**Case Round Up**

**Lien Tran summarises recent case law.**

**Lejonvarn v Burgess and another [2017] EWCA Civ 254.**

**Architect liable for botched project for friends**

An architect was liable for losses resulting from a project which she had undertaken for friends. Even though the architect had provided the services for free, she had still assumed responsibility in a professional context and her friends had relied on the proper performance of her services.

Mrs Lejonvarn, an architect and project manager, lived next door to Mr and Mrs Burgess. The Burgesses wanted to landscape their garden. Lejonvarn agreed to assist them with the project. She would work for free during the early stages of the project and would only charge later for design work on the garden.

The Burgesses were unhappy with Lejonvarn’s work. Eventually, they asked her to cease work on the project and hired another designer to finish the job. They sued Lejonvarn to recover the cost of the remedial works which they alleged were required as a result of her defective work.

The trial judge held that there was no contract between the parties, as the legal requirements for a contract were not made out. However, Lejonvarn still owed the Burgesses a duty of care in tort, on the basis of an assumption of responsibility and would be liable for a breach of that duty.

The Court of Appeal dismissed Lejonvarn’s appeal. Despite the services being offered for free, they were provided in a professional context and with the expectation that Lejonvarn would eventually be paid for her design work. Lejonvarn volunteered her professional services in the knowledge that the Burgesses were reliant on her proper performance of them. Rather than a brief piece of ad hoc informal advice, the services were provided over a lengthy period of time and at significant cost to the Burgesses. It was foreseeable that they would suffer economic loss if Lejonvarn failed to perform her services properly. Whilst she was not obliged to carry out the services, to the extent that she did, she owed a duty to exercise reasonable skill and care.

**Dreamvar (UK) Limited v (1) Mishcon de Reya (a firm) and (2) Mary Monson Solicitors Limited [2016] EWHC 3316 (Ch)**

**Buyer’s solicitors held liable for breach of trust in identity fraud case**

The High Court has held that Mishcon de Reya (Mishcon), the solicitors acting for a buyer on a property purchase, was liable for breach of trust in the case of identity fraud by the seller.

Mishcon’s client was Dreamvar, a developer who instructed them to purchase a £1.1 million property in London. Mary Monson Solicitors (MMS) was the Manchester law firm acting for Mr David Haeems, the seller. However, MMS’ client was in fact an imposter who claimed to be Mr Haeems using forged ID documents. Neither law firm had met the seller in person, instead relying on Denning Solicitors, another law firm, to certify the purported seller’s ID documents on behalf of MMS.

Mishcon was instructed to complete the sale as quickly as possible. After simultaneous exchange and completion, Mishcon transferred the completion monies to MMS. MMS then sent the funds onto Denning, who sent them on to a bank account in China.

The identity fraud came to light when the Land Registry noticed several inconsistencies when they came to register the sale. There was no connection between the real owner and the address on the ID documents. By this point, the imposter had disappeared with the funds.

Dreamvar sued Mishcon and MMS for negligence and breach of trust, amongst other claims. Mishcon claimed against MMS for breach of undertaking. MMS admitted that it had failed to carry out proper identity checks on the fraudster as a competent solicitor would have, as it did not request a meeting with the client or any original documents.
The High Court held that MMS was not liable to either Dreamvar or Mishcon for breach of trust. Even though the sale document was a nullity, MMS was not required to take responsibility for the seller’s breach of his contractual obligations. MMS was entitled to release the purchase funds to Denning. The court further held that there was no breach of undertaking to Mishcon. MMS had undertaken that it had its client’s authority to receive the purchase monies on completion. The fact that MMS’ client was an imposter was not sufficient to constitute a breach.

The Court did not consider Mishcon to be negligent in failing to advise Dreamvar on the risk of identity fraud. However, Mishcon was in breach of trust as it was only authorised to release the purchase funds for a genuine completion of a genuine purchase. It had paid the purchase funds in exchange for void documents, so there was no genuine purchase.

Mishcon sought relief under section 61 Trustee Act 1925 on the basis that it had acted honestly and reasonably. Although the court accepted that Mishcon had indeed acted honestly and reasonably, it refused to grant relief. Mishcon was in a better position to absorb the loss, as its professional indemnity insurance covered the full amount. In contrast, the loss was “disastrous” for Dreamvar, as it was uninsured and had no claim against MMS. Mishcon has appealed and an appeal is pending.

JCAM Commercial Real Estate Property XV Limited v Davis Haulage [2017] EWCA Civ 267

Tenants giving notice of intention to appoint administrators

It has long been a bone of contention for landlords that tenants can simply file a notice of intention to appoint administrators in order to get an automatic moratorium against any enforcement action. This prevents a landlord from forfeiting, suing or exercising CRAR irrespective of whether the tenant goes into administration and, seemingly, whether it ever really had such an intention.

Not anymore. On 11 April 2017, the Court of Appeal handed down judgment in JCAM Commercial Real Estate Property XV Limited v Davis Haulage confirming that any notice filed without a settled and unconditional intention to appoint administrators was an abuse of the court’s process, and liable to be struck out. It is a welcome decision for landlords concerned about tenant companies playing the insolvency process for their own ends.

The case was about warehouse premises in Crewe where the tenant, Davis Haulage, had built up considerable arrears. By January 2016, the landlord had had enough and issued forfeiture proceedings. Unknown to the landlord, the tenant had shortly beforehand filed at court a notice of intention to appoint administrators. The result was that, under paragraph 44 of Schedule B1 to the Insolvency Act 1986, forfeiture was a breach of the statutory moratorium and the landlord could not continue the proceedings without the court’s permission. This moratorium lasted 10 business days, but the tenant went on to file three further notices giving it a much longer period of protection.

By the time the tenant filed the fourth notice, it had proposed a company voluntary arrangement (CVA) to compromise its debts. The tenant’s justification was that, if the CVA was not approved by its creditors, then it would have to consider selling the business through a “pre-pack” administration.

The landlord made an application to have the fourth notice struck from the court’s file on the basis that the tenant did not have a fixed or settled intention to appoint administrators. The decision turned on the wording in paragraph 26(1) of Schedule B1, which requires anyone who “proposes” to appoint an administrator to give notice of intention to certain parties. At first instance, the judge found for the tenant, saying that someone can propose to do something without having any settled intention.
This has now been overturned on appeal. The Court of Appeal said that if “propose” did not mean “intend” in this context then it would not be called a “notice of intention”. The real issue, however, was whether that intention could be conditional, and the court said that it could not. This followed from the facts that a company proposing to appoint was obliged, not just entitled, to give notice and that the purpose of it was to give qualifying floating charge holders and others a chance to exercise their prior right to appoint. It was also relevant that a process was available for small companies proposing a CVA to obtain a moratorium; if the tenant was right then this would be redundant and any company, large or small, could file a notice to get a moratorium.

Whilst the court stopped short of saying that the tenant or its advisers had filed notices without believing it was entitled to do so, it made clear for the future that any notice filed with only a conditional intention to appoint administrators would not be validly given.


**Dilapidations: actual cost of repair should be used as a guide for diminution in value**

In this terminal dilapidations claim, Hammersmith and Fulham London Borough Council was the lessee of a property in Willesden, London. The claimants were the Council’s landlords. At the end of the lease term, the Council was in breach of its repairing covenants. The landlords brought a terminal dilapidations claim for a sum which exceeded the actual cost of their works. Some repairs were carried out but not all of the works described in the schedule of dilapidations had been undertaken. After those initial repairs, the units were re-let and no further works were carried out.

The general principle is that landlord’s damages should not exceed the difference in value between the state that the property should have been in and its actual condition, as at the date of termination. The High Court held that the cost of repair should be used as a “very real guide” to evaluating the damage to the landlords’ reversion. The landlords had not shown any real intention to undertake the rest of the repair
works, nor provided any evidence that the value of the reversion had been diminished by the equivalent cost.

_Camelot Property Management Ltd and another v Roynon (24 February 2017, Bristol County Court, unreported)_

Guardian of property occupies under AST instead of licence

Guardianship agreements can be used to deter squatters by granting a licence to a “guardian” to occupy vacant buildings. However, the County Court has held that such agreements may amount to an assured shorthold tenancy rather than a licence.

Bristol City Council owned a residential home which fell into disuse. The Council appointed the claimant (C) to find a guardian to occupy the property. Mr Roynon (R) entered into a guardianship agreement with C to occupy the property in 2014. The agreement stated that it was a licence rather than a tenancy, and that exclusive possession was not granted to R in respect of any part of the property. R was offered a choice of rooms to occupy within the property and selected two, for which he kept the keys. Other guardians had their own rooms and were not permitted to access R’s room without his permission. R had communal access to other facilities.

C served notice to quit on R in 2016. However, R refused to vacate and C commenced possession proceedings.

The County Court held that the guardianship agreement was an assured shorthold tenancy (AST) rather than a licence, as R had exclusive possession of his two rooms. In spite of onerous restrictions on R’s use of the property, they only affected the way in which R was to use his two rooms. Such limitations are often seen in tenancy agreements and are not incompatible with exclusive possession. There was no requirement for R to move rooms at C’s request or allow other people into his rooms. The fact that C exercised its right of entry to carry out monthly visual inspections of the rooms did not preclude exclusive possession.

_Kingsgate Development Projects Ltd v Jordan and another [2017] EWHC 343 (TCC)_

Do gates constitute substantial interference with right of way?

Mr and Mrs Jordan purchased a property called Ferndown in 2012. Ferndown included a track over which the neighbouring property, Kingsgate Farm, had the benefit of an express right of way. When the right of way was created in 1960, the track was part of the open countryside. However, by 2012, an electric gate had been installed at the track’s entrance (Gate 1) and another further along the track (Gate 3). The Jordans erected a further unlocked gate between the two existing gates after they bought the land (Gate 2).

Kingsgate claimed that the right of way had been substantially reduced, rendering it unsuitable for its intended use. In particular, they argued that Gate 1 was narrower than the right of way and Gate 3 restricted access for vehicles to the farm.

The court held that gates 1 and 3 did not interfere with the exercise of the right of way. They were unlocked and so did not impede access but did serve a legitimate purpose in separating the farm from the domestic property.

However, the court did not find any justification for the presence of Gate 2. As this resulted in three gates within 100 metres of each other, Gate 2 was held to be a substantial interference with the right of way. The court ordered that Gate 2 should be removed.

_First Tower Trustees Ltd and another v CDS (Superstores International) Ltd [2017] EWHC B6 (Ch) (20 February 2017)_

Landlords can’t rely on wide exclusion clauses to evade misrepresentation claims

First Tower Trustees was the landlord (L) of several bays in a warehouse which it let out to CDS, the tenant (T). Before entering into the lease, L had provided T with replies to pre-contract enquiries that stated there were no asbestos issues in the property. L also stated that it had not received notice of any environmental problems, “but the Buyer must satisfy itself”.

Do gates constitute substantial interference with right of way?
Before T completed the leases, L received notification that there was a potential asbestos problem. However, it did not communicate this to T. Following completion, T carried out works to the property and promptly discovered the presence of asbestos. T claimed against L for misrepresentation.

L argued that it was not liable for misrepresentation, as it was protected by an exclusion clause in the lease. The clause stated that the lease had not been entered into in reliance on representations made by the landlord. However, the judge concluded that the clause was too broad in purporting to exclude liability for all representations and so failed the test of reasonableness in Section 3 of the Misrepresentation Act 1967, meaning it could not be relied upon. L should have updated its replies to pre-contract enquiries when new information emerged and its failure to do so was an actionable misrepresentation.

Port of London Authority v Mendoza [2017] UKUT 146 (TCC)

Mooring houseboat does not amount to adverse possession

The Port of London Authority (PLA) applied to the Land Registry to register part of the Thames river bed and foreshore. Mendoza (M) lived on a houseboat, the Wight Queen, which had been moored at the same spot since 1997. In recent years, M had marked out the boundary of his mooring with piles of rocks and ropes. Mendoza objected to the PLA's application on the basis that he had acquired title to part of the river bed by adverse possession.

Adverse possession has two elements: factual possession (what M actually did) and the intention to possess (what M had intended). The Upper Tribunal held that there was factual possession. As for M’s intention to possess, it was insufficient for M to claim that he had always intended to possess the river bed to the exclusion of the world at large. Instead, the court considered the act of mooring and whether M’s conduct was “equivocal”. From the perspective of the world at large, M could have been moored with permission, pursuant to an easement, by exercising the public right of navigation or even by trespass. The act of mooring by itself did not demonstrate M’s intention, as the boat’s mere presence would not show an obvious intention to possess to a casual observer. Even though M used the boat as his place of residence, it would not have been obvious to a third party and the boat was still capable of relocation.

The court also commented that there was no rule precluding adverse possession where public rights of navigation existed.