March 2016

PROPERTY BRIEFING: ARTICLE 3

In this edition of 1 Chancery Lane's Property Briefing John Bryant discusses **the modification of leasehold covenants and variation of leases.**

The recent case of *Stevens v. Isamail* [2016] UKUT 43 (LC) in the Upper Tribunal raised interesting points about the Tribunal's jurisdiction to modify restrictive covenants and about variation of leases.

The jurisdiction under s.84 of the LPA 1925 is not confined to freehold covenants but, by s.84(12), extends to covenants affecting leasehold land but only where the term created by the lease was for more than 40 years and 25 years of that term have expired at the date of the application.

A four-storey building was divided into four flats. On 5th April 1980 each of the four flats had been let on a lease of 999 years from 24th March 1979. The applicants between them were the registered leasehold owners of two of them, the garden floor flat (GF) and the hall floor flat (HF), one immediately above the other. They wished to combine them to create a single larger flat. The lease of the GF described the demise as the several rooms and premises known as the GF in the position and for the purposes of identification only edged red on the [attached] plan. Clause 3(15) contained a covenant not to permit any encroachment or easement to be made on the demised premises. The lease of the HF contained a similar restriction and in addition a covenant at clause 3(20) to use and occupy the premises solely and exclusively as a self-contained residential flat. To achieve their purpose the applicants needed those two covenants to be modified. The owner of one of the other flats objected.

Between 1980 and 1998 the GF had been extended by the creation of a kitchen and conservatory. By a deed dated 26th August 1998 the lease of the GF was varied to give the lessee a right to park at the front of the building. The deed had attached to it a plan, which shall be substituted for the plan attached to the Registered Lease. It was a new plan, showing the area over which the right to park was to be exercised and showing the GF edged in red. The red edging enclosed the additional areas into which the GF had been physically extended.

The application to modify was made on 6th August 2015. The objector challenged the Tribunal's jurisdiction, arguing:

(1) the 1998 deed extended the demise of the GF, thus bringing about a surrender of the 1980 lease and the grant of a new lease of which fewer than 25 years had expired;

(2) cl.3(20) in the lease of the HF was a positive covenant and there was no jurisdiction to modify positive covenants.

The Deputy President, referring to *Friends Provident Life Office v. BRB* [1996] 1 All E.R. 336 C.A., decided that where a lease is varied and the parties show a

clear intention not to create a new lease, the court will give effect to that intention unless the only way by which the law can bring about the arrangement is to imply a surrender of the old tenancy and the creation of a new one. It was doubtful whether that "exceptional situation" could arise, except where the parties wished to extend the period of the term or to add further land to the existing holding. He held that the substitution of the new 1998 plan was intended only to indicate the area over which the lessee of GF now had a right to park. The deed contained no words of demise and like the plan attached to the 1980 lease the new plan was not intended to show the boundaries of the holding. He referred to the "imprecise" doctrine of accretion and decided that the parties would not have contemplated its technicalities. They had assumed that the existing extensions were already part of the premises comprised in the lease, even though they were not. There was no implied surrender and re-grant and therefore the 1980 lease remained on foot. More than 25 years of the term had elapsed and so the tribunal had jurisdiction.

As for cl.3(20) in the HF lease, the judge said that the form of words indicated an intention that, if the HF is to be used and occupied at all, then it must be as a self-contained flat; if the owner chooses not to use and occupy it, he is free to leave it vacant. It was a negative obligation. That gave the Tribunal jurisdiction.

John Bryant

John Bryant undertakes a wide range of property work, having a particular expertise in landlord and tenant, freehold covenants, constructive trusts of land, adverse possession and nuisance.