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Editor's Notebook

A Dispensation Gap

Consultation; Dispensations; Land registration; Landlords' duties; Landlords' rights; Non-compliance; Service charges

RM Residential Ltd v Westacre Estates Ltd[1] is, for me, a gift that keeps on giving. It brings together so much that I find fascinating about land law and landlord and tenant law. It is also, at this time when reform of the leasehold relationship is front and centre,[2] a timely reminder that a "leasehold" is a complex, multidimensional concept with deep links to other areas of land law.

RM Residential is (now) the registered proprietor of a freehold title to a mixed retail and residential property. The respondents are the registered proprietors of long residential leases in the block (the commercial units were empty at the relevant time and play no part in the case). When RM Residential purchased the freehold, it discovered serious structural and other defects that required significant and immediate remedial work. In undertaking that work, which took place before it was registered but after completion of its purchase (i.e. in the registration gap), RM Residential failed to comply with the consultation requirements of the Landlord and Tenant Act 1985 (the 1985 Act) s.20. As is well known, this section instituted a procedure to ensure that tenants are consulted before major works to buildings are undertaken, precisely because the costs are likely to be recoverable from the tenants under the service charges provisions in the lease.[3] Failure to follow the procedure, which hinges on the landlord sending out a notice to the tenants of an intention to carry out works, means that recovery of charges could be limited to £250 per tenant. The total costs of the works in this case was £123,150.52. But, of course, as is equally well known, s.20ZA of the 1985 Act allows a landlord to apply to the First-tier Tribunal (FtT) for dispensation from all or any of the consultation requirements, including the service of notices, and the tribunal may issue such a dispensation "if satisfied that it is reasonable" to do so. Furthermore, as is equally well known, in *Daejan Investments Ltd v Benson*,[4] the Supreme Court made it clear that the consultation requirements "are not an end in themselves, and failure to consult is not something to be punished".[5] Thus, the manner of the breach of the consultation process, particularly whether the breach was serious or aggravated is not enough to prevent dispensation. As Lord Neuberger said in *Daejan*:

> "44. Given that the purpose of the [consultation requirements] is to ensure that the tenants are protected from (i) paying for inappropriate works

[1] *RM Residential Ltd v Westacre Estates Ltd* [2024] UKUT 56 (LC).

[2] At least, while an election is imminent. And yes, I am deeply cynical about the current Government's commitment to leasehold reform of both short and long term residential leases. Perhaps the Renters Reform Bill and the Leasehold and Freehold Reform Bill will make it to the statute book containing meaningful reforms, and perhaps they will not.

[3] See also the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987).

[4] *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 W.L.R. 854.

[5] *Westacre* [2024] UKUT 56 (LC) at [11].

> or (ii) paying more than would be appropriate, it seems to me that the issue on which the [FTT] should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements."

So it is that *Daejan*, by deciding that dispensation should be given unless the tenants would suffer real prejudice by not being consulted,[6] has significantly weakened the effectiveness of s.20. In turn, this places tenants at increased risk of unsustainable services charges. This is addressed in the context of fire safety works post-Grenfell by Professor Susan Bright in an article also published in this issue of the journal.[7] Of course, not all applications for dispensations are granted, and *Aster Communities v Chapman*[8] is an example of prejudice that would occur if unconditional dispensation was granted; thus, dispensation was granted only on terms that protected the tenants.

In *Westacre* itself, the FtT appears to have gone far beyond its remit in assessing whether a dispensation should be granted; in fact, it seemed determined not to grant one and behaved incautiously. As well as *the panel* itself subjecting the representative of *RM Residential* to an hostile cross examination,[9] the FtT concluded that there was no real urgency in commencing the works without beginning the process of consultation and therefore refused a dispensation. This was, in truth, a generous reading of the evidence provided by the tenants as to urgency, but more importantly, indeed crucially, lack of urgency of works is not a relevant factor in determination whether to dispense. As *Daejan* makes clear with painful clarity, the test is one of prejudice to the tenants by failing to consult, and nothing else. Thus, unless the tenants could demonstrate prejudice by failing to consult—for example, that consultation could have revealed that the works were not needed, or that the works could have been done more cheaply—dispensation should follow. In fact, the FtT in *Westacre* appears to have decided that there was no prejudice, or at least accepted that the tenants had not alleged prejudice, and so the determination to refuse dispensation was fatally flawed.

Lack of urgency was, however, not the only ground on which the tenants sought to deny dispensation. When *RM Residential* purchased the freehold, they, of course, had to register it. That registration would be the moment at which they would become proprietors of the legal title, but not before. Prior to such registration, even after completion of the purchase and payment of the purchase price, RM Residential held only an equitable title—Land Registration Act 2002 (LRA 2002) s.27. This is the infamous "registration gap"—the period of time between completion of a purchase and its registration. During this period, the tenants alleged, RM Residential had no right to enter the premises, nor to institutes the works, nor apply for dispensation. This ingenious argument is built on cases like *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd*[10] and *Stodday Land*

[6] I have, admittedly, put this differently than the Supreme Court who decide that dispensation should not be refused unless there is real prejudice; but the effect of *Daejan* [2013] UKSC 14 is as stated.

[7] S. Bright, "A means to an end or an end in themselves? Consultation and dispensation for fire safety works" [2024] Conv.

[8] *Aster Communities v Chapman* [2021] EWCA Civ 660; [2021] 4 W.L.R. 74.

[9] *Westacre* [2024] UKUT 56 (LC) at [26].

[10] *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd* [2001] Ch. 733; [2000] 2 W.L.R. 566.

Ltd v Pye[11] which make it clear that only a legal owner (in other words the registered owner) can serve statutory notices. However, the serving of notices is not the same as being able to enter one's own premises in the registration gap and begin works. As Upper Tribunal Judge Cook points out, prior to registration, the vendor is a bare trustee for the purchaser and must act at their direction. Moreover, LRA 2024 s.24 gives the owner's powers to a person "entitled to be registered as the proprietor".[12] This was RM Residential and the point is more than sufficient to dispose of the tenant's argument that it had no right to undertake the works and hence no standing to seek a dispensation. That RM Residential were never in a position to serve a notice in the first place was not explored given Judge Cooke's watertight conclusion that they could, in any event, obtain dispensation from the consultation requirements of s.20 because of the meaning of "landlord" under the Act.[13]

As noted above, the future of residential leasehold, both long and short, is centre stage. The workings of the consultation process will continue to come under the microscope. *Daejan* itself casts a long shadow. Westacre is just the latest example, but may well prove to be more significant if HM Land Registry continues to experience inordinate delays in completing the registration of titles.[14]

MJD

[11] *Stodday Land Ltd v Pye* [2016] EWHC 2454 (Ch); [2016] 4 W.L.R. 168. See also M. Dixon, "The Registration Gap and Overreaching" [2017] Conv 1.
[12] *Westacre* [2024] UKUT 56 (LC) at [39], [40].
[13] Landlord and Tenant Act 1985 s.18 and/or s.30.
[14] See, M. Dixon, "How did it come to this?" [2023] Conv. 213–215.

Practice and Precedents

Levelling Up and Regeneration—A Work in Progress for the High Street?

High streets; Local authorities' powers and duties; Planning policy; Town centres; Unoccupied property; Urban regeneration

The Levelling Up and Regeneration Act 2023 is a wide-ranging and ambitious piece of legislation, with the potential to drive fundamental reforms affecting planning and property in England. The Government's stated aim for the Act is to "… speed up the planning system, hold developers to account, cut bureaucracy, and encourage more councils to put in place plans to enable the building of new homes".[1] Whilst the Act received Royal Assent on 26 October 2023, it is being brought into force piecemeal and much will depend on secondary legislation for its implementation and detail.

Amongst the many provisions in the Act, Pt 10 introduces discretionary powers for local authorities in England to conduct compulsory rental auctions of vacant premises in designated high streets or town centres.[2] The aim of these new powers is to reduce the rate of prolonged vacancy of shops and buildings as well as promote the regeneration and enhancement of the high street. Whilst Pt 10 of the Act sets out the framework for these powers, regulations will eventually set out much of the detail particularly in respect of the auction process, the tenancy contract, tenancy terms and other matters. The Government undertook a consultation on these details last year though it has not yet published the results.[3]

Designation

Local authorities will be able to designate a street as a high street and an area as a town centre if the street or area is important to the local economy because of a concentration of high street uses of premises on that street or in that area. In the case of town centres, the area must also be a built environment principally characterised by a network of streets. The local authority is required to maintain a public list of such designations and those designations will also be registerable as local land charges. This will make it possible to check the status of a street or area.

"Street" means a street, within the meaning given by New Roads and Street Works Act 1991 s.48, to which the public have access on foot (whether by right or permission). Premises are "on a street" if the building comprising or containing

[1] See Department for Levelling Up, Housing and Communities, "Press Release: New laws to speed up planning, build homes and level up" 26 October 2023 available at: *https://www.gov.uk/government/news/new-laws-to-speed-up-planning-build-homes-and-level-up* [Accessed 7 January 2024].

[2] Levelling Up and Regeneration Act 2023 ss.191–218.

[3] See Department for Levelling Up, Housing and Communities, "Closed consultation: High Street rental auctions" updated 22 June 2023 available at: *https://www.gov.uk/government/consultations/high-street-rental-auctions/high-street-rental-auctions* [Accessed 7 January 2024].

them directly adjoins the street or is separated from it only by the building's curtilage.

The local authority cannot designate a street or area whose importance derives principally from goods or services bought in the course of business. This means, for example, that an industrial estate where transactions or business are principally conducted between businesses cannot be designated.[4]

Premises within such designations will be qualifying high street premises if the local authority considers that they are suitable for high street use. High street use is not confined to retail. Instead, the Act gives it a very wide definition. It includes use as a shop or office, use for the provision of services to persons who include visiting members of the public, use as a restaurant, bar, public house, café or other establishment selling food or drink for immediate consumption, use for public entertainment or recreation, use as a communal hall or meeting-place and use for manufacturing or industrial uses which can reasonably be carried on in proximity to, and compatibly with, the other high-street uses. Warehouses are, however, specifically excluded and residential use is out of scope. When considering "suitable high-street uses" for a premises, the local authority must have regard to any works that it expects the landlord would be required to carry out, or the tenant would be permitted, and likely, to carry out, if a tenancy contract and tenancy were entered into under the Act.

Initial letting notice

In order to initiate the auction process, a local authority must serve an initial letting notice on a landlord in relation to qualifying high street premises. Two conditions must be met before such a notice can be served.

The first condition is the "vacancy condition". This requires the premises to have been unoccupied on the date of the initial letting notice and to have been unoccupied either for the whole of the immediately preceding year or for at least 366 days in the immediately preceding two years. When calculating these periods, days on which the premises were unoccupied before the Act comes into force can be counted and premises are "occupied" on a day during which occupation starts or ends. Thus, days when a property is partly occupied count as days of full occupation.

Occupation by a person living in premises that are not designed or adapted for residential use will not count as occupation. This means that residential use by trespassers or property guardians will not count as occupation if the property has not been "adapted" for residential use. Occupation by other types of trespassers, such as a commercial tenant who remains in occupation of the premises following the expiry of their lease, may count as occupation. The occupation must also involve the use of the premises for a substantial and sustained activity involving the regular presence of people.

The second condition which must be satisfied before an initial letting notice can be served is the "local benefit condition". This requires that the local authority is

[4] See the Explanatory Notes to the Bill, p.143 available at: *https://publications.parliament.uk/pa/bills/cbill/58-03/0006/en/220006en.pdf* [Accessed 7 January 2024].

satisfied that occupation of the premises for a suitable high street use would be beneficial to the local economy, society or environment.

If both these conditions are satisfied, the local authority can serve an initial letting notice on the landlord in order to start the high street rental auction process. "Landlord" in this context is the person entitled to possession of the premises who can grant a tenancy of the premises for one year or more.

An initial letting notice will expire if it is withdrawn by the local authority, when a final letting notice takes effect, or at the end of the period of 10 weeks beginning with the day it takes effect. An initial letting notice is registerable as a local land charge.

Initial letting notices will be tightly regulated. Regulations will make provision about their form and content, their service and when they take effect. Initial letting notices will need to identify the premises, their suitable high-street use, and the reason for, and consequences, of service, in adequate detail so that the recipient can decide how to respond. The permitted methods of service must be methods that mean, in the ordinary course of events, the landlord is likely to become aware of the notice by the time it takes effect. Regulations may also provide for the service of copy notices on superior landlords and mortgagees.

Following the service of an initial letting notice, a landlord has, in effect, an eight-week period to find its own tenant or licensee of the premises and so avoid a rental auction.

While an initial letting notice is in force, a landlord may not, without the local authority's written consent, grant, or agree to grant, a tenancy of the premises or a or licence to occupy the premises, or enter into an agreement entitling another person to possess or occupy the premises. However, consent is not required for the landlord to transfer or surrender its interest. The local authority must either give or refuse consent within a reasonable time after consent is sought. Regulations may make provision about the manner of or the procedure for seeking, giving or refusing consent.

The local authority must consent to the grant of a tenancy, an agreement to grant a tenancy, or the grant of a licence to occupy where:

- the tenancy term or licence period would begin within eight weeks beginning with the day on which the initial letting notice took effect;
- the term or licence period would be at least one year;[5] and
- the tenancy or licence would be likely to lead to the occupation of the premises for a high-street use.

A letting will not be considered to be for one year or more if it includes a landlord's break right within the first year. However, the same does not apply if the letting includes a tenant's break right during the first year.[6]

Except for the obligation to give or refuse consent within a reasonable time, there is no obligation on the local authority to consent to "any other agreement".[7]

Consent is treated as not given, if the tenancy or licence is not granted, or the tenancy term or licence period does not begin, within the eight week period.

[5] A tenancy or licence will not satisfy this condition if the landlord or licensor has a right to terminate within the first year, unless due to the tenant or licensee's default.

[6] See the Explanatory Notes to the Bill, p.145.

[7] That is an agreement other than a tenancy, an agreement to grant a tenancy, or a licence to occupy.

The restriction on letting does not prevent the grant of a tenancy pursuant to an obligation that bound the landlord before the initial letting notice took effect, for example, where the landlord has entered into an agreement for lease.[8] The Act contains an anti-avoidance provision so that this exception does not apply where the obligation was conditional on the service of an initial letting notice.

A tenancy, licence or other agreement entered into without the local authority's consent is void. However, the tenancy, licence or other agreement will be treated as never having been void if the initial letting notice expires without a final letting notice taking effect, or the final letting notice expires without a contract for tenancy being entered into, and, until the expiry of the initial letting notice, the parties conducted themselves towards each other as if the tenancy, licence or agreement was valid.

Final letting notice

A local authority may serve a final letting notice on the landlord where an initial letting notice is in force, the period of eight weeks beginning with the day on which that initial letting notice took effect has elapsed and either:

- no tenancy, licence or other agreement has been entered into with the local authority's consent under the Act, or in circumstances where consent was not needed due to a pre-existing obligation; or
- any tenancy, licence or agreement that has been entered into is consistent with the local authority exercising its power to enter into a tenancy contract.

As with the initial letting notice, the landlord on whom the final letting notice must be served is the person entitled to possession of the premises with sufficient interest to grant a tenancy of one year or more.

The final letting notice must be served in time for it to take effect before the initial letting notice expires. This means that the local authority has a two-week period to serve a final letting notice. A final letting notice expires at the end of the period of 14 weeks beginning with the day on which the final letting notice takes effect. The 14-week final notice period may be extended if the landlord serves a counter-notice, or while an appeal is ongoing. The landlord is restricted from letting or carrying out works during the 14-week final notice period.

As with an initial letting notice, a final letting notice is registerable as a local land charge.

Final letting notices will be tightly regulated. Regulations will make provision about their form and content, their service and when they take effect. Final letting notices will need to identify the premises, their suitable high-street use, and the reason for, and consequences, of service, in adequate detail for the recipient to decide how to respond. The permitted methods of service must be methods that mean in the ordinary course of events the landlord is likely to become aware of the notice by the time it takes effect. Regulations may also provide for the service of copy letting notices on superior landlords and mortgagees.

[8] See the Explanatory Notes to the Bill, p.145.

While a final letting notice is in force, the landlord may not, without the written consent of the local authority, grant, or agree to grant, a tenancy or licence to occupy, or enter into an agreement entitling another person to possess or occupy the premises. However, consent is not required for the landlord to transfer or surrender its interest.

A tenancy which is granted, or an agreement which is entered into, without the local authority's consent will be void. Unlike the restriction on letting while an initial letting notice is in force, there is no specific mention that a licence to occupy will be void. However, it could be that the phrase "agreement entered into" includes a licence to occupy but this will need further clarification in regulations, guidance or ultimately by the court. Otherwise, the restrictions on lettings are similar to those which restrict lettings while an initial letting notice is in force.

Regulations may make provision about the manner of or the procedure for seeking, giving or refusing consent.

Similar to the position while an initial letting notice is in force, the restriction on letting while the final letting notice is in force does not prevent the grant of a tenancy further to an obligation that bound the landlord before the initial letting notice preceding the final letting notice took effect. The Act also contains an anti-avoidance provision so that this exception does not apply where the obligation was conditional on the service of an initial letting notice or a final letting notice.

While a final letting notice is in force, the landlord may not carry out or permit any works to the premises without the local authority's written consent. If works are carried out, or permitted, without reasonable excuse, a criminal offence will be committed, punishable on summary conviction to a fine not exceeding level 4 on the standard scale.[9] "Works to the premises" include the alteration or removal of any fixtures or fittings. However, the restriction on works does not apply to works that are either urgently necessary for repair or preservation, or necessary to fulfil a landlord's obligation, except an obligation voluntarily assumed after the initial letting notice took effect. The local authority must give or refuse consent within a reasonable time, and give consent unless there are reasonable grounds for refusing it.

Appeal against a final letting notice

A landlord can appeal against a final letting notice. The first step in the appeal process is for the landlord to serve a counter-notice within 14 days beginning with the day the final letting notice takes effect. The counter-notice must state the landlord's intention to appeal against the final letting notice if it is not withdrawn, and specify the ground or grounds of appeal.

The permissible grounds of appeal are set out in Sch.20 of the Act. They are:

- that the vacancy condition was not met on the day the initial letting notice was served;
- that the premises cannot reasonably be considered suitable for the suitable high-street use identified in the final letting notice. Regard must be had to any works that the landlord would be required to

[9] Under the Sentencing Act 2020 s.122, this is currently £2,500.

carry out, or the tenant would be permitted, and likely, to carry out, if a tenancy contract and tenancy were entered into;

- that the local authority's view that the local benefit condition was met was one that no authority reasonably could have reached;
- that the local authority failed, while the initial letting notice was in force, to consent to a proposed tenancy, licence or agreement, where the authority was required to give consent, or would have been required to consent, had it not failed to be satisfied that the tenancy or licence would be likely to lead to the occupation of the premises for a high-street use when any authority giving reasonable consideration to the matter would have been satisfied;
- that the landlord intends to carry out substantial works of construction, demolition or reconstruction affecting the premises and could not reasonably do so without retaining possession. Works carried out in contravention of the restriction on works without consent while a final letting notice is in force cannot be relied on for this ground;
- that the landlord intends to occupy the premises for the purposes, or partly for the purposes, of a business to be carried on by the landlord in the premises; and
- that the landlord intends to occupy the premises as the landlord's residence.

The meaning of "landlord" in the final two grounds only has an extended meaning and includes a company in which the landlord has a controlling interest and a person who has a controlling interest in the landlord, where the landlord is a company.

Where a landlord serves a counter-notice, the 14-week final notice period is extended by 28 days.

Regulations may make provision about the manner of, or procedure for, giving a counter-notice.

A landlord may appeal to the County Court against the final letting notice if they have given a counter-notice and the local authority has not notified the landlord of the withdrawal of the final letting notice within 14 days of it receiving the counter-notice.

The appeal must be on the ground or grounds specified in the counter-notice and be brought within 28 days beginning with the day on which the local authority received the landlord's counter-notice.

The County Court must either revoke or confirm the final letting notice.

The 14-week final notice period is effectively extended by one day for each day the appeal is ongoing.

Extension of time limits

A local authority may apply to the County Court for an extension of the 10-week initial notice period or the 14-week final notice period and the court can order an extension if the local authority has been impeded in deciding whether or how to exercise its Pt 10 functions due to either the failure to comply with the requirement

to provide information, or the obstruction of a person exercising the power to enter and survey land.

Rental auction

A local authority may arrange for a rental auction if a final letting notice is in force, the final letting notice can no longer be revoked on appeal (either because the 14-day period for serving a counter-notice or the 28-day period for bringing an appeal has expired, or due to the final determination, withdrawal or abandonment of an appeal), and either:

- no tenancy, licence or other agreement has been entered into (with the local authority's consent under the Act, or in circumstances where consent was not needed due to a pre-existing obligation); or
- any tenancy, licence or agreement that has been entered into is consistent with the local authority exercising its power to enter into a tenancy contract.

The details of the rental auction process, including how costs will be allocated, are to be set out in regulations. Such regulations:

- must make provision about the rental auction process;
- must require the local authority to specify the suitable high-street use of the premises ahead of the auction;
- must provide for the identification of the "successful bidder" or provide for there not to be a successful bidder;
- may provide for a person who took part in the auction to be treated as the successful bidder provided the landlord agrees and where it appears to the local authority that it would not be reasonably practicable to contract with the person who would otherwise be the successful bidder;
- may set out with whom, and on what terms, the local authority can enter into arrangements for the auction; and
- may allow local authorities to decide the procedure (provided they have regard to the landlord's representations). Regulations may make provision about the manner of, or procedure for, making representations.

The Government's consultation last year proposed that there should be no reserve price or rent, that local authorities should have the option of outsourcing the process, and that the auction should be run on a sealed bids basis with the landlord having sole direction over choosing the successful bidder.[10]

There is no guidance as to the criteria under which offers should be assessed. Should the successful offer be the one in which the prospective tenant agrees to pay the most rent or should other factors, for example a prospective tenant's commitment to renovate the premises, be considered?

[10] See Department for Levelling Up, Housing and Communities, "Closed consultation: High Street rental auctions" updated 22 June 2023.

Once an auction has taken place and there is a successful bidder, the local authority can enter into a tenancy contract with that successful bidder and the contract has effect as if entered into by the landlord instead of the local authority. This is defined as a contract, including a conditional contract, under which the landlord agrees to grant, and the successful bidder agrees to take, a short-term tenancy of the premises. A short-term tenancy will be a tenancy for a term of at least one year but not exceeding five years.

The local authority must act in its own name, with an indication that it is acting to bind the landlord rather than itself, and must provide a signed copy of the completed tenancy contract to the landlord as soon as possible.

The local authority can exercise its power to grant a tenancy:

- if the final letting notice is in force and 42 days have elapsed, beginning with the day it took effect;
- a rental auction has been carried out in respect of qualifying premises; and
- either no tenancy, licence or other agreement has been entered into, or one has but it is consistent with the local authority's power to enter a tenancy contract.

The tenancy contract:

- must be for a term of one to five years;
- must set out the terms, including covenants, conditions and grants, of the agreed tenancy;
- may identify the physical extent of the premises in greater detail than used previously; and
- may, subject to regulations, allow the tenant to carry out pre-tenancy works, and to enter land for that purpose, which may be subject to the landlord's consent, require the landlord to carry out pre-tenancy works, whether inside or outside the premises, before the term begins, and detail the tenant's remedies if the landlord fails to carry out any pre-tenancy works.

Pre-tenancy works are works carried out, whether inside or outside the premises, before the term in contemplation of the tenant's use of the premises once the term begins.

Regulations may provide further details of the tenancy contract. When making any such regulations, regard must be had to the terms on which contracts for the grant of short-term tenancies are typically entered into on a commercial basis.

When deciding the terms of the tenancy contract, so far as it has discretion to do so, the local authority must have regard to the landlord's representations. Regulations may make provision about the manner of, or procedure for, making the representations.

The terms of the tenancy which is agreed to be granted by the tenancy contract:

- cannot be for a term that is longer than the landlord's remaining interest in the premises, which must be at least one year;

- must require that the premises are used wholly or mainly for the suitable high-street use specified by the local authority ahead of the rental auction;
- must, unless the landlord agrees otherwise, provide that the premium or rent payable is the same as the successful bidder indicated at the rental auction, subject to any terms about rent review or deductions from rent;
- may grant the tenant interests or rights in or over land outside the premises in connection with tenant's use of the premises; and
- must include provision dealing with broadly the landlord's obligations, if any, regarding maintenance, repair and the supply of utilities, the tenant's repair, alterations, insurance, alienation and deposit obligations, and provisions regarding the recovery of costs from the tenant, re-entry and yielding up.

Regulations may provide exceptions and further detail to these terms. When making such regulations, regard must be had to the terms on which short-term tenancies are typically granted on a commercial basis.

When deciding the tenancy terms, insofar as it has discretion to do so, the local authority must have regard to representations made by the landlord. Regulations may make provision about the manner of, or procedure for, making representations.

If the landlord fails to grant a tenancy as required by the tenancy contract, the local authority may grant the tenancy. It will then have effect as if granted by the landlord and the local authority may do anything that the landlord could do to make an effective grant.

Similar to the tenancy contract, when granting the tenancy, the local authority must act in its own name, with an indication that it is acting to bind the landlord rather than itself, and provide a signed copy of the completed tenancy document to the landlord as soon as possible.

A tenancy contract and a tenancy are deemed to have been entered into or granted with the express consent of any superior landlord or mortgagee. "Mortgagee" is to be interpreted as if any charge or lien for securing money or money's worth was a "mortgage".

A tenancy granted pursuant to a tenancy contract is excluded from Landlord and Tenant Act 1954 ss.24–28 and so the tenant will not have the right to remain in possession once the tenancy ends.

Local authority power to obtain information

A local authority has the power to require information about the premises that it thinks is "likely to be necessary or expedient for the exercise of its functions" under Pt 10 in relation to the premises. For example, the local authority could use the power to obtain details of the person to be served with letting notices or to obtain information regarding the premises which it needs be provide to prospective bidders at the rental auction.[11]

A local authority may, in writing, require any interested person to give information about a premises in the local authority's area. An "interested person"

[11] See the Explanatory Notes to the Bill, p.151.

is someone who appears to the local authority to have an interest in the land. The premises must be situated on a designated high street or within a designated town centre.

The local authority can require information about the occupation of the premises, matters affecting the premises and persons interested in the premises and their interests in the premises.

Regulations may make provision about the manner of, or procedure for, making a requirement.

The requirement must state the time and manner by which the information must be given.

Failure to provide the information, without reasonable excuse, or the provision of false information that the person knows or should reasonably know is false is a criminal offence, punishable on summary conviction to a fine not exceeding level 4 on the standard scale.[12]

Local authority power to authorise entry on and survey of land

A person authorised in writing by the local authority may enter and survey premises situated on a designated high street or within a designated town centre, or enter on any other land to access the premises for the purpose of surveying it.

The local authority may only exercise this power:

- in order to obtain information about the premises that it thinks is "likely to be necessary or expedient for the exercise of its functions" under Pt 10 in relation to the premises;
- if it has given, or made all reasonable efforts to give, at least 14 days prior written notice to the landlord (for the purposes of entering and surveying premises) or to the person who appears to be in possession of, or entitled to possession of, the other land (for gaining access to the premises);[13]
- at a reasonable time; and
- without using force, except on the authority of a warrant issued by a justice of the peace and in order to issue the warrant, the justice of the peace must be satisfied that reasonable efforts have been made to exercise the power without using force.

The person exercising the power must produce evidence of the local authority's written authorisation and a copy of any warrant, and if there is no one with control of the premises present, leave the premises or land as secure against trespassers as when they entered.

Compensation from local authority

A "person interested in land" may be entitled to compensation from the local authority for any damage resulting from the exercise of the power of entry. Any dispute is to be determined by the Upper Tribunal, applying Land Compensation Act 1961 s.4, with any necessary modifications.

[12] Under the Sentencing Act 2020 s.122, this is currently £2,500.
[13] Regulations may make provision about the manner of, or procedure for, giving notice.

Obstruction and disclosing confidential information

It is a criminal offence without reasonable excuse to obstruct a person exercising the power to enter and survey land and it is punishable on summary conviction to a fine not exceeding level 3 on the standard scale.[14]

It is also a criminal offence to disclose confidential information obtained while exercising the power to enter and survey land for purposes other than those for which the power was exercised. This is punishable on summary conviction to a fine, or on conviction on indictment by imprisonment for a term not exceeding two years or to a fine, or both.[15] "Confidential information" is information constituting a trade secret, or which, if disclosed, would or would be likely to prejudice a person's commercial interests.

Conclusion

Whilst these provisions are not yet in force and further details are to be provided in secondary legislation which has yet to be laid and which may or may not reflect the proposals contained in the consultation,[16] any party with an interest in high street premises should start considering the impact of these provisions now.

A criticism of the provisions is that they allow local authorities to interfere with a property owner's right to deal with their property as they see fit. An investor may be waiting for the commercial market to improve in order to secure a higher rent rather than letting out the property at the bottom of the market. The Government's response to this appears to be that its aim is not to target proactive owners seeking to let their properties and that it wants to see the high street rental auctions used "where vacancy rates are a real problem and there is little co-operation between landlords and local authorities".[17]

It will be interesting to see the extent to which these powers will be utilised and, to the extent they are, whether they are successful in revitalising the nation's high streets. Will local authorities have the time and resources for engaging with the scheme?

Russell Hewitson

[14] Under Sentencing Act 2020 s.122, this is currently £1,000.

[15] The fine on both summary conviction and conviction on indictment is unlimited.

[16] See Department for Levelling Up, Housing and Communities, "Closed consultation: High Street rental auctions" updated 22 June 2023.

[17] See Department for Levelling Up, Housing and Communities, "Closed consultation: High Street rental auctions" updated 22 June 2023.

Net Zero Homes: Time for a Reset, the English Story

Emeritus Professor Sarah Nield*

Decarbonisation; Houses; Public policy

Abstract

Critiques the contribution of the built environment within the English strategy to attain net zero by 2050 focussing upon the measures required to retrofit residential properties.

Introduction

There is no doubt that attaining net zero is going to be a challenge for all sectors of the economy and society. The built environment will be no exception. In 2021, the Government set out its initial strategy for the built environment in England's contribution to attaining net zero.[1] This strategy has received high-level scrutiny. For example, in the autumn of 2022, UK Finance, representing the financial sector, published a detailed assessment of the Government's strategy entitled *Net Zero Homes: Time for a Reset* (UK Finance Report).[2] The finance sector, of course, will play a major role in supporting delivery of net zero; thus, their views are particularly insightful. The UK Finance Report was followed, at the beginning of 2023, by an independent review of the country's progress towards net zero which included recommendations regarding buildings and homes. This review entitled *Mission Zero*[3] (Mission Zero Review) was commissioned by Liz Truss, the then Prime Minister and was headed by the Right Honourable Chris Skidmore MP, a former energy minister in the ruling Conservative Party. Yet despite the observations and recommendations made by both the UK Finance Report and the Mission Net Zero Review, the Conservative Government, in the autumn of 2023, chose to ignore these detailed findings and row back on their initial strategy for the built environment's contribution to achieving net zero by 2050. Their reasons for doing so have been triggered by the rising cost of living and perceived electoral advantage in watering down their net zero strategy. Nevertheless, they maintain that the 2050 net zero obligation remains.

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[1] HM Government, "Heat and Buildings Strategy CP388" (October 2021). See also HM Government, "Powering Up Britain" (March 2023).

[2] UK Finance, "Net Zero Homes: Time for a Reset" (November 2022) available at: *https://www.ukfinance.org.uk/policy-and-guidance/reports-and-publications/net-zero-homes* [Accessed 15 August 2023].

[3] Rt Hon Chris Skidmore MP (Chair), "Mission Zero: Independent Review of Net Zero" (January 2023) available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1128689/mission-zero-independent-review.pdf* [Accessed 15 August 2023].

This paper will review the English Government's journey on homes' contribution to achieving net zero taking the UK Finance Report as a guide and the Mission Zero Review's observations. It will conclude that even before the current change of tack, the Government's proposals were falling short and that now, the Government has all but given up on serious attempts to address homes' contribution to net zero. Economic headwinds but more significantly political opportunism is creating dangerous messaging and divisions which can only undermine the UK's net zero strategy at a time when around the globe, the effects of climate change are being destructively felt. Net zero by 2050 remains a legal commitment but the strategy to effectively achieve net zero homes is now seriously undermined and is likely to be challenged in the courts. This worrying development can only deflect attention away from tackling those constituent elements required to deliver net zero be that investment, technical innovation, skills development as well as effective legal frameworks which have drawn serious attention only amongst a select few.

This paper will first set the distinct context of the English housing market before looking at the Government's building related proposals. These proposals focus on the position in England; the Devolved Nations of Scotland, Wales and Northern Ireland are taking an independent but similar path.[4] It will then evaluate the UK Finance Report and its recommendations and the likelihood of these being implemented before looking to additional insights from the Mission Zero Review.

The English context

The United Kingdom (UK) is committed to net zero by 2050. This commitment is enshrined in legislation[5] and the Government has developed and published a strategy to that end.[6] Buildings feature prominently in this strategy because they constitute the second highest emitter of carbon after transport and a dedicated Heat and Building Strategy (H&B Strategy) was published in October 2021.[7] This paper will concentrate on residential buildings which contribute 14% to the UK's present carbon emissions.[8] This percentage has not reduced significantly since 2015.[9] Reducing these emissions presents a real challenge given that housing in England is amongst the least efficient in Europe. Over 50% of dwellings were built before 1965, and 20% or so were built before 1919.[10] Furthermore, the heating of homes in England is largely from hydrocarbon sources—heating by gas accounts for approximately 80% of all homes with another 10% heated by oil.[11] Compounding this challenge, is the poor insulation of many homes. Government programmes to subsidise insultation were unfortunately halted in 2012 and are only beginning to be ramped up once more.

[4] e.g. Scotland hopes to attain net zero by 2045, see Scottish Government, "Climate Change" available at: *https://www.gov.scot/policies/climate-change/* [Accessed 11 September 2023].

[5] Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019/1056) amending the Climate Change Act 2008 s.1.

[6] HM Government, "Net Zero Strategy: Build Back Greener" (October 2021).

[7] HM Government, "Heat and Buildings Strategy CP388" (October 2021).

[8] Buildings, as a whole, contribute 30% of UK's greenhouse gas emissions and 20% of direct greenhouse gas emissions (i.e. largely from heating) see Mission Zero Review, [944].

[9] Mission Zero Review, [944].

[10] See Mission Zero Review, fn.686.

[11] Mission Zero Review, fn.690.

The UK Finance Report estimated that approximately two thirds of England's housing stock will need to be retrofitted. It identifies significant regional differences with more housing below standard as well as higher levels of fuel poverty in the north of England. Nearly half of low-income households in England live in homes with an Energy Performance Certificate (EPC) of D or below and consequently, use and pay for more electricity and gas than the average EPC C rated home.[12] The H&B Strategy sets out an aspiration for all homes to have a Minimum Energy Performance Standards (MEES) of EPC C or above where this is feasible. Clearly, a small proportion of homes, given, for example, their age, means of construction, historic or cultural significance, will not be able to meet this requirement. Nevertheless, the UK Finance Report estimates that 16.7 million dwellings fail to meet EPC C and that 1.285 million dwellings will need to be retrofitted every year to meet the 2050 net zero target. That equates to 3,500 dwellings per day! Yet only 200,000 dwellings were upgraded in 2021, a mere 15% of the required total.

The government strategy took a sectoral and graduated approach to the MEES target of EPC C with rental properties the initial target. Social rented housing is expected to meet a MEES of EPC C by 2035 with an earlier target of 2030 for "the fuel poor". Private rental properties are currently required to have an EPC rating of E. It was proposed that this rating would raise to C by the end of 2025 for new tenancies and 2028 for all tenancies.[13] A price cap of £3,500 was proposed where landlords could not raise third party finance and were wholly self-funded. An exemption could be obtained should £3,500 be insufficient for the property to upgrade to EPC E. Clearly, this cap was only going to enable minimal measures for improved insulation. But these modest proposals are a victim of the Government's change of policy with this private sector strategy presently scrapped and the prospect of the most fuel poor condemned to continued high energy bills and poorly insulated and heated homes. This is particularly disappointing in the light of research that showed that private sector landlords were making investment decisions based on the expected standards with 71% of landlords saying they would only invest in properties with an EPC C rating and a third of landlords indicating they would sell their properties that failed to meet this MEES.[14]

The UK Finance Report and the Net Zero Review both also recommend the careful and phased introduction of MEEs standards for all owner-occupied homes.[15] Careful in the sense of protecting vulnerable home-owners who do not have available funds to pay for the upfront costs of retrofitting, and phased in the sense of a realistic timeline for retrofitting in the light of some of the obstacles already considered. The Net Zero Review in fact calls for an earlier target of 2033 for meeting EPC C. Despite these calls, MEES have not yet been officially set for either owner occupiers or mortgage lenders' portfolios and, to an extent, any MEES

[12] See Mission Zero Review fnn.687 and 688.

[13] A landlord can apply for an exemption on limited grounds. See Department for Energy Security and Net Zero, "Domestic private rented property: minimum energy efficiency standard—landlord guidance" last updated 13 April 2023 available at: *https://www.gov.uk/guidance/domestic-private-rented-property-minimum-energy-efficiency-standard-landlord-guidance* [Accessed 3 September 2023].

[14] Research conducted by BVA BRDC for Foundation Home Loans widely reported in the landlord trade press see, e.g. N. Lewis, "Properties with EPCs under a Band C 'already harder to sell to other landlords" LandlordZONE, 18 September 2023 available at: *https://www.landlordzone.co.uk/news/properties-with-epcs-under-a-band-c-already-harder-to-sell-to-other-landlords* [Accessed 12 October 2023].

[15] Net Zero Review, [978] and [990] and UK Finance Report, p.40.

for these sectors will be inter-related.[16] It was widely expected that EPC C would be required across lenders portfolios but in the current political climate, it is unlikely that this minimum MEES will be officially adopted in the short term. Nevertheless, there are reports that mortgage lenders' plans to meet EPC C across their lending portfolios are so well advanced that it is unlikely that they will be delayed or abandoned.[17]

The Government envisages that MEES targets will be reached through carbon-reducing heating initiatives. Prominent is the installation of heat pumps, primarily air-sourced heat pumps, with the aspirations that these will be as economical to install as gas boilers. The target is for 60,000 heat pumps a year to be installed by 2028. The renewal of fossil fuel boilers was to be banned from 2026 but this date has now been pushed back to 2035 and with plans to exempt the poorest households entirely. Other initiatives are also being supported. These include the promotion of roof and cavity wall installation, solar panel energy generation and storage systems and research into the use of hydrogen as a viable domestic heating source.

These measures and their implementation have come in for criticism and challenge for not going far enough. The Climate Change Committee, as an independent expert adviser to the Government on net zero, was scathing of progress in their 2022 report. They reported that that heat pump targets had not been met and that "current policy [is] insufficient" to meet a MEES of C by 2035.[18] This assessment was repeated in their 2023 Report.[19] The UK Finance Report and the Mission Net Zero Review also call for more action and make recommendations to that end which we will consider shortly. The Government has been forced to make some revisions to their original H&S Strategy when a trio of environmental organisations bought a successful court challenge to that strategy. The court required the Government to revise the strategy by 31 March 2023.[20] However, this revised strategy[21] also has been branded as inadequate. For example, plans have been announced to fund the insulation of 300,000 homes but this is a very small proportion of those homes that could benefit and there is little else that specifically targets energy saving measures.[22] Future legal challenges are on the way and can only be encouraged by the Government's September 2023 announcements.

Primary barriers to MEES

Not only is reducing home carbon emissions a necessity to address climate change but there are clear advantages to the individual homeowner. Retrofitting homes

[16] Owner occupiers only require an EPC of whatever rating to sell.

[17] See, e.g. J. Fitgerald, "Owners of energy inefficient homes face being turned down for mortgages" *The Telegraph*, 5 October 2023 available at: *https://www.telegraph.co.uk/money/net-zero/banks-onerous-green-plans-despite-sunak-net-zero-rollback/* [Accessed 12 October 2023].

[18] "Progress in reducing emissions: 2023 Report to Parliament" (June 2022) available at: *https://www.theccc.org.uk/wp-content/uploads/2022/06/Progress-in-reducing-emissions-2022-Report-to-Parliament.pdf* [Accessed 18 February 2024], Ch.4.

[19] "Progress in reducing emissions: 2023 Report to Parliament" (June 2023), Ch.5.

[20] *R. (on the application of Friends of the Earth) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin); [2023] 1 W.L.R. 225.

[21] HM Government, "Powering Up Britain" (March 2023).

[22] See, e.g. J. Ambrose, "UK insulation scheme would take 300 years to meet government targets, say critics" *The Guardian*, 9 April 2023 available at: *https://www.theguardian.com/environment/2023/apr/09/uk-insulation-scheme-would-take-300-years-to-meet-its-own-targets-say-critics* [Accessed 15 August 2023].

should bring down energy bills, provide energy security and be more efficient in terms of keeping homes warmer in winter and cooler in summer with associated health and wellbeing benefits.[23] For example, it is estimated that increasing energy efficiency in homes would save those in the least efficient homes £950 a year.[24] Given these advantages and the drive to improve EPCs, homes with a higher A-C rating should also hold or increase their capital value. Just as buyers look for fast internet connections, they are likely to look also for energy efficient homes. It is suggested that homebuyers are willing to pay almost 10% more for energy efficient homes.[25] So why are homeowners reluctant to improve the energy efficiency of their homes? The UK Finance Report identifies four primary barriers to domestic buildings reaching the target of MEES of C or above.

No one easy solution

First, there is no one size fits all. There is a huge variety of homes, and each may need a tailored solution. There is variety of age with generally older properties lacking insulation and more likely to suffer from ill-fitting windows and doors. The type of construction and building materials employed also vary considerably across the country. Existing heating systems can present challenges to convert with upgrades required not only to the source of heat generation but to heat delivery, whether through radiators, underfloor heating and improvement of insulation, whether through upgraded glazing or insultation of roof and wall voids. Some rural homes present a particular challenge. They are not connected to mainstream energy supplies and presently rely on bottled gas or oil stored on site.

The focus of this paper is on retrofitting existing homes, but a target also has been set for new homes built from 2025 to reduce their carbon emissions by 75 to 80% from homes built under buildings regulations in force in 2022.[26] As a first step, revised building regulations were introduced in June 2022 to reduce emissions by 31%. Further industry consultations look to advance towards the 2025 target with the expectation that new homes will be built with low carbon heating systems primarily via air sourced heat pumps. The Royal Institute of British Architects, whilst acknowledge these positive steps, believe that these standards could be more ambitious, for instance, by setting independent benchmarks rather than look to a comparative reduction.[27] The Mission Zero Review also urges prompt implementation of these standards and their application as a benchmark for existing as well as new homes.[28]

Tenure too will affect retrofitting options. Owners of freehold houses generally enjoy the independence to make alterations to their property free of others control. A restrictive covenant could interfere with this independence or more significantly, planning permission may be required. Permitted development rights do extend to

[23] For a convenient summary, see Mission Net Zero, [952].

[24] Citizen's Advice Mission Net Zero, fn.671.

[25] Santander, "A Green Premium" (2022) available at: *https://www.santander.co.uk/about-santander/media-centre/press-releases/a-green-premium-house-buyers-willing-to-pay-almost-10* [Accessed 13 October 2023].

[26] See Department of Levelling, Housing and Communities, Future Homes and Building Standards (December 2021). Local authorities can set higher standards.

[27] See RIBA, "Future Homes Standard explained" 21 January 2021 available at: *https://www.architecture.com/knowledge-and-resources/knowledge-landing-page/the-future-homes-standard-explained* [Accessed 13 October 2023].

[28] Mission Net Zero Review, [974]–[975].

most energy saving measures but there is a concern that the noise generated by heat pumps will be problematic in more densely populated neighbourhoods and a maximum decibel limit is mandated. The installation of an aired sourced heat pump to terraced homes can thus present difficulties.

The retrofitting of flats and other developments with communal structures and services will require a communal decision-making process, a fair apportionment of costs and an effective means for their recovery. There may be a need to upgrade an existing common heating system or energy saving measures may need to be sited on the common parts of the building. The leasehold tenure employed in England as a vehicle for flat ownership presents a real challenge. The involvement of the landlord as owner of the common parts of the development will thus be vital That landlord may be an external entity, who may well be reluctant to be involved in what could be a time-consuming process. If the landlord is a corporate entity in which all flat owners are shareholders, there is the challenge of reaching a consensus between all the flat or unit owners. Other interested parties from tenants to mortgagees also may need to be consulted and consent. Even if an agreement can be reached, the terms of many leases do not provide for the recovery of building improvements costs from flat owners. Professors Sue Bright and Frankie MacCarthy are leading academic experts who have explored these legal challenges.[29] Overcoming them may well necessitate legislation in an area where complexity is already legendary.

Homeowner uncertainty

The second major barrier identified by UK Finance flows from the first and that is the high level of homeowner uncertainty over why and how they should improve the energy performance of their homes. As yet, there is no clear government message on what role homeowners need to play in meeting net zero and the individual benefits and costs that entails.[30] These issues are largely confined to policy papers from a range of government and non-government bodies. With no one obvious retrofit route, property owners will need individual advice on what would best suit their needs, property and budget. Solar panels and insultation enjoy a more prominent profile with consumers than heat pumps which have yet to reach their "Tesla" moment. The press so far is mixed with noise, additional works and different performance and operational standards for gas or oil heating all feeding into consumer hesitancy. There is plenty of online guidance available, but it can be difficult to be sure of its quality or to determine which advice relates to different property types and consumers. The Government's backtracking on net zero targets is only going to feed homeowner hesitancy.

Supply side challenges

The third barrier looks to supply side challenges. For example, there is presently a shortfall in qualified fitters of heat pumps and the component supply chain could be more robust. The Mission Zero Review refers to the Heat Pump Association's

[29] See "Futureproofing flats" Faculty of Law, University of Oxford available at: *https://www.law.ox.ac.uk/private-law-research-group/futureproofing-flats* [Accessed 16 August 2023].

[30] See, e.g. Mission Net Zero Review, [979]–[984].

estimate that there are currently only 3,000 trained heat pump engineers in the UK when at least 27,000 will be needed over the next six years if targets are to be met.[31] A further immediate challenge is the inadequacy of the electricity grid to meet the growing demand from energy projects particularly the expansion of solar energy. A significant upgrade of the grid infrastructure is thus necessary but will take time. A streamlining of the planning process may be necessary in a similar way to that adopted to facilitate the upgrade and roll out of mobile data infrastructure.

The cost!

Last but by no means least is just how to finance the daunting task ahead. UK Finance estimates that the cost of dwellings meeting an EPC C or above rating is a sobering £249.6 billion and £291 billion to achieve full energy efficiency potential. The Government, when issuing its Build Back Better Strategy in 2021, earmarked £3.9 billion with £950 million allocated to the Home Upgrade Scheme and £450 million to a Boiler Upgrade Scheme. Remaining funds look to support the decarbonisation of social housing and public buildings as well as promoting green heating technologies. The pressure to upgrade its strategy already referred to has led to the further allocation of funds including an additional £450 million to the Boiler Upgrade Scheme and £60 million to support the installation of heat pumps. Additional funds have also been allocated to the training of more heating engineers and the social housing and public buildings decarbonisation.

These are the big numbers and clearly the current funding commitments fall far short of the expected cost. But of more immediate and individual concern for homeowners is the reality of what it will cost to retrofit their home. The Mission Zero Review quotes costs as the number one barrier to people improving their homes.[32] Offsetting the costs and benefits do not immediately stack up but emerge only over time. Initially, homeowners could only claim a £5,000 grant towards the installation of a heat pump, but this is often a fraction of the cost. A heat pump for a standard three-bedroom house costs, on average, £10,000 but there will also be fitting costs and additional upgrades may be required in terms of larger radiators or insulation. The Nationwide Building Society estimate that improving the energy rating of a homes rated F or G, would result in a saving of £1,780 a year but, with costs of installation likely to nudge £25,000, it would take 14 years to recover the cost. The picture is better for homes upgraded from EPC D to C which they estimate to involve an upgrade cost £8,100.[33] It is thus welcome that the Government's September 2023 announcement contained one welcome message that the grant would increase to £7,500. Even so, loan finance is going to be vital, and it is to the recommendations in the UK Finance Report, with additional insights from the Mission Zero Review, that this paper turns.

[31] Mission Net Zero Review, [1010].
[32] Mission Net Zero, [966].
[33] Mission Net Zero, fn.694.

Policy recommendations

Policy 1 recommendation: Inspiring action

Climate change is happening. The scientists are in no doubt and worldwide governments are reacting to the inevitable with commitments agreed at recent UN Climate Change Conferences. The UK Finance Report refers to polls that suggest 85% of the public see climate change as an important issue that needs to be addressed but only 35% have or are planning to adopt energy efficient measures. This gap will need to be closed if net zero is to become a reality.

The first of UK Finance's recommendations is the establishment of a government led delivery body to co-ordinate stakeholder action. The shift from targets to delivery is a vital step. It is easy to set targets but much more challenging to meet them. Greening homes is a complex and inter-related task requiring action from across the economy and society. Co-ordination is thus key. Some advances have been made in this direction with the setting up in February 2023 of the governmental Department of Energy Security and Net Zero with one of its aims being "to improve the energy efficiency of UK homes, businesses and public buildings".[34] This was closely followed by establishment of the Net Zero and Energy Efficiency Task Force a month later. This task force brings together experts from different sectors with the stated aim of "drawing up priorities and ways forward to turbocharge energy efficiency, including accelerating household insulation and boiler upgrades".[35] The UK Finance Report and the Net Zero Review also see a key role for local initiatives, for instance, local authorities know and are closer to their communities and local groups can often generate local interest and harness local enthusiasm effectively. For example, they call for the development of Local Area Energy Planning,[36] local retrofit hubs[37] and support for key local areas to pioneer carbon saving initiatives.

The second recommendation to inspire action is to establish a retrofit advisory service for homeowners to provide accurate advice on both retrofit options and funding finance. The internet is awash with generic information, but this can be confusing, sometimes inaccurate and cannot be bespoke to the individual homeowner. Homeowners need to have confidence that their hard-earned money is going to be spent on heating systems that suit their needs and the environment. Unfortunately, experience from other home related upgrades too often references misinformation and "cowboy" installers. An accessible and government endorsed advisory service would thus be a valuable support. An accreditation scheme, particularly for suppliers and installers, would also engender confidence. The UK Finance Report and the Net Zero Review also pick up suggestions for a passport system for each property made by the Green Finance Institute Coalition for Energy

[34] Department for Energy Security and Net Zero, "About us" available at: *https://www.gov.uk/government/organisations/department-for-energy-security-and-net-zero/about* [Accessed 9 August 2023].

[35] HM Government, "Government announces team of leading experts to boost energy efficiency" 16 March 2023 available at: *https://www.gov.uk/government/news/government-announces-team-of-leading-experts-to-boost-energy-efficiency#:~:text=The%20new%20Energy%20Efficiency%20Taskforce,by%202030%2C%20from%202021%20levels* [Accessed 9 August 2023].

[36] Such local energy plans have been pioneered by local NGO's see, e.g. Catapult Energy Systems, "Local Area Energy Planning: Supporting clean growth and low carbon transition" available at: *https://es.catapult.org.uk/report/local-area-energy-planning/* [Accessed 9 August 2023].

[37] See, e.g. UK Finance Report, p.32 and Net Zero Review, [985].

Efficient Buildings. This passport would provide a convenient record of what has and what could be done to improve a building's energy efficiency and in so doing, highlights the central importance of energy efficiency.

The last strand of the UK Finance Report's recommendations to inspire action is to support supply chain confidence. Ensuring that retrofitting can be physically delivered is crucial in reaching net zero. This will involve global supply chains, business investment and suitably qualified advisors and installers. Both reports emphasise the need for a clear policy steer from government to support businesses and fund confidence to plan and make these critical investments. This is not the time for mixed messages or wavering resolve. All down the supply chain, certainty and clarity is required from overall policy to delivery where initiatives need to include accreditation schemes, for example, through Publicly Available Specifications (PAS Standards)[38] and linked financial incentives. Critically, the present Government, and now the opposition, backtracking is undermining this certainty.

Many of the players within the supply chain are likely to be small- and medium-sized businesses that lack the research and development skills of larger corporations. Government or industry-based support is thus going to be particularly significant. Reference has already been made to the changes to building regulations for new build homes through the Future Homes and Building Standards, but similar guidance is necessary for retrofitting. The Committee on Climate Change estimates that an additional 200,000 workers across all sectors will be required to deliver net zero by 2050. The Government has announced a £8.85million to be made available for retrofit training and a target of training 8,000 more workers through free or low-cost courses.[39] But these plans are modest with the Federation of Master Builders already reporting worrying construction worker shortages which delay building projects and result in increased prices.

But are these recommendations enough to inspire action? The UK is currently enmired in a cost-of-living crisis. Inflation is proving stubbornly high and to bring it down, the Bank of England is rising interest rates to dampen demand. With rising interest rates come rising mortgage costs and with fixed rate mortgages generally limited to two to five years in the UK, many mortgage holders are facing high uplifts in their monthly mortgage repayments. One of the last things on their mind is refitting their homes even if that brings the prospect of lower heating bills.

Worryingly, instead of redoubling efforts to keep net zero by 2050 as a feasible goal in the face of the cost-of-living crisis, the Government has rowed back on targets causing a wave of dismay amongst investors and industries who needed confidence that the investments they have made, and will continue to make, are sustainable. Signs of government hesitancy emerged with the resignation of a prominent government minister with responsibility for the environment, Zac Goldsmith, in June 2023. He accused the Prime Minister, Rishi Sunak of being

[38] See PAS 2030 under the TrustMark scheme available at: *https://www.trustmark.org.uk/business/information-guidance/become-pas-mcs-certified* [Accessed 13 October 2023].

[39] HM Government Press Release, "Thousands to be trained to boost energy efficiency in homes across the country" 25 July 2023 available at: *https://www.gov.uk/government/news/thousands-to-be-trained-to-boost-energy-efficiency-in-homes-across-the-country* [Accessed 13 October 2023].

"simply uninterested" and the Government of "apathy" on environmental issues.[40] His warnings proved prescient with the September 2023 climate change cutbacks. Chris Skidmore, the author of the New Zero Review, followed Zac Goldsmith and resigned in January 2024 over the Government's licencing of more North Sea fossil fuel drilling.

Unfortunately, these may well not be the last of climate change scepticism by the Government. A controversial bye-election win by the Conservative Party is widely attributed to questioning clean air policies and has inspired the Conservative Party to politicise climate change policies. These divisive tactics are sadly likely to grow louder with a general election due in 2024. However, the issue may not be as divisive as once feared since the Labour Party, prompted by budgetary fears, have slashed their green investment plans by approximately 75% from its promised £28 billion a year target. A major victim of this funding cut is home energy savings with a dramatic fall in the number of homes to be insulated. It is easy, but simplistic, to point to the individual cost of retrofitting a home but climate change is inevitably bringing costs—it is rather a question of what costs and how they are going to be met. What is needed is not political division but cross party consensus and a clear and authoritative message on the need and benefits at an individual, national and global level, flowing from reduced carbon emissions and energy efficiency from the built environment.

Policy 2 recommendation: Delivering funding

The UK Finance Report puts forward four recommendations on their second theme of delivering funding.

Their first recommendation is to prioritise the retrofitting of social housing as a more coherent sector than either the private rental sector or owner-occupied housing. It already has firm links with government policy through regulatory oversight and funding provision and thus can be more readily open to policy advancement. It also houses vulnerable and fuel poor sectors of society who can benefit the most from energy savings. In October 2021, research commissioned by the Housing Federation, representing housing association landlords, estimated that £36 billion would be required to retrofit the UK's social housing stock.[41] The Government established a Social Housing Decarbonisation Fund in 2020 which earmarked a total of £3.8 billion over 10 years with funds being made available in phases.[42] Extra money was allocated to this decarbonisation fund in March 2023 with the expectation of matched funding from social landlords.[43]

The UK Finance Report also emphasises the importance of funding the supply chain, the backbone of which are small- and medium-sized businesses who are

[40] Zac Goldsmith's resignation letter: " Read Zac Goldsmith's resignation letter in full as he attacks Tory election hopes" *The Independent*, 30 June 2023 available at: *https://www.independent.co.uk/news/uk/politics/zac-goldsmith-resigns-rishi-sunak-partygate-b2367098.html* [Accessed 11 August 2023].

[41] This figure would meet the cost of bringing the social housing stock up to an EPC rating of C plus fitting heat pumps and low carbon technology to 27 million housing association homes see Savills, "Decarbonising the Housing Association Sector: Costs and Funding Options" (October 2021) and Housing Federation, "Decarbonisation, A Guide for Housing Associations" (October 2021).

[42] The first wave allocated £179 million and the second wave £800 million.

[43] Amounting to £774 million. See Department for Energy Security and Net Zero, "£1.8 billion awarded to boost energy efficiency and cut emissions of homes and public buildings across England" 22 March 2023 available at: *https://www.gov.uk/government/news/18-billion-awarded-to-boost-energy-efficiency-and-cut-emissions-of-homes-and-public-buildings-across-england* [Accessed 11 August 2023].

dependent on loan finance but may well lack the experience of funding expansion of their businesses.

A further recommendation is to look at the incentives that fiscal measures can provide. Value added tax is already zero rated for energy saving materials including insulation, heat pumps and solar panels until at least 2027. Building costs for new buildings are also zero rated and this could be extended to renovations. Incentives through stamp duty are also suggested by providing lowers rates for homes which satisfy the relevant MEES or a tax rebate offered upon retrofitting.

However, the UK Finance Report is surprisingly silent on their role in financing the transition to net zero. They do call upon the Government to provide further funding which should be targeted to the more vulnerable who are unlikely to meet the commercial criteria required by lenders. Also, they see a role for the Government in providing guarantees to support green lending. Such guarantees have been successful in facilitating access to home ownership.

Banks and other lenders will be a key source of funding for retrofitting or the purchase of dwellings with a low carbon footprint and a growing number of lenders offer green mortgages. The Green Finance Institute seeks to encourage green mortgages by setting Green Finance Principles which promote clear and consistent lending methodology.[44] In an effort to bring key players together to enhance a consistent message they also hosted the first Green Mortgage Summit in July 2023.[45] Green mortgages offer incentives by way of slightly lower interest rates or cash backs. But after a decade, the take up of green mortgages is disappointing. Interest rate differentials are often insufficient to entice homeowners since traditional mortgage products often offer more competitive rates. It is also suggested that they target those borrowers with healthy credit profiles rather than those who are dependent on loans to fund retrofitting.[46]

There are measures that could be taken to encourage lenders to offer more attractive green mortgages terms. The central Bank of England could provide a Green Fund Lending Stream to banks and the Prudential Regulatory Authority could also adopt lower regulatory capital requirements for green mortgages. From a wider perspective, the growth of green finance and the Environmental, Social and Governance corporate agenda should encourage corporations to see how they can support greening buildings as an important strand in this agenda.

The progress towards greening lenders mortgage portfolios by looking for an average MEES of EPC C across a lender's portfolio has already been referred to, however, the UK Finance Report raises several concerns in setting EPC requirements in lending decision making. First, are affordability issues. Borrowers, whose properties or financial vulnerability may make an EPC of C beyond reach, risk becoming mortgage prisoners. An effective advice scheme directing borrowers to viable sources of funding could help to alleviate this risk. Secondly, the recording of, and accounting for, environmental data is an unfamiliar hurdle that lenders need to address. For example, how can MEES be incorporated into property valuations or how can energy cost savings be factored into affordability

[44] See Green Finance Institute, "Utilisation linked finance: Financial innovation to accelerate the EV transition" available at: *https://www.greenfinanceinstitute.com* [Accessed 12 August 2023].

[45] Green Finance Institute, "Utilisation linked finance: Financial innovation to accelerate the EV transition".

[46] See generally Shepherd and Wedderburn, "A Guide to Green Mortgages" available at: *https://shepwedd.com /sites/default/files/Green%20Mortgages%20Guide.pdf* [Accessed 12 August 2023].

assessments? These will take experience to overcome but, in the meantime, there is an increased risk of miss-selling.

Clearly, innovative financing instruments will be needed, and the UK finance industry should be well placed to develop schemes and products that work. The Government has recently updated its green finance strategy, but this is focussed on the big picture and there is little in this strategy which outlines how an individual homeowner can finance the retrofit of their home.[47] At the micro-level, the Government have launch funded competitive programmes to promote green lending products. The Green Home Innovation Fund was launch by the Government in 2019 and the three funded projects reported in 2022.[48] This has been followed by the Green Home Accelerator which was launched in the autumn of 2022 and is expected to report in 2025.[49] In the meantime, there are examples from around the world that link repayments to energy saving costs or link the finance to the property rather than the individual homeowner to make long term investment attractive.

Policy 3 recommendation: Redefining standards

The final strand to UK Finance Report's is the call to refine standards in particular EPC ratings.[50] As we have seen, much of the net zero strategy for buildings depends on EPC ratings as a basis for MEES. An accurate methodology including metrics that will support the road to Net Zero is thus crucial. However, currently EPCs are falling short. They were devised for a different purpose and fail to take account of new technologies. For instance, installing a heat pump bizarrely can increase the EPC rating of a dwelling. There is work ongoing on redefining the EPC methodology. An action plan was published in September 2020 with the hope that its recommendations, including a more accurate measure will be implemented by 2025.[51] Not only is there a call for more appropriate metrics but also for a more accurate and live database. Currently, the database is too slow to update, sometimes taking take months to record changes.

Missing in action

The UK Finance Report is important and useful but what does it overlook? Reading that report alongside the Net Zero Review, there is much common ground on what needs to be done. However, achieving energy efficient homes is not just about the engineering and the finance. There are two key gaps, first a need for public engagement and secondly a recognition that the law is a vital component.

[47] HM Government, "Mobilising Green Finance" (March 2023) available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1149690/mobilising-green-investment-2023-green-finance-strategy.pdf* [Accessed 3 September 2023].

[48] See HM Government, "Green Home Finance Innovation Fund competition—successful bids" updated 18 October 2022 available at: *https://www.gov.uk/government/publications/green-home-finance-innovation-fund-competition-successful-bids/green-home-finance-innovation-fund-competition-successful-bids* and its evaluation, HM Government, "Green Home Finance Innovation Fund evaluation" at *https://www.gov.uk/government/publications/green-home-finance-innovation-fund-evaluation* [Accessed 3 September 2023].

[49] See Department for Energy Security and Net Zero, "Green Home Accelerator (GHFA)" available at: *https://programmes.carbontrust.com/ghfa/* and "Green Home Finance Accelerator: Discovery Phase (competition closed" last updated 19 May 2023 available at: *https://www.gov.uk/government/publications/green-home-finance-accelerator* [Accessed 3 September 2023].

[50] Net Zero Homes: Time for a Reset, p.38.

[51] Department for Business, Energy & Industrial Strategy and the Ministry of Housing Communities and Local Government, "Energy Performance Certificates for Buildings: Action Plan" (September 2020).

Public engagement

There is a feeling that both reports are speaking to a limited audience—an audience that is largely converted or at least open to their messages. The Net Zero Review highlights that to ensure that net zero works for everyone there is a need for "Agency, Affordability and Accessibility".[52] We have already considered accessibility and affordability to ensure that there are the heating and insulation systems that compare favourably with carbon-based options, and which are accessible to all because they are affordable both in terms of cost and monetary assistance to meet the upfront capital outlay. What is also key under the agency imperative is public engagement. The Mission Zero Review describes public engagement as "the missing piece of the puzzle".[53]

The actions outlined in the H&S Strategy require actions by individuals yet there has been little to engage the public on what net zero entails, what benefits it can bring and how those benefits can be achieved. The consequences of sitting back and doing nothing also need to be underlined for climate change will require action whether to minimise or address its impact. Too often the need to tackle climate change is presented as offshore weather-related catastrophes from wild fires in Southern Europe, North America or Hawaii to devastating floods in Pakistan, China and Libya. Domestic consequences may not appear so immediately dramatic, but in this interconnected world, they cannot be ignored.

The benefits of improving the thermal efficiency of homes also needs to be communicated, for example, reduced heating costs and the consequential benefits to health and wellbeing. Almost all are aware of net zero, with 65% very concerned about the impact of climate change, but just less than half know much about it.[54] There is a real deficit between those who want to do something and knowing what to do and the support available to make that happen. Even those who get so far as finding out what they could do are faced by conflicting and confusing information.

The New Zero Review thus calls for a widespread public information campaign that is sufficiently nuanced to address the concerns of different groups and makes sure that no one is left out.[55] They point to the work of the Scottish and Welsh Governments in developing a public engagement strategy and to the Covid-19 response as examples of initiatives that can radically change behaviour. Instead, the political messaging is that action can be delayed and that the individual can be excused from engagement.[56]

The legal deficit

Achieving energy efficient homes strikes right at the heart of peoples' relationship with property. The rules that govern that relationship must thus feature prominently to facilitate rather than obstruct the drive to net zero.

We are beginning to see instances where legal challenges are raising their head. For example, the green leases of commercial property, which impose, or at least

[52] New Zero Review, [869].
[53] Mission Zero Review, [874].
[54] Mission Zero Review fnn.616 and 617.
[55] Mission Zero Review, [887]–[896].
[56] See "Prime Minister speech on Net Zero: 20 September 2023" available at: *https://www.gov.uk/government/speeches/pm-speech-on-net-zero-20-september-2023* [Accessed 3 October 2023].

protect existing, environmental standards are becoming increasingly common. This has prompted the question of whether a landlord can insist upon green lease provisions upon a statutory lease renewal under the Landlord and Tenant Act 1954. Different terms can only usually be imposed where they are "fair and reasonable".[57] Cases to date have shown the court's reluctance to shift the responsibility to meet MEES or other environmental standards from the landlord on to the tenant but have accepted a willingness to see tenants take responsibility for not compromising existing MEES standards.[58] The Law Commission is reviewing the Landlord and Tenant Act 1954, and it will be interesting to see what they recommend on this issue in the drive to net zero.

This paper has already alluded to the challenges that will need to be addressed where property is communally owned, most obviously in blocks of flats. There are also initiatives to increase the number of shared heating networks that bring different but equally challenging legal issues. Communal entities and decision-making mechanisms will be key. Sharing rather than exclusion is likely to become an ever more important norm of property relations. Engaging with commons scholarship from Ostrom[59] to Fournier[60] to determine how common pooled resources can be effectively regulated will be helpful in shifting this focus.

Property rules may also need to address temporal questions. The allocation of rights and responsibilities between present and future owners that have traditionally been addressed through trust mechanisms and notions of waste may need to be revisited in a similar manner to the emergence of rights and responsibilities in green leases. For example, innovative green financing may bring the need to spread the cost of retrofitting buildings beyond one owner to effectively pass financial repayment obligations to the owner for the time being of the building. Thus, green mortgages may be transferred from one mortgagor to the next or the repayment obligation attached to the property. Whatever mechanisms emerge, there is no doubt that property lawyers will need to be as inventive as they have been in the past to facilitate dealings with land. The development of Islamic financing provides a recent example of such innovation.

In their seminal article, "The Rhetoric of Realty", Kevin and Susan Gray highlighted the developing meta norm of reciprocity in property relations reflecting the "community value" of land in an eco-system we all inhabit.[61] In what the Grays described as a *civic equity* that "all are equally obliged to conserve and promote the quality of the natural or man-made environment".[62] An obligation that is exemplified for instance in environmental burdens imposed on landowners or other measures which provide public goods but at the expense of individual property rights. Such a norm underlies the principles of progressive property and the social obligation norm expected of property owners articulated by a group of American

[57] *O'May v City of London Real Property Co Ltd* [1983] 2 A.C. 726; [1982] 2 W.L.R. 407.

[58] *Clipper Logistics Plc v Scottish Equitable Plc*, unreported, 7 March 2022, Sheffield County Court.

[59] See, in particular, E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: CUP, 1990).

[60] V. Fournier, "Commoning: Or the social organisation of the commons" (2013) 16 M@n@gement.

[61] K. and S. Gray, "The Rhetoric of Realty" in J. Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: Butterworths, 2003), p.204.

[62] K. and S. Gray, "The Rhetoric of Realty" in Getzler, *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (2003), p.270.

legal theorists.[63] Progressive property theory is increasingly finding a voice in property discourse as we appreciate the inter-related fundamentals of property law in modern society.[64] Those fundamentals are enshrined in the qualified nature of the right not to be deprived of ones' property save in the proportionate pursuit of the public interest found in art.1 Protocol 1 of the European Convention on Human Rights. The boundaries of this "interlinked network of socialised duty"[65] will need to be probed and determined. For example, the proportionality of positive obligations in meeting MEES standards or other demands that compliance with net zero brings may emerge most obviously if vulnerable groups are called upon to bare an excessive burden.

Conclusion

The Net Zero Review concludes that "[h]omes are at the heart of the net zero equation".[66] The UK Government purports to have a strategy to achieve net zero by 2050 within which they have articulated the contribution that the built environment, including homes, would need to make to achieve that goal. That contribution has revolved largely around attaining MEES though the low carbon heating solutions in particular heat pumps, solar heating and improved insulation. In this aspiration, they have much in common with other European countries.

The implementation of this strategy was already subject to expert criticism as being too little too late before the current government faced with a cost-of-living crisis, empty government coffers and perceived political expediency has thrown key elements of the strategy into reverse. They have abandoned targets for private rental properties and put back to 2035 measures to phase out fossil fuel heating where feasible. The Labour party too have trimmed their green commitments in the face of financial realism. This political backtracking will make achieving net zero that much more difficult.

This is worrying when what is needed most is a clear and consistent long-term strategy to reduce our dependency on fossil fuels for heating (or cooling) our homes. There is a plethora of experts offering guidance and there is emerging common ground on what that strategy could or should be. The two policy documents examined in this paper are just two of many. They may overlook the legal issues but lawyers are needed to play their part in formulating the necessary legal frameworks to balance the parties' rights and obligations in what is often a communal endeavour.

What is now needed is, on the one hand, certainty to give investors, industry and business the confidence to put in place the necessary infrastructure and skills. Whilst, on the other hand, a positive aspirational public information campaign that can turn a wish to address climate change into a willingness to act supported by appropriate incentives. For all the finances will need to stack up and it is here, that

[63] Most obviously, compulsory purchase acquisitions for public facilities or planning restrictions on the individual exploitation of ones' property.

G. Alexander, E. Penalver, J. Singer and L. Underkuffler, "A Statement of Progressive Property" (2009) 94 *Cornell Law Review* 743.

[64] See, e.g. R. Walsh, *Property Rights and Social Justice* (Cambridge: CUP, 2021).

[65] K. and S. Gray, "The Rhetoric of Realty" in Getzler, *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (2003), p.278 fn.61.

[66] Net Zero Review, [944].

government and financial institutions will need to provide support at least until the virtuous circle of cheaper and sustainable energy and energy delivery infrastructure can be achieved. The bottom line is that climate change inevitably will bring the costs of change, our choice is what those costs will be.

Causation in Equitable Compensation: But For Test without Novus Actus Interveniens?

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Breach of trust; Causation; Compensation; Equitable principles; Intervening events

Abstract

Various Claimants v Giambrone & Law (A Firm) (Giambrone), as a Court of Appeal decision, holds significant referential value for subsequent courts interpreting the rule established in AIB Group (UK) Plc v Redler (AIB). However, current literature lacks a thorough examination of Jackson LJ's reasoning in Giambrone, particularly in his interpretation and application of the causation test. This article addresses this gap by identifying a discrepancy between Jackson LJ's judgment and the causation test employed in AIB. By examining this inconsistency, the authors highlight the areas where Jackson LJ's analysis diverges from the AIB rule and its potential implications for future cases.

Introduction

Traditionally, equity addresses a trustee's liability for misappropriation of trust property through the accounting mechanism. However, the decisions in *Target Holdings Ltd v Redferns* (*Target*)[1] and *AIB Group (UK) Plc v Redler* (*AIB*)[2] signalled the English apex court's departure from the traditional accounting mechanism. Citing with approval Lord Browne-Wilkinson's famous statement in *AIB* that "equitable compensation is designed to … make good a loss in fact suffered by the beneficiaries",[3] both Lord Toulson and Lord Reed opined that certain principles of common law damages can be introduced in the assessment of a trustee's liability for the misapplication of trust funds.[4] The *AIB* decision thereby established a general rule that equitable compensation is unavailable where a trustee's breach has not caused losses to the trust fund (the *AIB* rule).[5]

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[1] *Target Holdings Ltd v Redferns* [1996] A.C. 421; [1995] 3 W.L.R. 352.

[2] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] A.C. 1503; [2014] 3 W.L.R. 1367.

[3] *Target* [1996] A.C. 421 at 439.

[4] *AIB* [2015] A.C. 1503 at [63], [133].

[5] R. Lee, "Substitutive Compensation for Breach of Trust: An Irrelevant Fairy Tale?" (2015) 9 *Journal of Equity* 94, 101; J. Glister and J. Lee, *Hanbury and Martin Modern Equity*, 22nd edn (London: Sweet & Maxwell, 2018), p.632; P.G. Turner, "Want of Causation as a Defence to Liability for Misapplication of Trust Assets" in P.S. Davies, S. Douglas and J. Goudkamp (eds), *Defences in Equity* (Oxford: Hart Publishing, 2018), p.155; M. Conaglen,

From the perspective of *stare decisis*, it is unquestionable that "the [r]ules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute".[6] Upon closer examination of cases following *AIB*, it appears that the lower courts have consistently disregarded the *AIB* rule by utilising certain tactics, such as intentionally excluding or improperly interpreting the rule.[7] *Various Claimants v Giambrone & Law (A Firm)* (*Giambrone*)[8] is one such case. Being a Court of Appeal decision, *Giambrone* has referential significance for subsequent courts in their interpretations and applications of the *AIB* rule. The existing literature on *Giambrone* has mainly focused on the active-passive-duty distinction made by Jackson LJ;[9] how Jackson LJ applied the *AIB* rule to the facts in *Giambrone* has not yet been subject to in-depth scrutiny. This question is of scholarly and practical significance due to a discrepancy in his Lordship's ruling. While Jackson LJ stated in *Giambrone* that his Lordship had strictly followed the *AIB* rule, his Lordship's judgment contained a discrepancy between the application of the causation test in *Giambrone* and the causation test in *AIB*. It is unclear whether such a discrepancy was caused by Jackson LJ's misunderstanding of the *AIB* rule or by his Lordship's intentional choice. This short article fills the gap in the existing literature by examining this inconsistency. It identifies the areas where Jackson LJ's analysis departs from the *AIB* rule and the insights this departure might have for future cases.

The decision in the Court of First Instance

Giambrone[10] concerned an Italian real estate development project called JoTS, where RDV and Veco acted as developers and vendors and VFI as the promoter. JoTS attracted some potential buyers from England. These buyers entered into an off-plan purchase contract with the vendors in which they paid deposits for the purchase of the apartments before they were constructed. To protect such vulnerable buyers from the risk of the developers going bankrupt,[11] the Italian legislation Decree 122 required that vendors provide sureties issued:

> "by a bank, insurance company operator or financial intermediaries registered in the special list described in Article 107 of the Consolidated Law on Banking and Credit … upon the conclusion of a contract which has the purpose of the [non-immediate] transfer of ownership or other real right of enjoyment of a property to be built."[12]

"Equitable Compensation for Breach of Trust: Off Target" (2016) 40(1) *Melbourne University Law Review* 126, 159–60.

[6] *Young v Bristol Aeroplane Co Ltd* [1944] K.B. 718 at 729; (1945) 78 Ll. L. Rep. 6. See also *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407 at [157]–[161]; [2002] 3 W.L.R. 1617; *Williams v Glasbrook Brothers* (1947) 2 All E.R. 884 at 885.

[7] See, e.g. *Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWCA Civ 2291 at [51]–[60]; [2020] B.C.C. 316; *Various Claimants v Giambrone & Law (A Firm)* [2017] EWCA Civ 1193 at [62]–[63]; [2018] P.N.L.R. 2; *Interactive Technology Corp Ltd v Ferster* [2018] EWCA Civ 1594 at [26]–[30]; [2021] W.T.L.R. 561; *Davies v Ford* [2021] EWHC 2550 (Ch) at [105]–[106].

[8] *Giambrone* [2017] EWCA Civ 1193.

[9] G. Virgo, *The Principles of Equity & Trusts*, 4th edn (Oxford: Oxford University Press, 2020), p.552; S. Williams, "Equitable Compensation, Trustees, and Disobedience in the Court of Appeal" (2021) 13 *Conveyancer and Property Lawyer* 27–28.

[10] *Various Claimants v Giambrone & Law (A Firm)* [2015] EWHC 1946 (QB).

[11] *Giambrone* [2015] EWHC 1946 (QB) at [302].

[12] *Giambrone* [2015] EWHC 1946 (QB) at [122].

Giambrone, the law firm representing the interests of the vendors, was involved in this purchasing scheme, undertaking the duty to retain the deposits paid by the buyers and to release them to the vendors only after guarantees compliant with Decree 122 were shown by the vendors.[13] The solicitors, however, paid out the money upon receipt of defective guarantees that did not meet the requirements of Decree 122. The construction of the apartments was delayed, and the whole project was suspended due to suspected money laundering.[14] The conditions required to trigger the guarantees were never met, and the buyers were unable to recover their deposits.[15] Upon a summary judgment application by the buyers, Foskett J considered Giambrone's paying the deposits upon receipt of non-compliant guarantees to be a breach of trust and awarded the full amount of the deposits to the buyers in the name of equitable compensation.[16]

The decision in the Court of Appeal

The causation test

Giambrone appealed the case to the Court of Appeal (CA), arguing that equitable compensation should be nil because the buyers would have recovered nothing even if guarantees duly compliant with Decree 122 had been obtained before the payment of the deposits.[17] To address the issue related to equitable compensation, Jackson LJ began by reviewing three authorities: *Canson Enterprises Ltd v Boughton & Co*,[18] *Target* and *AIB*. His Lordship cited with approval some paragraphs from *AIB* in which Lord Reed drew a comparison between equitable compensation and common law damages in relation to the issue of causation:[19]

> "The foreseeability of loss is generally irrelevant, but the loss must be caused by the breach of trust, in the sense that it must *flow directly* from it. Losses resulting from unreasonable behaviour on the part of the claimant will be adjudged to flow from that behaviour, and not from the breach … Of course, the aim of equitable compensation is to compensate: that is to say, provide a monetary equivalent of what has been lost as a result of a breach of duty. At that level of generality, it has the same aim as most awards of damages for tort or breach of contract. Equally, since the concept of loss necessarily involves the concept of causation, and that concept in turn inevitably involves a consideration of the *necessary connection* between the breach of duty and a postulated consequence (and therefore of such questions as whether a consequence flows 'directly' from the breach of duty, and whether loss should be attributed to the conduct of third parties, or to the conduct of the person to whom the duty is owed)."

Here, it is clear that Lord Reed denied foreseeability as a relevant consideration in the assessment of equitable compensation but admitted the relevancy of *novus*

[13] *Giambrone* [2017] EWCA Civ 1193 at [21].
[14] *Giambrone* [2015] EWHC 1946 (QB) at [33], [37].
[15] *Giambrone* [2017] EWCA Civ 1193 at [29]–[31].
[16] *Giambrone* [2017] EWCA Civ 1193 at [37].
[17] *Giambrone* [2017] EWCA Civ 1193 at [48].
[18] *Canson Enterprises Ltd v Boughton & Co* (1991) 85 D.L.R. 129.
[19] *Giambrone* [2017] EWCA Civ 1193 at [58] (emphasis added).

actus interveniens (NAI) by emphasising that any loss covered by equitable compensation must "flow directly"[20] from the breach of the trustee rather than any intervening events attributable to third parties. The significance of causation between the breach of trust and the losses argued under equitable compensation was also emphasised in *Target*, where Lord Browne-Wilkinson remarked that "there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz. the fact that the loss would not have occurred *but for* the breach".[21]

In assessing equitable compensation, the *Target* and *AIB* decisions, when read together, give rise to two observations regarding the issue of causation. First, what is recoverable by equitable compensation must be losses that would not have occurred but for the breach of the trustee. To determine this, a hypothetical scenario in which the breach did not occur is to be constructed with reference to each case's facts, with any loss that would still have been suffered in the hypothetical scenario not being recoverable by equitable compensation (the but-for test). Secondly, even if a loss passes the but-for test—i.e. the loss would not have occurred but for the breach—this loss must still have flowed directly from the breach without any interruption of NAI in order to be recoverable under equitable compensation (the NAI test). In summary, the establishment of causation between a trustee's breach of duty and the loss suffered by a beneficiary recoverable under equitable compensation is a two-stage process consisting of the but-for test and the NAI test. Both tests must be satisfied before a loss can be recovered under equitable compensation.

The active-passive-duty distinction

Jackson LJ proposed an essential distinction between *Giambrone* and *Target* and *AIB*: whereas, in *Giambrone*, the solicitors' duty was to receive the guarantees provided by the developers and check their compliance, the solicitors in *Target* and *AIB* were obliged to take active steps to secure the guarantees (the active-passive-duty distinction).[22] It is common practice for judges to make factual distinctions between cases to justify deviations from principles established in those cases.[23] However, in *Giambrone*, the active-passive-duty distinction made between *Giambrone*, *Target* and *AIB* does not mean that Jackson LJ intended to exclude the application of the *AIB* rule. On the contrary, Jackson LJ held himself to have orthodoxly applied the but-for test under the *AIB* rule by drawing the following contrast: "In *Target* the plaintiff's claim failed on the "but for" test, and in the present case the claimants' claim passes the "but for" test".[24] Relying on the

[20] *Giambrone* [2017] EWCA Civ 1193 at [58]. Subsequent courts have frequently emphasised the requirement of "loss flowing directly from the breach of duty" when interpreting and applying the *AIB* rule. See, e.g. *Barrowfen Properties Ltd v Patel* [2022] EWHC 1601 (Ch) at [120]; *Maitland Hudson v Solicitors Regulation Authority* [2017] EWHC 1249 (Ch) at [53]–[58], [66]; *Gray v Smith* [2022] EWHC 1153 (Ch) at [390]; *ECU Group Plc v HSBC Bank Plc* [2021] EWHC 2875 (Comm) at [523]; *TMO Renewables Ltd (In Liquidation) v Yeo* [2021] EWHC 2033 (Ch) at [566].

[21] *Target* [1996] A.C. 421 at 434.

[22] *Giambrone* [2017] EWCA Civ 1193 at [60]–[61].

[23] That may be the reason why some scholars have interpreted the active-passive-duty distinction in *Giambrone* [2017] EWCA Civ 1193 as a generalised principle that can be relied upon to exclude the application of the *AIB* [2015] A.C. 1503 rule. See, e.g. Virgo, *The Principles of Equity & Trusts* (2020), p.552; Williams, "Equitable Compensation, Trustees, and Disobedience in the Court of Appeal" (2021) 13 *Conveyancer and Property Lawyer* 27–28.

[24] *Giambrone* [2017] EWCA Civ 1193 at [63].

active-passive-duty distinction, his Lordship then explained how a different result from those in *Target* and *AIB* was reached: the solicitors were liable for the full monetary amount wrongly paid out in *Giambrone*, whereas the solicitors in *Target* and *AIB* were liable for only part or none of the money disbursed without authorisation, despite the exact same but-for test being applied in all three cases.

As Jackson LJ elaborated,[25] the solicitors' role in *Giambrone* was to check whether the guarantees provided by the developers were compliant with Decree 122 and to release the money only if such compliance was confirmed. In other words, the vendors were solely responsible for acquiring the compliant guarantees; the solicitors were merely guardians of the buyers' money and were not obliged to participate in obtaining the compliant guarantees. This understanding is supported by the retainer letter sent by Giambrone to the buyers cited in the judgment: "We will ensure that the Builders/developers or the Promoters will provide us with a copy of an "idejussione bancaria", which is now mandatory in certain circumstances".[26] After clarifying the nature and scope of the solicitors' duty, Jackson LJ formed the following hypothesis (*Hypothesis 1*): but for the breach, the deposits would have been retained until the rescission of the contract and paid back to the buyers because the compliant guarantees that would trigger the release of the money never appeared.[27] Accordingly, the solicitors were liable for the full deposit amounts.

The reason Jackson LJ emphasised the passive nature of the solicitors' obligation is now clear: because of the passive nature of the solicitors' obligation in *Giambrone* in comparison to its active nature in *Target*, different assumptions were relied upon to construct the hypothetical scenarios for the but-for test. In *Giambrone*, the assumption was that the solicitors duly performed their passive duty to safeguard the money until the compliant guarantees were received. Therefore, because compliant guarantees were never received, the full deposit amounts should have been returned to the buyers. By contrast, in *Target*, the assumption was that the solicitors duly performed their active obligation to acquire the guarantees in the interest of the beneficiaries. Given that the intervening event responsible for the claimant's loss was the mortgagor's fraudulent inflation of the value of the mortgaged property,[28] the claimant would still have suffered the same loss even if the trustee had remedied their breach at a later stage of the transaction.[29] These differences in the duties of the solicitors in *Giambrone* and *Target* generated different hypotheticals, which explains why different consequences followed from the application of the same but-for test. The active-passive-duty distinction was not relied upon by Jackson LJ to justify his Lordship's deviation from the *AIB* rule; rather, it justified the different result arrived at in *Giambrone*, though the but-for test under the *AIB* rule had already been strictly adhered to in *Giambrone*.

Regarding the question of what would have happened but for the breach, *Giambrone*, the appellant, proposed an alternative hypothesis (*Hypothesis 2*) to Jackson LJ's: namely, that even if guarantees compliant with Decree 122 had been obtained before the release of the deposits, the buyers would still have lost the full

[25] *Giambrone* [2017] EWCA Civ 1193 at [60]–[62].
[26] *Giambrone* [2017] EWCA Civ 1193 at [21] (emphasis added).
[27] *Giambrone* [2017] EWCA Civ 1193 at [62].
[28] *Target* [1996] A.C. 421 at 426, 428.
[29] *Target* [1996] A.C. 421 at 436.

amount of their deposits.[30] The statement itself is uncontroversial because the conditions that would trigger the intervention of the guarantors never took place in *Giambrone*, rendering the buyers' loss irrelevant to whether compliant guarantees were eventually acquired.[31] Despite its correctness, Jackson LJ did not accept this hypothesis when applying the but-for test. His Lordship did not offer any explanation why Hypothesis 2 ought not to be accepted. Nonetheless, analysis of Jackson LJ's reasoning reveals two grounds to support his Lordship's rejection of Hypothesis 2.

The first ground lies in the nature and scope of the duties of the solicitors. The solicitors in *Giambrone* were custodians only because they were only obliged to check the compliancy of the guarantees provided by the vendors; they were not obliged to proactively obtain the compliant guarantees. Therefore, any hypothesis based on the assumption of due acquisition of such guarantees was outside the ambit of the solicitors' obligation and so irrelevant to the application of the but-for test. The second ground echoes the reasoning of David Richards LJ in *Auden McKenzie (Pharma Division) Ltd v Patel* (*Auden Mackenzie*),[32] where his Lordship held that "[the courts in *Target* and *AIB* did not consider] hypothetical events, [but only] actual events which go to establish the quantum of the loss to the trust or its beneficiaries".[33] In *Auden McKenzie*, the hypothetical event arose where, if the unlawful payments had not been made, the directors (who were also the sole shareholders) would have directed the company to issue equivalent payments to them in the form of dividends.[34] Similarly, in *Giambrone*, the hypothetical event was that the vendors would have provided guarantees compliant with Decree 122. Since hypothetical rather than actual events were deemed irrelevant to the application of the but-for test, Jackson LJ's rejection of Hypothesis 2 was justifiable.

Consideration of NAI

If one only considers the but-for test when assessing equitable compensation, Jackson LJ's conclusion that the solicitors in *Giambrone* were liable for the full amount of the wrongly paid deposits makes perfect sense. However, as noted earlier, the causation test under the *AIB* rule comprises two subtests; the but-for test is only one of them. The NAI test must also be passed for a successful equitable compensation claim. In *Giambrone*, the fact that the buyers would have recovered nothing even if the compliant guarantees had been acquired is irrelevant to the but-for test. However, it is relevant to the NAI test because it bears upon the question of whether the loss of the deposits "flow[ed] directly from"[35] the solicitors' breach of duty. If the buyers would have lost their money anyway, the solicitors' breach of their custodian duty would have been neither a necessary nor sufficient condition for the loss. According to the facts in *Giambrone*, the loss of the deposits was completely attributable to the malpractice of the vendors and the involvement of the project in a suspected money laundering scheme.[36] These facts were sufficient

[30] *Giambrone* [2017] EWCA Civ 1193 at [48].
[31] *Giambrone* [2017] EWCA Civ 1193 at [47].
[32] *Auden McKenzie* [2019] EWCA Civ 2291.
[33] *Auden McKenzie* [2019] EWCA Civ 2291 at [44].
[34] *Auden McKenzie* [2019] EWCA Civ 2291 at [9].
[35] *AIB* [2015] A.C. 1503 at [135].
[36] *Giambrone* [2017] EWCA Civ 1193 at [29].

to constitute NAIs because the chain of causation between the solicitors' breach of duty and the claimants' loss of deposits was clearly broken.[37] To sum up, the claimants' loss of the deposits successfully passed the but-for test, but it failed the NAI test inherent in the *AIB* rule. If both tests had been given sufficient weight by Jackson LJ in *Giambrone*, the observation that followed should have been that the solicitors in question were not liable for any of the losses suffered by the claimant.

It is noteworthy that, in his Lordship's analysis of the solicitors' liability, Jackson LJ compared equitable compensation with the contractual measure of damages, asserting that "[t]his is a case where equitable compensation and contractual damages run in tandem".[38] Jackson LJ did not provide any reasons for this assertion; accordingly, it is hard to see how his Lordship reached this observation. Existing contract scholarship has widely acknowledged that contractual damage claims are generally upheld when a party's breach has *effectively* caused the loss suffered by the other party.[39] Here, the *effective cause* requirement functions in the same way as the NAI test. In *Giambrone*, the effective cause of the buyers' loss of deposits, as explained earlier, was the malpractice of the developers and the inherent risks associated with the illegality of the development project rather than the solicitors' breach of duty. Therefore, even if *Giambrone* was judged on a purely contractual basis, the solicitors should still not have been held liable for any of the loss of deposits suffered by the buyers.

The effect of the Giambrone decision

The part of the *AIB* rule that emphasises the significance of NAI considerations in the assessment of equitable compensation was cited with approval by Jackson LJ.[40] However, in applying the *AIB* rule, Jackson LJ ignored the NAI-related factors and drew his conclusion with exclusive reference to the but-for test. It is unclear whether Jackson LJ's misinterpretation of the *AIB* rule caused this inconsistency or whether Jackson LJ deliberately chose to exclude considerations of NAI for some unexpressed reasons. In any event, in cases involving misappropriation of trust assets, Jackson LJ's reasoning places *Giambrone* in a liminal position between the traditional accounting rule and the modern principles of equitable compensation as formulated in *Target* and *AIB*.

When a breach of trust includes unauthorised disbursement of trust funds, the traditional accounting rule lays a strict liability on the wrongdoing trustee, who is "liable to place the trust estate in the same position as it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter".[41] As Lewison J remarked in *Ultraframe (UK) Ltd v Fielding*, "The taking of an account is the means by which a beneficiary requires a trustee to justify his stewardship of trust property. The

[37] *Giambrone* [2017] EWCA Civ 1193 at [29].

[38] *Giambrone* [2017] EWCA Civ 1193 at [63].

[39] *Shell International Petroleum Co Ltd v Gibbs* [1982] Q.B. 946 at 995; [1982] 2 W.L.R. 745; *Scottish Power UK Plc v Talisman North Sea Ltd* [2016] EWHC 3569 (Comm) at [12]. See also A. Burrows, "Limitations on Compensation" in A. Burrows and E. Peel (eds), *Commercial Remedies: Current Issues and Problems* (Oxford: Oxford University Press, 2003), p.27; M. Chen-Wishart, *Contract Law* 6th edn (Oxford: Oxford University Press, 2018), pp.526–27; H.R. Gray and D. Thompson, "The Measure and Remoteness of Damages" (1953) 16(4) *Modern Law Review* 518, 519.

[40] *Auden McKenzie* [2019] EWCA Civ 2291 at [59].

[41] *Permanent Building Society (in liquidation) v Wheeler* (1994) 14 ACSR 109 at 163.

trustee must show what he has done with that property".[42] Nevertheless, to mitigate the harshness of the rule that trustees are liable to recover the full amount of misapplied trust funds,[43] Lord Browne-Wilkinson in *Target*, as well as Lord Toulson and Lord Reed in *AIB*, have recognised equitable compensation as the principal personal remedy for the unauthorised disposal of trust funds. The equitable compensation remedy admits issues of causation when assessing the quantum of a trustee's liability, though foreseeability and remoteness are still excluded. Simply put, the crucial difference between the traditional accounting rules and the principles of equitable compensation formulated under *AIB* lies in whether causation questions—i.e. the but-for and NAI tests—matter.

The above analysis shows that the assessment of compensation under *Giambrone* is less strict than it is under traditional accounting mechanisms insofar as causation is completely irrelevant in the latter context.[44] On the other hand, the assessment of compensation under *Giambrone* is stricter than it is under the *AIB* rule: whereas the former only involves the but-for test, the latter involves consideration of both the but-for and NAI tests. Jackson LJ's understanding of causation in *Giambrone* is not unique. It also finds resonance in the Australian High Court decision of *McCann v Switzerland Insurance Australia Ltd*,[45] where Hayne J stated that:[46]

> "regardless of whether the immediate cause of loss is the dishonesty or fraud of a third party, a fiduciary is bound to make good the loss to the trust estate which, but for the breach of fiduciary duty, would not have occurred. *That is the only relevant causal requirement. [T]here is no translation into this field of discourse of the doctrine of novus actus interveniens*."

In *Giambrone*, although Jackson LJ cited with approval Lord Reed's and Lord Toulson's statements in *AIB* regarding equitable compensation,[47] his reasoning in the assessment of the solicitors' liabilities—i.e. admitting the but-for test but excluding the NAI test (the simple but-for test)—is a marked deviation from the two-stage test under the *AIB* rule. Jackson LJ did not explain the rationale for this deviation, nor did he clarify the particular contexts under which the simple but-for test should replace the *AIB* rule's two-stage test when assessing a trustee's liability for the misapplication of trust funds. In a jurisdiction where formalist culture is predominant,[48] the ambiguities in the simple but-for test in *Giambrone* introduce

[42] *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1513]; [2006] F.S.R. 17. See also *Jervis v Harris* [1996] Ch. 195 at 203; [1996] 2 W.L.R. 220; *Lehman Brothers International (Europe) (In Administration), Re* [2009] EWHC 2141 (Ch) at [53]; S. Elliott, "Compensation Claims Against Trustees" PhD Thesis, Faculty of Law, Oxford University, 2013, 169; Turner, "Want of Causation as a Defence to Liability for Misapplication of Trust Assets" in Davies, Douglas and Goudkamp, *Defences in Equity* (2018), pp.156–57.

[43] According to Man and Lee, an implicit "commercialist pragmatism" appears to be the explanation for the decisions in *Target* and *AIB*: "The English abolition of the accounting rules—in particular, the falsification of account—is silently reforming the core obligation of trusteeship. More generally, as we argue here, it is symptomatic of a primacy of commercialist pragmatism in the Supreme Court's reasoning. Quite clearly, the Supreme Court's objective in *AIB* was to simplify the remedial rules for breach of trust". See Y. Man and J. Lee, "The Commercialisation of Equity" (2017) 37(4) *Legal Studies* 647, 657.

[44] Conaglen, "Equitable Compensation for Breach of Trust: Off Target" (2016) 40(1) *Melbourne University Law Review* 126, 139. See also *Jervis v Harris* [1996] Ch. 195 at 203; *Lehman Brothers International (Europe) (In Administration), Re* [2009] EWHC 2141 (Ch) at [53]; Elliott, "Compensation Claims Against Trustees" PhD Thesis, Faculty of Law, Oxford University, 2013, 169; Turner, "Want of Causation as a Defence to Liability for Misapplication of Trust Assets" in Davies, Douglas and Goudkamp, *Defences in Equity* (2018), pp.156–57.

[45] *McCann v Switzerland Insurance Australia Ltd* (2000) 20 3 C.L.R. 579.

[46] *McCann* (2000) 20 3 C.L.R. 579 at [135] (emphasis added).

[47] *Giambrone* [2017] EWCA Civ 1193 at [52]–[58].

[48] J.H. Baker, *An Introduction to English Legal History*, 5th edn (Oxford: Oxford University Press, 2019), p.60.

confusions into the English legal system. In this context, the following questions arise: Does *Giambrone* reinterpret or qualify the causation test under the *AIB* rule? If so, why did such a reinterpretation take place, and how should the simple but-for test formulated in *Giambrone* be applied? Absent clarifications of the confusions introduced by Jackson LJ, subsequent courts will struggle to answer these questions.

A Means to an End or an End in Themselves? Consultation and Dispensation for Fire Safety Works

Susan Bright*

Consultation; Dispensations; Fire precautions; Landlords' duties; Repairs; Residential tenancies; Service charges; Tenants' rights

Abstract

The post-Grenfell fire safety crisis in England and Wales has led to many expensive remediation projects. This article reports on applications made to dispense with the statutory consultation requirements for these major works. It finds that notwithstanding the open-ended statutory discretion given to tribunals, the Daejan case has narrowed down the approach to the point where unless leaseholders can demonstrate financial prejudice dispensation is granted as works are said to be urgent. Usually dispensation is unconditional, often there is little scrutiny of claims made by applicants, and sometimes tribunals are critical of the applicant's conduct. No longer is consultation protected as an 'end in itself', but it is simply a means to the end of (financial) consumer protection. It is argued that: discretion should involve the active exercise of discretion; and the value of consultation as an end in itself should be recognised, if only through conditions attached to prospective grants. As it is, the dial has shifted too far in favour of landlords.

1. Introduction

Since 1974, landlords proposing to carry out works to residential leasehold buildings have been required to consult with tenants[1] where the costs exceed a specified sum.[2] The statutory consultation provisions form part of the long series of "piecemeal consumer protection measures" designed to shelter leaseholders from abuses by landlords and provide "more control over their flat and environment".[3] It is still the landlord who calls the shots, but the consultation provisions provide

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[1] The word tenant is used in the legislation. This article uses "tenant" interchangeably with leaseholder.

[2] Housing Act 1974 s.124 inserted s.91A into the Housing Finance Act 1972. This was later amended and became the Housing Act 1980 Sch.19, then the Landlord and Tenant Act 1985 s.20. The current iteration is found in the Landlord and Tenant Act 1985 s.20, s.20ZA, and the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987).

[3] M. Davey, "Long Residential Leases: Past and Present" in S. Bright (ed), *Landlord and Tenant Law, Past Present and Future* (Oxford: Hart Publishing, 2006), p.149. See the whole chapter for a review of the long history of such measures.

some, albeit small, opportunity to feed into decisions about works proposed to their buildings. As Clarke notes, leaseholders "desire involvement in such diverse matters as consideration of the specification for the work, obtaining and acceptance of quotes, and the colour schemes to be adopted".[4]

The importance attached to the consultation requirements is evidenced by the fact that if the landlord fails to conduct the statutory consultation, it is prevented (in the current form of the consultation provisions) from recovering more than £250 from an individual tenant in relation to those works.[5] Seemingly, this provides a very strong incentive to comply with the requirements but the protection offered was seriously weakened by the Supreme Court decision in *Daejan Investment Ltd v Benson*.[6] Lord Neuberger said that the consultation requirements are a means to an end rather than an end in themselves.[7] He sees the provisions as playing a supporting role in achieving (only) the end goal of consumer protection secured by the Landlord and Tenant Act 1985 s.19, that is, protecting tenants from unreasonable service charges. An alternative vision, supported by the dissenting judgment of Lord Wilson, acknowledges that consultation is an important end in itself. This recognises that consultation has an inherent value. Furthermore, it is in keeping both with the tenor of the new building safety regime that promotes fuller engagement with leaseholders and residents,[8] and the thrust of contemporary government policy towards providing consumer protection to leaseholders.[9]

The different visions of the "end" of consultation affect the approach adopted in dispensation applications. From the start, there has been a power for tribunals[10] to dispense with the consultation requirements. This enables the landlord to go ahead with work without the risk of there being a cap on service charge recovery. The dispensation "escape route" is designed to enable works to go ahead where there is urgency, or to excuse minor breaches of the consultation provisions, and can be both prospective (in advance of the work) or retrospective (after the work has commenced or been completed). Originally the tribunal could grant dispensation "if satisfied that the landlord acted reasonably",[11] whereas the current law, in the Landlord and Tenant Act 1985 s.20ZA, provides it may do so "if satisfied that it is reasonable to dispense with the requirements".[12] Introducing these changes Ms Keeble, speaking for the Government, suggested that dispensation would be appropriate for either technical breaches in relation to the consultation requirements

[4] D. Clarke, "Occupying Cheek by Jowl" in S. Bright and J. Dewar (eds), *Land Law, Themes and Perspectives* (Oxford: OUP, 1998), p.395. See also frustrations expressed by leaseholders about the inadequacy of voice during a major works programme in Oxford: S. Bright, "Tower block refurbishment, flats, and understandings of ownership" (2021) 48 J.L.S. 524, 531–535.

[5] Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) reg.6.

[6] Barry Gardiner MP recently claimed "the freeholder … successfully neutered key provisions on major works" Public Bill Committee, *Leasehold and Freehold Reform Bill* (Tenth sitting), 30 January 2024, col.467.

[7] *Daejan Investment Ltd v Benson* [2013] UKSC 14; [2013] 1 W.L.R. 854 at [46].

[8] See National Housing Federation, "Engaging with residents on building safety" March 2023 available at: *https://www.housing.org.uk/globalassets/files/building-safety/engaging-with-residents-on-building-safety---briefing-for-housing-associations.pdf.*

[9] See H. Carr et al, "Can a Consumerist Model of Law Reform Solve the Problems of Leasehold Tenure?" in N. Mrockova, A. Nair and L. Rostill (eds), *Modern Studies in Property Law* Vol.12 (Oxford: Hart Publishing, 2023), Ch.9. See also Leasehold and Freehold Reform Bill 2023–24.

[10] Prior to 2003, it was a court that could dispense with the requirements in proceedings relating to a service charge.

[11] Housing Act 1980 Sch.19 para.6.

[12] Landlord and Tenant Act 1985 s.20ZA(1).

or in the case of emergency.[13] Dispensation may be granted on such terms as the Tribunal thinks fit.[14]

The consequence of treating consultation as a means to an end in *Daejan* is that dispensation will be granted unless the leaseholders can show that the extent, quality or cost of the works is likely to be impacted by the failure to comply fully with the statutory provisions.[15] To do so, they will have to produce evidence that they have suffered a "relevant prejudice" as a result of the failure to consult, albeit tribunals are urged to "adopt a sympathetic … attitude to the tenants on that issue".[16] Although *Daejan* was a case involving retrospective dispensation, the same approach is also taken for applications for dispensation prior to the works being undertaken.

After summarising the consultation provisions in the next section of this article, Pt 3 illustrates that tribunals prior to *Daejan* recognised the importance of the opportunity provided by consultation for transparency, accountability and voice. The dial shifted when the majority of the Supreme Court in *Daejan* treated consultation as merely a means to the narrow end of consumer protection focused around cost. The dispensation jurisdiction could have been developed to buttress leaseholder involvement in important decisions affecting their homes and investments, but this opportunity was lost with *Daejan*.

This article illustrates the impact of the *Daejan* decision on dispensation applications in fire safety cases. The investigations conducted to blocks of flats following the Grenfell Tower fire have led to thousands of buildings requiring both interim fire safety measures, such as the fire patrols known as "waking watch" and the installation of fire alarm systems, as well as full remediation projects. The interim measures are likely to be particularly urgent but identifying and implementing a programme of remediation works will often take years. These remediation projects are generally hugely expensive (millions of pounds), and technically very complex. They can require the replacement of cladding systems, insulation materials and timber balconies, and as well as addressing multiple failures with internal fire breaks. There is likely to be significant disruption to residents during the works, as well as bills for tens of thousands of pounds for those leaseholders not given protection by the Building Safety Act 2022 Sch.8. Furthermore, the full extent of work required is sometimes only apparent once it has commenced and new defects are revealed. Some funding has been made available by the Government to assist with cladding replacement (but not wider remediation works), and in the early iteration of the Building Safety Fund (BSF) there were very strict funding deadlines which spawned many dispensation applications.[17]

Part 4 of the article summarises trends from a review of First-tier Tribunal (FtT) cases involving dispensation applications for fire safety measures, as well as Upper Tribunal cases. The outcome can be simply summarised: dispensation is invariably granted as the works are said to be urgent and there is a risk to the safety of

[13] Hansard, HC vol.381 col.715 (11 March 2002).
[14] *Daejan* [2013] 1 W.L.R. 854 at [54].
[15] *Daejan* [2013] 1 W.L.R. 854 at [45].
[16] *Daejan* [2013] 1 W.L.R. 854 at [73].
[17] e.g. MAN/00BN/LDC/2021/0074; MAN/00BN/LDC/2021/0046. The funding restrictions were less rigid in later schemes.

occupiers. In most cases, the tenants do not participate in the application which means that FtTs grant dispensation unconditionally. When tenants do object, they struggle to produce evidence of "relevant prejudice". Part 5 looks at the FtTs' approach to particular issues: urgency, the conditional grant of dispensation, waking watch and design and build contracts.

The consultation and dispensation provisions illustrate the complexity involved in managing blocks of flats. On the one hand, efficient management requires that the decision maker (freeholder, landlord or management company) is able to get on with the business of managing. Leaseholders will not speak with a united voice; they will have different preferences, different financial resources and whilst some may be well informed, others may have little understanding of choices. Taking on board multiple suggestions and objections from leaseholders may not be practicable, and in cases where emergency work is necessary the ability to press on must take priority. Nonetheless, in the conclusion it is suggested that the dial has shifted too far. There is sometimes little scrutiny of claims made by applicants for dispensation, and the low level of leaseholder participation in applications removes the opportunity for tribunals to attach conditions that promote ongoing leaseholder engagement. In practice, the outcome of dispensation applications is far from the consumerist framing of residential leasehold law supported by the government and built around informed choice, transparency and fairness.[18]

2. The consultation requirements

The Landlord and Tenant Act 1985 s.20 does not contain a duty to consult per se but provides that if a landlord fails to consult in relation to "qualifying works" or a "qualifying long term agreement" (QLTA), the amount of service charge that can be recovered is limited. In relation to works, an individual leaseholder cannot then be required to pay more than £250,[19] and in relation to a QLTA, the limit is £100 per year.[20] Section 20ZA defines both terms:

> "(2) In section 20 and this section—
>
> 'qualifying works' means works on a building or any other premises, and
>
> 'qualifying long term agreement' means … an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months."

The £250 threshold means that works that are relatively minor can be carried out without consultation; but if there is a "single set of works" that will exceed it then consultation is necessary.[21] Most fire safety projects involve contracts for "works on a building" and will inevitably cross the financial threshold. The QLTA is more relevant when a landlord enters into a long-term contract for management

[18] See Carr, "Can a Consumerist Model of Law Reform Solve the Problems of Leasehold Tenure?" in Mrockova, Nair and Rostill, Modern Studies in Property Law Vol 12 (2023), p.202.

[19] Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) reg.6.

[20] Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) reg.4.

[21] *Phillips v Francis* [2014] EWCA Civ 1395; [2015] 1 W.L.R. 741 at [36]. What constitutes a single set of works is "to be determined in a commonsense way".

services.[22] Presumably, the intention is that between them these definitions are meant to catch all contracts related to servicing and maintaining the building that will result in significant service charge bills for leaseholders.

The detailed consultation requirements for qualifying works are set out in the Service Charges (Consultation Requirements) (England) Regulations (the 2003 Regulations), outlined by Lord Neuberger in *Daejan Investments* at [12]:

> "Stage 1: *Notice of intention to do the works* Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.[23]
>
> Stage 2: *Estimates* The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.
>
> Stage 3: *Notices about Estimates* The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.
>
> Stage 4: *Notification of reasons* Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected."

These requirements may be "potentially time consuming, expensive and slow";[24] hence the need to provide the dispensation route where the works cannot wait.

3. Dispensation, prejudice and the "end" of consultation

Under the Landlord and Tenant Act 1985 s.20ZA, the tribunal is given a very broad discretion to grant dispensation "if satisfied that it is reasonable" to do so. This enables there to be a wide deliberative decision taken by the tribunal, enabling it to weigh multiple and potentially conflicting factors against one another. Indeed, the width of the criterion is remarked on by Lord Wilson (dissenting) in *Daejan*.[25] In practice, however, tribunals have focused on whether there is "prejudice" to tenants from a failure to consult, notwithstanding that there is no reference to prejudice in the wording of the statute. Prejudice is, however, capable of being understood broadly, reflecting the fact that consultation can serve multiple,

[22] e.g. *Paddington Basin Developments Ltd v West End Quay Estate Management Ltd* [2010] EWHC 833 (Ch); [2010] 1 W.L.R. 2735; *Southwark LBC v Leaseholders of Southwark LBC* [2011] UKUT 438 (LC). As Carr points out, with QLTAs entered into by social landlords the leaseholders have "a minimum input into decisions about repair and refurbishment despite the serious financial outlay that may be required of them". H. Carr, "The Right to Buy, the Leaseholder, and the Impoverishment of Ownership" (2011) 38 J.L.S. 519, 535.

[23] Service Charges (Consultation Requirements) (England) Regulations (SI 2003/1987) Sch.4 Pt 2 para.10 (observations on works) and para.12 (observations on estimates). In practice, however, this is a light-touch requirement.

[24] *Phillips v Francis* [2014] EWCA Civ 1395; [2015] 1 W.L.R. 741 per Lord Dyson MR at [62]. See also comments on the supply of residential property management services in England and Wales in Competition & Markets Authority, "Residential property management services: A market study" available at: *https://assets.publishing.service.gov.uk/media/547d99b8e5274a42900001e1/Property_management_market_study.pdf*, Appendix C p.69 para.75.

[25] *Daejan* [2013] 1 W.L.R. 854 at [97].

overlapping, purposes. Over time though, it has become narrowly construed. Post-*Daejan*, the "relevant" prejudice now taken into account appears to be limited to "financial' prejudice".[26] This is far from the wide discretion mandated by the wording of s.20ZA and changes consultation from "what was a freestanding right designed to address information asymmetries and promote transparency, to one that is rebuttable".[27]

Before *Daejan*, tribunals adopted a wider approach to the exercise of discretion, recognising that consultation performs the important role of providing information and "protecting tenants from unexpected costs from major works".[28] Being given early notice aids financial planning and alerts leaseholders of the need to save for "the serious financial outlay that may be required of them".[29] Although this does not feature strongly in tribunal decisions, cases pre-*Daejan* refer to the fact that consultation provisions also ensure a "degree of transparency and accountability", recognising leaseholders concerns that they otherwise "may not know what is going on or what is being done, ultimately at their expense".[30] This puts communication at the heart of the measures. In effect, it gives a "heads-up" to the leaseholders so that they know both about the work, and that there will be big bills coming.

The 2003 Regulations also give tenants the important right to participate, acknowledging the inherent value of consultation by giving tenants a voice. They can nominate a contractor and make observations, and the "landlord shall have regard" to those observations. In practice, however, this appears to require little more than that the landlord reads and considers them, and provide a summary of observations and its responses to them to the leaseholders.[31] As Lord Neuberger commented in *Daejan*, "The requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are done by, and what amount is to be paid for them".[32]

A failure to consult, unless minor or technical, is something that a tribunal (pre-*Daejan*) would take into account in considering whether to grant dispensation even where there was no evidence of resulting financial prejudice to the tenants. Lord Wilson says in *Daejan* (dissenting) that tribunals should be able to "weigh the gravity of the non-compliance" in considering whether to dispense with the

[26] M. Loveday et al, *Service Charges and Management*, 5th ed (London: Tanfield Chambers, 2022), [11.55].

[27] Carr, "Can a Consumerist Model of Law Reform Solve the Problems of Leasehold Tenure?" in Mrockova, Nair and Rostill, *Modern Studies in Property Law* Vol 12 (2023), p.199.

[28] *Phillips v Francis* [2014] EWCA Civ 1395 (Lord Dyson MR). The "mischief" of tenants finding themselves faced with unexpected bills is also said to lie behind the enactment of the Landlord and Tenant Act 1985 s.20B(1): *No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2021] EWCA Civ 1119 at [21]; [2022] H.L.R. 38. Under s.20B(1), the tenant "shall not be liable to pay" service charges where the costs were incurred more than 18 months before the demand unless written notice of them has been given within that period (s.20B(2)).

[29] Carr, "The Right to Buy, the Leaseholder, and the Impoverishment of Ownership" (2011) 38 J.L.S. 519, 535. In a study of the refurbishment of tower blocks in Oxford, leaseholders complained that bills around £50k arrived out of the blue: S. Bright, "Tower block refurbishment, flats, and understandings of ownership" (2021) 48 J.L.S. 524.

[30] *Martin v Maryland Estates Ltd* (2000) 32 H.L.R. 116; [1999] 2 E.G.L.R. 53, Robert Walker LJ. See also *Paddington Basin* [2010] EWHC 833 (Ch) at [26].

[31] Remarking on the pre-2003 provisions operating in the public sector context, Cooke J said that "[T]here is no machinery provided for the landlord to communicate the fact that he has considered the tenants' observations … [A]ll the landlord has to say is 'I read his letter. I considered it, I rejected it, I started work next morning' … One is left wondering about the utility or purpose of this": *Haringey v Bell*, unreported, 6 December 2004, Central London Court at [36]. Since then consultation requirements have changed to require two estimates, landlords must invite observations on estimates and works and they must have regard to any observations received. Although there is much more detail in the 2003 Regulations it remains the case that the landlord only has to "have regard to those observations".

[32] *Daejan* [2013] 1 W.L.R. 854 at [46].

consultation requirement.[33] In *Camden LBC v Leaseholders of 30–40 Grafton Way*, the Lands Tribunal upheld the LVT's refusal to grant dispensation even though the financial impact of refusal was huge: the landlord authority would be limited to recovering £9,250, as compared with the £504,200.71 figure recoverable if dispensation was granted.[34] The Lands Tribunal said that the failure to comply with the stage 2 requirements was a "gross error, which manifestly prejudiced the leaseholders in a fundamental way". Counsel for the leaseholders did not identify any particular "financial prejudice" but had argued that the leaseholders would have wanted to examine estimates to ensure value for money and perhaps identify areas where quality might be improved. The Lands Tribunal agreed that although it was a "matter of speculation" how much leaseholders would have wished to examine the tenders and make observations on them, the denial of this opportunity "amounted to significant prejudice".[35] Commenting on the case, Carr says it recognises that "consultation is an important 'good' in its own right, and failure to provide it results in significant prejudice".[36] Sissons also suggests it supports the idea that "procedural prejudice" can constitute relevant prejudice "even in the absence of any evidence that compliance with consultation procedures would have made a difference to the outcome (substantive prejudice)".

Daejan changes the approach. Lord Neuberger rejects the idea that consultation is important for its own sake: "The sections are not concerned with public law issues or public duties, so there is no justification for treating consultation or transparency as appropriate ends in themselves."[37] Instead, they are seen as being in place solely to support the policy reflected in the Landlord and Tenant Act 1985 s.19 which is to ensure that leaseholders do not pay more than is reasonable for necessary works and services which are provided to a reasonable standard.[38] With *Daejan*, the focus turned to securing reasonable substantive outcomes, ensuring that the works/services are appropriate and provide value for money. This means that the focus of the tribunal when considering whether to grant dispensation is "the extent, if any, to which the tenants were prejudiced" in respect of the extent, quality or costs of the works "by the failure of the landlord to comply with the Requirements".[39] Furthermore, the factual burden of identifying relevant prejudice is on the leaseholders, although their arguments may be viewed "sympathetically".[40] The inevitable consequence is that dispensation will be granted unless tenants oppose the application and provide evidence of relevant (financial) prejudice.

Daejan also confirmed that dispensation can be granted on conditions. For example, prospective dispensation could be given for urgent work on the condition that some form of consultation takes place.[41] Or where an identifiable cost can be ascribed to a specific failure it may be appropriate to grant dispensation on condition

[33] *Daejan* [2013] 1 W.L.R. 854 at [111].
[34] *Camden LBC v Leaseholders of 30–40 Grafton Way* LRX/185/2006 [2008] 6 WLUK 732, and remarking that "we cannot accept … that the particular effects on the landlord or the tenant in the case in question are properly to be taken into account" [34].
[35] *Camden LBC v Leaseholders of 30–40 Grafton Way* LRX/185/2006 at [35].
[36] Carr, "The Right to Buy, the Leaseholder, and the Impoverishment of Ownership" (2011) 38 J.L.S. 519, 536.
[37] *Daejan* [2013] 1 W.L.R. 854 at [52].
[38] *Daejan* [2013] 1 W.L.R. 854 at [42].
[39] *Daejan* [2013] 1 W.L.R. 854 at [44].
[40] *Daejan* [2013] 1 W.L.R. 854 at [67].
[41] *Daejan* [2013] 1 W.L.R. 854 at [56].

that the sum recoverable from leaseholders is reduced by this amount.[42] Dispensation may be given on condition that the landlord pays the leaseholders' costs involved in the s.20ZA application. In this particular decision, the Supreme Court said that dispensation should be granted on condition that Daejan (the landlord) pay the respondents costs in connection with the application, and that their aggregate liability to pay for the works should be reduced by £50,000 (a deduction that Daejan had proposed). As will be suggested below, even this opportunity to protect leaseholders from legal costs has been weakened in fire safety cases by the recent Upper Tribunal decision of *Adriatic Land 5 Ltd v the Long Leaseholders at Hippersley Point*.[43]

4. Dispensation and fire safety: overall trends

In all of the fire safety cases reviewed for this article,[44] dispensation was granted, at least in part,[45] and, with a few exceptions, the overwhelming majority were granted unconditionally even when the FtT was critical of the way in which the applicant had managed things.[46] The cases include both prospective and retrospective applications covering a broad range of work such as the removal of panels for testing; undertaking fire risk assessments and surveys; the installation of fire alarms, fire doors, and fire resistant materials; hiring a Waking Watch; the replacement of combustible timber balconies; and major remediation projects involving cladding replacement and addressing compartmentation issues.

Although in many cases, the FtT decision sets out the relevant principles of law with express reference to the *Daejan* decision, this is not always the case. In several cases, there are short extracts from s.20 and 20ZA but no expansion of the legal principles.[47]

Often there is a paper determination without a hearing and the reasoning in most decisions tends to be brief. The four-page decision in *Burton Place, Ellesmere St* gives an illustration: it contains a summary of the grounds and submissions, extracts from the legislation, and then a short section on the tribunal's conclusions and reasons.[48] The pattern of reasons given there is familiar across many cases: the work is urgent and necessary for grant funding, the defects have an obvious and significant potential to impact on the health and safety of occupiers and visitors, leaseholders are aware of the application, and the "urgency outweighs any identified prejudice".[49] Additional factors featuring in other cases are the need for the work to be done quickly in order to bring the ongoing costs of waking watch to an end,

[42] *Daejan* [2013] 1 W.L.R. 854 at [57]; cf. *Marshall v Northumberland and Durham Property Trust Ltd* [2022] UKUT 92 (LC); [2022] 2 P. & C.R. DG15.

[43] *Adriatic Land 5 Ltd v the Long Leaseholders at Hippersley Point* [2023] UKUT 271 (LC). Permission has been granted to appeal this decision to the Court of Appeal.

[44] Considerably in excess of 100.

[45] e.g. in *The Lumiere Building* LON/00BB/LDC/2019/0099 dispensation was granted for the removal of cladding but not for weatherproofing work as there was "no evidence … as to proposed methods or costs or length of project or management of the weatherproofing of the building (to name but a selection of the sort of issues on which we would expect evidence—preferably expert—to be provided, even if preliminary)".

[46] e.g. *The Lumiere Building* LON/00BB/LDC/2019/0099; *Cartier House, Block H* MAN/00DA/LDC/2021/0055.

[47] e.g. in *Dolphin Court, Woodlands* LON/ooAC/LDC/2017/0128 and *Burton Place, Ellesmere St* MAN/OOBN/LDC/2021/0041 there is a brief reference to prejudice but no expansion on the relevant legal principles.

[48] *Burton Place, Ellesmere St* MAN/OOBN/LDC/2021/0041.

[49] *Burton Place, Ellesmere St* MAN/OOBN/LDC/2021/0041 at [20]–[21].

the fact that flats cannot be sold until the works are completed, and risks that the building insurance may be withdrawn.

Many of these FtT decisions have a formulaic feel, with no sense that the Tribunal has needed to grapple with weighing competing factors to determine if dispensation is reasonable.[50] This is the inevitable result of the life-critical issues usually involved as well as the fact that *Daejan* requires leaseholders to produce evidence of prejudice. Even when the consultation by a major public sector landlord involved "several procedural flaws" in the context of a project costing more than £4million (the details of which are not specified in the decision) dispensation was granted given the absence of proven substantive prejudice.[51]

Mostly leaseholders do not object to the application,[52] and when they do they are often unaware of what is required of them, so that instead of showing prejudice they might, for example, complain about how unfair it is for them to have to pay for the works. When leaseholders do offer evidence of prejudice it is usually in the form of not having had the opportunity to obtain alternative estimates which may be at a lower price or being unable to express their opinions in the consultation process. But this does not stop Tribunals granting dispensation, and they often remark that leaseholders have had informal opportunities to engage with the landlord. The practical impossibility of leaseholders evidencing prejudice is sometimes referred to. For example, in *Hippersley Point*, the FtT noted that companies providing re-cladding services are likely to be overwhelmed with enquiries and leaseholders seeking alternative estimates would suffer the same problems as applicants do.[53] In *X1 The Terrace*, it was noted that the leaseholders "would face significant challenges in devising an alternative strategy to that of the Applicant, given that the Applicant is likely to have significantly greater expertise and/or resources to call upon, let alone legal responsibilities, when formulating its response to the fire safety issues; but such is often the nature of complex structural works".[54]

What is clear from this study of FtT decisions is that provided the works are necessary, and urgent, dispensation will be given, *even if* there appeared to have been sufficient time to conduct a s.20 consultation.[55] This sense of urgency, and what is potentially at stake if works do not progress, explains why the FtT itself can feel under pressure to grant dispensation.[56] In one of the most surprising cases, the FtT granted dispensation even when there was very little information supplied by the applicant. In *Island Apartments*, the applicant said it was unable to explain the extent of the necessary remedial work until the cladding was removed, and so there was no indicative costing.[57] The developer, Taylor Wimpey, had committed to part fund the work but there was no documentation supplied to the FtT to support this, there was no copy of the EWS1 that had identified the fire safety defects, no

[50] There are exceptional cases where there is more detailed engagement by the FtT. e.g. *53 Whytecliffe South Road* LON/00AH/LDC/2020/0111.

[51] *Bliss House and Purcell House* LON/ooAK/LDC/2023/0164. The landlord is Enfield LBC.

[52] Although in some cases there is significant leaseholder engagement, e.g. *The Lumiere Building* LON/ooBB/LDC/2019/0099.

[53] *Adriatic Land* [2023] UKUT 271 (LC) at [26].

[54] *X1 The Terrace* MAN/00BY/LDC/2021/0086 at [43].

[55] e.g. *Land at St Georges Close* MAN/00CG/LDC/2018/0019 MAN/00CG/LSC/2018/0033.

[56] See *The Lumiere Building* LON/ooBB/LDC/2019/0099 at [5].

[57] *Island Apartments* LON/00AU/LDC/2021/0006. See also *Cartier House, Block H* MAN/00DA/LDC/2021/0055; and *The Lumiere Building* LON/ooBB/LDC/2019/0099.

works specification and no budget costs. But the FtT accepted that the works were urgent and as there were no leaseholder objections, and therefore no evidence of prejudice, dispensation was granted, not even subject to conditions. There are even cases where "prejudice" is not expressly mentioned by the FtT but dispensation is granted because the works are "extremely urgent".[58]

Dispensation is also given even if, unusually, the leaseholders argue that there is potential financial prejudice from the failure to consult. This is shown in *52–58 Commercial Road*.[59] The applicants chose not to consult due to urgency and their belief that government funding would mean that the leaseholders did not have to pay (meaning that the absence of consultation would cause no prejudice). However, 96 of the 125 flats were owned by two companies, and their remediation contributions would not in fact be covered by the government funding. They therefore opposed the application to dispense with the consultation requirements, raising various objections. First, they said that they had not been properly consulted; the FtT's response is to note that the "whole point of s20ZA is that consultation requirements are dispensed with" and in any event, there had been lots of engagement. The main objection from the tenants was, however, that the applicants had chosen a more expensive replacement, i.e. "the alleged potential prejudice is based purely and simply on financial grounds"[60] (which is surely the "end" that Lord Neuberger had in mind). However, the tenders that had been produced to evidence prejudice were not comparable to the applicants, and therefore the Tribunal did not have "to consider whether financial loss alone is a permissible ground for pleading prejudice".[61] This is a peculiar remark because *Daejan* requires tribunals to focus on financial prejudice, and also says that tribunals should be sympathetic to points that tenants raise. Yet the FtT in *52–58 Commercial Road* said that any remedy would be under s.27A which is the route to arguing that the charge is not reasonable under s.19. This is in keeping with Lord Neuberger's remarks that s.20 is a means to an end, not an end in itself. When granting dispensation in *52–58 Commercial Road*, the FtT noted that delay could put at risk the government funding that would benefit the owner-occupier tenants, and those risks are "unconscionable and outweigh any potential financial detriment suffered by the Opposing Respondents".[62]

The next section considers particular issues that arise in the cases.

5. Dispensation and fire safety: particular issues

Urgency

As noted previously, the urgency of action has always been acknowledged as a reason why dispensation may be necessary. In fire safety cases there is often

[58] e.g. *604 Luminere Apartments* LON/OOBJ/LDC/2020/0131 at [9]. See also St *Francis Tower* CAM/ 42UWLDC/ 2018/0015; *13 Atkins Square* LON/00AM/LDC/2020/0095.

[59] *52–58 Commercial Road* LON/00BG/LDC/2020/0245. See also *Bracken House* MAN/00BN/LDC/2020/0055: leaseholders claimed that there were serious flaws in the approach taken to the works, the landlord had failed to consider a range of alternative construction methods and materials, and the price was "extremely high and must therefore be considered innately prejudicial to the leaseholders"; but the FtT said that evidence of actual relevant prejudice was, "at best, very weak".

[60] *52–58 Commercial Road* LON/00BG/LDC/2020/0245 at [15].

[61] *52–58 Commercial Road* LON/00BG/LDC/2020/0245 at [19].

[62] *52–58 Commercial Road* LON/00BG/LDC/2020/0245 at [22].

immediacy, linked to the underlying fear for the safety of residents, which means that there is no time to consult. For example, in *Safford Heights*, the local authority and London Fire Brigade inspected the block of flats on 8 July 2019, and required urgent measures to be taken.[63] Most of the work was done that month, and further fire alarm sounders were installed a few days later. In granting dispensation, the FtT noted that there was insufficient time for full consultation which "would have taken 3 months or longer". Likewise, in *Empress Heights*, the landlord had applied in June 2020 for funding under the Government's BSF and the leaseholders were kept up to date with the progress of the application.[64] It received confirmation that the full application for £11 million was successful on 10 January 2022, but the back stop date for commencing works to comply with the funding agreement was 28 February 2022. Unsurprisingly, the dispensation application made on 26 January 2022 was granted unconditionally. The tight timetable imposed by the BSF comes up frequently in decisions. In other cases, proceeding speedily will enable costs to be reduced. Dispensation is therefore in the interests of the leaseholders, as in *Holding & Management (Solitaire) Ltd v Leaseholders of Sovereign View*, where the application was for the installation of a fire alarm system to enable the landlord to dispense with the (expensive) waking watch.[65]

It is not always the case, however, that there is such an immediate threat that consultation is impossible. After all, where the Fire and Rescue Service has not deemed the risks sufficiently grave that evacuation is necessary the building is treated as "safe enough" for the time being. Complex remediation projects take considerable time to plan and commence. Often the timescale does provide sufficient time to consult leaseholders but tribunals tend to take the applicant's case for urgency and the impossibility of consultation at face value. Given that unopposed applications (and sometimes opposed ones) will often take the form of paper determinations there is no opportunity to question the applicant's assertions. The Upper Tribunal in *Marshall v Northumberland and Durham Property Trust Ltd* has recently emphasised the need for rigorous analysis, even when urgency is involved.[66] This was not a fire safety case, and, importantly, the dispensation was opposed by one of the leaseholders. Commenting on the lower decision, the Upper Tribunal noted that the key failing by the FtT in granting unconditional dispensation was that the urgency of the situation had meant that they gave insufficient consideration to the question of prejudice to leaseholders.[67] The FtT should have systematically identified the steps which the landlord had taken and those which it had omitted and for which it required dispensation. The FtT did not ask itself in terms what was the consequence of those steps not having been complied with. The FtT did not say whether it considered the objecting leaseholder, or any other, had been caused prejudice by the failure of consultation. According to the Upper Tribunal, each of these is a serious omission. Few FtT decisions involving fire safety adopt this kind of step by step analysis.

[63] *Safford Heights* LON/00AG/LDC/2019/0120.
[64] *Empress Heights* CHI/00MS/LDC/2022/0009.
[65] *Holding & Management (Solitaire) Ltd v Leaseholders of Sovereign View* [2023] UKUT 174 (LC) at [7], [24]; the issues on appeal related to the conditions attached to the grant of dispensation.
[66] *Marshall* [2022] UKUT 92 (LC).
[67] *Daejan* [2013] 1 W.L.R. 854 at [60-61].

Conditional dispensation

In *Daejan*, Lord Neuberger explained that the FtT can impose conditions provided that "any such terms are appropriate in their nature and their effect".[68] In effect, the FtT decides that it is only "reasonable" to grant dispensation on the basis that the landlord accepts certain conditions. This is an open-ended discretion, turning on an evaluation of reasonableness.

Given that most cases are unopposed there are, however, relatively few that involve the imposition of conditions. It is obvious that the applicant is highly unlikely to suggest any conditions. Nor do tribunals propose conditions on their own initiative; were they do to so, the parties would have to be given the opportunity to comment on them. As conditions will be attached only if requested by leaseholders this presupposes they have a degree of knowledge and engagement with the process and/or legal representation.[69] Furthermore, as it is in practice impossible to prove financial prejudice in fire safety cases there do not appear to be any decisions in which the costs of the works that can be charged to the leaseholders is reduced, unlike, for example, in *Daejan* itself, where a £50,000 deduction was required. In the recent (non-fire safety) case of *Marshall*, the Upper Tribunal capped the amount of the service charge to reflect the possible lower price that might have been agreed had there been an opportunity to suggest an alternative contractor and thereby create a more competitive environment.[70]

Where conditions are imposed, however, they do provide the opportunity to protect leaseholders from the consequences of the failure to consult. In some decisions, a condition is imposed that supports the idea of consultation (or engagement) as an end in itself. In *Cardinal Lofts*, this included a requirement to provide leaseholders with the BSF portal code, a reasonable summary of steps taken to recover costs from any third party, and to use reasonable endeavours to provide updates in relation to these matters and the progress of the works.[71] In *Bracken House*, the conditions also required that, "if reasonably practicable", leaseholders should be able to make comments on the final specification and contract price/terms which the landlord should have regard to.[72]

There are also several FtT cases in which the landlord has been prevented from recovering its costs in connection with the dispensation application from the leaseholders (either through a "costs condition" or a s.20C order) and/or required to pay the leaseholder's costs in opposing the application.[73] These may, however, now need to be approached differently in the light of a recent Upper Tribunal decision, *Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point*. The FtT had imposed a condition prohibiting the landlord from recovering its costs from

[68] *Daejan* [2013] 1 W.L.R. 854 at [54].

[69] In both *Cardinal Lofts* CAM/42UD/LDC/2021/0040 and *Bracken House* MAN/00BN/LDC/2020/0055, the leaseholders had solicitors engaged in discussion of the conditions.

[70] *Marshall* [2022] UKUT 92 (LC).

[71] *Cardinal Lofts* CAM/42UD/LDC/2021/0040. See also *Melia House* MAN/00BN/LDC/2021/0084 where the landlord was required to take reasonable steps to keep leaseholders fully and properly informed of progress.

[72] *Bracken House* MAN/00BN/LDC/2020/0055. See also *The Lumiere Building* LON/00BB/LDC/2019/0099 (detailed methods statements to be provided, plus contact details of a professional involved with the project).

[73] e.g. *Cardinal Lofts* CAM/42UD/LDC/2021/0040 (a s.20C order, and payment of the leaseholders' legal costs); *Bracken House* MAN/00BN/LDC/2020/0055 (payment of legal costs and the costs of an expert report); *Sesame Apartments* LON/ooBJ/LDC/2020/0234 P. In *146 Midland Road* CAM/ooKA/LDC/2020/0029, where the FtT considered that there had been sufficient time to consult, dispensation was conditional on the landlord meeting the leaseholders' costs of obtaining professional advice in any future challenge to the reasonableness of the service charge.

the leaseholders but the Upper Tribunal held that for both procedural and substantive reasons the FtT had been wrong to do so.[74] The procedural reasons speak to due process concerns, particularly that parties must have the opportunity to make submissions on the imposition of conditions, but they also touch on substantive issues about the exercise of discretion. Although, per *Daejan*, the FtT is to decide what is appropriate, this will now require it to take specific account of the impact of the Building Safety Act 2022 on the landlord's ability to recover costs from leaseholders protected by Sch.8 of the Act, and failure to do so will be a procedural flaw.[75]

Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point also makes it less likely that FtTs will impose costs conditions in the future. In relation to a condition requiring the landlord to meet the leaseholders' costs in connection with dispensation applications, Lord Neuberger provided a steer in *Daejan* by drawing an analogy between dispensation and the grant of relief from forfeiture on terms. In relief from forfeiture cases, the tenant (in breach) is seeking the indulgence of the court and the court may therefore require the tenant to pay the landlord's costs. In dispensation cases, the landlord is seeking to avoid the statutory cap imposed if there is no consultation; hence, the Supreme Court in *Daejan* held that as the landlord was seeking an indulgence it had to pay the leaseholders' reasonable costs in connection with their participation in the dispensation application. The FtT in *Adriatic Land* drew on this approach as it explained that the reason for preventing the landlord from being able to recover its costs from the leaseholders is that dispensation is "essentially a forbearance by the Tribunal", and it would be unfair for the landlord to recover its costs from the leaseholders in this instance. The Upper Tribunal, however, distinguishes the *Daejan* approach from fire safety cases in which the landlord is behaving responsibly.[76] Dispensation here was not "properly described as a forbearance": the landlord was "about as blameless as it could be" and was "not seeking to avoid its responsibilities". Nor was it unfair for the landlord to recover its costs as they "might legitimately be described as essential expenditure for the benefit of the Building and the safety of the Respondents". Presumably, this would apply equally to a condition relating to recovery of landlord costs (as in *Adriatic Land*) as one that requires the landlord to pay the leaseholders' costs (as in *Daejan*; indeed it is arguable a higher justification is needed to require the landlord to pay the costs of others).

Clearly, the fire safety context and the perceived responsible behaviour of the landlord is uppermost in the judge's mind in *Adriatic Land*. This echoes the approach in another Upper Tribunal case, *Holding & Management (Solitaire) Ltd v Leaseholders of Sovereign View*, which likewise set aside a FtT condition preventing the landlord from recovering its own costs, and again treats the dispensation not as an "indulgence" but as sensible and in everyone's interests.[77]

[74] *Adriatic Land* [2023] UKUT 271 (LC). Permission has been granted to appeal this decision to the Court of Appeal.

[75] *Adriatic Land* [2023] UKUT 271 (LC)).

[76] For a discussion on whether good/bad landlord behaviour is a useful test, see S. Bright, "Costs Conditions on Dispensation, and the (Non)Payability of pre-2022 Act costs: Part 1—Costs Condition" Faculty of Law Blogs/University of Oxford, 30 November 2023 available at: *https://blogs.law.ox.ac.uk/housing-after-grenfell-blog/blog-post/2023/11/costs-conditions-dispensation-and-nonpayability-pre* [Accessed 13 December 2023].

[77] *Sovereign View* [2023] UKUT 174 (LC) at [30].

There will be situations in which it is appropriate for the landlord's application costs to be paid by the leaseholders. This might be if there is an immediate threat or problem that must be fixed in a timeframe that makes full consultation impossible. In such a context it is, indeed, inapt to think of the dispensation application as an indulgence as the landlord is left with no choice. Or it may be that delay will lead to mounting costs to the leaseholders, as in *Holding and Management* where the application was for the installation of a fire alarm system to enable the landlord to dispense with a waking watch. There is, however, a risk that readily granting dispensation without attaching costs conditions makes it easy for landlords to avoid consulting leaseholders and engaging with their observations etc. Although the s.20 consultation process is time consuming (with leaseholders being given time to submit observations etc), it is not particularly onerous. The "urgency" flag is easily raised in the context of fire-safety but complex remediation projects take considerable time to plan and commence. Often this will provide sufficient time to consult leaseholders, and it is right to see the application for dispensation as a request for an indulgence.[78]

The approach to the imposition of costs conditions may, however, be affected not only by the fact that the *Adriatic Land* decision is being appealed to the Court of Appeal, but also by provisions in the Leasehold and Freehold Reform Bill that will prevent a landlord from recovering litigation costs unless a court of tribunal finds it "just and equitable" to do so.[79]

With prospective applications, FtTs invariably grant dispensation in fire safety cases (unsurprisingly, due to concerns about urgency and safety). It does not necessarily follow that consultation was impossible, and this is something that the imposition of conditions can, and should, take account of.

Is dispensation needed for waking watch?

Whether there is a need to consult if the landlord employs a waking watch patrol depends on whether this amounts to "works" or is an agreement for more than 12 months. In practice, waking watch agreements will be weekly or monthly and so the issue focusses on whether they involve "works on a building". Some FtT cases have said that waking watch is a service, not the provision of works, and therefore dispensation is not necessary.[80] In other cases, the FtT has declined, in the absence of argument, to rule on whether it is works or a service.[81] In some cases, however, fire patrols have been seen as within qualifying works as they form an essential element of the fire safety works.[82] In a recent Upper Tribunal decision, *Holding & Management (Solitaire) Ltd v Leaseholders of Sovereign View*, it has been said

[78] In *Adriatic Land* [2023] UKUT 271 (LC), the application encompassed two projects: the interim measures and the full remediation project. Perhaps consultation might have been possible for the latter if not the former, especially as the FtT said it was unimpressed with the applicant's statement that consultation is not possible with design and build contracts (note: this is not remarked on by the Upper Tribunal).

[79] Leasehold and Freehold Reform Bill 158 2023–2024 cl 35.

[80] e.g. *Transport House* MAN/00BR/LDC/2020/0044 at [17]; see also *101–2002 Raphael House* LON/00BC/LDC/2020/0003 (but although the FtT considered it likely to be a service, as the point had not been argued it was nonetheless treated as part of the qualifying works for which dispensation was granted); *2–3 Egerton Gardens* LON/00AW/LDC/2023/0022.

[81] *Beregaria Court* LON/00AY/LDC/2020/0192 at [25].

[82] *The Cube* MAN/00BN/LDC/2018/0005 at [26]; *Century House* LON/00AY/LDC/2017/0123.

that waking watch is a service, not works.[83] This means that it is not necessary to consult in relation to waking watch, revealing a gap in the coverage of s.20. Indeed, in the *Holding & Management* case, waking watch was employed for three months at a cost of £10,000 weekly when it appears a battery operated alarm system could have been installed at much less cost.[84]

The fact that there is no need to consult when a waking watch is employed suggests that the definitions of qualifying works and qualifying long-term agreement should be reviewed, as the goal is to ensure that leaseholders should only pay reasonable costs for necessary works and services. Outside the fire safety context, it has been held that window cleaning did not naturally fall within the concept of building works,[85] and there are ways of avoiding the QLTA route by either ensuring that contracts are for less than 12 months[86] or using "roll over" contracts.[87] Another way of avoiding consultation in relation to property management is for a contract to be entered between a developer and the supplier before any agreements for lease are concluded.[88]

Design and build

Several cases have involved applications for dispensation in relation to "design and build" (D&B) contracts for fire safety remediation works. In these cases, applicants have argued that the design and build procurement route does not fit with a s.20 consultation and for this reason, dispensation should be given. Although some tribunals agree with this,[89] others are unpersuaded by claims that they are incompatible with the consultation requirements.[90] Nonetheless, the *Melia House* decision illustrates that even if the use of D&B would not be a sufficient reason for granting dispensation, and even if leaseholders have objected, dispensation will be granted.[91] The FtT's reasoning in this case reveals the high hurdles presented by the combination of deadlines imposed by BSF funding applications, and the difficulties post *Daejan* of leaseholders evidencing prejudice. In this case, there remained uncertainty as to why the applicant had not undertaken more sampling to better identify the scope of the works, but further investigations might risk compliance with BSF deadlines and a successful BSF application would be of financial benefit to the leaseholders. Although leaseholders had objected to

[83] *Sovereign View* [2023] UKUT 174 (LC) at [7], [24]; although the appeal related to the conditions attached to the grant of dispensation.

[84] *Sovereign View* [2023] UKUT 174 (LC) at [10], the Upper Tribunal citing the FtT decision.

[85] *Paddington Walk Management Ltd v Peabody Trust* [2010] L. & T.R. 6 at [92]; [2009] 2 E.G.L.R. 123.

[86] *ASP Independent Living Ltd v Godfrey* [2021] UKUT 313 (LC): no consultation was required for a contract for services of 364 days.

[87] Competition and Markets Authority, "Residential property management services. A market study", 2 December 2014 available at: *https://assets.publishing.service.gov.uk/media/547d99b8e5274a42900001e1/Property_management_market_study.pdf*, [4.64].

[88] *BDW Trading Ltd v South Anglia Housing Ltd* [2013] EWHC 2169 (Ch); [2014] 1 W.L.R. 920. In this case, there was a 25-year contract for hot water and electricity. This practice seems not to be uncommon in relation to long-term energy contracts, and can be seriously detrimental to leaseholders.

[89] *37 Potato Wharf* MAN/OOBN/LDC/2021/0046 at [28]. See also *La Salle House* MAN/00DA/LDC/2022/0033 where design and build was said to be "inherently unsuited to the Consultation requirements" at [29]; *Jefferson Place* MAN/OOBN/LDC/2021/0073.

[90] e.g. *Cartier House* MAN/00DA/LDC/2021/0055: although dispensation was granted for other reasons: it was in the interests of leaseholders for remediation to begin as quickly as possible, an application had been made to the BSF, and there had been no leaseholder objections [33]–[37]. See also *Adriatic Land* LON/00AL/LDC/2021/0244 (appealed to the Upper Tribunal but this aspect was not discussed: *Adriatic Land* [2023] UKUT 271 (LC)).

[91] *Melia House* MAN/00BN/LDC/2021/0084 at [26].

dispensation they were unable to identify financial prejudice caused by the failure to consult.

6. Reflections on dispensation in fire safety cases

The cases focussed on in this study involve fire safety works necessitated following the issues identified in the aftermath of the Grenfell Tower fire. For the responsible landlord, there may be a dilemma: consult and delay, or press ahead and apply for dispensation. As one Tribunal judge put it, there is often the problem that the landlord is "damned if it did and damned if it didn't".[92] Once resident safety is added into the mix, both the landlord's decision, and the outcome of a dispensation application, may be inevitable: no one—judge or landlord—wants to make the wrong call and risk a tragedy. Furthermore, the complexity of the works and the shortage of suitably skilled experts and contractors mean that the "relevant prejudice" hurdle that has to be crossed is effectively a roadblock. No leaseholders can cross it. Dispensation must be granted only when the FtT considers it reasonable to do so but, in practice, this finding is automatic. Hence, many FtT decisions are brief and formulaic.

This study does, however, suggest that there should be reflection on how the dispensation jurisdiction is practiced.

Many of the earlier cases post-Grenfell focussed on interim safety measures, such as the installation of fire alarms. These are less complex than the full remediation projects for which it can take years to develop plans which are technically achievable, secure necessary certification levels, and which satisfy fire risk consultants. Moving through this process to the point of contract is unlikely to be quick. *Marshall v Northumberland and Durham Property Trust Ltd* provides a useful reminder of the questions that the FtT should be asking when considering dispensation.[93] In that case, the objection of one leaseholder meant that prejudice should have been addressed more directly. In most fire safety cases, there is no leaseholder participation but the FtT should, nonetheless, ask probing questions of the landlord as to why it is not possible to consult, particularly given the impact that these projects will have on the lives of leaseholders and the huge costs involved.

It is clear that tribunals are sometimes unimpressed with the landlord's approach to consultation. For example, in *146 Midland Road*, the tribunal judge noted had much time had been wasted during which consultation could have commenced.[94] Before *Daejan*, this would have been a factor taken into account when considering whether to grant dispensation; now it may be subject to a critical observation in the tribunal's decision but in the absence of leaseholders proving relevant prejudice dispensation will be granted.[95] In some instances, the applicant provides only sketchy details on the need for works, the works themselves, and the potential costs. The grant of dispensation provides a carte blanche to the landlord. Although it is always open to leaseholders to challenge the costs and the works through s.19 this is not the same as being able to engage in the process at an earlier stage. The

[92] *Premier House* LON/OOAC/LSC/2018/0272.
[93] *Marshall* [2022] UKUT 92 (LC).
[94] *146 Midland Road* CAM/ooKA/LDC/2020/0029.
[95] In *146 Midland Road* CAM/ooKA/LDC/2020/0029, a condition was attached in view of the delay: that in any future payability application, the landlord would meet any professional costs incurred by the majority of leaseholders.

use of paper determinations, and the very low participation rates of leaseholders, may make tribunals ready to accept the landlord's claims of urgency and the impossibility of consultation at face value. Indeed, it is not apparent from the FtT and Upper Tribunal decisions in *Adriatic Land v Hippersley Point* why consultation would not be possible for the full remediation project, as against the interim works.[96]

It is now half a century since the first, embryonic, consultation provisions were introduced. Since then, residential leasehold policy has further emphasised the importance of providing choice, transparency and fairness to leaseholders. Whilst the *Daejan* decision makes the grant of dispensation more likely, Lord Neuberger did suggest that conditional grants could ensure elements of consumer protection. In relation to prospective dispensation, he suggested that conditions could be imposed to ensure that there is engagement with leaseholders and compliance with the consultation requirements so far as practicable.[97] In the fire safety cases, only a small number of cases require this, and this will be when conditions have been suggested by the opposing leaseholders (and usually when they have instructed professional agents such as lawyers). FtTs should be able to require landlords to engage with leaseholders during remediation projects, particularly in relation to issues impacting on the scope of works, choice of materials, timeframes, disruption, and costs. The terms might reflect some of the issues covered in the Government's Code of Practice for the remediation of residential buildings (although the focus there is on residents rather than leaseholders there will be overlap).[98] Whether it is procedural rules or tribunal practice that stands in the way of greater use of such conditions, this should be reviewed.

In *Daejan*, Lord Neuberger also ensured that leaseholders could be protected from additional costs in connection with dispensation applications. In that case, the landlord had not sought to recover its own costs but the Supreme Court did require it to pay the leaseholders' reasonable costs in opposing and testing the application. In the small number of cases where conditions have been imposed in the fire safety context, they often include a requirement relating to costs, whether that be prohibiting the landlord recovering its own costs through the service charge, or having to pay the leaseholders costs in connection with the application. It may be that these conditions reflect the tribunal's concern about some aspect of the landlord's behaviour, or doubts about whether the timetable really did prohibit s.20 consultation (as in *146 Midland Road*).[99] Although this practice may survive the Upper Tribunal's decisions in *Adriatic Land* and *Holding & Management* (as those cases emphasised that the landlord was acting responsibly and therefore was not seeking an indulgence)[100] there is a risk that FtTs may become more cautious about imposing costs conditions.

Finally, with leasehold reform as a political priority, it is a good moment to reflect on the Supreme Court decision in *Daejan*. In the public bill committee considering the Leasehold and Freehold Reform, Bill Barry Gardiner MP sought to introduce an amendment seeking to undo the "neutering" impact of *Daejan* and

[96] *Adriatic Land* [2023] UKUT 271 (LC).
[97] *Daejan* [2013] 1 W.L.R. 854 at [56].
[98] Department for Levelling Up, Housing & Communities, "Code of Practice for remediation of residential buildings" 27 July 2023 available at: *https://www.gov.uk/government/publications/code-of-practice-for-the-remediation-of-residential-buildings/code-of-practice-for-the-remediation-of-residential-buildings#part-3--living-with-remediation*.
[99] *146 Midland Road* CAM/ooKA/LDC/2020/0029.
[100] *Adriatic Land* [2023] UKUT 271 (LC); *Sovereign View* [2023] UKUT 174 (LC).

reinvigorating the exercise of discretion with a focus on transparency and accountability.[101] Lord Neuberger's statement that consultation is a means to an end, rather than an end in itself is out of kilter with the focus post-Grenfell on the importance of tenant participation and listening to tenant's voices.[102] The Building Safety Act 2022 introduces a duty to develop a residents' engagement strategy to promote their participation in building safety decisions to address concerns found in the Hackitt review[103] that "residents did not have a strong enough voice in the safe management of their homes and specifically that they often did not have the chance to offer views and participate in the decision-making process".[104] In keeping with this revived focus on tenant voice and participation, we need to return to the idea that consultation is an end in itself but in the face of the Supreme Court decision in *Daejan* this will be possible only through legislation. In the meantime, tribunals should, where possible, ensure that dispensation orders also require ongoing leaseholder engagement.

[101] Public Bill Committee, Leasehold and Freehold Reform Bill (Tenth sitting), 30 January 2024, col.466-7. The government minister, Lee Rowley MP, agreed to "go away and look at the issue".

[102] P. Hickman and J. Preece, "Understanding social housing landlords" approaches to tenant participation: scoping study" UK Collaborative Centre of Housing Evidence, December 2019.

[103] Dame J. Hackitt, *Building a Safer Future*, Final Report May 2018, Cm.9607; see esp. Ch.4.

[104] Building Safety Act 2022 s.91 and explanatory notes.

Judicial Recasting of Owners' Statutory Repair and Maintenance Obligations under the New Zealand Strata Title Legislation

Rod Thomas*

Common parts; Flats; New Zealand; Repair covenants; Residential property

Abstract

The article is an overview of judicial activism in New Zealand in making bodies corporate responsible for most repairs and remediation around a development, in defiance of legislative requirements set out in the Unit Titles Act 2010 (2010 Act). The Act divides those responsibilities between owners and the body corporate in a manner that is sensible and practical. The article asserts that this judicial departure commenced in the 1990s with the New Zealand "leaky building" crisis and argues the extent of departure from key principles has now become unsustainable, causing confusion to owners, additional cost, and unwarranted judicial inquiry. It calls for a return to the prescriptive repair and maintenance regime set out in the 2010 Act.

> *"[Counsel] submitted that a scheme is required because the parties have not agreed on the division of the cost of repairs. He submitted that without a scheme in place, the body corporate cannot know who is going to pay, or the quantum of any required payment."*[1]

Introduction

Prior to the 1990s, the judicial understanding of the owners' repair obligations was similar to the older Victorian and New South Wales strata title legislation.[2] Under the Unit Titles Act 1972 (1972 Act), the body corporate was responsible for repair and maintenance of common property, and the unit owner, for their unit.[3]

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[1] Body Corporate No.318596 v RE and RM Bartlett HC Tauranga CIV 2009-470-000952, 13 May 2010 at [51] per Andrews J.

[2] This was to be expected, given the New Zealand Unit Titles Act 1972 (1972 Act) was derived from both pieces of legislation. In particular, the Strata Titles Act 1967 (Vict). See some limited discussion on point in (14 July 1972) NZPD 1092.

[3] A. Alston, T. Bennion, M. Slatter, R. Thomas and E. Toomey *Guide to New Zealand Land Law* (Wellington: Brooker's Ltd, 1997), Ch.11. See the Unit Titles 1972 Act s.15(1)(f) and Sch.2 r.1.

This repair regime was put under significant strain by the New Zealand "leaky building" crisis, which resulted in courts imposing repair and remediation schemes, the terms of which conflicted with the statutorily imposed regime. In response to this crisis, the parties' repair and maintenance obligations were altered by legislation of the new Unit Titles Act 2010 (2010 Act). This enabled the body corporate to repair "building elements" and "infrastructure" where those were located within units and charge the cost back to the unit owners. There is, of course, a fundamental difference between who may do the work, and who bears the financial cost of the work being undertaken. The two are a key features in the discussion that follows, accompanied by argument that the courts have not appreciated the difference between the two, as set out in the statutory framework of the 2010 Act.

This article argues that despite the legislative changes made by the 2010 Act, courts are still imposing remediation schemes that conflict with the obligations contained in the legislation. It argues that the result has been to cause confusion, making the statutory cost allocation regarding repair and maintenance obligations nonsensical.

The schema of the 1972 Act

Under the 1972 Act, the unit owner was made responsible for their unit, and the body corporate for common property. The result may have been perceived as unfair, or even brutal, however, it was clearly stated. If you owned the asset, it followed that the cost of remedial work fell on you, whether you be the body corporate, or a unit owner. It flowed from this, that where a "structural issue" was found within a unit, a unit owner was obligated to maintain and repair it. Where repairs by the body corporate to the common property disproportionately favoured one, or a few units, there was however, a discretion available to the body corporate to impose those repair costs on the benefiting owners.[4]

Architects invariably will hold the view that many component parts found within a unit form a part of the structural integrity of the development.[5] This issue can easily extent to exterior walls, roofs, internal walls, ceiling framing, decks and even doorframes and window fittings. Was it therefore unfair to impose such costs on owners where the work benefited others in the development?

A contrary argument can be put. "No man is an island entire of itself".[6] Each owner has their individual role and responsibility to play. Why should the structural aspects of any unit not be the responsibility of the owner? The contingent cost of a unit owner being responsible for the repair cost of their unit is surely built into the market price. Thus, if the unit is on the top floor and its title space includes

[4] Unit Titles 1972 Act s.33.

[5] Faced with argument in *Smallfield v Brown* (1992) 2 NZ ConvC 191,110 (HC) that most of the façade of a standalone flat was "structural", Fisher J agreed. At 191,117 his Honour stated as follows: "[I]n the case of a light timber-framed domestic dwelling there is no clear distinction between structural elements and the cladding, all being integral to the structure."

[6] T.-H. Ha, "John Donne's solemn 400-year-old poem against isolationism is resonating today" Quartz, 24 June 2016 available at: *https://qz.com/716088/john-donnes-solemn-400-year-old-poem-against-isolationism-is-resonating-with-brits-today#:~:text=English%20poet%20John%20Donne%2C%20writing,of%20all%20people%20with%20God* [Accessed 19 January 2023].

the roof, the repair burden of the roof is reflected in the sale price. The fact that units below benefit, is thus rendered incidental.[7]

The 1972 Act also contained a "nuclear" provision concerning repair issues. This was s.48 and, again, it had Australian origins.[8] Where the development was damaged or destroyed, as an alternative to cancelling the development outright, the court could impose a scheme for remediation. This was intended as an act of last resort, to save the "patient" as an alternative to turning off "life support systems" by cancelling the scheme. By this mechanism, the court could impose obligations outside those provided within the legislation Such broad powers extend to the ability to make "such orders as it considers expedient or necessary for giving effect to the scheme".[9] In the New Zealand context, one can think of damage through catastrophic events such as the various Christchurch earthquakes as a suitable candidate for such orders to be made.

Comparable provisions are presently found in eight Australian strata title Acts.[10] It is interesting that there is scant academic treatment of these Australian equivalent provisions. For the Queensland equivalent, Mercier explains the intended operation of those Australian provisions in the following general way:[11]

> "The purpose of the relevant processes is to enable stakeholders … to live safely and comfortably without being exposed to danger or discomfort arising from damage to the building or any part thereof. On the one hand, it obligates the body corporate, including the insurer, to reinstate the damaged building, and on the other, entitles the residents to seek reinstatement of the damaged building or part thereof …"

This statement appears to be an overly general, if not generous, statement. The writer has found only one Australian case that refers to orders being made. This was a Queensland Supreme Court case concerning a pleadings issue involving a development ripe for demolition due to fundamental construction defects.[12]

"Leaky building" crisis and judicial schemes

The New Zealand "leaky building" crisis first arose in the early to mid-1990s and its effect continues. The result was a catastrophe for the New Zealand building industry. Within a relatively short period of time, buildings, especially high-rise

[7] Arguably New Zealand courts long struggled with the idea that a unit owner should be responsible for repairs to their unit where those repairs benefited other units in the development. See *Berechan Investments Ltd v Body Corporate 164205* [2012] NZCA 256; [2012] 3 NZLR 72. Here the body corporate was made responsible for the repair of portions of a roof that extended into the title space of a unit. Also, in *Young v Body Corporate 120066* Auckland HC, CIV-2007-404-2375, a determination was made that a body corporate's repair obligations would often extend to the external wall spaces of units.

[8] The predecessor was the prior Strata Titles Act 1967 (Vict) s.29.

[9] Unit Titles 1972 Act s.48(5). Unit Titles Act 2010 s.74 is the successor to s.48. Section 74 in its entirely is found as Appendix 1 to this article.

[10] See now, for the various Australian jurisdictions. The Strata Schemes Development Act 2015 (NSW) s.130; Subdivision Act 1988 (Vic) ss.32AG, 32A1, 32AJ; Body Corporate and Community Management Act 1997 (Qld) ss.71–75; Community Titles Act 1996 (SA) s.59; Strata Titles Act 1985 (WA) s.166; Strata Titles Act 1998 (Tas) s.32; Unit Titles Schemes Act 2009 (NT) Subdivision 7; Unit Titles Act 1002 (ACT) Div 10.3.

[11] M.J. Mercier, *Body Corporate Law in QLD Practice and Procedure* (Sydney: CCH, Australia Ltd, 2018), [3-001].

[12] In *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd. R. 158 (SC).

buildings, were found to be significantly deficient and rotting, due to water ingress.[13] This made a "whole building" approach to the repair highly desirable.

In response to the crisis, courts began to impose remediation regimes under s.48 of the 1972 Act.[14] These enabled the necessary repairs and maintenance obligations to be undertaken under a "whole development" project which overrode the owners' and bodies corporate statutory obligations. As recently pointed out, the whole purpose of imposing a scheme is to depart from the repair regime set out under the Act.[15] From the beginning, the justification for imposing schemes was stated to be the "greater good", in terms of creating efficiencies in terms of cost, and organisational effort.[16]

A huge number of schemes have since been imposed. Case law now accepts that the extent of "damage" does not need to be significant.[17] Nor need the work be "essential".[18] The main authority for this remains the Court of Appeal decision in *Tisch v Body Corporate No 318596*.[19] A key part of the reasoning was expressed in the following manner:[20]

> "Fifthly, … the terms … should depart from the scheme of the Act and from the Body Corporate Rules no more than is reasonably necessary to achieve *what is fair* as between unit owners in the circumstances. Thus, the Act and the Body Corporate rules remain relevant considerations" (emphasis added)

Fairness?

We may well ask in this regard, what is for the "greater good" or indeed, "fair"? Both sides to any legal dispute invariably considers they are seeking a result that is "fair". This expression was not found in s.48, and patently is value laden. By being invited to impose a scheme for the "greater good", a court inevitably moves into a pragmatic, problem solving analysis, the outcome of which is dependant of the facts before it. By default, if the scheme is supported by a numerical balance of the owners, it is an easy step to then suggest the result must be for the "greater good". Indeed, any number of appeals exist, where the question of "fairness," as determined by the court of first instance, are appealed. Thus, the judicial system becomes clogged with arguments of what appropriate weight should be applied to matters of general principle, and challenges to issues of fact. A court is invited to approve measures based its perception of market efficiencies, and an enhanced ability to "get on" with the job.

[13] Indeed, the "leaky building" crisis has still not finished. The problem continues for remediated buildings. There is a saying, "once a leaky building, always a leaky building". The story is well documented, and to this day, the sage continues. See "Leaky homes crisis" Wikipedia The Free Encyclopaedia available at: *https://en.wikipedia.org/wiki/Leaky_homes_crisis* [Accessed 2 November 2022]. In 2009, the repair cost for leaky buildings was estimated to be in the vicinity of NZ$11.3 billion, "Leaky homes will cost $11.3b to fix—report" *The New Zealand Herald* (online), 22 December 2009 available at: *https://www.nzherald.co.nz/nz/leaky-homes-will-cost-113b-to-fix-report/MDZFRK6RN7EYCQFXVE3Z3B24NE/?c_id=1&objectid=10617051*. "The Leaky Homes Crisis Needs To End" Scoop, 2 June 2021 available at: *https://www.scoop.co.nz/stories/BU2106/S00046/the-leaky-homes-crisis-needs-to-end.htm* [Accessed 19 September 2022]. This was for a country with a population of some five million. Now, some 13 years later, by any account this figure appears modest as the repairs and the litigation continue.

[14] The first decision was *Body Corporate 173457 v Dunn* (2007) 8 NZCPR 668 (HC) (*Dunn*).

[15] *Body Corporate 81340 v Knight* [2018] NZHC 2143 (*Knight 1*).

[16] *Dunn* (2007) 8 NZCPR 668 (HC) at [11].

[17] See *Tisch v Body Corporate No.318596* [2011] 3 NZLR 679 at [49]; (2011) 12 NZCPR 533 (*Tisch*) at [36].

[18] See *Tisch* [2011] 3 NZLR 679 at [41].

[19] *Tisch* [2011] 3 NZLR 679 at [49].

[20] *Tisch* [2011] 3 NZLR 679 at [49].

Individual owners opposing such applications are invariably self-represented and run the litigation risk of having costs awarded against them. They invariably face an uphill battle in arguing that the repair provisions of the statute should be adhered to, and that their property rights are infringed. Such opposition has appeared technical and unhelpful.

Clearly, it would have been more cumbersome for the body corporate to have undertaken repairs by use the statutory *schema* set out in the Act for that purpose. However, the attraction of such a scheme being imposed is overwhelming for the majority of owners. As the works are done in furtherance to a court order, committee members avoid the issue of personal liability claims being raised against them by disgruntled owners who do not support the proposed repair plans.

What alternatives were available?

Was the 1972 Act incapable of meeting this crisis? As stated, most of the damage was essentially caused by external leaks. Invariably, but not always, the outer shells of building structures were and remain common property. Consequently, it would have been possible to have taken the traditional view that the repair obligation was placed with the body corporate as the owner of common property. It would then follow that consequential damage to units, caused by the failure of the outer shell (being common property), was also the responsibility of the body corporate, by applying normal causation principles. Alternatively, where the external leak was to units, the repair obligation was made the responsibility of that owner, with (again) any consequential damage to other units, or to common property, being sheeted back to the unit owner.[21]

The 1972 Act also contained a little-known provision that would have enabled the body corporate to undertake remedial work to units, when required to do so by the territorial authority.[22] The statutory threshold for this was the existence of a health and safety issue.[23] It is interesting that this provision has never apparently received judicial scrutiny in New Zealand.

The effect of enactment of the Unit Titles Act 2010

The 2010 Act was legislated, in part, in response to the "leaky building" crisis.[24] Additional provisions were included. These enabled a body corporate to undertake works in all parts of the development, whether it be units or common property, and to sheet the cost back to individual owners, where the work was done to units where those works affected either "infrastructure" or a "building element". Otherwise, the policy of the 1972 Act was carried forward. Owners were made responsible for the repair and maintenance of their units, and the body corporate, for common property.

[21] See Bennion, Brown, Thomas and Toomey, *New Zealand Land Law* (2005), [12.5.17]. This is a reference to principles articulated in *Simons v Body Corporate Strata Plan 5181* [1980] V.R. 103 (SC). Although subsequent editions of this text have since been published, the discussion at [12.5.17] has not been carried through to later texts.

[22] Unit Titles 1972 Act s.15(1)(g). The body corporate's ability to recover this cost from proprietors, where the work was done to individual units, was found in the Unit Titles 1972 Act s.33.

[23] This provision has not carried forward to the Unit Titles Act 2010. This may be because it was thought unnecessary, given under the 2010 Act, the body corporate is responsible for repair of building elements and infrastructure.

[24] 5 March 2009, 652 NZPD 1713.

Given the importance of these new measures, the applicable provisions in the 2010 Act are set out below.

Building elements and infrastructure

The definition of each term is extensive and needs to be set out. For this, we go to s.5 of the Act.

> *"building elements* includes the *external and internal components* of any part of a building or land on a unit plan that are *necessary to the structural integrity of the building*, the *exterior aesthetics of the building*, or *the health and safety of persons who occupy or use the building* and including, without limitation, the roof, balconies, decks, cladding systems, foundations systems (including all horizontal slab structures between adjoining units or underneath the lowest level of the building), retaining walls, and any other walls or other features for the support of the building." (emphasis added)

This definition includes "structural integrity", but also "health and safety" and "exterior aesthetics of the building". These elements may be in any part of the development. Different aspects of any development may be considered structural, aesthetic, a health and safety concern or potentially be none of these. An owner will not know what status the repair has, pending a decision being made on the issue. By way of example, replacement of a railing may not be "structural", but it may be an "aesthetics" issue, a "health and safety" issue, or indeed, something else.

"Infrastructure" has a related meaning.

> *"infrastructure* includes *pipes, wires, ducts, conduits, gutters, watercourses, cables, channels, flues, conducting, or transmission equipment necessary* for the provision of water, sewerage, drainage, stormwater removal, gas, electricity, oil, shelter, protection from fire, security, rubbish collection, air, telephone connection, Internet access, radio reception, television reception, or any other *services or utilities to or from a unit or to or from the common property*." (emphasis added)

This definition does not require the work undertaken be "necessary to the structural integrity of the building". However, this is probably not significant. "[P]ipes, wires, ducts, conduits, gutters, watercourses, cables, channels, flues" and so on, will invariably affect other units, or the common property.

Who then is responsible for doing what, and who pays for it?

The issue or responsibility for undertaking the work, and the allocation of the cost of doing such work is only problematic if the body corporate has the same obligations as owners.

First s.80 dealing with owners' responsibilities:

> **"Responsibilities of owners of principal units**
>
> (1) An owner of a principal unit—

(a) must permit the body corporate (or its agents) to enter the unit … for any of the following purposes:

…

(ii) to maintain, repair, or renew any infrastructure for services and utilities that serve more than 1 unit and any building elements that affect more than 1 unit or the common property, or both:

…

(g) must repair and maintain the unit and keep it in good order to ensure that *no damage or harm*, whether physical, economic, or otherwise, *is*, or has the potential to be, *caused to* the common property, *any building element, any infrastructure,* or any other unit in the building." (emphasis added)

Thus, by s.80(1)(a)(ii), the body corporate is granted access to units for the purpose of undertaking the repair and maintenance of "building elements" and "infrastructure". We should reflect that although this provision grants a right of access, it does not deal with who bears the cost of the work that the body corporate may undertake.

By s.80(1)(g), an owner must repair their unit. However, there is an ambiguity concerning "no damage or harm, whether physical, economic, or otherwise, … caused to … any building element, any infrastructure". Does this mean that the unit owner must ensure their repairs do not extend to anything that is a "building element" and "infrastructure", or does it mean that any repair of the unit (which includes those elements) must be done, but in a manner that does not "damage or harm" their operation? Either construction is possible.

Who then is to pay for the work being done?

This issue has become the key cause of confusion in the case law that has subsequently emerged. We need to consider the applicable statutory provisions. First, we go to s.138, which deals with the body corporate's statutory obligation to repair and maintain elements. The relevant portion provides as follows:

"Body corporate duties of repair and maintenance

(1) The body corporate must *repair and maintain*—

(a) the *common property*; and

(b) *any assets designed for use in connection with the common property*; and

…

(d) *any building elements and infrastructure that relate to or serve more than 1 unit*.

…"

Then subs.(4) and (5), which are key:

"(4) Any *costs incurred by the body corporate that relate to repairs to* or maintenance of *building elements and infrastructure contained*

in a principal unit are recoverable by the body corporate from the owner of that unit as a debt due to the body corporate (less any amount already paid) by the person who was the unit owner at the time the expense was incurred or by the person who is the unit owner at the time the proceedings are instituted.

(5) For the purposes of this section,—

…

(c) the duty to repair and maintain includes (without limitation) *a duty to manage* (for the purpose of repair and maintenance), *to keep in a good state of repair, and to renew where necessary*." (emphasis added)

We gain much from the wording of this section. First, we understand that the body corporate must repair and maintain the common property and "building elements" and "infrastructure" found to "relate to or serve more than 1 unit". This emphasises that in undertaking the work, the body corporate is ensuring one of three things. Either, that the physical integrity of the building is maintained, the work is necessary for exterior aesthetics, or that the work is required for health and safety issues. This obligation extends to "manage (for the purpose of repairs and maintenance), to keep in a good state of repair, and to renew where necessary".[25] That might involve the body corporate deciding to work on elements within units not in imminent need of repair.[26]

By s.138(5), the cost to the body corporate of undertaking this work of work is charged back to that unit owner as a "debt due", but "less any amount [the unit owner has] already paid". This wording helps us in two regards.

First, the language of s.126(4) ("less any amount already paid") only makes sense because the unit owner has already started remedial work on any "building element" or "infrastructure" found within their unit. Thus, this is a recognition that a unit owner may quite legitimately have commenced this work. This assists us to understand that the owner's obligations include remediation of these elements. Secondly, where this has happened (that is, that the owner has started the remedial work) the owner is to receive a credit for that work. The amount still to be charged to the owner is therefore to be no more than a "catch up" share. After all, the owner is repairing their own property. Indeed, any suggestion that the unit owner cannot do (or should not) repair their property creates the real and practical definitional problems already referred to. The result is not practicable, nor workmanlike.

The Unit Titles Regulations 2011 also supports this understanding. Regulation 34(j) requires pre-settlement disclosure statements to be made to unit purchasers. It requires the selling owner to disclose to the purchaser the extent to which they have yet to pay for any remedial work done to elements contained within their units.

"(j) *whether any costs relating to* repairs *to building elements or infrastructure contained in the unit are unpaid* and, if so, the amount of unpaid costs." (emphasis added)

[25] Unit Titles Act 2010 s.138(5)(c).
[26] *Wheeldon v Body Corporate 342525* [2016] NZCA 247; (2016) 17 NZCPR 353 (*Wheeldon*) at [72].

These provisions only make sense if the unit owner has remediation obligations to elements contained within their unit space.

The problematic ss.126 and 127 of the 2010 Act

The 1972 Act provision enabling the body corporate to recover expenditure from owners, was carried forward to apply in the 2010 Act, and without significant change, becoming ss.126 and 127 of the 2010 Act. They are straightforward provisions. However, they have proved hugely problematic for any analysis that suggests owners are not responsible for the cost of work undertaken in their units that includes "building elements" and "infrastructure".

Section 126

First, s.126 (which was s.33 of the 1972 Act):

> **"Recovery of money expended for repairs and other work**
>
> (1) This section applies where the body corporate does any repair, work, or act that it is required or authorised to do, by or under this Act, or by or under any other Act, but the repair, work, or act—
>
> (a) is substantially for the benefit of 1 unit only; or
>
> (b) is substantially for the benefit of some of the units only; or
>
> (c) benefits 1 or more of the units substantially more than it benefits the others or other of them.
>
> (2) Any expense incurred by the body corporate in doing the repair, work, or act is recoverable by it as a debt in any court of competent jurisdiction."

To what is this provision directed?

Section 126 is directed to work that the body corporate does, that by the statute it has financial responsibility for funding. This is clear, as the provision is directed at enabling the body corporate to make other parties responsible for that cost. We must remember that s.126 is the updated wording of s.33 of the 1972 Act, and that the earlier provision applied to work that the body corporate did to common property (that it was financially responsible for) that disproportionately benefited some unit owners, greater than the others. The purpose of (what is now) s.126 was clear under the 1972 Act, and its meaning should not alter by being now incorporated, without meaningful change, in the later, 2010 Act. However, with the benefit of hindsight, the draftsperson who crafted the 2010 Act should have foreseen possible confusion and clarified the wording of s.126, perhaps by referring specifically to common property. He or she should have realised that confusion was now possible if the wording remained unchanged, given the body corporate is now (by the 2010 Act) also authorised to undertake work on "building elements" and 'infrastructure" found within units. However, careful consideration shows there is no actual confusion. This is because by ss.80(1)(g) and 138(4), the financial responsibility for the cost of work undertaken on units is imposed on the unit owner, and not the body corporate. This is because the body corporate is repairing

that party's property. Thus, s.126, has no role to play, as the body corporate is never responsible for the cost of work done within units.

Where s.126 does apply, exceptional circumstances need to be shown for the body corporate to then spread the cost of that work (which it would otherwise absorb), to designated units. This requires a "call" to be made by the body corporate that a designated owner or owners "substantially" benefits from the work that it does on common property that it would otherwise charge to the owners by a general levy. An example might be a health and safety matter (thus a building element), where the body corporate undertakes (say) the trimming of a hedge found on common property, that blocks light and ventilation to the neighbouring unit, but otherwise has of no benefit to other unit owners.

Section 127

Then s.127 (which was s.34 of the 1972 Act):

> **"Recovery of money expended where person at fault**
>
> (1) This section applies if the body corporate does any repair, work, or act that it is required or authorised to do, by or under this Act, or by or under any other Act, and the repair, work, or act was rendered necessary by reason of any wilful or negligent act or omission on the part of, or any breach of the Act, the body corporate operational rules, or any regulations by, any unit owner or his or her tenant, lessee, licensee, or invitee.
>
> (2) Any expense incurred by the body corporate in doing the repair, work, or act, together with any reasonable costs incurred in collecting the expense, is recoverable as a debt due to the body corporate (less any amount already paid) by the person who was the unit owner at the time the expense became payable or by the person who is the unit owner at the time proceedings are instituted."

Here, fault triggers liability. Where an owner is in default in undertaking their repair obligations (which we have seen extends to "building elements" and "infrastructure") and the body corporate does that work, the body corporate can recover that cost from the defaulting owner.

Explanations of how the schema was intended to work

Submitters to the select committee dealing with the Unit Titles Bill 2008 (Bill) were concerned about who would pay for repair costs. They especially focused on the relationship between (what are now) ss.126, 127 and 138(4). Clause 122 became s.138 and cll.111 and 112 became ss.126 and 127 in the 2010 Act. How that issue was dealt with is recorded in the appropriate Departmental Report as follows:[27]

> "Some submitters were confused over the link between a unit owner's responsibility to repair and maintain their unit and the body corporate

[27] Unit Titles Bill 2008 (212-3) (Select Committee Report) Department of Building and Housing *Departmental Report to the Social Services Select Committee on the Unit Titles Bill 2008* (July 2009), 20–21.

> responsibility to repair and maintain all building elements and infrastructure *that affect more than one unit*… All building elements and infrastructure that relate to or serve more than one unit ought to be maintained by the body corporate, *but costs should be recoverable from the unit owners in instances where those unit owners substantially benefit from the repair or are at fault* under clauses 111 and 112.
>
> **Recommendation**
>
> Add sub-clause to clause 122 to indicate that *costs may be recovered from the owner of the principal unit if the body corporate does any repair work to the building elements or infrastructure that are contained within a unit owner's principal unit." (emphasis added)*

The intention of this measure is unequivocal. Where the body corporate does work on elements within a unit, those "costs may be recovered from the owner of the principal unit". This is assuredly because that work will benefit the unit owner "substantially" as they have statutory responsibility for undertaking that work. Such unit owners are "at fault".

In the Committee stage of the Bill, this division of responsibilities was again emphasised by Moana Mackey, the Member for East Coast. Again, the reference is to cl.122 (which was enacted as s 138):[28]

> "So, we amended clause 122 by adding a subclause that makes it clear under what circumstances the body corporate will be responsible for repairs and maintenance, and under what circumstances the unit holder will be responsible. *Unit owners must repair and maintain their own units so that they do not cause harm to other unit holders in a development*. In general, when the property is common, then it is the responsibility of the body corporate to recover money expended for repairs, *except in situation where a unit holder has caused damage to the property by his or her actions. In that case, that unit owner will be held responsible*." (emphasis added)

During the third reading of the Bill, Moana Mackey again explained that "[we] need to be clear about exactly when a body corporate was responsible, and when an individual unit holder was responsible".[29]

What we take from this

Owners are responsible for all work required for their units, as imposed by s.80(1)(g). Sections 126 and 127 are basically recovery provisions, with the twist that the wording of s.126 enables the body corporate to allocate costs between unit owners who disproportionately ("substantially") benefit from work undertaken on common property. Where the body corporate repairs elements that are the responsibility of a unit owner, recovery is permitted by s.138(4). Any benefit analysis under s.126 is directed to something other than a unit owner undertaking their statutory obligations.

[28] 25 March 2010, 661 NZPD 9858.
[29] 30 March 2010, 661 NZPD 10216.

What has subsequently occurred

In New Zealand, the courts have suggested that the recovery provisions brought forward from the 1972 Act, and the new ones from the 2010 Act, are alternative routes for recovery and therefore create an apparent conflict. As stated, this has arisen as a result of the courts' failure to appreciate the legislative intent of ss.126 and 127, transplanted from the 1972 Act to the 2010 Act, without change. This failure has resulted in a basic confusion in comprehending who has the responsibility for undertaking what work, and who pays for it. The key judgment where this confusion is made apparent is the Court of Appeal's in *Body Corporate S73368 v Otway* (*Otway CA*),[30] together with that of the High Court in *Body Corporate S73368 v Cook*.[31] The judgments in *Otway* and *Cook* occurred within quick succession to each other.

Otway in the High Court[32]

The *Otway* judgment was delivered against the backdrop of the Court of Appeal's findings in *Wheeldon v Body Corporate 342525*,[33] where the Court held that only the body corporate, and not the owners, had the responsibility for repair and maintenance of building elements and infrastructure. That has proved to be a highly problematic finding.

In *Otway*, the body corporate repaired decks, located within unit spaces. The decks were accepted as constituting "building elements". The issue arose of who would be responsible for the cost of the work being done.

The body corporate sought recovery from the relevant unit owners. Two grounds were advanced. First, recovery under s.127, on the basis that the owners were remise in repairing their units. Secondly, given the decks were building elements, recovery was sought by operation of s.138(4). Section 126 was pleaded in the alternative, as a further means of recovery.

The High Court held the s.127 claim failed because the deck owners "had not committed any wilful or negligent act in breach of the Act or body corporate operational rules".[34] However, with respect, this overlooks the fact that by statute, the owners are made responsible for repairs and maintenance of their units.[35] Given this, their failure to keep these in good repair was arguably culpable.

The claims under ss.126 and 138(4) succeeded. In holding this, the Court commented on s.138. It held that s.138(4) was an alternative mode of recovery and its application was not limited to circumstances where s.126 did not apply.[36] As discussed, that finding makes sense only if s.126 is understood as enabling parties other than the owner of a unit to be responsible for remedial work undertaken on that unit.

[30] *Body Corporate S73368 v Otway* [2018] NZCA 612 (*Otway* CA). As further explained in *Body Corporate 203780 v Bell* [2020] NZCA 665; (2020) 21 NZCPR 655.
[31] *Body Corporate S73368 v Cook* [2018] NZHC 1244 (Cook).
[32] *Body Corporate S73368 v Otway* [2017] NZHC 3265 (*Otway* HC).
[33] *Wheeldon* [2016] NZCA 247; (2016) 17 NZCPR 353.
[34] *Otway* [2017] NZHC 3265 at [36] HC. The Court of Appeal agreed. See *Otway* [2018] NZCA 612 at [30] CA.
[35] By Unit Titles Act 2010 s.80.
[36] *Otway* [2017] NZHC 3265 at [40] HC.

The *Otway* judgment was then followed in short succession by *Body Corporate 199380 v Cook*.[37]

Cook

Similarly, *Cook* involves the repair cost of decks within units, with the work being done by the body corporate. Again, the decks constituted "building elements".[38]

The matter was heard in the High Court. In considering the relationship between ss.126 and 138(4), the Court held that although s.138(4) may have been intended to link with s.126, in practice it "set up a parallel recovery mechanism that sits beside s.126".[39] Furthermore, the Court held that the body corporate had limited discretion to choose which applied. The Court then set out a list of mandatory considerations to consider in deciding which provision had relevance in any given factual situation.[40]

Otway was then heard in the Court of Appeal.

Otway in the Court of Appeal

The Court of Appeal accepted, as a consequence of its earlier decision in *Wheeldon*, that owners had no responsibilities for work related to "building elements" or "infrastructure". It then went on to consider the relationship between the recovery rights set out by ss.126, 127 and 138(4). The terms of s.138(4) were considered "problematical", to be read down so there was no conflict with these other measures.[41] It then held that the earlier two provisions prevailed over s.138(4).[42] Of course, the provisions are only "problematic" if the issue of who bears the responsibility of the cost of work undertaken on units remains at large.

The repairs to the decks were considered to be within the category of "building elements"[43]: Given the repairs could affect weathertightness issues, the Court found all owners had an equal benefit in ensuring the development remained watertight.[44] Consequently, s.126 had no application.[45] It opined as follows:[46]

> "… the repairs fixed an important part of the storm water system for the entire building. We have already noted that we see the weathertightness of the entire building, including the podium and soffit works, as being interlinked and indivisible."

Given the defect was one of original construction, the Court further held the unit owners could not be in default in terms of their repair obligations.

[37] *Otway* [2017] NZHC 3265 at [40] HC.
[38] *Otway* [2017] NZHC 3265 at at [8] HC.
[39] *Otway* [2017] NZHC 3265 at at [75] HC.
[40] *Otway* [2017] NZHC 3265 at at [96]–[100] HC.
[41] *Otway* [2017] NZHC 3265 at at [32] and [46] HC. A further point of confusion arises. The Court suggested that the body corporate could pass on the repair cost to the unit owner when it otherwise did repair work in the unit. However, by the definition of "building elements" in s.5, the matters at issue affect the "structural integrity of the building". Thus, they will not be limited in effect, to the unit that contains the elements.
[42] *Otway* [2017] NZHC 3265 at [53] HC.
[43] See *Otway* [2018] NZCA 612 at [31] CA.
[44] *Otway* [2017] NZHC 3265 at [62] HC.
[45] *Otway* [2017] NZHC 3265 at [63] HC.
[46] *Otway* [2017] NZHC 3265 at [66] HC.

As a result of this analysis, the repair cost was to be born equally by all members of the body corporate. The Court held that it did not "benefit" the unit owner, nor the surrounding units, to the extent where they "substantially" benefited, allowing recovery under s.126.

One may reflect that the same argument would equally appear to available for many, if not most, structural, aesthetics or health and safety issues around the development.

Problems with the reasoning in Wheeldon and Otway

The Court of Appeal's reasoning in both *Wheeldon* and *Otway* have created practical as well as academic confusion. Section 126 has no application, as its focus is on redistributing the cost of work that the body corporate has the financial responsibility for. This is argued to apply only to work on the common property. This does not include work carried out on "infrastructure" and "building elements" found within units, which by s.138(4) are made the financial responsibility of the unit owner. To hold otherwise is to misunderstand the statutory framework prescriptively set out for the allocation of the cost of work undertaken within a development.

Furthermore, significant practical difficulties follow. If only the body corporate can be responsible for the cost of work to anything that may be construed as "building elements" and "infrastructure" found within a unit, how can a unit owner have clarity on what to repair, or not? To repeat, "building elements" may extend to issues such as windows, balustrades, external and internal walls, faulty electric sockets, appliances and such like, that affect more than one unit. We then add to this quagmire, individual perceptions concerning of may amount to "aesthetics" and "health and safety" issues that may affect more than one unit. An understanding that only the body corporate can do such work, has a simplicity that some commentators have welcomed. However, the reality of this, can lead to unfairness. Not all developments require a "nuclear" repair regime to be imposed before repairs can be undertaken. Furthermore, any suggestion that bodies corporates will undertake such work competently assumes a lot. The author instead suggests that the reality will be that most bodies corporate will shrink from assuming the responsibility for doing repair work to individual units, especially where the body corporate is also made responsible for the costs of those works being done. Some owners simply want to repair the property that they, after all, own. Surely, if pragmatism is to be valued, this is a better option. Where the initial repair job is not well done by the owner, the body corporate can then take over, do it competently, and then charge the cost back to the owner.[47]

Finally, we need do deal with the Court of Appeal's finding in *Otway* that owners were not in breach of their statutory repair obligations for work arising from original construction defects.[48] If this is correct, a statutory *lacuna* emerges, as no statutory

[47] This debate has been carried out in the following exchanges. R. Thomas "Otway, Wheeldon, and the cutting of the gordian knot that is s 126 of the Unit Titles Act 2010" (2023) 20 *LexisNexis Conveyancing Bulletin* 175; T. Gibbons "Response to Otway, Wheeldon, and cutting the gordian knot that is s126 of the Unit Titles Act 2010" (2023) 20 *LexisNexis Conveyancing Bulletin* 190 and R. Thomas "Further reflections on Otway, Wheeldon, and the cutting of the gordian knot" (2023) 20 *LexisNexis Conveyancing Bulletin* 218.

[48] See *Otway* [2018] NZCA 612 at [30] CA. Under the Unit Titles Act 2010 (and the Unit Titles 1972 Act), the body corporate is never authorised to undertake basic remedial work to units where building elements are not involved.

entitlement exists in the 2010 Act for the body corporate to do this work in units (if not "building elements" or "infrastructure").[49]

Reflections

Behind the Court of Appeal reasoning in *Wheeldon* and *Otway*, is a judicial disquiet that work on "building elements" or "infrastructure" should be the responsibility of any single unit owner.[50] Such an owner is consequently in a fortunate, but confusing position. They are responsible for all work required to the unit, *except* that necessary:

- to the structural integrity of the building;
- the exterior aesthetics of the building; or
- the health and safety of persons who occupy or use the building;

identified and claimed as such by the body corporate.

With respect, the present situation is untenable.[51] It cannot be sensible that each time a repair or maintenance issue arises in a unit, court proceedings are required to determine who pays.[52] This also imposes a significant burden on any conveyancer (or valuer) seeking to advise as to repair obligations.[53] It also significantly undercuts the fundamental principles of the 2010 Act, that owners are responsible for their units and the body corporate for common property.

With respect, neither ss.126 nor 127 are "problematic", as suggested by the Court of Appeal in *Wheeldon*.[54] Nor are ss.126 and 127 a "parallel" form of recovery to s.128.[55] The legislative meaning both those provisions carried over from the 1972 Act should continue by their incorporation (without change) in the 2010 Act. The ability to reapportion repair costs by s.126 is intended to apply to work the body corporate is obligated to fund on common property. We need to construe the meaning s.126 against our appreciation that by ss.80(10(g) and 138(4) the unit owner is made responsible for funding the cost of work undertaken regarding their unit, which may include "building elements" and "infrastructure".

The continued imposition of schemes

The New Zealand 1972 Act continues s.48 schemes, but now by s.74 of the new Act. The wording of that more recent provision is given as Appendix 1 to this article. It seems that the benefits of obtaining such a scheme have become almost

[49] This reasoning may be compared with that of *Proprietors of Strata Plan No.6522 v Furney* [1976] 1 NSWLR 412 (SC) where the court held that the duty to "maintain and keep" extended to the cost of remedying defects arising from faulty construction. See Bennion, Brown, Thomas and Toomey, *New Zealand Land Law* (2005), [12.6.14].

[50] As discussed, the reasoning in *Wheeldon* [2016] NZCA 247; (2016) 17 NZCPR 353 and *Otway* [2018] NZCA 612 CA holding that body corporate and not the owner was tasked with repair of "building elements" would appear to also apply to "infrastructure".

[51] Nor is the court's analysis of the "purpose" provisions of the Unit Titles Act 2010 necessarily persuasive in supporting its conclusions. The objectives stated by s.3 of the 2010 Act are of a general nature. As such, they can be used to support different results, including the analyses put forward in this article. It is a question of weight and emphasis.

[52] See also T. Gibbons "Maintenance" Paper presented to New Zealand Law Society Unit Titles Intensive Conference, April 2013, p.68.

[53] See generally, R. Thomas "Degraded unit title property rights—a judicial trend" (2013) 25 *New Zealand Universities Law Review* 1023.

[54] *Wheeldon* [2016] NZCA 247; (2016) 17 NZCPR 353 at [32] and [46].

[55] *Cook* [2018] NZHC 1244 at [75].

irresistible.[56] It is usual for orders to be made on terms that protect works already undertaken which are in contravention to the legislative provisions; provide indemnification for past and future works undertaken in breach of the statutory *schema*; validate prior ultra vires decisions of the body corporate; require owners to vacate their units, obligate them to pay levies despite pending arbitration,[57] and that the body corporate pay compensation to owners whilst work is undertaken.[58] In *Knight v Body Corporate 81340* (*Knight 2*),[59] penalty interest due on levies, accepted as being ultra vires, were found recoverable.

Indeed, in *Tisch*, the Court of Appeal suggested that the re-enactment of s.48 as s.74 of the 2020 Act, amounted to implicit legislative approval of the prior practice.[60] This observation overlooks, of course, the fact that the 2010 Act expressly introduced fresh measures to make this prior judicial practice unnecessary, being the construct of "building elements" and 'infrastructure". Also, this general assumption made by the courts overlooks the reality that all comparable strata title legislation continue to have disaster recovery provisions such as (now) s.74, and that the structure of the legislation would be sadly remise if this was not so.

Conclusion

In terms of any regime design, policy decisions are called for in designing a strata title Act. Invariably owners are made responsible for the repairs and maintenance of their units, and the body corporate made responsible for works on common property.

Starting with the "leaky building" crisis, this article holds that for New Zealand courts have failed to understand the prescriptive nature of the repair and maintenance obligations set out under the legislation, be it the 1972 Act or the 2010 Act. We have been sucked down a vortex where the cost allocation for any unit repair, be it "structural", "aesthetics" or a "health and safety" concern, have become problematic, and opinion and context driven. We have reached the stage that no certain advice can be given as to who bears the responsibility for work to be undertaken within units.

With respect, the matter is not (or should not) be open for debate. The only problematic issue is a judicial unwillingness to accept the prescriptive and practical cost regime set out in the statute. A unit owner is made responsible for meeting the cost of all works to their units (including "building elements" and "infrastructure") and the body corporate for common property. A cost sharing of the work done on common property may be possible, by s.126, but this would be for rather unusual circumstances. One is left to reflect that a judicial willingness to suggest otherwise invites litigation, cost increases, and creates general uncertainty. The result is confusion which puts the repair and maintenance obligations under the 2010 Act at variance with other, comparable strata title

[56] Remembering that the ability to seek a building scheme was retained under Unit Titles Act 2010 s.74, in almost identical language to the Unit Titles 1972 Act s.48.

[57] *Re Body Corporate 320785* [2018] NZHC 1046.

[58] *Knight v Body Corporate 81340* [2020] NZHC 1111; 21 NZCPR 36 (HC) (*Knight 2*) is a recent example of this. Discussed by T. Gibbons, "Unit Titles" (2023) 19 *Conveyancing Bulletin* 82–84. See also a list is the orders made that depart from the statutory regime made by R. Thomas, "Repairing Leaky Unit Titles, Tisch, and the Appointment of Administrators" in *The Leaky Building Crisis* (Wellington: Thomson Reuters, 2011), pp.178–179.

[59] See above, *Knight 2* [2020] NZHC 1111; 21 NZCPR 36 (HC) at [57].

[60] See *Tisch* [2011] 3 NZLR 679 at [26].

legislation of similar origins.[61] One is reminded of a certain book, sometimes featuring in judicial writing:[62]

> "[Alice] 'Would you tell me, please, which way I ought to go from here?' 'That depends a good deal on where you want to get to,' said the Cat."

Appendix 1

The Unit Titles Act 2010 s.74 provides as follows.

"74 **Scheme following destruction or damage**

(1) This section applies if any building or other improvement comprised in any unit or on the base land is damaged or destroyed, but the unit plan is not cancelled.

(2) The High Court may, by order, settle a scheme on the application of—
- (a) the body corporate; or
- (b) if the unit title development is in a layered unit title development, the body corporate of the head unit title development or any subsidiary unit title development in that layered unit title development; or
- (c) an administrator; or
- (d) the owner or one of the owners of a unit; or
- (e) a registered mortgagee of a unit.

(3) A scheme under subsection (2) may include provisions—
- (a) for the reinstatement in whole or in part of the building or other improvement; or
- (b) for the transfer of units to the body corporate so as to form part of the common property.

(4) If an order is made under subsection (3)(b), sections 58(1)(c) and 59 apply to the transfer, so far as applicable, but subject to any order of the High Court to the contrary.

(5) A notice of any application made under subsection (2) must be lodged with the Registrar who must enter on the supplementary record sheet a notification that the application has been made.

(6) On any application to the High Court under subsection (2), the following persons have the right to appear and be heard:
- (a) any person having or claiming to have any estate or interest in any unit or in the whole or part of the base land; or
- (b) any insurer who has effected insurance on the buildings or other improvements comprised in any unit or in the whole or part of the base land.

[61] The Australian ones. Reference is made back to the eight Australian strata title Acts mentioned at n 10, above.
[62] Lewis Carroll, *Alice in Wonderland* (London: MacMillan Children's Books, 2016), p.105.

(7) In the exercise of its powers under subsections (2) and (3), the High Court may make any orders that it considers expedient or necessary for giving effect to the scheme, including orders—

(a) directing the application of any insurance money; or

(b) directing payment of money by or to the body corporate or by or to any person; or

(c) directing the deposit of an appropriate new unit plan; or

(d) imposing any terms and conditions that it thinks fit.

(8) The High Court may cancel, vary, modify, or discharge any order made by it under this section.

(9) The High Court may make any order for payment of costs that it thinks fit."

Casenotes

Directors, Concurrent Fiduciary Duties, and Ad Hoc Fiduciary Relationships

Directors' powers and duties; Fiduciary duty; Fiduciary relationship; Singapore; Third parties

Abstract

In Tan Teck Kee v Ratan Kumar Rai, the Singapore Court of Appeal had occasion to decide whether, and when, a director of a company may owe concurrent fiduciary duties both to a third-party and to his principal company. Furthermore, the apex court took the chance to consider when an ad hoc fiduciary relationship could arise. This note critically examines the Court's analysis, and discusses the approaches adopted by the courts in other common law jurisdictions. It concludes that, overall, the decision of the Court of Appeal is to be welcomed.

I. Introduction

The adage that "money is the root of all evil" seems true even in the present age, where long-standing friendships can be ruined over monetary issues. Such was the case in *Tan Teck Kee v Ratan Kumar Rai*,[1] a decision delivered by the Singapore Court of Appeal. As Steven Chong JCA, delivering the judgment of the Court, observed, the appeal raises an "interesting question as to whether and when a director may owe concurrent fiduciary duties both to a third-party *and* his principal company".[2] In addition, the apex court took the opportunity to consider the broader question of when an ad hoc fiduciary relationship can arise between parties.

The note will proceed as follows. After the introduction, Part II summarises the facts and decision of the Court. Part III investigates whether, and when, directors can owe concurrent fiduciary duties to third parties, while Part IV explores the various approaches in establishing a fiduciary relationship. As the issues examined by the Court are also relevant to other jurisdictions, the jurisprudence of other common law jurisdictions will also be discussed. It is argued that the Court was correct in holding that there is no general principle precluding a director from owing concurrent fiduciary duties to a third-party besides his principal company. On the issue of establishing an ad hoc fiduciary relationship, it is argued that the "basket of characteristics" approach to the "legitimate expectation" test is preferable to the Court's articulation of a "broader" and "open-textured" approach.

[1] *Tan Teck Kee v Ratan Kumar Rai* [2022] 2 S.L.R. 1250 (*Tan Teck Kee*).
[2] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [1] (emphasis in original).

II. The facts and decision of the Court of Appeal

Messrs Ratan Kumar Rai (Mr Rai) and Tan Teck Kee (Mr Tan) were friends since 2005,[3] and shared a "tight friendship".[4] They and six others entered into an oral agreement where investors, including Mr Rai, would participate in an investment venture with the view of purchasing property in Cambodia to be sold for profit when it eventually appreciated in value.[5] However, the group could only execute this investment via a Cambodian company, given that Cambodian law precluded foreigners from owning land in Cambodia, and only citizens or companies incorporated in Cambodia with at least 51% of their shares held by a Cambodian national are allowed to do so. To circumvent this restriction, Mr Rai and two other investors met with Mr Oknha Rithy Sear (Mr Rithy), a Cambodian businessman, to discuss the latter's involvement. It was eventually decided that the venture was to be carried out via Worldbridgeland (Cambodia) Co Ltd (WBL), a Cambodian company, where WBL would acquire the land.[6] Mr Rithy and Mr Tan were the only directors and shareholders of WBL. Mr Rithy held 51% of the shares while Mr Tan held the remaining 49%.[7] By contrast, Mr Rai was neither a director nor a shareholder of WBL.

To finance the purchase of the identified property, the investors transferred over nine million US dollars into the control of Mr Tan, Mr Rithy and WBL. However, they did so without any security, guarantee or any other form of written documentation to record the purpose of the transfers.[8] After purchasing the relevant land, Mr Tan issued a document to the contributing investors which recorded the contributions of each investor and included the following two terms:

> "2. The decision on investment opportunities and the amount of investments for each projects [*sic*] *will be solely decided by [Mr Tan]* … director of [WBL], the company handling these funds.
>
> 3. To protect the interests of all subscribers, these funds will be logged in for a minimum period of two years. At the maturity of the investment funds, *10% of the net profit* (after deducting all cost and tax) *will be paid to the director, [Mr Tan]* as the director fees."[9]

The investment proved successful and instead of selling off the land, the group decided that it would be more profitable to develop it. A joint venture agreement (JVA) was eventually entered between WBL and Oxley Holdings Ltd. Mr Rai contributed a total of US$5,394,252 and under the JVA, he was entitled to 31.2% of the profits.[10] At all material times, Mr Tan oversaw the entire investment operation. Subsequently, he withheld a portion of the generated profits and made several unauthorised deductions from the payouts due to Mr Rai.[11] Mr Rai then commenced proceedings against Mr Tan, claiming that the latter was his fiduciary,

[3] *Ratan Kumar Rai v Tan Teck Kee* [2021] SGHC 276 at [68] (*Tan Teck Kee (HC)*).
[4] *Tan Teck Kee* [2021] SGHC 276 at [2].
[5] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [6].
[6] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [9].
[7] *Tan Teck Kee* [2022] 2 S.L.R. 1250.
[8] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [49].
[9] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [14] (emphasis in original).
[10] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [19].
[11] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [22]–[29].

and that the latter having breached his fiduciary duties, was under a liability to account for the profits that were withheld from him.[12]

The Singapore Court of Appeal held that Mr Tan was indeed a fiduciary to Mr Rai, even though he was concurrently also a fiduciary to WBL by virtue of his directorship in the company. Having breached his fiduciary duties, Mr Tan was liable to account to Mr Rai for profits unlawfully withheld from the latter. The Court reasoned that the facts supported the conclusion that Mr Tan undertook his role in the investment venture in his personal capacity whilst concurrently being a director of WBL, and rejected the contention that he did so in his capacity as a director of WBL.[13] Consequently, Mr Tan had a direct relationship with the other investors without the interposition of WBL.[14] The investors therefore did not merely have a contractual relationship with WBL. It was also observed that WBL was not a sham and that Mr Rithy was not a mere front of WBL.[15] Although Mr Rithy, as majority shareholder and director, could theoretically exercise his powers to hinder Mr Tan, there was no occasion where he in fact did so.[16] Thus, Mr Tan's role in the venture was not diminished by the fact that Mr Rithy possessed these powers. The Court found that Mr Tan was a fiduciary to Mr Rai on three grounds.[17] First, he possessed a high degree of control over the investors' interests in the venture. Secondly, Mr Rithy's position as co-director and co-shareholder of WBL did not meaningfully restrict Mr Tan's ability to exercise such control. Thirdly, there was little that the investors could do to protect their interest in the venture. They were particularly vulnerable to Mr Tan's exercise of power, given that he was the one who oversaw the entire operation in Cambodia.

III. Can directors owe concurrent fiduciary duties to third parties?

At first glance, one might wonder why the Court of Appeal described the issue of concurrent fiduciary duties as an "interesting question". After all, a non-executive director can sit on the board of multiple companies, and it is undisputed that he is a fiduciary to each company. Furthermore, while a director owes fiduciary obligations to his company, there is nothing stopping him from voluntarily assuming the management of assets belonging to a bedridden relative who is without any next-of-kin, thereby rendering him a trustee *de son tort*. In both circumstances, the issue of the director owing concurrent fiduciary duties is not in doubt. However, once the facts of *Tan Teck Kee* are fully appreciated, one could begin to understand the "interesting" aspect of the issue, and why the dispute was litigated all the way to Singapore's apex court. This case was made more complicated because of a convergence between Mr Tan's role in relation to the investors and his role as a director of WBL. While Mr Tan was found to have taken up his role with the investors in his personal capacity, WBL was the corporate vehicle to execute the acquisition of the Cambodian land pursuant to the investment agreement, and that in turn required Mr Tan to act in his capacity as a director of WBL. This brings

[12] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [30].
[13] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [60].
[14] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [63].
[15] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [65].
[16] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [66].
[17] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [78].

any potential conflict with WBL and the third-party investors into sharper focus. It was in this context that the issue of concurrent fiduciary duties arose.

Against this factual backdrop, the counsel for Mr Tan argued that a director may not, outside his capacity as a director of a company to which he owes fiduciary duties, voluntarily undertake a role vis-à-vis a third-party to give rise to fiduciary duties.[18] This was because a director already owes a duty of "single-minded loyalty" to his principal company to place the interests of the company above all others including his own.[19] It was further contended that permitting a fiduciary relationship to arise between a director and a third-party concurrently would require the director to do the "very opposite" of what he should do vis-à-vis his principal company.[20]

The Court rejected the above arguments, and held that as a matter of principle, there is nothing that prevents a director from placing himself in a position which could generate a second fiduciary relationship with a third-party.[21] The Court clarified that the relevant inquiry proceeds in two stages. The first stage examines whether the director has placed himself in a position vis-à-vis a third-party so as to attract fiduciary obligations. This is a factual inquiry. The analysis on when an ad hoc fiduciary relationship can arise is explored below. The second stage is a legal inquiry, where the Court would determine whether the director's conduct, having assumed concurrent fiduciary duties, has resulted in a "real sensible possibility" of conflict of interest.[22] In addition, the Court held that:

> "[T]o hold that such a person (who is concurrently a director), cannot, as a matter of law, owe fiduciary duties to the third party would in effect immunise the errant director from the consequences of his actions which had in turn created real or potential conflicts between his position as a director and that of his role to the third party."[23]

The Court's ruling was correct. The counsel for Mr Tan had erroneously conflated the "existence" of fiduciary duties with the "breach" of such duties. To say that a person would be in breach of his fiduciary duties, and therefore cannot be said to have undertaken these duties is to place the cart before the horse. Furthermore, while the Court observed that "[t]here is, in this scenario, little room for actual conflict between the interests of WBL and its investors as they are substantially aligned", it was not saying that a director can have a concurrent fiduciary relationship with a third-party so long as no conflict of interest arises.[24] A fiduciary who serves two principals concurrently *should not* place himself in a position of conflict with either, but that does not mean that he *could not* do so. Adherence to the Court's two-staged inquiry would help dispel confusion in this area.

Indeed, courts in other jurisdictions have recognised that in exceptional circumstances, a director of a company can concurrently owe fiduciary duties to

[18] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [84].
[19] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [70], relying on *Bristol & West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch. 1 at 18; [1997] 2 W.L.R. 436.
[20] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [84].
[21] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [85].
[22] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [85], endorsing Lord Upjohn's test for a conflict of interest in *Boardman v Phipps* [1967] 2 AC 46, 124.
[23] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [85].
[24] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [86].

individual shareholders. The English,[25] Australian,[26] and New Zealand[27] courts have held that where a "special factual relationship" exists, directors are not precluded from establishing a concurrent fiduciary relationship with individual shareholders. After reviewing the authorities, Nugee J (as he then was) in *Sharp v Blank* concluded that this "special relationship" often involves "a close family or other personal relationship" between the parties.[28] Therefore, where a director has a personal relationship with an individual shareholder, bringing them into direct and close contact, the law may exceptionally recognise that the former owes concurrent fiduciary obligations to the latter, as well as to the principal company.

The Court's analysis in *Tan Teck Kee* regarding the issue of Mr Tan owing concurrent fiduciary duties is consistent with the position adopted by other courts in their treatment of directors potentially owing fiduciary duties to certain shareholders. After all, Mr Rai only invested in the joint venture which Mr Tan executed (through WBL) on account of their "tight friendship".

Whenever a director is found to have a concurrent fiduciary relationship with a third-party, such as an investor, very often there will be a "special" and "close, personal" relationship between them. However, this does not involve an invocation of any special doctrine known to equity. Instead, the courts ground the fiduciary relationship by finding that an ad hoc fiduciary relationship existed between the parties. In *Kelly v Baker*, Cockerill J, whilst relying on the "special relationship" analysis, concluded that "the existence of the close relationship is not the hallmark; it is merely a situation in which it is more likely that (objectively) one party will be entitled to repose trust and confidence" in the other, so as to enable the court to conclude that an *ad hoc* fiduciary relationship has arisen.[29] It is this issue of finding an ad hoc fiduciary relationship that this note now turns.

IV. Establishing an ad hoc fiduciary relationship

In holding that Mr Tan owed fiduciary obligations to Mr Rai, the Court did so on the basis that he was an ad hoc fiduciary.[30] Three noteworthy observations could be made from the Court's decision. First, it rejected the submission by the counsel for Mr Tan that the putative fiduciary must have given a subjective undertaking to act exclusively for another for fiduciary obligations to arise.[31] Secondly, it also declined[32] to adopt Worthington's call for legal precision that fiduciary relationships be specific to "legally significant facts" where the putative fiduciary "has control of another's property or has undertaken to act on another's behalf and for the other's benefit and not the fiduciary's own benefit".[33] Thirdly, the Court acknowledged that while other jurisdictions have embraced a test premised on the

[25] *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192 at 208.
[26] *Brunninghausen v Glavanics* (1999) 46 NSWLR 538.
[27] *Coleman v Myers* [1977] 2 NZLR 225.
[28] *Sharp v Blank* [2015] EWHC 3220 (Ch); [2017] B.C.C. 187 at [13].
[29] *Kelly v Baker* [2022] EWHC 1879 (Comm) (*Kelly*) at [31].
[30] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [78]–[80].
[31] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [76].
[32] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [74].
[33] S. Worthington, "Fiduciaries Then and Now" (2021) 80(S1) C.L.J. s154, s163. Worthington was examining Len Sealy's earlier scholarship, "Fiduciary Relationships" (1962) 20(1) C.L.J. 69, where he identified that the term "fiduciary" had been employed in five different categories. Worthington expressed support that only two categories—(i) control of another's property; and (ii) undertaking to act on another's behalf and for the other's exclusive benefit—are core fiduciary categories (see her article from s.157–165 for a discussion on the five categories).

"reasonable expectations" of the supposed principal, it declined to endorse such a test.[34] Instead, it preferred a "broader approach", one which asks, "whether the putative fiduciary had voluntarily placed himself in a position where the law can objectively impute an intention on his part to undertake fiduciary duties".[35]

(i) Rejecting the narrower formulations to ad hoc fiduciary relationships

The Court was right to reject the narrower formulations as advanced by the counsel for Mr Tan and Worthington. Although it is said that "fiduciary obligations are voluntarily undertaken",[36] this does not mean the law requires a subjective undertaking by the putative fiduciary. English courts have held that the inquiry to an ad hoc fiduciary relationship is an objective one.[37] As Sales J (as he then was) clarified in *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No.2)*, fiduciary obligations are "imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct of the affairs of another".[38] As will be demonstrated below, "voluntariness" here refers to a situation where a person, by his own volition, positions himself in a "basket of characteristics" sufficient to attract fiduciary obligations.

Next, the "legally significant facts" that Worthington articulated as grounding a fiduciary relationship are sweeping in two respects. First, not all persons who "ha[ve] control of another's property" are regarded as fiduciaries. For instance, a bare trustee who does not possess discretionary powers is not a fiduciary.[39] As will be argued below, having the power to exercise discretion that could affect the interests of another is a necessary, though insufficient, element in finding that one is a fiduciary. Furthermore, in *Al Nehayan v Kent*, Leggatt LJ (as he then was) explained that "fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another *and to make discretionary decisions on behalf of that person*".[40] Therefore, a trustee (or an agent) who does not have any discretion in performing his obligations should not be recognised as a fiduciary.

Secondly, it is not entirely accurate to describe "an undertaking to act on another's behalf and not the fiduciary's own benefit" (i.e. to act selflessly) as a "fact". While the Court in *Tan Teck Kee* reasoned that instances of an express undertaking to act selflessly are rare in rejecting the submission that fiduciary obligations require a subjective undertaking,[41] the same argument can be levied against Worthington's claim that such an undertaking is a "legally significant *fact*". If an express undertaking is rare, and such undertakings are usually to be implied

[34] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [73].
[35] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [73].
[36] *Tan Yok Koon v Tan Choo Suan* [2017] 1 S.L.R. 654 (*Tan Yok Koon*) at [194].
[37] *Vivendi SA v Richards* [2013] EWHC 3006 (Ch); [2013] B.C.C. 771 at [139].
[38] *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No.2)* [2011] EWHC 1731 (Ch); [2012] Ch 613 at [225].
[39] *Financial Management Inc v Associated Financial Planners Ltd* [2006] A.J. 132 (QL) at [19], the court held that "while a trustee may owe fiduciary duties to its beneficiary, a bare trustee does not". J. Hudson, B. McFarlane and C. Mitchell, *Hayton, McFarlane, and Mitchell on Equity and Trusts*, 15th edn (London: Sweet & Maxwell, 2022), [2-167]: "[i]t is not always clear whether or not someone is a trustee of a type that is typically fiduciary".
[40] *Al Nehayan v Kent* [2018] EWCH 333 (Comm) (*Al Nehayan*) at [159]; [2018] 1 C.L.C. 216 (emphasis added).
[41] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [76], where the Court agreed with the observation made in W. Tan, "Negotiating New Curves Along Chancery Lane: Four More Questions on Fiduciaries" (2022) 35 T.L.I. 197, 201.

or imposed by law, then it is more accurate to classify the requirement to act selflessly as an "expectation" or "consequence" rather than a "fact" to be ascertained. Consequently, the significant facts giving rise to this expectation must correspond to something else. With that in mind, it is now apposite to examine the judicial approaches in establishing ad hoc fiduciary relationships.

(ii) The court's "open-textured" approach v the "legitimate expectation" test

On the issue of identifying fiduciaries, the courts in Australia,[42] New Zealand,[43] Canada[44] and the UK[45] have applied a test based on inquiring whether there is a "reasonable" or "legitimate" expectation that the putative fiduciary would act in the other's interest to the exclusion of his or a third-party's interest. This test was endorsed by the UK Law Commission,[46] and in *Lehtimäki v Cooper*, Lady Arden, in applying the test, acknowledged that it "introduces the additional concept of reasonable expectation of abnegation of self-interest".[47] In contrast, the Court in *Tan Teck Kee* declined to adopt such a test.[48] Instead, it preferred an "open-textured"[49] approach inquiring whether the "putative fiduciary had voluntarily placed himself in a position where the law can objectively impute an intention on his part to undertake fiduciary duties".[50] However, the difference between both tests could be more apparent than real. Indeed, it is noteworthy that in *Kelly*, Cockerill J viewed the Singapore approach as authority supporting the "legitimate expectation" test.[51]

On its face, the "legitimate expectation" test merely gives a reply without an answer, for it further begs the question: when is there a legitimate expectation that one party will act in another's interest? To answer this, the test can be applied in two ways. The first method, as applied by Lady Arden in *Lehtimäki* in determining if members of a charitable company are fiduciaries, can be termed as the "basket of views" approach.[52] Her Ladyship considered the views of the defendant-fiduciary himself,[53] speculated on the views of potential beneficiaries,[54] the expectations of members of the public at large,[55] and the opinions of the Charity Commission[56] before concluding that all relevant parties would have expected that a member of a charitable company owes an obligation to exercise his rights and votes in a selfless manner vis-à-vis the company. This test is straightforward when all parties' expectations are aligned. However, where parties' expectations do diverge, it is

[42] *Grimaldi v Chameleon Mining NL (No.2)* [2012] FCAFC 6 at [174].
[43] *Arklow Investments Ltd v Maclean* [2000] 1 W.L.R. 594 at 598; (2000) 144 S.J.L.B. 81.
[44] *Waxman v Waxman* [2002] OTC 443 at [1225].
[45] *Lehtimäki v Cooper* [2020] UKSC 33; [2020] 3 W.L.R. 461 (*Lehtimäki*).
[46] Law Commission, *Fiduciary Duties of Investment Intermediaries* Law Com No.350, [3.24].
[47] *Lehtimäki* [2020] 3 W.L.R. 461 at [48].
[48] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [73].
[49] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [74].
[50] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [69].
[51] *Kelly* [2022] EWHC 1879 (Comm) at [27].
[52] Tan, "Negotiating New Curves Along Chancery Lane: Four More Questions on Fiduciaries" (2022) 35 T.L.I. 197, 199.
[53] *Lehtimäki* [2020] 3 W.L.R. 461 at [91].
[54] *Lehtimäki* [2020] 3 W.L.R. 461 at [91].
[55] *Lehtimäki* [2020] 3 W.L.R. 461 at [91].
[56] *Lehtimäki* [2020] 3 W.L.R. 461 at [48].

not clear how a court is supposed to resolve these competing views.[57] It is paramount for parties to know if the law adopts a subject-focused or detached approach when recognising a fiduciary relationship. Given its uncertainty in application, this approach should be rejected.

The second method can be referred to as the "basket of characteristics" approach.[58] Courts have affirmed that being a "fiduciary" is a conclusionary label.[59] Therefore, it is more edifying to first determine the characteristics of a fiduciary relationship. They include trust and confidence,[60] dependence and vulnerability,[61] consent to act in the interests of another,[62] and the ability to exercise a discretion to affect the interests of another.[63] The vulnerability that arises here is due to "knowledge" and "power" gaps.[64] A "knowledge" gap exists because there is an asymmetry of information of subject matter between the parties,[65] whereas a "power" gap exists by virtue of the principal's limited ability to monitor and detect the fiduciary's breaches.[66] While these characteristics have been described by judges as "helpful"[67] and "useful"[68] in identifying a fiduciary relationship, it is submitted that Birss LJ in *Tulip Trading Ltd v Bitcoin Association for BSV* was more accurate in observing that they are not only "important features", but "are also *necessary* components of what it means to be a fiduciary".[69] Simply put, this approach relies on a coalescence of these characteristics to give rise to an expectation of abnegation of self-interest. The advocated test is an objective one: did the putative fiduciary place himself in a set of characteristics that gives rise to an expectation in a reasonable person that he would act in the exclusive interests of the putative principal? The greater the degree of each characteristic, the more likely a reasonable person would develop this expectation of abnegation of self-interest. Consequently, the "basket of characteristics" are the legally significant facts. These facts, when sufficiently present, would trigger this expectation of abnegation of self-interest. This expectation confers certain rights on the principal, and correlatively subjects the fiduciary to fiduciary duties. As Gageler J expressed extra-curially, whether a relationship is "fiduciary" is a question of attributing a *legal character* to the relationship which has *in fact* been formed.[70]

[57] e.g. should a court accord more weight to the views of parties internal to the fiduciary relationship (i.e. the principal and fiduciary)? Or should the court pay more attention to external parties, such as the expectations of the officious bystander, or the opinions of regulatory bodies?

[58] Tan, "Negotiating New Curves Along Chancery Lane: Four More Questions on Fiduciaries" (2022) 35 T.L.I. 197, 200.

[59] *How Weng Fan v Sengkang Town Council* [2022] SGCA 72 (*How Weng Fan*) at [171].

[60] *Att-Gen v Blake* [1998] Ch. 439 at 545; [1998] 2 W.L.R. 805.

[61] *Hospital Products Ltd v United States Surgical Corp* (1984) 156 C.L.R. 41 (HCA) (*Hospital Products*) at 97; *Frame v Smith* [1987] 2 S.C.R. 99 (SC) at 136.

[62] *Al Nehayan* [2018] EWCH 333 (Comm) at [159]; *Breen v Williams* (1996) 186 C.L.R. at 71, 92, 113, 117.

[63] *Al Nehayan* [2018] EWCH 333 (Comm) at [159], *Hospital Products* (1984) 156 C.L.R. 41 (HCA) at 97.

[64] I. Samet, "Guarding the Fiduciary's Conscience: A Justification of a Stringent Profit-Stripping Rule" (2008) 28 O.J.L.S. 763.

[65] Samet, "Guarding the Fiduciary's Conscience: A Justification of a Stringent Profit-Stripping Rule" (2008) 28 O.J.L.S. 763, 769.

[66] Samet, "Guarding the Fiduciary's Conscience: A Justification of a Stringent Profit-Stripping Rule" (2008) 28 O.J.L.S. 763, 778.

[67] *Susilawati v American Express Bank Ltd* [2009] 2 S.L.R.(R) 737 at [41].

[68] *Commodities Intelligence Centre Pte Ltd v Mako International Trd Pte Ltd* [2022] SGHC 131 (*Mako*) at [54].

[69] *Tulip Trading Ltd v Bitcoin Association for BSV* [2023] EWCA Civ 83 at [70]; [2023] 4 W.L.R. 16 (emphasis added).

[70] S. Gageler, "Expansion of the Fiduciary Paradigm into Commercial Relationships: The Australian Experience" in P. Devonshire and R. Havelock, *The Impact of Equity and Restitution in Commerce* (Oxford: Hart Publishing, 2019), 181–182.

However, each characteristic is insufficient to ground a fiduciary relationship by itself. For example, one can agree to act in his neighbour's interest by helping to walk the latter's dog in the park whilst walking his own dog, yet such a person is not regarded as a fiduciary. Similarly, a driver reposes trust and confidence in his fellow drivers that they will not drive dangerously, yet drivers are not fiduciaries to one another. Nevertheless, even if these characteristics are present, courts are slow to hold that a fiduciary relationship necessarily arises, but merely that they "might affect the conclusion".[71] This can be rationalised on at least two grounds. First, not only must all the necessary characteristics be present, they must exist at a sufficient degree for the court to characterise the relationship as "fiduciary". Secondly, parties can consensually negate the legitimate expectation from arising. This can be done through contract, where parties expressly provide that one is not acting in a fiduciary capacity to the other or expressly contracting out of the "no-conflict" and "no-profit" duties.[72] Hence, it has been observed that a "fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which contract was intended to have according to its true construction".[73] Such a negation of the legitimate expectation is also helpful in explaining why the Singapore Court of Appeal in *How Weng Fan v Sengkang Town Council* commented that "[t]here are certain established classes of relationships where there is a strong but *rebuttable presumption* that fiduciary duties are owed".[74] These include a relationship of a trustee-beneficiary, solicitor-client, and between partners.[75] Therefore, the test is two-staged. First, are the "basket of characteristics" present at a sufficient threshold? Secondly, is there any agreement that negates the finding of a legitimate expectation? If the answer to the first question is "yes", and the latter "no", the court would conclude that the relationship is "fiduciary". This test can be used to explain why a mortgagee is not in a fiduciary relationship vis-à-vis his mortgagor.[76] Although the basket of characteristics arguably exists where the mortgagee exercises his power of sale, the agreement between the parties makes it explicit that the mortgagee is allowed to act in his own interests in realising his own security.[77]

This version of the "legitimate expectation" test shares a strong parallel with the test in *Tan Teck Kee*. To recap, the test articulated by the Court was "whether the putative fiduciary had voluntarily placed himself in a position where the law can objectively impute an intention on his part to undertake fiduciary duties". Under both approaches, the inquiry focuses on whether the putative fiduciary has landed himself into certain circumstances. The court will then determine, in light of the factual matrix, if he was indeed a fiduciary. However, the "legitimate expectation" test is preferable for three reasons. First, the Court in *Tan Teck Kee* did "not see any reason to depart from the open-ended approach … [e]ven if this approach may engender some uncertainty".[78] It therefore abstained from identifying

[71] *Mako* [2022] SGHC 131 at [55].
[72] *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471 at [37]; [2022] Ch. 123; *Australian Securities v Citigroup* [2007] 241 A.L.R. 705 at [280].
[73] *Hospital Products* (1984) 156 C.L.R. 41 (HCA) at 97.
[74] *How Weng Fan* [2022] SGCA 72 at [175] (emphasis added).
[75] *How Weng Fan* [2022] SGCA 72 at [175].
[76] *Cuckmere Brick Co v Mutual Finance* [1971] Ch. 949; [1971] 2 All E.R. 633 at 634 (Salmon LJ), 646 (Cross LJ).
[77] *Cuckmere Brick* [1971] 2 All E.R. 633 at 643.
[78] *Tan Teck Kee* [2022] 2 S.L.R. 1250 at [77].

any necessary factors. On such a critical area, certainty and clarity are crucial. Otherwise, the test merely repeats the question: when will the court impute an intention on a person to undertake fiduciary obligations?

Secondly, the "legitimate expectation" test eschews the legal fiction of "imputation". Imputing an intention on a person is controversial and a court should only do so as a last resort.[79] In fact, imputing an intention here is an unnecessary distraction. By attributing the presence of certain characteristics to an intention to undertake fiduciary duties, it risks a misconception that the law ultimately demands a certain *state of mind* before one can assume these duties. In truth, however, it is sufficient for the law to examine one's *conduct* in determining whether fiduciary duties should be imposed. Furthermore, "imputation" of intent requires an evaluative exercise of what the court considers "fair" in a given case,[80] and such an exercise obscures legal analysis. By contrast, the two-staged "legitimate expectation" test provides greater transparency in determining whether a legitimate expectation has been nullified by the parties notwithstanding the presence of the "basket of characteristics". There is thus no need to artificially fill the intention lacuna through imputation.

Thirdly, given that other jurisdictions have embraced the "legitimate expectation" test, there is value for Singapore courts, in striving to be part of the global legal ecosystem, to adopt a concept familiar to other jurisdictions. As the test in *Tan Teck Kee* shares considerable resemblance with the preferred test, adopting the latter would not require a radical departure from existing law. Indeed, as Lord Neuberger expressed in *FHR European Ventures LLP v Cedar Capital Partners LLC*:

> "As overseas countries secede from the jurisdiction of the Privy Council, it is inevitable that inconsistencies in the common law will develop between different jurisdictions. However, it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world."[81]

V. Conclusion

The late Lord Walker cautioned that courts should not introduce uncertainty into commercial settings through the "over-ready use of equitable concepts such as fiduciary obligations".[82] Nevertheless, there is no blanket rule that parties in a commercial setting cannot stand in a fiduciary relationship. The Singapore Court of Appeal in *Tan Teck Kee* has made it clear that whilst a director is a fiduciary to his principal company, there is no legal impediment preventing him from voluntarily placing himself in a position that gives rise to a concurrent fiduciary relationship to a third-party. Therefore, a director who seeks investment opportunities through personal relationships with friends or family can in appropriate circumstances owe them fiduciary duties. When the courts are tasked

[79] *Jones v Kernott* [2011] UKSC 53; [2012] 1 A.C. 776 at [47]; [2011] 3 W.L.R. 1121.

[80] *Jones v Kernott* [2012] 1 A.C. 776 at [51] (Lady Hale and Lord Walker), [64] (Lord Collins), [75] (Lord Kerr), [87] (Lord Wilson).

[81] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2015] A.C. 250 at [45]; [2014] 3 W.L.R. 535.

[82] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 W.L.R. 1752 at [81].

to identify an ad hoc fiduciary relationship, the "basket of characteristics" approach to the "legitimate expectation" test is useful in determining when a relationship is "fiduciary". Overall, the decision in *Tan Teck Kee* represents a step in the right direction.

Weiming Tan*

MacLean v MacLean—Mutual Wills and Proprietary Estoppel: An Inexorable Evolution or Doomed Diversion?

Mutual wills; Oral contracts; Proprietary estoppel

Abstract

The doctrine of mutual wills remains subject to uncertainty, both in terms of its practical requirements and its theoretical underpinning. The recent High Court decision in MacLean v MacLean addressed both of these facets, and this case analyses its endorsement of the incorporation of proprietary estoppel and the requisite conduct.

The doctrine of mutual wills plays a small, but critical role in testamentary distributions of property. Although mutual wills are consequential to individuals' confidence that their surviving partner will distribute the now combined estate in accordance with the terms agreed once they subsequently die, the theoretical and practical foundations of the doctrine have remained slippery and contentious among both academics and the judiciary.

A mutual will arises when there is a binding agreement between two individuals (usually romantic partners) who have created co-wills concerning the distribution of their estate. The agreement has two facets. First, the parties agree to leave their property to one another upon either of their respective deaths, and to particular beneficiaries after the death of the initially surviving partner. Secondly, in addition to agreeing the beneficiaries, they also agree that they will not amend these executed wills. Thereby, so long as the initial deceased partner did not amend their will before their death, whoever dies second will be precluded from amending their will and leaving their assets to alternative, non-agreed beneficiaries.

These foundational requirements of a mutual will were recently raised by the High Court in *MacLean v MacLean*,[1] which resuscitated the near dormant possibility of the doctrine being founded upon a proprietary estoppel basis, rather than a merely contractual basis. However, this runs counter to another recent statement also from the High Court in *Naidoo v Barton*,[2] where it was categorically stated that only a contractual agreement would suffice—without even mentioning the

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[1] *MacLean v MacLean* [2023] EWHC 1863 (Ch); [2023] 4 W.L.R. 69.

[2] *Naidoo v Barton* [2023] EWHC 500 (Ch); [2023] 1 W.L.R. 2162.

possibility of there being a proprietary estoppel basis. This case note analyses this apparent tension between members of the High Court surrounding mutual wills.

The need for a contract—orthodoxy

Jurisprudential orthodoxy has made clear that for a mutual will to arise, there must be an agreement between the parties. As far back as *Lord Walpole v Lord Orford*,[3] Loughborough LC held that where wills were intended to be mutual, and a legally binding obligation not to revoke the identical wills was expressed, Equity would treat the agreement as being binding and impose a constructive trust. This has been developed and formalised by subsequent courts into requiring that the parties must enter into a contract with one another,[4] and Virgo has gone so far as to label the doctrine a "mutual wills contract".[5]

In elaborating on these formalities, it has been held that a mere "honourable agreement" is insufficient for the doctrine of mutual wills to arise[6]—neither will a "mere understanding of arrangement" be sufficient for a constructive trust to be imposed by the court.[7] In *Re Goodchild*,[8] one of the most authoritative reviews of the doctrine, Leggatt LJ made clear that a contract, or clear evidence of a mutual intention of irrevocability, was required.

Such is the need for an explicit agreement between the parties, that the execution of identical wills has been held insufficient to evidence the necessary mutuality.[9] Instead, similar to the law of contract, the orthodox position requires the parties to have actively agreed that they will leave their collective property in a particular way after the final partner's death, and are no longer free to alter the terms of their will and distribute the property covered by the will in conflict with the agreement. However, in contrast to the law of contract, it must also be noted that due to the need for the death of one of the parties to occur for the constructive trust to be imposed, the mutual will is revocable until that first death,[10] and liability will not attach to the revoking party owing to the fact that the other party can amend their will to reflect the change in circumstances and "right" the injustice incurred by this change to the will.

Hence, the orthodox position is settled: in order for a mutual will to have arisen, the partners must have expressed an irrevocable agreement that upon the death of one of the partners, the surviving partner will not amend their will so as to distribute property adversely to the agreed terms.

MacLean v MacLean—facts

MacLean concerned a husband, Reginald, and wife, Maureen, who executed mirror wills in 2017. These mirror wills left their estates to one another if the other spouse survived them, and upon the surviving spouse dying, the now combined estates

[3] *Lord Walpole v Lord Orford* 30 E.R. 1076; [1797] 3 Ves. J.R. 402.
[4] *Dufour v Pereira* 21 E.R. 332; (1769) Dick. 419; *Goodchild v Goodchild* [1997] 1 W.L.R. 1216; [1997] 2 F.L.R. 644; *Walters (Deceased), Re* [2008] EWCA Civ 782; [2009] Ch. 212.
[5] G. Virgo, *Principles of Equity and Trusts*, 5th edn (Oxford: OUP, 2023), p.677.
[6] *Lord Walpole v Lord Orford* [1797] 3 Ves. J.R. 402.
[7] *Dale (Deceased), Re* [1994] Ch. 31; [1993] 3 W.L.R. 652.
[8] *Goodchild* [1997] 1 W.L.R. 1216.
[9] *Oldham, Re* [1925] Ch. 75.
[10] *Stone v Hoskins* [1905] P. 194.

were to be left to and divided between four children (one joint child and three from Reginald's previous marriage).

Reginald died in March 2019, and six months after his death, Maureen executed a new will that left all of the now combined estates to her son with Reginald, Brett. In doing so, the three other children from Reginald's previous marriage were excluded from receiving an inheritance from the estate.

Eleven days after Maureen executed this new will in August 2019, she too died.

Inevitably, given the effect of Maureen's new and amended will on three of the children, they disputed its validity, and their primary submission was that when Reginald and Maureen executed their mirror wills in 2017, they had in fact created mutual wills that bound Maureen to abide by those original terms.

The original mirror wills had been entered into by Reginald and Maureen in 2013 and these created a discretionary trust with the four children as trustees, but these had been replaced by the 2017 mirror wills. The need for the new mirror wills in 2017 resulted from Brett not interacting well with his three half-siblings, and so the original discretionary trust was unviable (due to the need for the trustees to act unanimously) and a new method of distribution was required.

MacLean v MacLean—a contractual agreement?

Recorder Robertson, who as the trial judge received the witness' testimony first hand, held the following occurred when the 2017 replacement wills were executed:[11]

- that Maureen said words to the effect that she would not change her will, nor that she would disinherit her stepchildren from Reginald's previous marriage through her will;
- that when making these mirror wills, both Reginald and Maureen trusted one another, and believed that the terms of the wills would be abided by;
- that Reginald never made a promise that his will would not change, only that he trusted Maureen implicitly to abide by the terms they had drawn up;
- nor, it was held, had a discussion or agreement as to what would occur should Maureen pre-decease Reginald occurred;
- that the trust placed in one another only amounted to a moral obligation.

For all these reasons, there was no agreement or contract between Reginald and Maureen, and so it was held by the Recorder that no mutual wills had been executed.

In the High Court, Sir Anthony Mann J concurred with Recorder Robertson,[12] and rejected the appeal of the three children from Reginald's previous marriage. The appeal focussed on the submission that the Recorder had failed to give proper recognition to the "trust" that Reginald and Maureen had placed in one another—that they had both expressly relied on one another (following Reginald's statement that he wished for Maureen to not revoke her will after his death) to

[11] *MacLean* [2023] EWHC 1863 (Ch) at [15].
[12] *MacLean* [2023] EWHC 1863 (Ch) at [34].

abide by the terms of their mirror wills. Moreover, it was proffered that the context of the exchange was central to there being a mutual will—that because the mutual expression of trust occurred during the revocation of their existing wills and the creation of mirror wills, this should amount to a binding agreement between Reginald and Maureen. Sir Anthony Mann J rejected the submission, and held that the Recorder was entitled to conclude as he did, and that as the requirement for a mutual will is a clear, quasi-contractual agreement, the placing of trust in another individual—even if mutual—is insufficient.

Regarding the existence of a mutual agreement, *MacLean* therefore provides a clear demonstration of what conduct will be considered insufficient. Owing to the settled orthodoxy, the parties must enter into a clear, evidentialable agreement not to alter the terms of their will after their partner dies. The mere placement of trust—even if expressed—in the fellow partner will not be sufficient as this will amount to a "mere understanding of arrangement". Moreover, it further reinforces the widely held practitioner view that owing to its high bar, the doctrine of mutual wills should be avoided by parties seeking to securely make provision for the distribution of their estate after their death, and alternative mechanisms adopted.

MacLean v MacLean—a mutual will through proprietary estoppel?

A further and alternative submission made by Maureen's three disinherited stepchildren was that rather than a contractual agreement being required for a mutual will to exist, the doctrine could operate as a result of a proprietary estoppel. The use of proprietary estoppel in the context of mutual wills rests on the nature of the doctrine. As noted by Watt[13] (paraphrasing Edward Nugee QC in *Re Basham*),[14] where one party is encouraged by another with an assurance or representation, they then rely on that assurance and act to their detriment, the promising party is estopped from acting inconsistently with the terms of the assurance. Hence, in the context of a mutual will, each of the partners, when they make an assurance to the other partner, would be precluded from amending the terms of their will after the death of their partner in a manner that is inconsistent with the assurance because the deceased partner has acted detrimentally by executing their will in the manner agreed.

In relation to *MacLean*, the submission rested on the claim that as Reginald had expressed his intentions for his and Maureen's wills not to be altered after their death so that his children would not be disinherited, he had relied upon Maureen's assurance that she would not amend the terms of her will, and so had acted to his detriment—the requirements of a proprietary estoppel.

Recorder Robertson, however, rejected the submission on two grounds: first, that there was no sufficient representation from Maureen, and secondly, that the doctrine of mutual wills cannot be founded upon a proprietary estoppel. It was held that factually, as Reginald made the will due to his own placement of trust and not on a statement made by Maureen, no legally binding promise was entered into—meaning that only a moral obligation existed between the two of them. Furthermore, they also commented that "the authorities do not, in my judgment,

[13] G. Watt, *Trusts and Equity*, 10th edn (OUP: Oxford, 2023), p.424.
[14] *Basham (Deceased), Re* [1986] 1 W.L.R. 1498; [1987] 2 F.L.R. 264.

support the engagement of the doctrine of mutual wills based on a proprietary estoppel".[15] Hence, although succinct, Recorder Robertson was categorical—a mutual will cannot be founded upon the existence of a proprietary estoppel.

In the appeal, Sir Anthony Mann J concurred that on the facts no proprietary estoppel could have arisen in *MacLean*, and held that as there was no agreement between Reginald and Maureen to not amend the terms of their wills, Maureen could not have made a binding assurance to which Reginald could have relied on and acted to his detriment.[16]

However, Sir Anthony Mann did not leave his analysis there, and proceeded to make obiter comments concerning the adoption of proprietary estoppel as a basis for the establishment of a mutual will.

His Honour focused his comments on consideration of the fellow High Court judgment of *Legg v Burton*,[17] where HH Judge Matthews expressed support for the possible adoption of proprietary estoppel. HH Judge Matthews drew the comparison of an agreement and proprietary estoppel, commenting that "So, for practical purposes, if you need a contract to achieve an object, a proprietary estoppel should equally serve your purpose".[18] However, he did not elaborate on this conclusion, other than to comment that should a proprietary estoppel arise, it would be legally binding,[19] and that its possible adoption had not been excluded by Legatt LJ in *Goodchild*[20] as it was not a pertinent issue.

Sir Anthony Mann did, though, acknowledge that *Goodchild*, if it were taken at face value, indicated the need for a contractual agreement between the parties, and thereby preclude the adoption of proprietary estoppel. Notwithstanding this prima facie view of *Goodchild*, it was commented that HH Judge Matthews' comments had credibility, and that "at least as a matter of principle, it is not easy to see why an estoppel should not operate in the realms of mutual wills if the evidence were clear enough (though in practice there may not be many cases where it would be likely to operate)".[21]

Sir Anthony's reasoning for proprietary estoppel's potential adoption, however, differed to the argument made by HH Judge Matthews, and was that because the doctrine of mutual wills is meant to prevent instances of injustice, and this too is the fundamental role of proprietary estoppel, the two doctrines can co-exist and operate in harmony.[22]

Hence, given Sir Anthony Mann's endorsement and elaboration of HH Judge Matthews' endorsement for the adoption of proprietary estoppel, it is apparent that there is some support for mutual wills' evolution in this direction. The question, though, is whether this is a practicable evolution and whether these statements of support indicate a rising groundswell of support.

[15] *MacLean* [2023] EWHC 1863 (Ch) at [15].
[16] *MacLean* [2023] EWHC 1863 (Ch) at [40].
[17] *Legg v Burton* [2017] EWHC 2088 (Ch); [2017] 4 W.L.R. 186.
[18] *Legg* [2017] EWHC 2088 (Ch) at [27].
[19] *Legg* [2017] EWHC 2088 (Ch) at [24].
[20] *Goodchild* [1997] 1 W.L.R. 1216.
[21] *MacLean* [2023] EWHC 1863 (Ch) at [42].
[22] *MacLean* [2023] EWHC 1863 (Ch) at [42].

Analysis

The adoption of proprietary estoppel does, prima facie, have a number of attractive elements to it, but as will also be noted, these elements also encounter a number of insuperable hurdles to any attempted adoption.

As stated by Sir Anthony Mann, a proffered theoretical advantage is the alleged natural synergy between the doctrines of mutual wills and proprietary estoppel. It was submitted in *MacLean* that both doctrines are concerned with Equity preventing instances of injustice from occurring, and ensuring that promises made by parties are enforced. However, whilst this is to some degree correct, there is a fundamental limitation to the suggestion that there is a synergy between the doctrines. For whilst a mutual will is concerned with preventing an injustice occurring where two parties have made equal and identical binding commitments to one another (due to the existence of a contract between the parties), proprietary estoppel is concerned only with the binding assurances of a single individual[23]—indeed, whilst the claimant must rely and act to their detriment, there is no need for them to express acceptance or an intention that they will rely upon the assurance.[24] Hence, the injustices both doctrines are seeking to prevent are at cross-purposes, and seek to address very divergent factual matrices. Despite the apparent initial similarities, the two doctrines thereby only have a limited co-existence and synergy.

Exacerbating this limited co-existence are the differing parties that benefit from the respective assurance or contract. As noted by Walker LJ in *Gillett v Holt*,[25] the contract central to the creation mutual will benefits a third party—the prospective beneficiary, rather than the pre-deceasing testamentary promisor. A proprietary estoppel, however, benefits the party relying on the assurance made by the property owner, rather than any third party to whom the property was promised. Hence, the party to whom an injustice has been committed, and whom Equity is seeking to protect, varies greatly between the doctrines—further underlining the fundamental dissimilarity between the two doctrines.

The primary practical advantage of adopting a proprietary estoppel basis would be that rather than requiring the mutual agreement of both parties as required under the mutual will's orthodoxy, only one party would be required to express an intention to bind themselves to the terms of the will—owing, as noted above, to an estoppel being concerned with assurances rather than agreements. Thus, should there be a power imbalance between partners, with one party having a more dominant position (such as in *MacLean*, with Maureen appearing to be the more dominant of the couple, or where one party is physically infirm and thereby reliant on the other party), then a simple assurance by that more controlling party, and the corresponding reliance from the other party, would estop them from acting counter to the mutual terms. Additionally, even where there is no unequal power dynamic, it would also assist where one party places implicit or explicit trust in the other party due to their natural personality. Adoption of proprietary estoppel would thereby, prima facie at least, simplify the forms of communication required and expand the applicability of this very restrictive doctrine. Moreover, given that

[23] See *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] Q.B. 133; [1981] 2 W.L.R. 576; *Thorner v Major* [2009] UKHL 18; [2009] 1 W.L.R. 776.

[24] *Guest v Guest* [2022] UKSC 27; [2022] 3 W.L.R. 911; *Gillett v Holt* [2001] Ch. 210; [2000] 3 W.L.R. 815.

[25] *Gillett v Holt* [2000] EWCA Civ 66.

a proprietary estoppel arises once the detriment is incurred, unlike with the orthodox position,[26] the party making the assurance would not be free to amend the terms of their will prior to their death due to the detrimental reliance incurred by the other party—preventing any last-minute deception.

Although proprietary estoppel would broaden the acceptable forms of conduct, a fundamental limitation to its adoption is the fruit of the doctrine's distinctiveness to mutual wills, and is that the assurance is only made by one party to the relationship. Should there be mutual assurances, then in most instances this would amount to, or be required to amount to, an orthodox mutual contractual obligation binding other parties.[27] With the utilisation of proprietary estoppel and a single assurance, only one of the parties has their conscience affected, and so for the "mutual will" to be given effect, the assuring party must die second as the other party does not have their conscience bound and is free to amend their will counter to the agreed terms—something that cannot be assured. Hence, it is proffered, the use of proprietary estoppel would not create a "mutual" will at all—merely an estopped, unilateral testator.

In tandem with the lack of the creation of a mutual will, the assurance required for a proprietary estoppel to arise is also problematic. As demonstrated in *MacLean*, the mere statement of intention is insufficient—indeed, the expression of a general intention to not alter the terms of her will by Maureen was held insufficient to create a binding assurance despite the implicit trust placed in her by Reginald. Instead, a "clear and unequivocal"[28] statement that the party will not amend the terms of their will is still required—a standard that remains factually difficult for many to evidence.

Most problematic though is the distinct lack of support such an evolution has from the existing case law. As was made clear above, the orthodox position is that the partners who seek to create a set of mutual wills must enter into a contract that limits their ability to freely distribute property in their will—that they have agreed a legal obligation to distribute the now combined estate in a particular manner. This orthodoxy stretches back to 1797, and has been reaffirmed time and again—most authoritatively in *Goodchild*. Indeed, the trial judge in *MacLean*, Recorder Robertson, although they did not elaborate on the conclusions, was firm in stating that there was no support for the adoption of proprietary estoppel in the existing authorities. More categorical though are the recent comments of Cadwallader J in *Naidoo v Barton*, who six months before the *MacLean* judgment stated that "… a mutual wills agreement is a contract first, before there is any basis for equity to intervene".[29] No consideration of adopting a proprietary estoppel basis was even considered, and in calling for the continued adoption of a contractual basis, a retention of strong testamentary freedom was called for.

Furthermore, as set out above, there have only been two expressions of support for the adoption of proprietary estoppel as a basis for creating a mutual will, and

[26] *Stone v Hoskins* [1905] P. 194.
[27] S. Atkins, "Legg v Burton [2017] EWHC 2088 (Ch): Proprietary Estoppel Might Found a Basis for Mutual Wills" (2018) (24)(4) T. & T. 377, 379.
[28] *Thorner v Major* [2009] 1 W.L.R. 776 at [783].
[29] *Naidoo v Barton* [2023] 1 W.L.R. 2162 at [40].

both have come from the High Court.[30] In the first of these statements, HH Judge Matthews placed much weight on the Court of Appeal's lack of rejection of proprietary estoppel in *Goodchild*. However, it is submitted that this absence cannot be given much weight given that the issue was not pertinent in that appeal, and therefore would not have merited comment by the court. Moreover, Leggatt LJ reaffirmed the need for a contract—making clear His Lordship's views on the foundations of a mutual will, and meaning *Goodchild* cannot be seen as an even oblique endorsement of proprietary estoppel despite Sir Anthony Mann's subsequent endorsement of HH Judge Matthews' interpretation. This limited support for the adoption of proprietary estoppel has, therefore, only come from the lower courts and in six years has seen only two statements of support whilst at the same time there has been several express statements of rejection. It is thereby proffered that it appears that there is only very shallow support for proprietary estoppel's adoption to the doctrine of mutual wills, rather than a rising groundswell of support.

Conclusion

MacLean, in endorsing the proposition in *Legg*, has demonstrated that there is some support among junior members of the judiciary for the adoption of proprietary estoppel as a means of giving rise to a mutual will. However, as has been demonstrated, there are fundamental impediments to this adoption of proprietary estoppel, including: a cross-purpose, and thereby limited, synergy between the doctrines; the limitation that a proprietary estoppel will only give rise to a single party being subject to testamentary restrictions; and the continuing high bar of required evidence. Hence, such an evolution would fail to overcome the restrictiveness identified by practitioners of the doctrine's orthodox position. Most problematic, though, is the distinct lack of wider judicial support—with the contemporaneous High Court judgment of *Naidoo* making clear that many of the judiciary even now do not endorse such an evolution. Hence, whilst it can be said there is support for the adoption of proprietary estoppel, it is not inexorable, and for the reasons outlined above, could be perceived as a doomed theoretical diversion.

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[30] Although a proprietary estoppel claim was made in *Baker v Baker* [2008] EWHC 937 (Ch); [2008] 2 F.L.R. 767, this was in the context of a traditional, separate claim, rather than as a basis for the recognition of the existence of a mutual will.

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