul to Antigua? Perhaps you need some reassurance about your rights on the beach and in the surf (brrr!) here in Blighty.

There are 3 main issues: access (by land and by sea), user rights, flotsam and jetsam.

In the United Kingdom no-one lives more than 75 miles from the sea, and most of us live much closer than that to tidal water. We have 7,000 miles of coastline. Mr Justice Best observed "Free access to the sea is a privilege too important to Englishmen to be left dependent on the interest or caprice of any description of persons". (*Blundell v Catterall* 1821). Unfortunately there is no special or general common law or statutory right of access to the seashore over land. Many beaches and coastal areas are accessible over public footpaths or permissive ways, but many are not.

In our crowded island you might feel that there should be a right to walk to the nearest bit of cliff and look over the edge. Indeed the Government gave a commitment in its recent Rural Manifesto to improving public access to coastal areas as "an early priority for a Labour Third Term".

There is a common law public right of navigation and of fishing in the sea (the latter now subject to many constraining EU Directives). That common law right includes a legal right for people to access the foreshore for these purposes (and from the sea) but not for other purposes such as bathing or merely walking by the

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seashore. On the beach and other land above the foreshore such access as does take place is generally permissive, although it may also have been long-standing.

Sadly, the opinion of Mr Justice Best was expressed in a dissenting judgement. His brother judges ruled that no legal rights had been established to support traditional public recreational uses of the foreshore; and they were alarmed at the prospect of mixed bathing. This restrictive view of beach access and user (though presumably not mixed bathing) has continued to be influential at law.

In 1999 the Government was advised by the Countryside Commission that “there is a strong case for a new statutory right of access on foot to uncultivated and undeveloped coastal land, such as cliffs, foreshore, beaches, dunes, coastal marshes, flats and banks, with suitable constraints to protect wildlife and habitats”.

However, the Countryside and Rights of Way Act 2000 (CROW) does not include coastal land in its list of land types to be subject to the CROW access arrangements (although powers under s3 of the Act would permit the inclusion of coastal land by statutory instrument). In this respect England (and Wales for the time being) lag behind Scotland where there has been public access to the coast since February 2005.

For the time being this means that access to the coast continues to be restricted. There are long-distance coast-paths which have opened up large sections of coastline, but they are not by any means continuous.

It is much easier to come in by sea. If you want to access that awkward bit of coastline, use your rubber dingy. The common law established centuries ago that there is a public right of navigation for vessels in tidal navigable waters. It also established that anchoring for vessels in tidal navigable waters is part of the public right. In *Fowley Marine v Gafford* (1967) the right to moor was confirmed in the course of considering the issue of an asserted right to moor permanently. The right is limited to a temporary right to moor (see also *Fairlie Yacht Slip v The Crown Estate* 1979 for confirmation on the same point in Scottish law).

Even if you can get to the coast (lawfully or otherwise) over land or sea, that does not mean that you have the right to remain on the foreshore, or do very much when you get there.

Once you reach the foreshore (that imprecise margin between mean High and mean Low Water) there is a good chance that you are on Crown Land or on land managed by the Crown. Almost all the seabed within United Kingdom territorial waters is managed by the Crown Estate on behalf of the Crown. Approximately 55% of the foreshore is also managed by the Crown Estate. But 45% of the foreshore is in private ownership. The foreshore of the whole Kingdom originally belonged to the Sovereign by Royal Prerogative – over time many miles of foreshore were granted to others (by Royal Charter or otherwise).



Again, there are no general rights to bathe or walk on the foreshore whether it is the Crown's or anyone else's. Many landowners will be indifferent to bathing (mixed or single-sex) or walking on their foreshores. But other pursuits, like wind-buggying or kite-surfing, may well be regarded as objectionable. The point is, we do not have rights of user of the foreshore, so that one is at the mercy of an aggressive landowner. It is all a very long way indeed from the Scandinavian common law "allemansret" or general entitlement to access all land provided no damage is caused. Public landowners have come under increasing pressure from lobbyists to favour or disfavour particular groups or interests. The National Trust and several local authorities have proscribed certain activities on their land (including some coastal land).

Once you have come to terms with your lack of enforceable right to access and to remain on a bit of beautiful foreshore you may not be inclined to risk a camp fire or a tent. That would be wise. Many public authorities (and the National Trust) prohibit fires and camping.

But the public right to fish in tidal water is firmly established at common law. We may lay lines, draw nets and adopt any other ordinary mode of fishing (*Bevins v Bird* (1865) 12 LT 306 at 307 DC per Cockburn CJ). We may even take shellfish, although there is doubt that the right extends to bringing home empty shells (see *Bagott v Orr* (1801) 2 Bos & P 472). Perhaps we can risk taking one or two, even if boxloads may be objectionable. Apart from the special custom of a particular locality or by statute the public has no right when fishing to go upon land above high water mark: eg custom of Kent: *Mercer v Denne* [1905] 2 Ch 538; and by statute in Somerset, Devon and Cornwall: a right to go upon land adjoining the coast for certain purposes (landing fish and drying nets) connected with fishing for herring, pilchard and other fish caught with seine nets (1 Jac 1 c.23 1603-4; White Herring Fisheries Act 1771 s 11).

The public has no general right to use the foreshore but there is a right to cross it to and from the sea for the purpose of fishing but only such places as usage or necessity have appropriated to that purpose (*Blundell v Catterall* (1821) 5 B & Ald 268).

In short, carry a rod or a small net and look busy!

Assuming some right to be there, what if one wants to take away a souvenir? Apart from empty crab shells are there laws to prohibit the removal of stones, or bits of driftwood, or even a bucket of sand? The Theft Act 1968 proscribes the dishonest appropriation of property belonging to another. The removal of stones or sand from a beach would certainly be theft. It may be a relief to know that wild mushrooms may be picked (Theft Act 1968 s.4(3)), but you don't get much fungus on a beach. You may also pick wild flowers, fruit or foliage from a plant (but not commercially), as long as you do not destroy a protected wild plant (criminal offence – s.13 Wildlife and Countryside Act 1981). You may make off with a wild creature (if you can catch one without a dog) and risk poaching, but that is not theft.



Flotsam, jetsam and ligan all belong to the owner of the right to wreck (usually the Crown, but not always, and in Wales the Lords Marchers spiritual and temporal). There isn't much of the stuff around nowadays, and you won't get that supertanker in your boot anyway. It is helpful to know that the owner of the foreshore may well not be the owner of the right to wreck – so if challenged with an armful of driftwood by a mean local landowner, knowledge of this at least may be helpful.

Finally, if you find silver or gold items spilled from a Spanish galleon, a Viking Longboat or King John's baggage cart, it is probably treasure and belongs to the Crown (and not to the owner of the land in which it was found).

The Treasure Act of 1996 replaced the common law of treasure trove in England, Wales and Northern Ireland (Scotland has different laws). The Treasure Act removed the need to establish that objects were deliberately hidden with the intention of being recovered, which was one of the tests of the common law of treasure trove. The Treasure Act sets out the precious metal content required for a find to qualify as treasure; and it extends the definition of treasure to include other objects found in archaeological association with finds of treasure.

Generally speaking, when the owner of an archaeological find cannot be traced, any find will belong to the owner of the land on which it was discovered. In the case of 'treasure trove', special legislation applies. All 'treasure trove' (basically gold and silver, which was originally hidden and where the owner cannot now be found) belongs to the Crown and, when discovered, is subject to an inquest at a coroner's court to establish the circumstances of its loss or deposition. Archaeologists are frequently involved in giving evidence to such inquests. Finders are often allowed to keep the objects, or an institution such as the British Museum pays the finder so that the objects can be added to a national collection.

Good luck!

Jonathan Ferris

Disclaimer of Leasehold Interests

The law of disclaimer of leasehold interests can give rise to difficult and anomalous situations, but perhaps no more so than where the disclaimed lease is of a building that is occupied by a number of sub-tenants.

The immediate effect of the disclaimer is of itself strange since it does not effect the sub-tenant's right to continued occupation of his demise, but nor does it bring him into a direct landlord and tenant relationship with the lessor of the disclaimed lease. Instead, he is entitled to remain in occupation for as long as he pays the rent and performs the covenants of the disclaimed lease. If he fails to do so the lessor is



entitled to distrain for rent or bring forfeiture proceedings [see *In re A. E. Realisations Ltd* (1988)1 WLR 1988].

This presents no problem where there is only one sub-tenant in occupation of premises demised by a disclaimed lease since he will inevitably have to decide whether to apply for a vesting order and in effect step into the shoes of his former landlord.

Where there is more than one sub-tenant, however, the position is less straightforward. On the face of it, it appears that the landlord under the disclaimed lease can look to each sub-tenant for the whole of the rent due under the disclaimed lease rather than simply an apportioned part thereof. Any sub-tenant who did make such payment, however, would presumably be entitled to seek a contribution from his fellow sub-lessees. But what is he to do if some or all of them simply get up and leave the premises, as they would be entitled to do?

The obvious way out of this dilemma is for every sub-tenant who wishes to remain in occupation to apply for a vesting order. Such application has to be made within 3 months of receipt of the copy of the liquidators notice of disclaimer [see Rule 4.193 of the Insolvency Rules].

It is not widely appreciated that an application for a vesting order can be made in respect of only part of the premises demised by the disclaimed lease. This is provided for by section 182(2) of the Insolvency Act 1986, but in the most curious way.

Section 182(1) of the Act provides that no vesting order shall be made except on terms that make the applicant subject to the same liabilities and obligations as the company was subject to under the lease at the commencement of its winding up, or subject to the same liabilities and obligations as if the lease had been assigned to him at that time.

Section 182(2) then states that where an application is made in respect of only part of any property comprised in a [disclaimed] lease, section 182(1) shall apply as if the lease comprised only the property to which the order relates.

It appears that these two provisions pull in opposite directions since on the one hand the court can only make a vesting order on terms that ensure the landlord of the disclaimed lease suffers no loss by the making of the order, and yet section 182(2) seeks to apply that requirement to the creation of a new lease of part of the property.

How in practice is this intended to work? What happens if not all of the sub-tenants in occupation at the date of the disclaimer choose to apply for a vesting order?

The answer may be that in the event of the landlord not being placed in the same position as he was in pre-disclaimer, any one or more applications for a vesting order of only part of a property would be refused.



At the end of the day, however, any practitioner asked to advise upon a disclaimer in the circumstances being discussed would do well to establish the intention of all the sub-tenants affected by the disclaimer as quickly as possible in the hope that a common approach can be adopted for the way forward. An inability to do this is likely lead to costly and protracted litigation

Philip Kremen

Notices to determine Assured Tenancies: a law unto themselves

That a tenancy protected by the assured regime does not always behave like a common law contractual tenancy was apparent once again in the recent decision of the Court of Appeal in *Church Commissioners for England v Giselle Meya* [2006] EWCA Civ 821, given on 21 June 2006. In that case the fixed term of an assured shorthold tenancy expired, being a year less one day, and the landlord then sought to determine the follow-on statutory periodic tenancy by serving a notice under s.21(4) of the Housing Act 1988 (“HA”). The question before the Court of Appeal was whether the statutory periodic tenancy which arose under s.5 of the HA upon the expiry of the fixed term had quarterly periods or annual periods. The focus of the analysis was the provision in the fixed term tenancy as to the payment of rent, which provided for a yearly rent of £17,680 to be paid by equal quarterly payments in advance. At common law, an annual tenancy would have arisen upon the tenant holding over, because the rent was expressed to be an annual rent. However, the Court of Appeal held that, on a true construction of s.5(3)(d) of the HA, the periods of the statutory periodic tenancy should correspond with the period for which the last instalment of rent under the fixed term was payable, namely a quarter (paragraph 20 of *Meya*). The statutory periodic tenancy was accordingly a quarterly tenancy. For the landlord this was of course the desired result, but perhaps more by chance than by design.

Notices to determine assured or assured shorthold tenancies

As will be well known, an assured tenancy can only be brought to an end by the landlord by the service of a notice under s.8 of the HA, or possibly by the operation of a break clause. That latter possibility appears to be left open by the wording of s.5(1) of the HA which provides that “*an assured tenancy cannot be brought to an end except...in the case of a fixed term tenancy which contains power for the landlord to determine the tenancy in certain circumstances, by the exercise of that power...*”. Section 45(4) of the HA makes it clear that such a ‘power’ does not include a power of re-entry or forfeiture, so that the only possibility left would appear to be the power to exercise a break clause; the meaning of ‘in certain circumstances’ is obscure but arguably includes not only an event, the occurrence of which enables the break clause to be exercised, but also the mere passage of a period of time, such as six months.

In relation to assured shorthold tenancies, landlords have the added advantage of being able to serve a notice under s.21 of the HA, so that the tenancy in question can eventually be brought to an end through the mere passage of time – something which (subject to the point on break clauses above) cannot be achieved with an assured tenancy.

There are two particular instances where the determination of assured or assured shorthold tenancies by notice under the HA bears close resemblance to the procedures for determining common law non-assured tenancies, but where there are in fact fundamental differences; and in one case very much to the landlord's advantage. They are firstly the determination of periodic assured shorthold tenancies by notice under s.21(4) of the HA, and secondly the determination of fixed term assured or assured shorthold tenancies during the fixed term by notice under s.8 of the HA.

Determination of periodic assured shorthold tenancies by notice under s.21(4) of the HA

Section 21(4) of the HA requires that a notice given in accordance with that subsection states the date after which possession is required by virtue of that section. That date must be (1) the last day of a period of the tenancy (2) not earlier than two months after the date on which the notice is given and (3) not earlier than the day on which the tenancy could be brought to an end by notice to quit were it not protected by s.5(1) of the HA. It is settled that, as with notices to quit, a formula of words can be used to 'specify' the date, such as 'after the end of the period of your tenancy which will end next after the expiration of two months from the service of this notice upon you' (*Lower Street Properties v Jones* [1996] 2 EGLR 67, CA). However, unlike a common law notice to quit, a notice under s.21(4) cannot validly require possession on the last day of the relevant period of the tenancy, only after it. The validity of a notice on this very point was considered by the Court of Appeal in *Notting Hill Housing Trust v Roomus* [2006] 1 WLR 1375, in which judgment was given on 29 March 2006. The s.21(4) notice in that case required possession "at the end of the period of your tenancy...", and the tenant's contention was that this was not the same as 'after' the end of the period of the tenancy. Fortunately for the landlord, the Court of Appeal held that 'at the end of' meant 'after the end of', and was accordingly in compliance with s.21(4), pointing out that a request to an audience that they should remove all their belongings 'at the end of the concert' is not asking them to do something at the split second when the last note is played, but only after the concert has ended. This was just as well, because it was the very formula of words approved in *Lower Street Properties* albeit without the benefit of argument on whether that wording complied with s.21(4) – the argument on that occasion was addressed to whether a formula of words could be used at all – and no doubt many landlords, agents and draftsmen of standard forms had, like the Notting Hill Housing Trust, relied on that form of words. As Dyson LJ commented, although the point "may seem to involve hair-splitting... unless the notice complies with the requirements of section 21(4) it is invalid".



Determination of fixed term assured or assured shorthold tenancies during the fixed term by notice under s.8 of the HA

A fixed term assured or assured shorthold tenancy can only be determined by notice under s.8 of the HA during the fixed term if the landlord can rely on certain of the grounds in schedule 2 to the HA (namely grounds 2, 8 or any ground in Part II of schedule 2 apart from grounds 9 or 16) *and* the terms of the tenancy make provision for it to be brought to an end on the ground in question (s.7(6) of the HA). That term will usually be a forfeiture clause, and a tenant would ordinarily be able to claim relief from forfeiture in the event of its enforcement by the landlord. Furthermore, in order to forfeit for a breach of a tenancy other than non-payment of rent, the landlord would ordinarily be required to serve a notice under s.146 of the Law of Property Act 1925 (“LPA”) before bringing forfeiture proceedings in the first place. It would appear that the tenant has neither of these advantages where he is an assured or assured shorthold tenant. This is the effect of the decision of the Court of Appeal in *Artesian Residential Developments Ltd v Beck* [2001] QB 541, which concerned a notice under s.8 of the HA based upon ground 8 (two months rent arrears) served during the fixed term of a 10 year assured tenancy, and where the tenancy contained a forfeiture clause entitling the landlord to forfeit for non-payment of rent. The County Court Circuit Judge held, on appeal, that the tenant was entitled to relief from forfeiture under s.138 of the County Courts Act 1984 (“CCA”). The Court of Appeal disagreed, deciding that s.138 did not apply in the first place. The analysis of Hirst LJ, with whom Mantell LJ agreed, was that whilst the presence of the forfeiture clause in the tenancy was necessary for an order for possession under s.5 of the HA by virtue of s.7(6)(b), in seeking that order the landlord was not making a claim for forfeiture; to use the terms of s.138(1) of the CCA, which Hirst LJ said were not met, the landlord was not “*proceeding by action in a county court...to enforce against the lessee a right of re-entry or forfeiture in respect of any land for non-payment of rent*”. Hirst LJ was “*quite satisfied that the terms of the Act of 1988 expressly rule out a claim for forfeiture*”.

It would appear to follow from this that a notice under s.146(1) of the LPA is not a necessary prerequisite to an order for possession under s.5 of the HA for breaches of a tenancy other than the non-payment of rent, and also that relief from forfeiture is likewise not available for such breaches under s.146(2) of the LPA; in both cases because the landlord is not ‘enforcing’ the relevant forfeiture clause when he seeks an order for possession under s.5 of the HA.

The potential advantage of this quirk of the assured regime to a landlord becomes of significance when considering fixed terms of some substantial duration, such as the 10 years in *Artesian*. If the tenant has temporary financial difficulties in year 1 so that sufficient arrears accrue for the landlord to rely on ground 8, and the tenant is not able to discharge those arrears prior to the hearing of the claim for possession (bearing in mind that the extended discretion of the court under s.9 of the HA to adjourn, stay or suspend the order for possession is not available in a claim for possession based upon ground 8) then the tenancy is brought to an end without any right equivalent to relief from forfeiture. In reality, the advantage is limited to claims based upon ground 8,



since in order for the Court to make an order for possession on the grounds contained in Part II of Schedule 2 to the HA not only must it first consider that it is reasonable to make that order, but in addition the Court has available to it the extended discretion to adjourn, stay, or suspend the order under s.9.

It is of note that whilst the House of Lords in *Leeds City Council v Price* [2006] UKHL 10 appears to have finally shut the door on an argument that article 8 of the European Convention on Human Rights requires the Court to take into account each tenant's particular circumstances at a possession hearing, even where domestic law does not provide for that to be done (as in the case of an order for possession sought under s.5 of the HA on ground 8), it has nonetheless left the door open to a defence advanced by a tenant based upon a challenge to the domestic legislation itself (paragraphs 109-110). It is conceivable that a construction of the HA which results in there being no right equivalent to relief from forfeiture for the non-payment of rent for assured or assured shorthold tenants may, if not capable of justification, be the subject of just such a challenge in the future under articles 8 and 14 of the Convention.

Conclusion

When considering tenancies protected by the assured regime and their determination by notice, the best advice is perhaps contained in an observation of Ward LJ in *Meya*: *"Interesting though the common law position may be, our task is to construe the legislation...Whilst for the sake of consistency one might hope that the new statutory regime would be introduced to reflect the common law, there is no presumption in this case that it should do so."*

Richard Clegg