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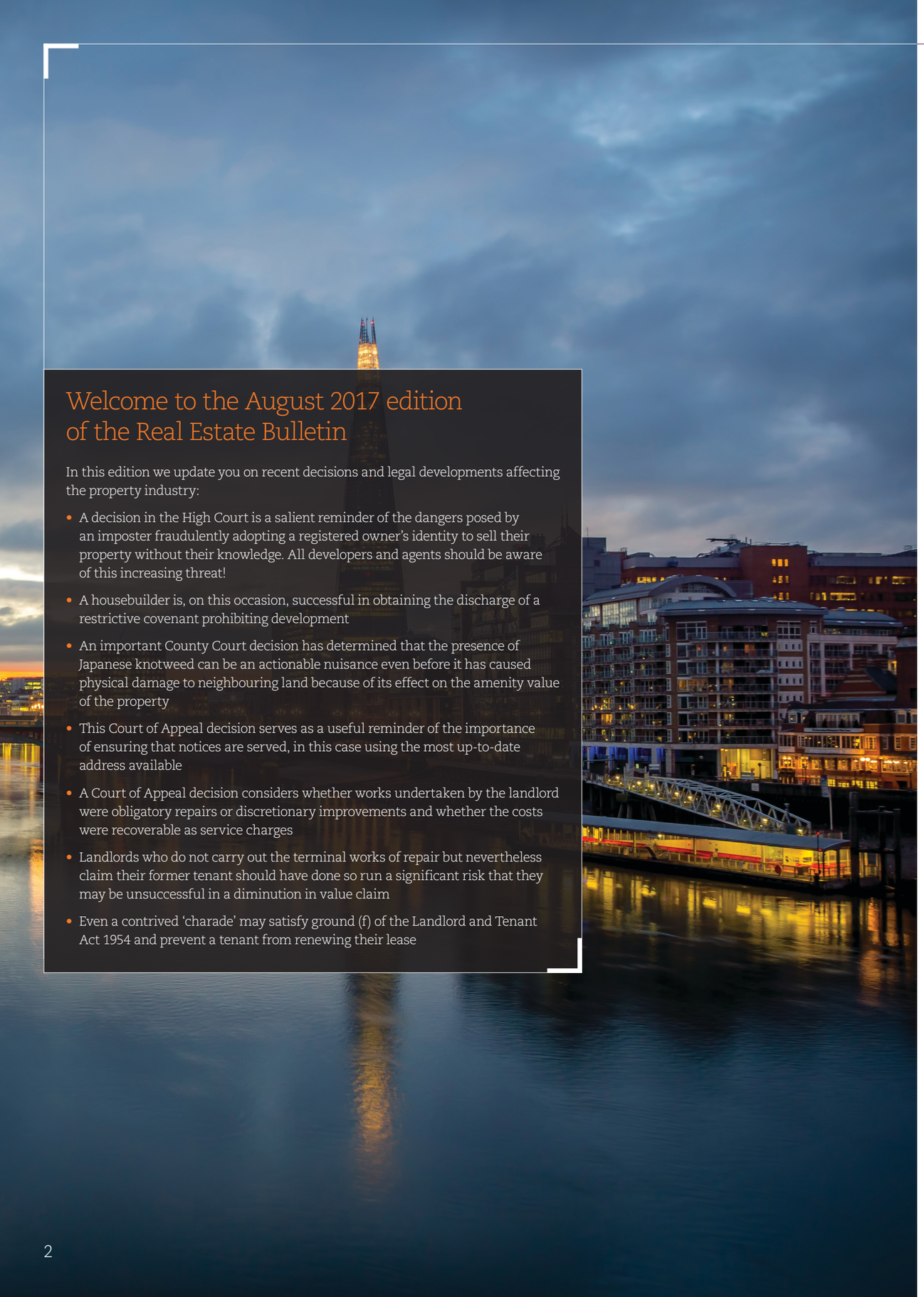
# Real Estate Bulletin

August 2017



## Welcome to the August 2017 edition of the Real Estate Bulletin

In this edition we update you on recent decisions and legal developments affecting the property industry:

- A decision in the High Court is a salient reminder of the dangers posed by an imposter fraudulently adopting a registered owner's identity to sell their property without their knowledge. All developers and agents should be aware of this increasing threat!
- A housebuilder is, on this occasion, successful in obtaining the discharge of a restrictive covenant prohibiting development
- An important County Court decision has determined that the presence of Japanese knotweed can be an actionable nuisance even before it has caused physical damage to neighbouring land because of its effect on the amenity value of the property
- This Court of Appeal decision serves as a useful reminder of the importance of ensuring that notices are served, in this case using the most up-to-date address available
- A Court of Appeal decision considers whether works undertaken by the landlord were obligatory repairs or discretionary improvements and whether the costs were recoverable as service charges
- Landlords who do not carry out the terminal works of repair but nevertheless claim their former tenant should have done so run a significant risk that they may be unsuccessful in a diminution in value claim
- Even a contrived 'charade' may satisfy ground (f) of the Landlord and Tenant Act 1954 and prevent a tenant from renewing their lease



# Contents

# Identity fraud alert!

We have previously written about a number of cases involving fraudsters who sell residential property they do not own (see our Real Estate Bulletin - Summer 2016).

The case of *Dreamvar UK Limited v (1) Mischon de Reya (2) Mary Monson Solicitors Limited [2016] EWHC 3316 ch* should serve as a warning to all parties dealing in residential property. The claim against two different firms of solicitors arose out of the purported sale of a property by a fraudster. The judgment (which is proceeding to an appeal) has wide-ranging implications in both the property and insurance markets and for estate agents.

## The facts

The Claimant, Dreamvar UK Limited ("Dreamvar") was a small property development company. The managing director of Dreamvar instructed Mishcon de Reya (MdR) to advise on the purchase of a residential property in Earls Court ("the Property"). Mr David Haeems was the registered owner of the Property. In September 2014 a fraudster purporting to be Mr Haeems ("the Vendor") offered the Property for sale, marketing it through a reputable estate agent. The Vendor instructed Mary Monson Solicitors ("MMS"), a firm based in Manchester.

Exchange and completion occurred simultaneously on 17 September 2014 following which MdR paid Dreamvar's £1.1 million purchase monies to MMS, who transferred this on to the Vendor. Some months later, but prior to registration, the Land Registry noticed some inconsistencies in the documentation. It was discovered that the Vendor was a fraudster with no proprietary interest in the Property and the Land Registry would not complete the registration. By this stage the Vendor had disappeared, leaving Dreamvar with substantial losses.

Dreamvar sought to recover the losses it had suffered as a result of the fraud from its solicitors, MdR, and from the vendor's solicitors, MMS.

## The claim

**Dreamvar brought claims against MdR for:**

i. Negligence in failing to advise as to the risk of identity fraud, especially given the unusual features of the transaction, including the speed insisted on.

ii. Negligence in failing to obtain an undertaking from MMS that it had taken reasonable steps to confirm the identity of Mr Haeems.

iii. Breach of trust in releasing the monies to the fraudulent seller.

**Dreamvar and MdR brought claims against MMS for:**

i. Breach of an undertaking that it had the authority of the real Mr Haeems.

ii. Breach of warranty of authority. In acting for the Vendor it was alleged that MMS had warranted that it had the authority of the registered owner of the Property.

iii. Breach of trust in releasing the monies to the fraudulent seller.

## Judgment against MdR

Both allegations of negligence against MdR were dismissed. However, MdR was held to have acted in breach of trust since "it was an implied term of [the] retainer that [Mischon] would only release the monies…for a genuine completion." There was no genuine completion here.

Section 61 Trustee Act, which provides a defence in the event that a trustee "has acted honestly and reasonably and ought fairly to be excused for the breach of trust", failed to save MdR in this case. Whilst the Judge found that MdR had acted honestly and reasonably, he declined to exercise his discretion under Section 61 because of the comparative financial consequences of the breach of trust. The effect on Dreamvar would be catastrophic, whereas the effect on MdR, who had at least £3 million in insurance to cover the liability, would be limited to the excess payable and any resulting premium increases.

MdR was ordered to pay £1.08 million together with interest.

## Judgment in favour of MMS

MMS admitted it fell short in its client due diligence and anti-money laundering checks. Its failures included: (i) failing to request original documents; (ii) failing to carry out enhanced due diligence, despite never having met the vendor; (iii) relying upon a TV licence as proof of address; and (iv) failing to notice that the address the vendor had given had no connection with the property.

However, despite this, MMS successfully defended all the substantive allegations made against it and escaped liability. The Judge found that MMS was entitled to release Dreamvar's monies even though the transfer document received in return was not genuine; as such, there was no breach of trust. MMS was held not to have breached an undertaking because the relevant undertaking was with reference to the seller, which did not necessarily mean the registered owner. The breach of warranty of authority allegation failed on similar grounds - the authority given was limited to that of the client (in this case the fraudster), rather than the authority of the true registered proprietor.

## Comment

This decision will be of concern to solicitors and their insurers. The Court took a practical approach, choosing to impose a liability on MdR, the purchaser's solicitors, notwithstanding the fact that they acted honestly and reasonably. In making its decision the Court concluded that MdR was "far better able to meet or absorb [the losses] than Dreamvar."

This case is relevant to all solicitors who deal with property transactions. The decision highlights the significant burden that a purchaser's solicitors face in carrying out due diligence. They may be found to be in breach of trust even where they comply with normal conveyancing standards, or where the seller's solicitor is negligent in carrying out their checks.

It is trite, but nevertheless true, to say that this case turned on its own particular facts. Permission to appeal has been granted, with the Law Society considering whether to intervene. We will closely follow the outcome and report back in a later edition of the Bulletin.

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# How restrictive is a restrictive covenant?

*Millgate Developments Limited and another v Smith and another [2016] UKUT 515*

The pressure to deliver much needed housing means that developers frequently wish to obtain modification or the release of restrictive covenants. In this dispute between a residential developer in breach of a restrictive covenant and the owner of an adjoining children's hospice, the Upper Tribunal had to consider the balance between public interest and private rights over the development land.

## Modification of restrictive covenants under section 84 of the Law of Property Act 1925

Under section 84 of the Law of Property Act 1925, the Tribunal has discretionary powers to modify or discharge a restrictive covenant. Section 84(1)(aa) provides that the Tribunal may modify or discharge a restrictive covenant where it impedes some reasonable use of the land and that, in doing so, the restriction:

a) Does not secure to persons entitled to the benefit of it any practical benefits or substantial value or advantage to them; or

b) Is contrary to the public interest.

In addition, money must be adequate compensation for loss or disadvantage which anyone may incur as a result of the discharge or modification.

Note that, even if the above requirements are satisfied, the Tribunal has discretion as to whether to exercise its power to discharge or modify the restriction.

## Facts

Millgate Developments (M) obtained planning permission for and commenced construction of 23 new social housing units (the Development) that it was required to provide alongside a new development of 47 market sale properties on another site. Part of the land for the Development was burdened by a restrictive covenant prohibiting the land from being used for any building or for any purpose other than a car park.

The restrictive covenant benefitted land owned by Mr. Smith (S) that he had donated to the Alexander Devine Children's Cancer Trust (the Trust) for building a new children's hospice (the Hospice). S objected to M's construction works and requested an undertaking from M to stop the works in order to comply with the restrictive covenant. S argued that, once built, the Development would overlook the Hospice's garden and that this would compromise the carefully planned environment of the Hospice and its outdoor space. The restrictive covenant was vital to protect the amenity and privacy of the Hospice and thereby its suitability for patients.

M did not stop its construction work. Instead, the Development was completed but the part of the Development situated on the burdened land, comprising 13 units, was not transferred to the housing association for social housing and remained unoccupied. The upper floors of some of the units overlooked the Hospice land and their gardens backed onto the boundary with the Hospice.

M applied to the Upper Tribunal for the restrictive covenants to be discharged to allow the 13 completed units to be occupied.

The Trust focused on three key benefits conveyed by the restrictive covenant, namely the protection of privacy, noise and light, to argue that the restrictive covenant retained a valuable practical benefit (see (a) above) and that therefore the Tribunal should not order modification or discharge of the restriction. Conversely, Millgate focused on the public benefit test (see (b) above) to argue for removal of the restrictive covenant, emphasising the importance of social housing in light of the ongoing nationwide housing shortage.

## Held

The Tribunal found, in favour of Millgate, that the restrictive covenant should be modified to permit the occupation and use of the 13 social housing units as there was a clear public interest in providing this new housing. It exercised its discretion to award compensation of £150,000 to the Trust to compensate for loss of the restrictive covenant.

**The Tribunal commented on each element of s.84(1)(aa) as follows:**

a) As argued by S, the restrictive covenant did convey a clear practical benefit to the land. Therefore it could not apply the practical benefit element of s.84(1)(aa) (see (a) above) to discharge or modify the restriction.

b) However, as argued by M, it was not in the public interest for the 13 new units to remain empty as this would be an 'unconscionable waste of resources'. Therefore the public interest element of s.84 (1)(aa) (see (b) above) was satisfied. The fact that the Development was social housing, as opposed to commercially marketed property, was 'highly material' as was the fact that the housing was for tenants who would have been waiting for accommodation for a long time.

c) A monetary award to the owner of the benefitted land would be sufficient compensation for the loss of the benefit of the covenant. In this case, the Trust could use money to offset the loss of privacy and seclusion by planting hedges along the Hospice's boundary with the Development. The Tribunal rejected the Trust's claim that they should be entitled to a share of the developer's profits.

## Comment

This decision cannot be relied upon to assume that the Tribunal will discharge or modify restrictive covenants where a development has been completed in breach. Indeed, the Tribunal qualified its decision with a warning to developers who may interpret this decision as judicial tolerance for disregard of restrictive covenants that such behaviour would risk a 'rude awakening'. However, if social housing is involved, it does appear that the chances of success may be higher.

It is worth noting that the Tribunal was influenced in its decision by Millgate's conduct prior to the hearing where it had already offered to pay the Trust £150,000 as well as its costs in return for consent to removal of the restrictive covenant. The Tribunal regarded this offer highly and deemed it 'regrettable' that it did not 'elicit a positive response' from the Trust.


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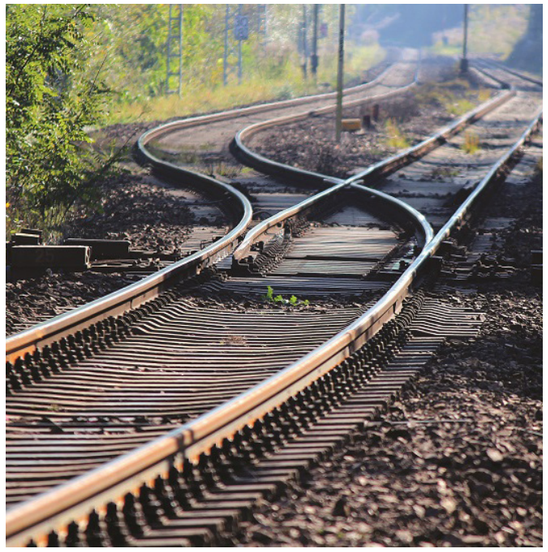
# Network Rail tied in knots!



Japanese knotweed, an extremely invasive non-native plant, has long been a scourge on landowners. It has been described by the Environment Agency as "indisputably the UK's most aggressive, destructive and invasive plant". The plant is extremely difficult to control and its deep roots can compromise the structure of buildings. Lenders have considered the presence of Japanese knotweed to be reason to refuse a mortgage.

In *Williams & Waistell v Network Rail Infrastructure Limited [2017]*, the Claimants succeeded in a private nuisance claim against Network Rail Infrastructure Limited ("Network Rail") who had failed to control the plant on a railway embankment. The judgment will be of interest to all those who own, manage or insure significant property portfolios. It puts the onus on property owners to control invasive plants species, especially when it encroaches on or near residential homes.

## The Facts

The Claimants owned adjoining bungalows in Wales whose rear walls abutted a Network Rail railway embankment. Japanese knotweed had been present on the embankment for many years.

The Claimants brought a claim in private nuisance (an unlawful interference with the use and enjoyment of land). They argued:

i. That the plant had encroached on their land and that the roots had probably caused damage to their properties (although they claimed that they did not have to actually prove physical damage)

ii. That the presence of Japanese knotweed had unlawfully interfered with the "quiet enjoyment and amenity value" of their properties

In order to make out their claim, they would need to show that Network Rail had knowledge or constructive knowledge of the nuisance and that they had failed to take reasonable steps to prevent it.

The Claimants sought damages and an injunction requiring Network Rail to abate the nuisance and adequately treat the weed.

## Judgment

The Court rejected the Claimants' first ground that encroachment per se could amount to nuisance. They upheld the long established position that physical damage had to be proved. No satisfactory evidence that physical damage had occurred was adduced by the Claimants.

The Court accepted the Claimants' second ground that the presence of the plant had interfered with their quite enjoyment and the amenity value of the property. The judge held "the amenity value of a property can include the ability to dispose of it at a proper value" and that this is "so important a part of an ordinary householder's enjoyment of his property that such an interference should be regarded as a legal nuisance".

Network Rail was deemed to have constructive knowledge of the risk posed by the plant and its potential damage. The Court was also satisfied that the interference was reasonably foreseeable and that Network Rail had failed (since 2012-13) to do all that was reasonable in the circumstances to prevent the interference (spraying the plant with herbicide was deemed inadequate).

The Court rejected Network Rail's argument that they enjoyed a prescriptive right to commit nuisance (because of the plant's presence on the land for at least 50 years) and their contention that the plant formed part of the "established character" of the locality.

The Court awarded damages to the Claimants for:

i. The cost of treating the knotweed and insurance backed guarantees to eliminate it (£4,320 for each Claimant).

ii. The loss of amenity and interference with quiet enjoyment (£350 per annum for a four year period for each Claimant).

iii. The diminution in the value of the properties (£10,000 for one and £10,500 for the other Claimant).

However, the Court rejected the Claimants' application for a mandatory injunction (requiring Network Rail to remove the knotweed) considering that the grounds for granting one had not been sufficiently made out.

## Comment

This judgment is significant because it has determined that the presence of Japanese knotweed can be an actionable nuisance before it has caused physical damage on neighbouring land because of its effect on the amenity value and quiet enjoyment of such land.

Property owners, managers and insurers should be aware of the potential liability they are exposed to by the presence of Japanese knotweed. Careful management, weed control and eradication programmes on any affected land will be prudent. When acquiring property, purchasers should be mindful of the presence of the plant and raise any queries with their surveyors and solicitors.

In July 2017 Network Rail, which may be facing a mass of such claims, appealed the decision. We will be closely monitoring developments.

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# Old or new? Which address should be used for service of notices?

In *Grimes v The Trustees of the Essex Farmers and Union Hunt [2017] EWCA Civ 361* the Court of Appeal held that a landlord's notice to quit was invalidly served because it had been delivered to the tenant's old address and not his new address as notified to the landlord.

## Background

The main issue in this appeal was whether notice to quit an agricultural holding was validly served on the tenant, Mr Terence Grimes, by his landlords, the Trustees of the Essex Farmers and Union Hunt (the "Landlord").

The facts are straightforward: Mr Grimes had farmed the 121 acre agricultural holding (the "Holding") as tenant of the Hunt under a succession of tenancy agreements. Mr Grimes lived at 24 Glebe Way, Burnham-on-Crouch until October 2005 when he moved to 44 Maple Way. In 2005 his tenancy agreement was renegotiated with two consecutive agreements, each for a three-year term, running until 30 September 2012. Mr Grimes' address in these agreements was recorded as Glebe Way, but when he made the first rental payment in December 2006 Mr Grimes sent a handwritten note to the Landlord advising of his change of address.

On 1 July 2011 the Landlord hand delivered a letter to 24 Glebe Way that gave notice to quit and required Mr Grimes to vacate the Holding by 30 September 2012.

Following unsuccessful negotiations for a new letting to Mr Grimes, the Landlord eventually granted a lease of the Holding to a new tenant with effect from 1 October 2012. Mr Grimes claimed that his tenancy had not been validly terminated on the grounds that the notice had been delivered to his old address and he claimed that he had been wrongfully dispossessed of the Holding and was entitled to damages.

The key issue turned on the true construction of a clause in the tenancy agreement, which provided that: "Either party may serve any notice (including any notice in proceedings) on the other at the address given in the Particulars or such other address as has previously been notified in writing".

## First Instance

The Judge took a literal interpretation of the tenancy agreement and found that the notice was valid on the basis that a notice could validly be served either at the address as stated in the agreement or at the address that has previously been notified in writing. Mr Grimes appealed.

## Court of Appeal

The Court of Appeal overturned the Judge's decision. It held that the relevant wording has to be considered in the context of the agreement as a whole. If the judge "had approached the question in this way, he would...have realised that the language can naturally be read as providing for an alternative which is not only exclusionary but also substitutive; and that, viewed objectively, this is what the parties must have intended". The Court of Appeal questioned what the point of enabling the tenant to notify the landlord of his new address would be if the landlord could simply disregard it and remained free to serve notice on the tenant at the address given in the Particulars. As a matter of commercial common sense, the parties must have intended that the new address, once duly notified, would supersede the original one shown in the Particulars. The Landlord's notice to quit was therefore invalid and Mr Grimes was awarded damages of £31,500 together with interests and costs.

## Comment

This decision serves as a useful reminder of the importance of ensuring that notices are served in accordance with the terms of the lease and that the receiving party's address is checked to ensure that, if appropriate, the notice is served on the most up-to-date address available. As a matter of caution, it is always advisable to serve notices on all available addresses to avoid any potential dispute.

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# Repair or replace? Residential service charge update

The decision of the Court of Appeal in *London Borough of Hounslow v Waaler [2017] EWCA Civ 45* will have a significant impact on a landlord's ability to recover the cost of improvement works.

An issue often encountered by a Landlord is whether to repair or replace. The usual principle behind a long lease of a flat is that a landlord is responsible for repairing the main structure and it will recover the costs through a service charge payable by a tenant.

Mrs Waaler was a long leaseholder of a flat owned by the London Borough of Hounslow. The building in which Mrs Waaler's flat was situated was in need of repair. The authority served the relevant notices to carry out works of repair which included replacement of a flat roof with a pitched roof, replacing wooden framed windows with metal framed units and external cladding. Some of the windows had been identified as requiring repair where rot had been discovered and all of the wooden window frames required redecoration. It was accepted that the wooden frames could be repaired but the authority considered that it would be more economical for the leaseholder in the long-term to replace the wooden frames with metal units.

The authority expected to recover the cost by adding it to the service charge. The costs the authority was seeking to recover from the leaseholder were just over £55,000.

The leaseholder applied to the First-tier Tribunal to determine whether this was reasonable. The issue was whether the costs incurred by the authority were reasonably incurred.

The First-tier Tribunal found that the replacement of the roof, the windows and cladding could be recovered via the service charge. The leaseholder appealed to the Upper Tribunal which approved the decision in respect of the roof but overturned it on the windows and cladding, ruling that these were improvements rather than repair. The authority appealed to the Court of Appeal and the appeal was dismissed. The Court of Appeal agreed with the Upper Tribunal that the same legal tests should be applied to all work falling within the definition of service charge but there was a difference between obligatory repairs and discretionary improvements. The cost of improvements can be recovered from tenants only if the service charge provisions in the lease permit it. In this case, Mrs Waaler's lease allowed the landlord to recover costs if it carried out improvements but the authority had to take into account the views of leasees which it had not done. The decision to replace the windows and cladding was motivated by the authority's desire to install energy efficient units and coverings rather than the need to repair. Consequently, the authority could not recover the costs relating to the windows and cladding.

Landlords must carefully consider whether the costs involved in any repair or replacement are recoverable under the lease and should also give consideration to whether there is a better alternative for the tenant.

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# Dilapidations

## Can a Landlord delay carrying out works but still be successful in a claim for damages for those works against a former tenant?

The case of *Car Giant Limited and Acredart Limited v The Mayor and Burgesses of the London Borough of Hammersmith [2017] EWHC 197 (TCC)* concerned an industrial site in Willesden where the London Borough of Hammersmith and Fulham ("LB HF") were tenants pursuant to a lease which expired on 21 February 2011. The case concerned the landlord's claim for diminution in value as a result of terminal disrepair (in the sum of £500,000). Before the proceedings reached the High Court, the parties had agreed the items of disrepair and the cost of remedying the breaches of the lease.

Since lease expiry, the landlord had carried out some works, and the parties' building surveyors had agreed the common law assessment for those works to be £183,897.86. The landlord had not, since lease expiry, carried out some further works (the agreed costs of which were £218,990) for which it was still claiming. The total cost of works claimed was therefore £402,887.86. However, the LB HF argued that the Section 18 cap in the Landlord and Tenant Act 1927 limited the landlord's recovery to £110,000.

The landlord's surveyor ignored the agreed common law assessment and argued instead that a hypothetical purchaser would have (a) asked a surveyor to quantify the approximate cost of repairs and that (b) that surveyor would have erred on the side of caution (since he or she would not have had the benefit of the detailed inspection and costings). This, in the opinion of the landlord's surveyor, would have resulted in a higher figure than the agreed sum.

The Judge held that this was an incorrect basis for a valuation and that the agreed figures should have been the "basic building block in the diminution calculation." In any event, he did not accept that the figure in the hypothetical purchaser's survey would have been higher and stated that the correct starting point was £402,887.86.

The Judge then drew a distinction between the works that had been carried out (for which authorities had already established that the costs expended were a good guide to the damage of the reversion) and those that had not been.

The Judge found that there was no explanation as to why the works had not been carried out, six years after lease expiry. The landlord's counsel sought to argue that these works had not been carried out due to lack of finance, not wanting to disturb the then occupiers, that there was a rolling programme of works and that it had been reasonable to hold back expenditure when the LB HF had been resisting payment. However, these arguments were not supported in evidence. Further, there was also nothing in evidence to suggest that the work would be done shortly or that the repairs were substantial and serious. Further, the Judge was mindful that units had since been let out on a market rent (suggesting that the remaining disrepair did not cause the landlord a material loss).

On the basis that the landlord's "action and inaction" had shed light on the diminution in value of the reversion, the Judge held that only the work actually carried out represented the true damage to the reversion and accordingly, that the recoverable damages should be limited to £166,000.

The Judge therefore awarded the landlord recoverable damages in the sum of £179,125 (£13,125 of which was in respect of the fees for preparing the schedule of disrepair) and interest was awarded from the expiry of the lease. This was in contrast to the landlord's original claim of £500,000.

### Summary

This case shows that landlords who do not carry out the works of repair for which they are claiming, run a significant risk that they may be unsuccessful in a diminution in value claim. While this case does not seek to preclude landlords from claiming sums in respect of works that have not yet been carried out, it shows the importance of adducing strong evidence as to exactly why those works have not yet been carried out (e.g. perhaps the building has been sold). A landlord is of course more likely to be successful in a claim if the works have already been carried out or where it can clearly be established that there is a real intention to do so.

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# Can a contrived 'charade' prevent a tenant from renewing their lease?

## It is well established that a landlord can oppose renewal of a business lease if he demonstrates settled intention to demolish, reconstruct or carry out substantial construction works to the premises or a substantial part (and could not reasonably do so without obtaining vacant possession).

But how genuine do those intentions have to be and is the landlord's motive and the economic viability of any relevance? The Courts have consistently resisted analysing the economic viability of the landlord's intentions unless they cast doubt on whether the intentions are genuine.

In the recent decision of *S Franses Limited v The Cavendish Hotel (London) Limited [2017] EWHC 1670*, in the High Court on Appeal from the County Court, a tenant's claim under the Landlord and Tenant Act 1954 ("the Act") for a new tenancy at 80 Jermyn Street, London W1 ("the Premises") was dismissed on the basis that the Landlord had made out its ground of opposition under s.30(1)(f). However the case raised important questions of interpretation and considered the relevance of a landlord's intention and motive.

### Background

S Franses Limited ("the Tenant"/appellant) is a textile dealership with a renowned specialism in antique tapestries and textile art. The Tenant occupied the ground floor and basement of the Premises. Part of the Premises also houses a tapestry archive. The gallery had operated for more than 25 years. The remainder of the building is occupied and managed by The Cavendish Hotel (London) Limited ("the Landlord") as a luxury hotel.

On 16 March 2015 the Tenant served a request for a new tenancy under s.26 of the Act. On 15 May 2015 the Landlord served a counter notice relying on ground s.30(1)(f) "that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises".

It was the Tenant's case that some aspects of the Landlord's intended works had been contrived only for the purposes of satisfying ground (f). Both in the first instance decision and on appeal, the judges accepted the Tenant's case in this regard. The factitious character of the intended works was evidenced by the fact that a new central wall dividing what would become two retail units stopped two metres short of the shopfront at ground floor level. In cross examination, the witness for the Landlord accepted that the works would not be undertaken if the Tenant left voluntarily and that if the court ruled against the Landlord on ground (f) the works would not be undertaken. The judge on appeal noted that it seemed clear from the evidence that the Landlord's predominant purpose in devising the works was to obtain vacant possession of the Premises underground (f).

### First Instance

The judge at First Instance assessed the Landlord's witness to be a "convincing, realistic witness and a professional woman of integrity". He did not believe the Landlord would renege on its undertaking to the Court to carry out the works if a new tenancy was not granted. The judge held that the underlying motive of the Landlord is irrelevant unless it undermines the assertion of the Landlord that it has a genuine and settled intention to proceed. Additionally he determined that whilst the Landlord's current intention is in one sense conditional (i.e. conditional on the termination of the current tenancy, the witness having accepted that the Landlord would not proceed with the works if vacant possession was obtained voluntarily), this could not be said to vitiate his intention as at the time of the hearing.

## Appeal

The Tenant appealed on nine separate grounds. This summary will focus only on some of the grounds of appeal.

The Tenant had two primary objections to the conclusions of the First Instance judge:

i. The judge had mischaracterised the nature of the Landlord's intention. It is not that the Landlord's intention is conditional "on the termination of the current tenancy" but rather that it was conditional on the works being necessary in order to satisfy ground (f).

ii. Once correctly characterised it is clear that the Landlord's conditional intention cannot in law be sufficient to satisfy the statutory test.

The Tenant argued that the Landlord's intention to carry out the works was conditional on these works being necessary in order to satisfy ground (f) and that this was not a sufficient intention within the meaning of the Act.

The Tenant also raised a point of statutory construction arguing that by enacting ground (f) "Parliament intended that the protection of business tenants should not be a barrier to buildings and land being improved… which is in the public interest… it is inconceivable that it was Parliament's intention to allow a wealthy landlord to simply subvert the protection… by promising to do works for the sole purpose of getting the court to make an order under the Act."

The Landlord argued that the court should not be concerned with questions surrounding the wisdom or long-term viability of the works nor the question of the landlord's underlying motive. The issue of intention was also to be judged as at the date of the hearing.

## Decision on Appeal

On appeal the judge disagreed with the Tenant that the purpose of the Act was to "secure the most beneficial and efficient use of land". He stated that "although it [the Act] may be predicated on the assumption that market forces will usually generate commercially viable projects, that is not a hard substratum of legislative policy".

The judge agreed with the Landlord that the general trend of the authorities is that questions of motive are irrelevant to issues surrounding ground (f). This is because the paragraph in the Act refers to intention, not motive (the law traditionally recognises a distinction between the two). He also agreed that the question of intention must be assessed as at the date of the hearing.

A court has to be satisfied that the Landlord would remain steadfast to the intention of completing the works. As a matter of common sense and commerciality, if a landlord, as here, says they are only doing the work because without doing so they would not be able to obtain vacant possession, then a court is entitled to be sceptical about the genuineness of the landlord's intention to deliver the project, since such landlord's assertions are often short-lived. However in this case, taking into account the witness evidence and the undertaking to carry out the works, the judge decided the Landlord had a settled and genuine intention to proceed. As such the Tenant's appeal failed and the Landlord was held to have successfully made out its ground of opposition under s.30(1)(f).

## Comment

Landlords will be able to defeat a tenant's right of renewal by contriving a development for the sole reason of obtaining vacant possession (provided there is a genuine and settled intention to proceed with the works). In this case the proposed works were described as a "charade". A "leapfrog" application has been granted so that the decision may be considered by the Supreme Court. We will keep you informed.

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# Clyde & Co real estate specialists

Strategic and commercial in our approach, our real estate group provide clients with specialist legal advice across the whole property "life-cycle" from the initial acquisition, development, and financing through to the end sale of real estate, and landlord and tenant disputes. Working with a wide range of real estate clients across the UK and internationally, we understand the real estate industry from all angles. We provide advice across all transactional and contentious real estate services.

**These include:**

- Acquisition, disposal and project structuring
- Finance and investment
- Planning
- Post completion occupier and landlord services
- Leasing
- Refurbishments and construction
- Dispute resolution

Our integrated team works across legal disciplines with supporting areas such as construction, tax and environment assisting our core real estate specialists.

**Contact us:** realestate@clydeco.com

**Visit us:** www.clydeco.com

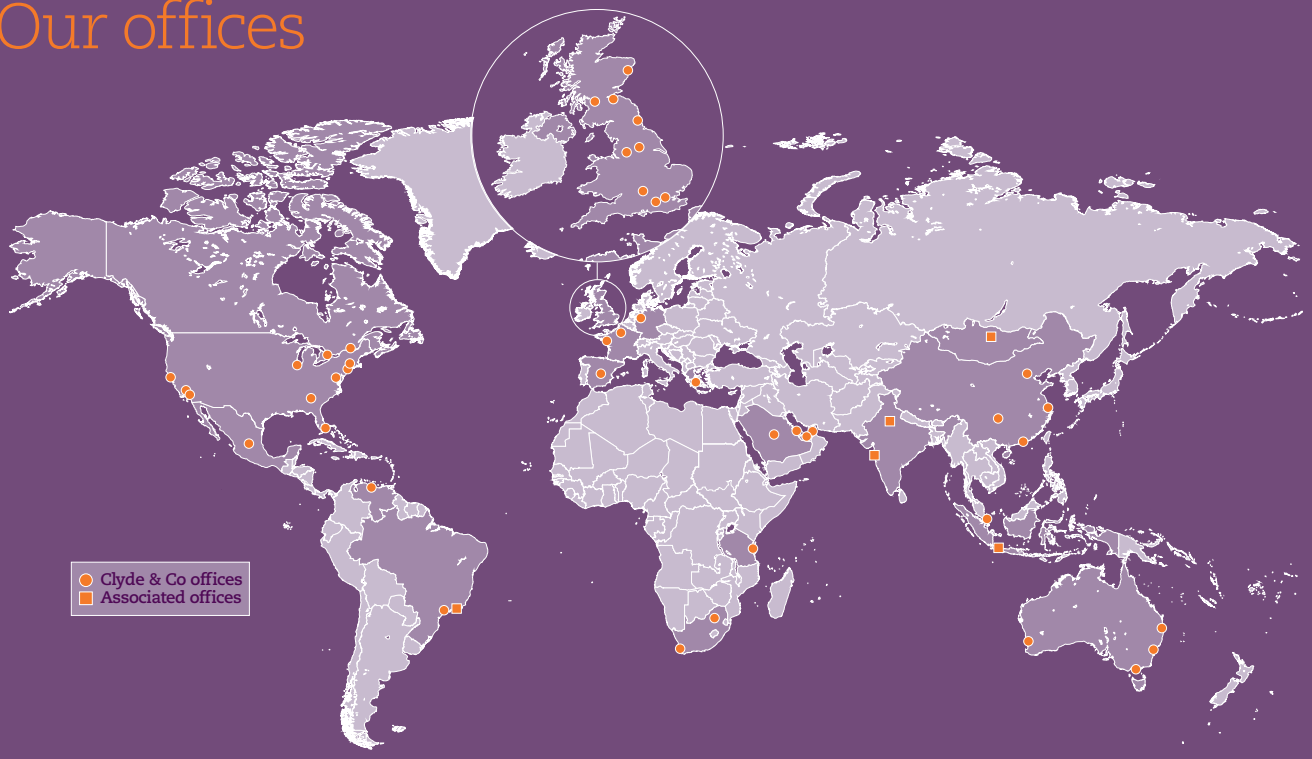
**What they say:**

"They always go the extra mile for the client and are extremely personable."
**Chambers UK 2017, Real Estate**

They are excellent and very commercial. They always try to come up with the most cost-effective solution.
**Chambers UK 2017, Real Estate**

They show outstanding 'communication and team-building' skills. Keith Conway is recommended for his 'commercial realism and common sense'.
**Chambers UK 2016, Real Estate**

# Our offices




**45+**
offices across
6 continents

**375+**
partners,
over 1,500 lawyers
and 3,600+ staff

*Associated offices
** Pending regulatory approval

For full office details please refer to the Clyde & Co website
**www.clydeco.com/locations/offices**

## Asia Pacific
Beijing
Brisbane
Chongqing
Hong Kong
Jakarta*
Melbourne
Mumbai*
New Delhi*
Perth
Shanghai
Singapore
Sydney
Ulaanbaatar*

## Europe
Aberdeen
Dusseldorf
Edinburgh
Glasgow
Guildford
Leeds
London
Madrid
Manchester
Nantes
Newcastle
Oxford
Paris
Piraeus

## Americas
Atlanta
Caracas
Chicago
Long Beach
Los Angeles
Mexico City**
Miami
Montreal
New Jersey
New York
Rio de Janeiro*
São Paulo
San Francisco
Toronto
Washington, DC

## Middle East/ Africa
Abu Dhabi
Cape Town
Dar es Salaam
Doha
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Riyadh



**Clyde & Co LLP** **www.clydeco.com**

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