Jonathan Chew acted with Jonathan Seitler QC for the successful landlord in Phillips v Francis and Jonathan Davey acted for the intervener, the Secretary of State for Communities and Local Government.

Normal Service Charges Resumed: Phillips v Francis [2015] 1 WLR 741

In Phillips v Francis [2015] 1 WLR 741, the Court of Appeal reversed the controversial decision of Morritt C at first instance ([2013] 1 WLR 2343) on the meaning of “qualifying works” for service charge consultation. The decision was greeted with relief by managing agents and surveyors across the country, who viewed the former Chancellor’s decision as unworkable in practice and harming rather than protecting tenants.

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The consultation regime applies to “qualifying works” (section 20(1)), defined as “works on a building or any other premises” (section 20ZA(4)). Regulations set out the detail of consultation requirements. The consultation process takes time (to give tenants a chance to respond) and costs money to administer (which costs themselves form part of the service charge sums payable by tenants). Failure to comply with the consultation requirements means that, unless the landlord obtains dispensation from the tribunal, the landlord can only recover the “appropriate amount” set by the regulations. Prior to the 2002 Commonhold and Leasehold Reform Act, this was a £1000 sum; now it is £250 per tenant. This is the “statutory cap”.

The issue in Phillips was how to apply the statutory cap to the definition of qualifying works. The problem with the statutory definition is that it only tells you what works are covered: the Act is silent on the question of to what group or value of works on a building the statutory cap applies to. It answers “what?” but not “how much?”

The two approaches

In Phillips, two approaches were canvassed:
(1) The “sets approach”, where a project of works is objectively assessed to see what constitutes one “set” or “batch” of works. The statutory cap is then applied to the value of that set of works; if the works cost less than £250 per tenant there is no need to consult.

(2) The “aggregating approach”, where all works on a building in a given service charge period are taken together. Their value is added together and, if it exceeds £250 per tenant, the cap applies unless there is consultation.

The problem with the aggregating approach was brought into account. Rather, he used the service approach was inappropriate, because the landlord argued that there were project of works constituted one or two sets.

In Phillips, before Morritt C, both sides argued for the sets approach. The tenants argued that there was one set of works on the holiday park, the landlord argued that there were multiple sets. The judge had decided the sets approach was inappropriate, because the statutory definition did not provide for any sets or batching. Rather, he used the service charge period to provide a limit and ordered that all qualifying works carried out within a service charge year be brought into account.

The sets approach originated in the decision of Robert Walker LJ in Martin v Maryland Estates [1999] 2 EGLR 33. There, both sides accepted that a sets or batching approach was correct, and the question was whether a given project of works constituted one or two sets.

The sets approach and, importantly for practitioners, Lord Dyson MR gave guidance on how to distinguish one set from another at [36]:

“It is a multi-factorial question the answer to which should be determined in a common sense way taking into account all relevant circumstances. Relevant factors are likely to include: (i) where the items of work are to be carried out (whether they are contiguous or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree. Robert Walker LJ said that, on the facts in Martin’s case [1999] 2 EGLR 33, the fact that all the works were the subject of one contract was a factor which decisively pointed to the conclusion that there was a single set of works in that case. It seems to me that the judge must have had in mind such an approach when he said at para 362 that he had considered “the nature, extent and timing of the works as undertaken and proposed to be undertaken.””

Etherton C emphasised that this question of fact is to be determined objectively and indicated that the way the works were planned and the landlord’s reasons for the works are of relevance (at [60]).

The Court of Appeal held that the trial judge had gone too far in stating that the works must be of permanent effect by way of modification of what was there before (at [38]). So, the limit is the multi-factorial question of what is a “set” and no more: any “work on a building” counts within a set.

As well as indicating a list of factors, the Court of Appeal’s approach emphasises the factual nature of the question. This can only benefit both landlords and tenants. It should move the debate away from legal questions about the meaning of the (badly-drafted) provisions of the 1985 Act and onto the real life issues on the ground at the relevant property. This puts the question in the factual hands of surveyor experts, and limits legal argument to the facts of any given case.

Phillips has been, as it should be, welcomed by practitioners in the field. Not only has the Court of Appeal corrected a wrong turning in the law, it has provided detailed guidance to landlords, tenants, and the first instance courts and tribunals who will deal with such matters on a daily basis. The multi-factorial approach set out provides the definition sorely missing from the legislation and shows the way forward.

Jonathan Chew

s.25 Landlord and Tenant (Covenants) Act 1995:
Tindall Cobham 1 Ltd v Adda Hotels [2015] 1 P&CR 5
Julian Greenhill acted for the successful landlords

There have been two recent related decisions on the scope and effect of section 25 of the Landlord and Tenant (Covenants) Act 1995 (“the 1995 Act”), the anti-avoidance provision. Both cases have broken new ground since the case of K/S Victoria’s House of Fraser [2012] Ch 497 (“KSV”) which held that section 25 invalidated any agreement that involved a guarantor of the tenant guaranteeing the tenant’s assignee i.e. a “repeat” guarantee.

The first case is Tindall Cobham 1 Ltd v Adda Hotels [2015] 1 P&CR 5. The second case is, Zinc Cobham 1 Ltd v Adda Hotels [2015] EWHC 53 (Ch), which will be covered in the next issue of this newsletter.

The facts

Following a sale and leaseback in 2002, two companies within the Hilton group held leases of ten hotels from various “Tindall” landlords. Hilton Worldwide Inc (“HWI”, the US parent company) was Guarantor of each of the hotel leases. The hotel leases each contained an identical alienation provision. As well as a general covenant against assignment of the whole of the term without consent, this alienation provision included a specific covenant dealing with assignments to Associated Companies. This clause provided as follows:

“The Tenant shall not assign this Lease to an Associated Company of the Tenant without the prior consent of the Landlord Provided Always that ... the Landlord shall be entitled to impose any or all of the following conditions set out in sub clauses (a) and (b) below:

(a) [T to give L notice of an assignment within 10 working days]
(b) That on any such assignment, the Tenant shall procure that the Guarantor and any other guarantor of the Tenant shall [guarantee the assignee] and subject to the Tenant’s compliance with such conditions the Landlord’s consent shall be given.”

In order to restructure its business, Hilton
wanted to assign the leases from the tenants to ten new companies within the Hilton group. The newcos all met the description of “Associated Companies”. Hilton could see that a guarantee of the newcos procured pursuant to condition (b) from HWI would be void as a “repeat” guarantee. So Hilton concluded that condition (b) was unenforceable on an assignment from the tenants. Hilton went ahead and assigned to the ten new SPVs without asking for consent, notifying Tindall after the event in satisfaction of condition (a).

Tindall was thereby left with the ten newcos as tenants and no new guarantor. Because Tindall was in the process of re-financing its debt, there was an urgent need to establish the invalidity of what Hilton had done and to reverse it, so the question was put before the Court as a summary judgment application on an expedited basis.

**The decision at first instance**

At first instance (citation [2014] EWHC 2637 (Ch)) Peter Smith J held that the assignments were unlawful for three reasons. First because consent had not been sought by Hilton in advance: under a negative covenant you have to seek consent in advance and if you don’t you are in breach, even if consent could not have been refused. *Barrow v Isacca* ([1891] QB 417). Second, the judge accepted Tindall’s argument that condition (b) could be interpreted so as to be satisfied by provision of a new guarantor so it was not invalid. Third, he held that if condition (b) was caught by section 25 the only sensible result was that the whole of the proviso to clause 3.14.6 was rendered unenforceable, not condition (b) alone.

**The decision on appeal**

Hilton appealed. The appeal was also expedited. On appeal Hilton accepted that the assignments were in breach of covenant by reason of the fact that no consent had been sought by Hilton in advance: under a negative covenant you have to seek consent in advance and if you don’t you are in breach, even if consent could not have been refused. Hilton and Tindall raised all their other arguments again on the question of whether section 25 meant Hilton could assign without giving a guarantee.

The Court of Appeal dismissed Hilton’s appeal. They overturned the Judge’s conclusion on the interpretation of condition (b) put forward by Tindall. The Judge had striven too hard to adopt an interpretation that overcame the effect of section 25. But, agreeing with the Judge, they held that a condition in a lease which entitles a landlord to require a tenant to procure a repeat guarantee as a condition of consent to an assignment is an “agreement” caught by section 25. Both Hilton and Tindall had argued that section 25 would only apply if it would require procurement of a repeat guarantee but not on a further assignment at which point the Court of Appeal in *KSV* had held that a guarantor could give a valid guarantee for the assignee. Tindall argued that the effect of section 25 was not to prevent the landlord from imposing condition (b) but to prevent the tenant from satisfying it.

Rejecting these arguments, the Court of Appeal held that section 25 invalidates any “agreement” that would have effect “to exclude modify or otherwise frustrate the operation of the provision of the [1995] Act”. Section 25 is not limited to the exercise of rights contained in such “agreements”. The fact that the parties had agreed that the landlord could require this pre-condition in certain circumstances was enough to engage section 25 so as to invalidate that “agreement” altogether.

So the question then became, how far does section 25 avoid the contractual provisions of the lease? The Court of Appeal held that section 25 should be interpreted generously to ensure the operation of the 1995 Act is not frustrated, but that the words “void to the extent that” in section 25 envisage partial invalidity and require the Court to take a balanced approach to invalidation, so as not to leave the clause as a whole unworkable. It is necessary to consider the agreement in question as a whole and identifying the complete terms and the subsidiary parts, taking care not to excise a subsidiary part so as to leave an imbalance. In this case the Court of Appeal said removal of condition (b) alone was wrong because the conditions were interdependent and part of a composite proviso, so the whole proviso was avoided by section 25.

**Conclusion**

The Court of Appeal undoubtedly adopted a wide reading of section 25, one that captures any provision in a lease that is capable of frustrating the 1995 Act whether or not it necessarily would do so in every instance. It remains to be seen where the limits of this approach will lie, but the guidance offered on applying section 25 to a given provision is clearly welcome.

The Tindall saga did not end there however, because Tindall wished to have the wrongful assignments reversed. The concluding chapter of the litigation, which was the subject of *Zinc Cobham 1 Ltd v Adda Hotels* [2015] EWHC 53 (Ch), will be covered in the next issue of this newsletter.

**Julian Greenhill**

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**Legal Digest - May 2015**

**The Ghost Writer Case: Ramsay v Love [2015] EWHC 65 (Ch)**

Jonathan Seiter QC and Benjamin Faulkner acted for Gordon Ramsay

In November last year, the trial of Gordon Ramsay’s claim against the landlord of one of his restaurants, Gary Love, was heard in the Chancery Division. As has been widely reported in the press, Mr Ramsay’s business operations had been controlled by his father in law, Chris Hutcheson, before Mr Hutcheson’s various allegedly fraudulent activities were rather publicly revealed, and Mr Hutcheson was expelled from the business. Mr Ramsay’s claim was that during his period of control of the business Mr Hutcheson had taken a step too far, by purporting to bind Mr Ramsay to a personal guarantee in respect of the £640,000 pa lease of the York & Albany hotel and restaurant, granted to one of the group companies, without his authority. What’s more, Mr Hutcheson had used a ‘Ghost Writer’ signature machine, normally used for auto penning Christmas cards, fan photographs, menus and other merchandising, to execute the relevant deed in Mr Ramsay’s name.

**Decision on the facts**

On the facts, Mr Ramsay was unsuccessful. In his judgment of 20 January 2015 Morgan J concluded that the ordinary scope of Mr Hutcheson’s general authority was so wide that it extended to entering into all manner of transactions on behalf of the group companies, and to entering into personal guarantees in Mr Ramsay’s name in respect of those business leases, even where Mr Ramsay was not aware in advance that any such personal guarantee was being given. Mr Hutcheson’s authority even extended to using the Ghost Writer machine to execute all kinds of documents on Mr Ramsay’s behalf.

**Legal argument**

So aside from the celebrity gossip, with sensational headlines such as ‘Gordon Ramsay’s Courtroom Nightmare’, what interest is Ramsay v Love to property lawyers? Unfortunately, the meaty legal argument was eclipsed by the findings of fact against Mr Ramsay, and was only cursorily dealt with at the very end of the judgment, by way of obiter comment. But Morgan J concluded that all of the legal arguments raised by Mr Love which would have supported that Mr Hutcheson was found not to have acted within the scope of his authority, were unfounded.

**Estoppel by negligence**

First, if Mr Hutcheson did not have authority to sign the personal guarantee using the Ghost Writer machine, would Mr Ramsay be estopped by his negligence, in entrusting the Ghost Writer to Mr Hutcheson, from denying the validity of the personal guarantee? This was the most interesting legal issue to arise. It has much wider significance beyond the unusual case of Ghost Writer machines: every company entrusting company seals or signature stamps to company secretaries or employees will be concerned to ensure that it will not be bound by the fraudulent acts of such trusted persons.

- The cases establish that in order for estoppel by negligence to arise, (i) the claimant must owe a duty to the defendant; and (ii) the alleged negligence must be the proximate cause of the loss – or in...
other words the negligence must be ‘in or immediately connected with the transfer itself’. General negligence as to the way seals or stamps or cheque books are secured and stored, and general negligence in trusting even known fraudsters and giving them unrestricted access to these items, is not sufficient for an estoppel to arise because: (i) such seals and stamps etc could be used for absolutely anything, so it is difficult to identify a class of people to whom a duty of care is owed; and (ii) any negligence is not sufficiently connected with the very transaction in hand for an estoppel to arise.

- By contrast, estoppel by negligence can operate where a person has negligently drawn up an instrument, such as a cheque, by leaving spaces in it, permitting a fraud to take place (such as in London Joint Stock Bank Limited v Macmillan and Arthur [1918] AC 777 where a £20 cheque was altered to read £120). In that case, the person has taken responsibility for that very instrument, and the negligence is connected with that very instrument.

- Furthermore, even where a person signs a blank document, entrusting it to a trusted adviser or other party they may well not be negligent (see the comments in Mercantile Credit Co Ltd v Hamlin [1965] 2 QB 242 at 265G, 275D-E and 279D).

- On the facts, entrusting the Ghost Writer to Mr Hutcheson was not negligent: Mr Ramsay was justified in trusting his father in law in the way that he did at the time. It also seems clear that any negligence was not sufficiently connected with the execution of the personal guarantee itself.

**Representation as to due execution**

Secondly, if Mr Hutcheson did not have authority to sign the personal guarantee, did he have authority to warrant that it was not sufficiently connected with the very transaction in hand for an estoppel to arise?

- It is clear that in order for an estoppel to arise there must be (i) a representation as to due execution; and (ii) this representation must somehow have come from the person bound or his authorised agent.

- In each case it will be important to focus on what representation has in fact been made expressly, or by implication. Ordinarily even a company secretary, when delivering a document, is connected with that very instrument, and the negligence is connected with that very instrument.

- The short point here is that actions by the group company tenant ratify the personal guarantee.

- The tenant had a long lease of premises at 19 Bolsover Street, London W1 with some 900 years unexpired. The premises were at all material times used as serviced offices but the tenant proposed to provide 16 or 17 residential flats. Landlord’s consent to the proposed alterations was required but could not be unreasonably withheld. Such consent was refused and one of the grounds of refusal (relating to the 16 flat proposal) was as follows:

> “In the event that the proposed residential units were to be held on long leases, it would give rise to the possibility of the tenants claiming extended leases. It is our client’s policy not to grant consent to conversion of commercial properties into residential because of the potential difficulties if the opportunity arises in the future for our client to acquire the property where there are residential long leases”.

In refusing consent to the 17 flat proposal, the landlord added this ground:

> “Further, our client is concerned at the possibility of the lessees of the proposed residential units applying for collective enfranchisement which would, amongst other things, lead to our client losing the current control of the building”.

Thus, rather belatedly, the enfranchisement possibility was raised as a ground for refusing consent to the proposed alterations.

**The decision at first instance**

The trial judge (H.H. Judge Birtles in the Central London County Court) dealt with this ground briefly. He accepted that it was possible that, if the flats in the altered premises were let on long leases, the tenants of those flats might combine together to exercise a statutory right to collectively enfranchisement. He also accepted that there was ample authority for the proposition that this was a reasonable consideration for the landlord to take into account. However, having regard to answers given by the landlord’s representative in cross-examination, including agreement that the possibility was “wholly speculative”, he decided that he could not accept that a reasonable landlord would take it into account in refusing consent to the proposed alterations.

**The decision on appeal**

On appeal, counsel for the landlord relied, amongst other arguments, upon passages in the judgments of members of the Court of Appeal in the 1976 cases. Mr. Isaacs QC
Interest must be considered and evaluated, of the possibility upon the landlord’s enfranchisement. In each case, the impact made by reference to the possibility of relied upon as the sole basis of any objection. The decisions in the 1976 cases cannot be quoted above are of general importance. The observations in para. 17 of the judgment the actual result of the case obviously. What can be drawn from this history? The position was set out by Lord Browne-Wilkinson in Workers Trust & Merchant Bank Ltd v Dajap Investments Ltd (1993) AC 573: “Ancient law has established that the forfeiture of such a deposit (customarily 10% of the contract price) does not fall within the general rule and can be validly forfeited even though the amount of the deposit bears no reference to the anticipated loss to the vendor flowing from the breach of contract... Even in the absence of express contractual provision, it is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser’s failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture”. A deposit, in other words, has all the characteristics of a penalty, in particular, if a purchaser in breach is forced to forfeit its deposit, its quantum may well – indeed in a rising market is likely to – outstrip the vendor’s loss as a result of that breach. Correcting that apparent injustice was what s.49 Law of Property Act 1925 was meant to address, as appears from Sir Benjamin Cherry’s commentary (in Wolstenholme & Cherry’s Conveyancing Statutes, 12th ed (1932)). However, in practice establishing grounds under s.49 is often an uphill struggle for a purchaser, especially one in breach of contract for failing to complete. In Hardy v Griffiths, the vendor could not prove any loss as a result of the purchaser’s failure to complete yet sued the purchaser both to retain the sum already paid by way of deposit and to top it up to 10%. Both claims succeeded. The contract incorporated the Standard Conditions of Sale (Fourth Edition). Standard Condition 6.8.3(b) meant that because the buyers had paid a deposit of less than 10%, they were under an obligation to pay a further deposit, equal to the balance of 10%, on receipt of a notice to complete. The further deposit was held not to be a further instalment of the purchase price, even though the claim to it arose at the end of the process, rather than the beginning. And the Judge was unimpressed with reliance on s.49, particularly as it was not pleaded. She held that the purchasers could not rely on s.49 as they had not pleaded a claim for the return of the deposit but said that even if it had been pleaded, there was nothing special or exceptional in the case which would have justified its return. That is now the test following Midill. Jonathan Seitzer QC

Conclusions

What can be drawn from this history? The actual result of the case obviously depended on the unusual facts. However, the observations in para. 17 of the judgment quoted above are of general importance. The decisions in the 1976 cases cannot be relied upon as the sole basis of any objection made by reference to the possibility of enfranchisement. In each case, the impact of the possibility upon the landlord’s interest must be considered and evaluated, having regard to the relevant statutory provisions and the facts of the case.

John Furber QC

A Salutary Tale about Deposits: Hardy v Griffiths [2014] EWHC 3947

Jonathan Seitzer QC acted for the successful claimant

Hardy v Griffiths [2014] EWHC 3947 is a reminder about the unique treatment of a 10% deposit in land transactions and the difficulties for a purchaser who seeks return of a deposit, which the vendor seeks to forfeit. As was said by Carnwath J in Midill (97PL) Ltd v Park Lane Estates Ltd (2008) EWCA Civ 1227, a contractual provision for a deposit on the sale of land is a long-established - albeit anomalous - exception to the ordinary principles governing penalties in contract.

The position was set out by Lord Browne-Wilkinson in Workers Trust & Merchant Bank Ltd v Dajap Investments Ltd (1993) AC 573:

“Ancient law has established that the forfeiture of such a deposit (customarily 10% of the contract price) does not fall within the general rule and can be validly forfeited even though the amount of the deposit bears no reference to the anticipated loss to the vendor flowing from the breach of contract... Even in the absence of express contractual provision, it is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser’s failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture”. A deposit, in other words, has all the characteristics of a penalty, in particular, if a purchaser in breach is forced to forfeit its deposit, its quantum may well – indeed in a rising market is likely to – outstrip the vendor’s loss as a result of that breach. Correcting that apparent injustice was what s.49 Law of Property Act 1925 was meant to address, as appears from Sir Benjamin Cherry’s commentary (in Wolstenholme & Cherry’s Conveyancing Statutes, 12th ed (1932)). However, in practice establishing grounds under s.49 is often an uphill struggle for a purchaser, especially one in breach of contract for failing to complete. In Hardy v Griffiths, the vendor could not prove any loss as a result of the purchaser’s failure to complete yet sued the purchaser both to retain the sum already paid by way of deposit and to top it up to 10%. Both claims succeeded. The contract incorporated the Standard Conditions of Sale (Fourth Edition). Standard Condition 6.8.3(b) meant that because the buyers had paid a deposit of less than 10%, they were under an obligation to pay a further deposit, equal to the balance of 10%, on receipt of a notice to complete. The further deposit was held not to be a further instalment of the purchase price, even though the claim to it arose at the end of the process, rather than the beginning. And the Judge was unimpressed with reliance on s.49, particularly as it was not pleaded. She held that the purchasers could not rely on s.49 as they had not pleaded a claim for the return of the deposit but said that even if it had been pleaded, there was nothing special or exceptional in the case which would have justified its return. That is now the test following Midill.