UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – covenants -- Commonhold and Leasehold Reform Act 2002 s.168(4) -- alleged breach of covenant against parting with possession without consent -- completion of sale of flat by execution of transfer of registered underlease and payment of price -- assignee not yet registered as proprietor at Land Registry -- whether a parting with possession -- Land Registration Act 2002 ss. 23, 24 and 27 -- Trusts of Land and Appointment of Trustees Act 1996 s.6 -- whether relevant consent (namely that of a right to manage company) unreasonably withheld -- right to manage company not notifying landlord of proposed assignment -- Landlord and Tenant Act 1988 -- Commonhold and Leasehold Reform Act 2002 ss. 98 and 99

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

(1) CHARLOTTE ABIGAIL REINER
(2) DAVID WISMAYER

Appellants

and

TRIPLARK LIMITED

Respondent

Re: Flat LG-01,
Northwood Hall,
Hornsey Lane,
London N6 5PE

Before His Honour Judge Huskinson

The Royal Courts of Justice
16-18 November 2016

Edwin Johnson QC, instructed by Payne Hicks Beach on behalf of the Appellant
Brie Stevens-Hoare QC and *Stan Gallagher*, instructed by Hamlins LLP on behalf of the Respondents

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The following cases are referred to in this decision:

Lam Kee Ying v Lam Shes Tong [1975] AC 247
Akici v L R Butlin Limited [2005] EWCA Civ 1296
Stening v *Abrahams* [1931] 1 Ch 470
Stodday Land Limited v Pye [2016] EWHC 2454 (Ch)
Pincott v Moorstons Limited [1937] 1 ALL ER 513
Jackson v Simons [1923] 1 Ch 373
Horsey Estate Limited v Steiger [1899] 2 QB 79
Scribes West v Relsa [2005] 1 WLR 1847
Go West Limited v Spigarolo [2003] EWCA Civ 17
Norwich Union Life Insurance Society v Sophomore Limited [1999] 1 WLR 531
Clarence House v National Westminster [2010] 1 WLR 1216
Schalit v Nadler [1933] 2 KB 79

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal Property Chamber (Residential Property) (hereinafter "the F-tT") dated 23 February 2016 whereby the F-tT determined that the first appellant (hereafter Ms Reiner) had breached clause 3(8)(ii) of her underlease in that she had parted with possession of Flat LG-01, Northwood Hall ("the flat") to the second respondent (hereafter Mr Wismayer) without obtaining the previous written consent of the respondent (hereafter Triplark). The determination was made upon an application to the F-tT by Triplark under section 168(4) of the Commonhold and Leasehold Reform Act 2002.

2. Ms Reiner holds the flat from Triplark upon an underlease dated 12 May 1978 for a term from that date until 26 September 2101 at the rent and upon the terms and conditions therein contained. Clause 3(8)(ii) contains a covenant in the following terms:

> "(ii) Not at any time assign sublet or part with possession of the whole of the flat or permit or suffer the same to be done without the previous written consent of the Lessors such consent not to be unreasonably withheld."

3. The reversion immediately expectant upon Ms Reiner's underlease has at all material times been vested and remains vested in Triplark. However, when it comes to dealing with the obtaining of any consent such as that required under clause 3(8)(ii), it is no longer Triplark whose consent must be sought but is instead the consent of a right to manage company namely Northwood Hall RTM Company Limited (hereafter "the RTM Company") which was incorporated on 23 June 2010 and which assumed the management role in respect of Northwood Hall on 12 January 2011. In circumstances where there is in place a right to manage company the provisions of the 2002 Act, and especially sections 98 and 99 thereof which are of importance in the present case, make provision for the necessary consent to be sought from the right to manage company, with that company being under an obligation to notify the landlord (here Triplark) of the request for consent.

4. The events which are said by Triplark to have given rise to a breach of this covenant are in summary: that on 26 June 2015 Ms Reiner entered into a contract to assign the underlease of the flat to Mr Wismayer; that this contract was completed by the execution of a transfer on 29 July 2015; that on completion the full purchase price (less a presently irrelevant deduction) was paid by Mr Wismayer to Ms Reiner; that Ms Reiner moved out of the flat with all her possessions; and that (to use a neutral expression at present) control of the flat passed to Mr Wismayer. However, the title to the underlease is registered at HM Land Registry. Prior to the assignment to Mr Wismayer being registered an objection was made to the Land Registry on behalf of Triplark which has prevented Mr Wismayer becoming registered as proprietor of the underlease. Accordingly at all times since completion on 29 July 2015 the legal estate in the underlease has remained vested in Ms Reiner because registration of Mr

Wismayer as proprietor of the underlease has not been effected. The legal consequence of this state of affairs is examined in the course of this decision.

5. Triplark made an application under section 168(4) of the 2002 Act for a determination that by reason of the events mentioned above Ms Reiner had breached covenant 3(8)(ii).

6. It is common ground between the parties that no consent from the RTM Company was granted to any assignment or parting with possession of the flat by Ms Reiner to Mr Wismayer.

7. In summary the issues in the present case are as follows:

(1) In the events which have occurred, has Ms Reiner parted with possession of the flat to Mr Wismayer? (It is common ground that there has not been any assignment – because the transaction has not been completed by registration of Mr Wismayer as proprietor of the underlease and accordingly the legal title to the underlease remains vested in Ms Reiner). If the answer to issue (1) is no, then the present appeal must be allowed and a decision on issue (2) below becomes of no significance.

(2) If the answer to issue (1) is yes and there has been a parting with possession, was Ms Reiner entitled, without the consent of the RTM Company, to part with possession of the flat to Mr Wismayer by reason of the RTM Company having unreasonably withheld its consent to the proposed assignment? It is common ground that the answer to this question involves the analysis of two separate points, namely:

(a) Was any application for consent to an assignment by Ms Reiner to Mr Wismayer ever made to the RTM Company (and if so when was it made)?

(b) If such an application was made, was the situation as at 29 July 2015 that the RTM Company was unreasonably withholding its consent to such an assignment? (It is common ground that if there was an unreasonable withholding of consent then, at common law, Ms Reiner was permitted to assign and part with possession of the flat to Mr Wismayer without the consent of the RTM Company).

8. It is agreed on behalf of the appellants and the respondent that the present dispute arises in most unusual circumstances.

9. As regards the general background there is nothing especially unusual regarding that, although the background is unfortunate. Northwood Hall (hereafter "the building") is a block of flats in North London comprising in all 194 flats. The RTM

Company commenced its role in 2011 and remained the right to manage company in relation to the building until the appointment in the second half of 2016 of a tribunal appointed 1987 Act manager. Some years ago it became recognised that there were major problems with the heating system for the building. The RTM Company with the assistance of its then manager Canonbury Management (hereafter "Canonbury") identified a way forward and entered into contracts for major works to cure the problems with the heating system. Difficulties arose with this programme. In due course there came about a polarisation of views regarding the appropriateness of the scheme being pursued by the RTM Company and Canonbury in relation to the heating problems. There emerged a faction of leaseholders (the supportive faction) supportive of the line taken by the RTM Company. There also emerged a faction of leaseholders (the adverse faction) which was adverse to the line taken by the RTM Company. Strong views were advanced by each faction critical of the line taken by the other faction.

10. It came about that the adverse faction were introduced to Mr Wismayer and formed the opinion that, having regard to Mr Wismayer's experience in managing residential blocks and problem solving therein, he could assist in finding a solution to the problems at the building.

11. Much material is to be found in the papers before me in which the supportive faction and the adverse faction developed their views including their criticisms of the other faction. It is common ground between the parties that for the purpose of the present appeal I am not concerned to reach any conclusion upon these disputes and criticisms. It is merely relevant to note that they exist. Each party however emphasises that all their arguments upon these points are reserved in case in any future litigation these points do become of relevance.

12. Against this background the following is a summary (the evidence is discussed in more detail below) of facts which appear relevant to the matters which are before the Tribunal:

(1) Mr Wismayer was appointed a director of the RTM Company on 13 March 2015.

(2) In March 2015 Ms Reiner was seeking to sell her flat – her son had recently been born and she and her husband wished to move to a house.

(3) On 29 April 2015 there was held the first general meeting of the RTM Company. Various trenchant views were expressed on behalf of the supportive faction and the adverse faction. It appears that the outcome of this meeting was not propitious for a smooth sale by Ms Reiner of her flat to any purchaser who interested themselves in the normal answers to leasehold enquiries regarding service charges and any management problems at the building.

(4) A director of the RTM Company resigned on 1 May 2015. Two other directors resigned on 8 June 2015. This left Mr Wismayer as the sole director of the RTM Company from 8 June 2015 to 25 July 2015. Mr Wismayer ceased to be a director on 25 July 2015 when the votes cast at a general meeting held on 24 July 2015 were tallied and the result given effect to – being a vote removing him as a director and installing new directors.

(5) It is of importance that Mr Wismayer was the only director of the RTM Company from 8 June to 25 July 2015.

(6) During the course of June 2015 Ms Reiner, through her solicitors, was still seeking to pursue negotiations with a prospective purchaser of her flat. In due course she contacted the RTM Company (the sole director then being Mr Wismayer) and thereafter became in communication with him regarding potential information which the third party purchaser might be seeking. These communications included discussions between Mr Wismayer and Ms Reiner regarding the prospect of Mr Wismayer personally purchasing Ms Reiner's flat. These communications were pursued to some extent orally and also by way of emails (some sent from and to Mr Wismayer on the RTM Company email account and some on his private email account) and also communications between Ms Reiner's solicitors and Mr Wismayer's solicitors.

(7) On 26 June 2015 Mr Reiner and Mr Wismayer exchanged contracts for the sale by her to him of the flat. The contract included certain special conditions including a condition that Mr Wismayer would take all responsibility to obtain consent to the assignment and was not to delay completion if consent was not obtained by the completion date.

(8) Despite the provisions of section 98(4) of the Commonhold and Leasehold Reform Act 2002 the RTM Company (acting through Mr Wismayer) did not give 30 days' notice (or indeed any notice) to Triplark of the proposed assignment by Ms Reiner to Mr Wismayer. This was an intentional decision on Mr Wismayer's part not to do so because he understood that Triplark would object to the transaction and he did not wish to trigger the delays which would follow from the operation of section 99. Mr Wismayer did not consider that Triplark had any reasonable grounds to withhold consent but he perceived that they would withhold consent and that this would trigger the section 99 delays.

(9) Mr Wismayer's purpose in purchasing Ms Reiner's flat included the desire to make what he saw was an appropriate investment in a building with which he was becoming substantially concerned and also was in order to put himself in the position of a lessee of a flat in the building – thereby enhancing his status as against the RTM Company and Canonbury to hold them to account.

(10) The transaction was completed on 29 July 2015; Ms Reiner moved out and moved into her new house with her family; Mr Wismayer paid the purchase price; the keys were handed over to Mr Wismayer; and Mr Wismayer took control of the flat.

13. It is in these circumstances that Triplark says there has been a breach by Ms Reiner of the relevant covenant by reason of her, without consent from the RTM Company, having parted with possession of the flat to Mr Wismayer.

14. The appellants say:

(1) As a matter of law there has not been any parting with possession of the flat to Mr Wismayer. This follows from the facts of the case and the operation thereon of well-known principles of law as stated by the Privy Council in *Lam Kee Ying v Lam Shes Tong* [1975] AC 247 and having regard also to the fact that Mr Wismayer never became registered as proprietor of the underlease, such that Ms Reiner continued to hold the legal estate as a trustee for him. Reference is made to various provisions in the Land Registration Act 2002 and also to the Trusts of Land and Appointment of Trustees Act at 1996 section 6.

(2) If there was a parting with possession, then there is to be found in the communications between Ms Reiner and Mr Wismayer (and their solicitors) a sufficient application by Ms Reiner to the RTM Company for consent to an assignment to Mr Wismayer. Also by reason of the conduct of the RTM Company (through the sole director Mr Wismayer until 25 July and thereafter by the new directors) the RTM Company was unreasonably withholding its consent to the proposed assignment by 29 July 2015 such that Ms Reiner was entitled without the consent of the RTM Company to complete the sale by assigning the lease to Mr Wismayer and to allow Mr Wismayer into possession of the flat.

15. A particular feature of the present case, which both parties recognise is highly unusual, is the dual role of Mr Wismayer. Mr Wismayer was the contracting purchaser who, it is alleged, Ms Reiner has allowed into possession of the flat. Also Mr Wismayer was (during most of the relevant period) the sole director of the RTM Company. It was the RTM Company whose consent was required for any assignment or parting with possession and whose consent is said to have been unreasonably withheld by reason of (inter alia) the action/inaction of the RTM Company during the period when Mr Wismayer was the sole director and thus in control of the RTM Company.

16. The F-tT in its decision stated at paragraph 173:

> 173. There is no doubt in our mind that, for all practical purposes, upon completion of the sale of the Flat, there was a parting with possession of

the Flat from the First to the Second Respondent. We conclude this for the following reasons:

(a) The purpose of the sale was for the First Respondent to be able to buy (and move to) a larger home for her growing family.

(b) The contract for sale, as one might expect, provided that vacant possession of the Flat was to be given by the First to the Second Respondent upon completion.

(c) There is no dispute that the Second Respondent took physical possession of the flat; the First Respondent referred in her evidence to having moved all her possessions to her new property on the day of completion.

(d) There is no evidence that the Respondents ever contemplated that the First Respondent would ever have any control over or say in the Flat after completion.

(e) There is no question that the purchase price was not fully paid for the Flat on completion.

(f) There is evidence that the Second Respondent either sub-let the Flat after completion or gave a licence to occupy the flat to a third person.

(g) The question of obtaining consent from the First Respondent for his use of the Flat after the sale had never occurred to the Second Respondent.

17. The F-tT noticed the absence of registration; the fact that this as a matter of law gave rise to a trust whereunder Ms Reiner as trustee held the lease for Mr Wismayer as beneficiary; and that the purpose of the trust was for Mr Wismayer to have possession of the flat with the intention that the legal interest would pass to him by his becoming registered as proprietor of the leasehold interest at the Land Registry. The F-tT considered that the power of an absolute owner vested in Ms Reiner by section 6 of the Trustees of Land and Appointment of Trustees Act 1996 could only be exercised having regard to the rights of Mr Wismayer as beneficiary namely his right to occupy and have conveyed to him the legal title. The F-tT considered the case of *Lam Kee Ying* and also the Court of Appeal decision in *Akici v L R Butlin Limited* [2005] EWCA Civ 1296. The F-tT noted the difference between a tenant allowing another person to occupy the relevant premises and a tenant actually parting with possession. The F-tT stated:

> "The natural and commercially sensible interpretation of possession on the facts of this case include a parting of possession that falls short of registration with the Land Registry, especially when bearing in mind that [Mr Wismayer] attempted to register his title at the Land Registry."

The F-tT in passing noted that its conclusion would prevent a situation whereby the words "or part with possession" in clause 8 of the lease were rendered completely

redundant. The F-tT therefore concluded there had been a parting with possession by Ms Reiner to Mr Wismayer on 29 July 2015.

18. As regards whether this was a breach of covenant the F-tT observed that, whilst it was clear that a number of parties for differing reasons were alarmed at the prospect of having Mr Wismayer as a leaseholder, the F-tT did not consider there was in any sense a coherent and coordinated plan hatched between leaseholders and Triplark and Canonbury to prevent that event (para 186). In any event the F-tT did not consider that, to whatever extent there may have been an attempt to stop Mr Wismayer becoming a leaseholder, that was relevant to the question of whether or not there was a breach of covenant.

19. The F-tT concluded that the RTM Company had not granted consent and had not unreasonably withheld consent to the assignment (and parting with possession) to Mr Wismayer. As part of its analysis upon the question of whether the RTM Company's consent had been unreasonably withheld, the F-tT noticed that there had been no compliance with certain conditions which at one stage had been put forward by Canonbury as a requirement if any consent to an assignment were to be granted. However at the appeal before me it was agreed between the parties that at all relevant times Canonbury did not have authority to deal with an application by Ms Reiner to assign to Mr Wismayer; that it was the responsibility of the RTM Company itself to deal with any relevant application for consent to assign; and that any omission to comply with any condition purportedly put forward by Canonbury was not a matter of relevance and could not provide justification for the withholding of consent if a withholding of consent by the RTM Company would be otherwise unreasonable.

20. The appellants were granted permission by the F-tT to appeal to the Upper Tribunal, save in respect of certain points which, putting it broadly, concern the role of Canonbury. The appellants have made a protective application to the Upper Tribunal that, if necessary, they should be permitted to advance these two further points concerning the role of Canonbury. These points are developed in Mr Johnson's skeleton argument at paragraph 19. It is convenient at this point to record that it is not submitted on behalf of Triplark that any failure by the appellants to comply with any condition laid down by Canonbury constitutes a valid reason for withholding consent to the assignment. Triplark is in agreement with the appellants that any action or omission on behalf of Canonbury is not of relevance in the present case upon any question regarding whether a valid application for permission for Ms Reiner to assign the lease to Mr Wismayer was ever made to the RTM Company nor as to whether, if such an application was made, the RTM Company unreasonably withheld its consent. It is therefore not necessary to say anything further regarding the subsidiary points raised by Mr Johnson in paragraph 19 of his skeleton.

21. The parties agreed (and the Upper Tribunal ordered) that the present appeal should proceed by way of a re-hearing. As already recorded there is before the Upper Tribunal substantial documentation regarding the merits/demerits of the position taken by the supportive faction and by the adverse faction regarding the general difficulties at the building and the best way of solving them. It is not necessary that I

record evidence upon these points – although as already noted above both parties reserve their position on these points in case this becomes relevant in future litigation.

The evidence

22. I have already given above a summary of the evidence. In somewhat more detail (and with reference to relevant documentation) the evidence before me was as follows.

23. Oral evidence was given by Ms Reiner and by Mr Wismayer, both of whom had put in a written statement and exhibits and both of whom were then cross-examined.

24. On behalf of Triplark it was originally intended that evidence should be given by Mr Robert Saunders, Mr Sidney Ormonde and Mr Roger McElroy. Unfortunately on 7 November 2016 Mr Saunders was admitted to the Royal Stoke Hospital in Stoke on Trent. Medical advice was given that he would be unable to attend these proceedings. This led to an application for an adjournment on the part of Triplark. The appellants contended such adjournment should not be granted because Mr Saunders' evidence was not of relevance to the limited issues in the present appeal. The Tribunal indicated its provisional view that this was correct and declined to adjourn the case ahead of the commencement of the case on 16 November, but indicated that the application for an adjournment could be renewed at the opening of the appeal. The Tribunal also observed that, on the basis that the appellants were correct in their contention that Mr Saunders' evidence was not relevant, the Tribunal had difficulty in seeing how substantial amounts of the evidence of Ms Reiner and Mr Wismayer were relevant. On 16 November 2016 there was discussion regarding the extent of the evidence which was potentially relevant upon the issues before the Tribunal on this appeal. It was agreed between the parties (and in so far as it was not agreed it was my conclusion and I so rule) that the evidence contained in the statements of the appellants and in the documents they produced were not relevant to the present appeal in so far as they referred to the state of mind of Mr Saunders or any action or inaction on behalf of Mr Saunders. The application for the adjournment was withdrawn and the case proceeded. As regards Mr McElroy Triplark had failed to require him to attend through a witness summons served in proper time. However bearing in mind the limited issues before the Tribunal and bearing in mind the fact (as accepted by both parties) that Canonbury did not have a role in the granting or withholding of consent to any assignment by Ms Reiner of the flat to Mr Wismayer, once again Mr McElroy's evidence was not of relevance.

25. In the result therefore the only evidence relied upon by Triplark was the evidence of Mr Ormonde as contained in his original witness statement and as contained in paragraphs 1-8, 11, 15, 16 and 18 of his second witness statement. By agreement between the parties I was invited to read this material. Mr Ormonde was not required for cross-examination. I was asked to note that as regards paragraph 15 of the second witness statement his confirmation that at no stage was any application for a licence to assign passed on to Triplark by the RTM Company was to be taken to

be limited to the period up to and including 29 July 2015 (which is the period relevant for the present appeal).

26. Ms Reiner gave evidence (which I accept) to the following effect:

(1) Her personal view is that she is being used by Triplark and its supporters as a pawn in its power struggle at the building regarding management issues not of her making. With the arrival of a newborn child, she and her husband realised the flat was too small and they wanted to find a larger family home. She negotiated with a third party purchaser, but was concerned that this transaction would not proceed because of management difficulties which would have to be revealed upon answers to leasehold enquiries. She was much concerned with the level of dispute (and the seriousness of the dispute) over the heating system and other management issues as existed between the various factions at the building.

(2) She made enquiry of the RTM Company in connection with answers which she would have to give to leasehold enquiries from the third party purchaser. This led her into contact with Mr Wismayer, who at the relevant time was the sole director of the RTM Company.

(3) During her telephone discussions with Mr Wismayer he indicated a preparedness that he himself should buy her flat. Certain emails were exchanged between her and her solicitors on the one hand and Mr Wismayer and his solicitors on the other hand regarding this.

(4) On 12 June 2015 she asked her solicitors to issue a contract to Mr Wismayer and to proceed to exchange with him as soon as possible.

(5) On 18 June 2015 Mr Wismayer emailed a draft licence to assign. This was in respect of a proposed assignment by her to him. She was told this was being copied to her solicitors.

(6) She is a teacher with a husband and a young child. She has no legal experience. She left matters to her solicitors. She was concerned to synchronize the sale of her flat with the purchase of her proposed new house.

(7) Her solicitors sent a draft contract to Mr Wismayer's solicitors on 19 June. Contracts were exchanged on 26 June 2015. Her solicitor amended the standard contract terms regarding licence to assign in order to reflect the uncommon circumstance of the assignment being to a director of the RTM Company. She understood that the obtaining of licence to assign to Mr Wismayer was something which was within Mr Wismayer's control and was being taken care of by him.

(8) On 16 July 2015 her solicitors sent to the RTM Company at its then registered office address a licence to assign signed by her.

(9) Mr Wismayer was not at any stage bullying (there was at one point an allegation now withdrawn on the part of Triplark that there might have been such conduct on behalf of Mr Wismayer). Ms Reiner said that Mr Wismayer was kind and helpful and accommodating.

(10) During most of the time that she was dealing with Mr Wismayer she was aware that he was the sole director of the RTM Company.

(11) She thought that, bearing in mind Mr Wismayer's position as a director of the RTM Company, the transaction could go forward with the minimum of formalities.

(12) She knew that she needed a licence to assign the lease but she thought that the RTM Company were the people to deal with. Bearing in mind Mr Wismayer's position with the RTM Company she thought that she was dealing with the RTM Company. She did not attribute any significance to which email account Mr Wismayer was writing to her from.

(13) She did not recall the exact advice her solicitor gave regarding the obtaining of consent to the assignment, but her solicitor told her that she had acted properly and that Mr Wismayer had given the solicitor assurance that as a director he would take care of obtaining the consent to the assignment. Hence the special terms in the contract.

(14) Her understanding when she had been paid in full at completion was that the flat was no longer hers. All of her possessions were moved out on the day of completion or the next day. She handed over the keys of the flat. She in effect disconnected herself from the flat and she moved to the new family house. She has not ever been back to the flat.

(15) She did not talk to any of the new directors of the RTM Company (who from 25 July 2015 replaced Mr Wismayer) about whether she had a valid licence to assign.

(16) In paragraph 9 of her witness statement Ms Reiner said that she believed that at all material times Triplark and the RTM Company knew she was selling her flat to Mr Wismayer. However in cross-examination she agreed that the people she believed knew she was selling the flat to Mr Wismayer were people who lived in other flats in the building. As regards Triplark Ms Reiner accepted that her solicitor contacted Triplark (or more precisely their agent OCK) as recorded in paragraph 61 and 74 of her statement asking for a clear ground rent statement. Ms Reiner did not suggest that her solicitors ever notified Triplark of a proposed assignment to Mr Wismayer.

27. Mr Wismayer gave evidence (which I accept) to the following effect:

(1) Ms Reiner contacted the RTM Company (in effect him as he was the only director at that point) asking for information to give to her

prospective purchaser of the flat. Mr Wismayer was concerned that a full and frank answer to such leasehold enquiries would cause anxiety to an incoming purchaser. He left a telephone message for Ms Reiner to contact him.

(2) Before he contacted Ms Reiner he reflected that the purchase by him of her flat might be an elegant solution to the situation, because Ms Reiner wanted to sell and he wanted to have a direct investment in the building as a leaseholder. Some of his detractors had commented that he was not a leaseholder. He considered that it was easy to portray him as an outsider, with no connection to the building, who was seeking to charge fees. He felt it would reinforce his commitment to the building to purchase a flat. He also saw the purchase by him of a flat as an additional method of holding Canonbury accountable.

(3) At this stage Canonbury was no longer authorised to sign licences to assign. Mr Wismayer did not consider there to be any necessity to apply to Canonbury for a licence to assign.

(4) He considered that it was for the RTM Company to produce a licence to assign. This could be in the same form as used by Canonbury.

(5) He became a director of the RTM Company in March 2015 and was the sole director between 8 June and 25 July 2015.

(6) Mr Wismayer agreed that the exchange of emails at page 322 of the bundle, whereby Ms Reiner asked for details of his solicitor and how quickly he could exchange contracts etc and whereby he replied with the name of his solicitors and stated that exchange of contracts could occur as soon as the minimal formalities had been addressed, constituted a private conversation by email between him and Ms Reiner. This communication was not using the RTM Company's email address but one of his own personal email addresses.

(7) On 9 June 2015 (email at page 321) Ms Reiner asked what Mr Wismayer meant regarding the minimal formalities. Mr Wismayer (on his personal email) replied on 9 June at page 321 in the following terms:

"I'm not the solicitor so cannot advise all the details.

But, for example, we do not need a 'sales information pack' nor do we need a copy of the building insurance policy.

We will provide the 'licence to assign' at no cost to you.

We will undertake the relevant searches as quickly as may be practicable.

Please confirm that you have accepted my offer to buy your flat in the amount of £445,000."

(8) Although this involved communications between Ms Reiner and himself on his private email regarding the proposed transaction between her and him, he was unable to separate the knowledge he held by reason of his personal transactions from the knowledge he held as a sole director of the RTM Company. Thus the RTM Company (through him) knew of this proposed sale.

(9) He typed up a draft licence from scratch for the proposed assignment by Ms Reiner to him. He sent Ms Reiner a copy of this on 18 June 2015 (page 369).

(10) He considered that during these emails, whether from his account or the RTM Company account, he was acting not only on his own behalf but also as a director of the RTM Company. Accordingly the RTM Company was well aware that Ms Reiner wanted licence to assign her lease to him.

(11) Mr Wismayer was aware (after having typed up the draft licence to assign if not earlier) that the RTM Company could only give licence to assign if it had first given 30 days notice in writing to Triplark.

(12) Mr Wismayer agreed it was his responsibility to obtain any licence to assign and he understood that completion of his purchase was not to be delayed if such licence had not been obtained by the completion date. He agreed he would have read the contract which was exchanged including the provisions in clauses 11 and 12 which provided:

"11. The Buyer takes all responsibility from the date hereof to obtain consent to assignment under the terms of the lease and the Buyer shall not delay completion if consent is not obtained by the Completion Date.

12. Standard Condition 8.3.2(a) and 8.3.3 are omitted."

(13) These standard conditions which were omitted were conditions to the effect that the seller was to apply for consent to the assignment and to the effect that if no such consent to the assignment was given then the parties had a right to rescind the contract.

(14) Mr Wismayer was concerned that every conceivable obstruction would be placed in the way of him being allowed to complete on the purchase of a flat in the building.

(15) Mr Wismayer agreed he did not give Triplark any notification of the proposed sale by Ms Reiner to him. Mr Wismayer knew that he was not able to purport to grant consent himself (on behalf of the RTM Company). He knew that a procedure with Triplark was officially required and he did not consider or envisage that Triplark had any reasonable grounds to withhold consent. He decided to go ahead with completion of his purchase of the flat without notifying Triplark of the proposed transaction. A delay would not have mattered much to him

but he was concerned on behalf of Ms Reiner that if he notified Triplark then the section 99 procedures would be triggered and she would face delay which might mean she would lose the purchase of her house. It was a conscious decision on his part not to notify Triplark.

(16) He paid the price on completion. He paid on the basis that the flat would become entirely his – that was his understanding of the situation. He understood that after he had paid the price Ms Reiner would have no further interest in the flat. He was given keys to the flat. Ms Reiner moved out and took everything belonging to her. Since the completion date on 29 July 2015 Mr Wismayer agreed that he had had control of the flat regarding who goes into it. He does not live there himself, but has allowed someone else to live there temporarily (not as a sub-tenant).

(17) Mr Wismayer confirmed that Ms Reiner had done all that he expected her to do under the contract by way of completion. His solicitors sent an application for him to be registered as proprietor of the underlease to the Land Registry. However this was not completed.

28. Mr Ormonde gave evidence (which I accept) in his written statements to the following effect. I was asked to read these statements– he did not give oral evidence and was not required for cross-examination. He is a self-employed office manager who acts for Triplark and has day to day conduct of this matter on its behalf. Prior to 29 July 2015 Triplark did not receive notice from the RTM Company or anyone else of any proposed grant of an approval to the assignment of the lease of the flat from Ms Reiner to Mr Wismayer. On 9 September 2015 Triplark lodged an objection at the Land Registry to the registration of Mr Wismayer as proprietor of the flat. If Triplark had received an application for licence to assign the flat to Mr Wismayer it is likely that Triplark would have objected. Triplark proposes, if the present appeal is dismissed, to serve a section 146 notice with a view to instigating forfeiture proceedings. However Triplark would consent to relief against forfeiture on terms that the flat is not retained by Mr Wismayer or any party connected with him.

Statutory provisions

29. The Land Registration Act 2002 section 23(1) provides as follows:

"23. Owner's powers

(1) Owner's powers in relation to a registered estate consist of –

(a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a mortgage by demise or sub-demise, and

(b) power to charge the estate at law with the payment of money."

30. Section 24 of that Act provides:

"24. Right to exercise owner's powers

A person is entitled to exercise owner's powers in relation to a registered estate or charge if he is --

(a) the registered proprietor, or

(b) entitled to be registered as the proprietor."

31. Section 27(1) and (2)(a) of that Act provides:

"27. Dispositions required to be registered

(1) If a disposition of a registered estate or registered charge is required to be completed by registration, it does not operate at law until the relevant registration requirements are met.

(2) In the case of a registered estate, the following are the dispositions which are required to be completed by registration –

(a) a transfer."

32. It is common ground between the parties that Mr Wismayer has not yet acquired the legal title to the underlease of the flat because he has not yet been registered as proprietor thereof at the Land Registry. The registered proprietor after 29 July 2015 remained Ms Reiner. It is also common ground that the consequence of this was that completion of the transfer on 29 July 2015 gave rise to a trust of land within the meaning the Trusts of Land and Appointment of Trustees Act 1996. Section 6 of that Act provides:

"6. General powers of trustees:

(1) For the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner.

(2) Where in the case of any land subject to a trust of land each of the beneficiaries interested in the land is a person of full age and capacity who is absolutely entitled to the land, the powers conferred on the trustees by subsection (1) include the power to convey the land to the beneficiaries even though they have not required the trustees to do so; and where land is conveyed by virtue of this subsection –

(a) the beneficiaries shall do whatever is necessary to secure that it vests in them, and

(b) if they fail to do so, the court may make an order requiring them to do so.

(5) In exercising the powers conferred by this section trustees shall have regard to the right of the beneficiaries.

(6) The powers conferred by this section shall not be exercised in contravention of, or of any order made in pursuance of, any other enactment or any rule of law or equity."

33. The Landlord and Tenant Act 1988 makes provision imposing statutory duties in connection with covenants in leases against assigning underletting or parting of possession of premises without consent. Sections 1 and 2 provide as follows:

"1.– Qualified duty to consent to assigning, underletting etc. of the premises.

(1) This section applies in any case where –

(a) a tenancy includes a covenant on the part of the tenant not to enter into one or more of the following transactions, that is –

(i) assigning,

(ii) underletting,

(iii) charging, or

(iv) parting with the possession of,

the premises comprised in the tenancy of any part of the premises without the consent of the landlord or some other person, but

(b) the covenant is subject to the qualification that the consent is not to be unreasonably withheld (whether or not it is also subject to any other qualification).

(2) In this section and section 2 of this Act –

(a) references to a proposed transaction are to any assignment, underletting, charging or parting with possession to which the covenant relates; and

(b) references to the person who may consent to such a transaction are to the person who under the covenant may consent to the tenant entering into the proposed transaction.

(3) Where there is served on the person who may consent to a proposed transaction a written application by the tenant for consent to the transaction, he owes a duty to the tenant within a reasonable time –

(a) to give consent, except in a case where it is reasonable not to give consent,

(b) to serve on the tenant written notice of his decision whether or not to give consent specifying in addition –

(i) if the consent is given subject to conditions, the conditions,

(ii) if the consent is withheld, the reasons for withholding it.

(4) Giving consent subject to any condition that is not a reasonable condition does not satisfy the duty under subsection (3)(a) above.

(5) For the purpose of this Act it is reasonable for a person not to give consent to a proposed transaction only in a case where, if he withheld consent and the tenant completed the transaction, the tenant would be in breach of a covenant.

(6) It is for the person who owed any duty under subsection (3) above –

(a) if he gave consent and the question arises whether he gave it within a reasonable time, to show that he did,

(b) if he gave consent subject to any condition and the question arises whether the condition was a reasonable condition, to show that it was,

(c) if he did not give consent and the question arises whether it was reasonable for him not to do so, to show that it was reasonable,

and, if the question arises whether he served notice under that subsection within a reasonable time, to show that he did.

2. – Duty to pass on applications.

(1) If, in a case where section 1 of this Act applies, any person receives a written application by the tenant for consent to a proposed transaction and that person –

(a) is a person who may consent to the transaction or (though not such a person) is the landlord, and

(b) believes that another person, other than a person who he believes has received the application or a copy of it, is a person who may consent to the transaction,

he owes a duty to the tenant (whether or not he owes him any duty under section 1 of this Act) to take such steps as are reasonable to secure the receipt within a reasonable time by the other person of a copy of this application.

(2) The reference in section 1(3) of this Act to the service of an application on a person who may consent to a proposed transaction includes a reference to the receipt by him of an application or a copy of an application (whether it is for his consent of that of another)."

34. The Commonhold and Leasehold Reform Act 2002 in sections 98 and 99 makes provisions relating to the giving of approvals in circumstances where a right to manage company is in place. Section 98(1)-(4) provides as follows:

"98. Functions relating to approvals

(1) This section and section 99 apply in relation to the grant of approvals under long leases of the whole or any part of the premises; but nothing in this section or section 99 applies in relation to an approval concerning only a part of the premises consisting of a flat or other unit not held under a lease by a qualifying tenant.

(2) Where a person who is –

(a) landlord under a long lease of the whole or any part of the premises, or

(b) party to such a lease otherwise than as landlord or tenant.

has functions in relation to the grant of approvals to a tenant under the lease, the functions are instead functions of the RTM company.

(3) Accordingly, any provisions of the lease making provision about the relationship of -

(a) a person who is landlord under the lease, and

(b) a person who is party to the lease otherwise than as landlord or tenant,

in relation to such functions do not have effect.

(4) The RTM company must not grant an approval by virtue of subsection (2) without having given -

(a) in the case of an approval relating to assignment, underletting, charging, parting with possession, the making of structural alterations or improvements or alterations of use, 30 days' notice, or

(b) in any other case, 14 days' notice,

to the person who is, or each of the persons who are, landlord under the lease."

Section 98(7) provides that "approval" includes consent or licence.

35. Section 99 of the CLR Act 2002 provides:

"99. Approvals: supplementary

(1) If a person to whom notice is given under section 98(4) objects to the grant of the approval before the time when the RTM Company would first be entitled to grant it, the RTM Company may grant it only –

(a) in accordance with the written agreement of the person who objected, or

(b) in accordance with a determination of (or on an appeal from) [the appropriate tribunal]

(2) An objection to the grant of the approval may not be made by a person unless he could withhold the approval if the function of granting it were exercisable by him (and not by the RTM Company).

(3) And a person may not make an objection operating only if a condition or requirement is not satisfied unless he could grant the approval subject to the condition or requirement being satisfied if the function of granting it were so exercisable.

(4) An objection to the grant of the approval is made by giving notice of the objection (and of any condition or requirement which must be satisfied if it is not to operate) to –

(a) the RTM company, and

(b) the tenant,

and, if the approval is to a tenant approving an act of a sub-tenant, to the sub-tenant.

(5) An application to [the appropriate tribunal]

for a determination under subsection (1)(b) nay be made by –

(a) the RTM company,

(b) the tenant,

(c) if the approval is to a tenant approving an act of a sub-tenant, the sub-tenant, or

(d) any person who is landlord under the lease."

The Appellants' submissions

36. On behalf of the appellants Mr Edwin Johnson QC advanced arguments which first were addressed to the question of whether there had been any parting with possession and which then addressed the question of whether (supposing against his primary submission that there had been a parting with possession) Ms Reiner was entitled at common law to complete the assignment and allow Mr Wismayer into possession of the flat on the basis that consent to the proposed assignment had been unreasonably withheld by the RTM Company.

37. Mr Johnson recognised that the contract for sale provided that the property was sold with vacant possession. However it was essential to note that the assignment had not been completed by registration of Mr Wismayer as proprietor of the underlease at

the Land Registry; that the legal estate (i.e. the term of years created by the underlease) remained at all times vested in Ms Reiner; that a relationship of trustee/beneficiary arose; that the relevant provisions of the Trustees of Land and Appointment of Trustees Act 1996 and of the Land Registration Act 2002 applied; that it was necessary to examine whether, in the light of these provisions and the existence of the trust, Ms Reiner had been completely excluded from legal possession of the flat for all purposes; and that when so examined the question could only be answered in the sense that there had not been a parting with possession.

38. Mr Johnson recognised that in evidence Ms Reiner and Mr Wismayer said that, so far as they were concerned, the sale had been completed and Ms Reiner had in effect given up all interest in the flat to Mr Wismayer such that she had no further interest therein or right to enter upon the flat. However, Mr Johnson submitted that the personal understanding of Ms Reiner and Mr Wismayer was not the relevant matter to consider. What had to be considered was the true legal position which had been reached having regard to the execution of the transfer (by way of completion of the contract) and the statutory provisions governing the interregnum between transfer and registration. The personal appreciations of Ms Reiner and Mr Wismayer could not assist upon this analysis. It is right to note that Mr Johnson during the course of the evidence sought to object to questions directed towards asking the witnesses whether after completion either or them considered Ms Reiner had any continuing interest in or rights in respect of the flat – but I considered such questions could properly be asked with Mr Johnson's rights being reserved to advance argument as to whether such evidence was relevant.

39. Mr Johnson observed that the present case is very unusual and involves a technical dispute. The first question is whether there has been a parting with possession. The authorities show that parting with possession is a narrow concept in law.

40. The starting point for a consideration as to what involves parting with possession is to be found in *Lam Kee Ying v Lam Shes Tong* which is a Privy Council case which has been followed and applied subsequently and was notably endorsed in *Akici v L R Butlin Limited* in the Court of Appeal through the judgment of Neuberger LJ (as he then was). In *Lam Kee Ying* the Privy Council referred to a number of cases in which it was held that a lessee who retains the legal possession does not commit a breach of a covenant against parting with possession by allowing other people to use the premises, such that a lessee who grants a licence to another to use the demised premises does not commit a breach of the covenant:

> "unless his agreement with his licensee wholly ousts him from the legal possession …. nothing short of a complete exclusion of the grantor or licensor from the legal possession for all purposes amounts to a parting with possession."

This citation was taken by the Privy Council from the judgment in *Stening* v *Abrahams* [1931] 1 Ch 470 at 473-474. Their Lordships regarded the law being settled as there stated. They observed that a covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he

allows another to use and occupy the premises. They recognised that the covenant, on this construction, may well be of little value to a lessor in many cases and may admit of easy evasion by a lessee who is competently advised, but the words of the covenant must be strictly construed, since if the covenant is broken a forfeiture may result.

41. Mr Johnson submitted therefore that it was necessary to consider whether the events which occurred on 29 July 2015 (whereby the sale to Mr Wismayer was completed save for registration at the Land Registry) resulted in Ms Reiner being wholly ousted from legal possession of the flat. It is necessary to ask whether there was a complete exclusion of Ms Reiner from the legal possession for all purposes. He submitted that once it is recognised that that is the correct question to ask the answer is clear and is: no. This answer necessarily follows from the nature of the interregnum pending registration which gave rise to a trust, the incidents of which Mr Johnson went on to examine.

42. Mr Johnson submitted that the actual decision in *Lam Kee Ying*, namely a decision to the effect that there had been a parting with possession on the facts of that case, was not of any particular significance. The decision turned upon the scant evidence and, in particular, upon the fact that there was no evidence from the relevant parties denying that there had been a parting with possession.

43. The fact that the relevant question to ask was as posed in paragraph 41 above is confirmed by the decision in *Akici* in paragraph 18. The court in *Akici* recognised the technical but very well established distinction between possession and occupation, albeit that the distinction may be somewhat elusive and not entirely easy to define. At paragraph 39 Neuberger LJ observed:

> "Nonetheless, where the person *prima facie* entitled to possession, in this case Mr Akici, is alleged to have parted with possession to an entity which is admittedly in occupation, the ultimate question is whether he has effectively ceded possession to that other entity."

44. In the present case on and after 29 July 2015 Ms Reiner remained the registered proprietor of the underlease. Accordingly she continued to enjoy the owner's powers as laid down in section 23 of the Land Registration Act 2002. She held the legal estate on trust for Mr Wismayer. Section 6(1) of the Trusts of Land and Appointment of Trustees Act 1996 provided that for the purposes of exercising her function as trustee she had in relation to the flat "all the powers of an absolute owner". For instance if squatters had got into the flat after 29 July 2015 she would have had title to bring a possession claim against them. It may be that Mr Wismayer would have enjoyed his own rights against the squatters pursuant to section 24 of the Land Registration Act 2002, but he would not have enjoyed his rights to the exclusion of Ms Reiner. It is possible that after 29 July Ms Reiner and Mr Wismayer were sharing possession, by reason of them each having these rights, but the covenant which is alleged to have been breached is a covenant against parting with possession not a covenant against sharing possession.

45. Mr Johnson referred to *Stodday Land Limited v Pye* [2016] EWHC 2454 (Ch) which concerned a case where within the "registration gap" (i.e. in the period after *Stodday* had sold off the freehold of a piece of land which formed part of an agricultural holding but before registration of the purchaser at the Land Registry) there had been served certain notices to quit. A question arose as to whether a notice to quit by the (unregistered) purchaser of the plot could be valid. Three arguments were advanced in support of the notice being valid, two of which do not need considering here but the third of which involved reliance upon section 24 of the Land Registration Act 2002. The court held that someone that is entitled to be registered as proprietor was not empowered by section 24 to undertake transactions that would be effective at law before he is registered. Such a persons' powers of disposition were limited to powers that were exercisable under the general law. Under the general law someone who was only an equitable owner of the reversion, albeit with a right to be registered as proprietor, did not have power to serve a valid notice to quit. Mr Johnson submitted that this case showed there was a real and substantial area where the powers of the owner remained vested in Ms Reiner after 29 July and were not enjoyed by Mr Wismayer. This pointed against there having been any parting with possession. For instance if on completion there had been a tenant present in the flat Mr Wismayer would not have been entitled after the completion date but before registration to serve a notice to quit on that tenant.

46. Mr Johnson submitted that there cannot be a parting with possession (properly construed) in circumstances where section 6 of the 1996 Act applies. The provisions of section 6(5) and (6) do not alter that conclusion. The relevant question is whether Ms Reiner has been ousted from legal possession for all purposes. For so long as Ms Reiner retains the powers of an absolute owner pursuant to section 6(1) she has not been so ousted and she has not therefore parted with possession.

47. On the question of whether after 29 July 2015 Ms Reiner would have been entitled to enter upon the flat even against the wishes of Mr Wismayer, Mr Johnson pointed out that during the interregnum Ms Reiner would remain liable upon the covenants in the lease. He submitted that therefore she would have a right of entry (which she might have to enforce by applying to the court), even if Mr Wismayer refused her entry, for the purpose of her complying with some covenant, e.g. curing a leaking pipe.

48. Mr Johnson pointed out that there is no decided case directly in point upon the question of whether during the interregnum there has been a parting with possession to a purchaser who has completed on his purchase but not become registered with title to the property. He submitted that *Pincott v Moorstons Limited* [1937] 1 ALL ER 513 was of assistance. There the question arose as to whether a contracting purchaser, in circumstances where the landlord's consent to an assignment of the lease had not been obtained, was entitled to return of the deposit or whether instead the purchaser was required (as contemplated by the contract) to accept a declaration of trust in her favour by the vendor in respect of the lease. One argument which arose was whether the purchaser was not required to accept such a declaration of trust on the grounds that the accepting of such a declaration of trust would involve a forfeiture of the lease which included a covenant not to assign transfer underlet or part with possession of

the demised premises or any part thereof without the previous licence in writing of the landlords and their superior lessors such consent not to be unreasonably withheld. The court referred to the case of *Jackson v Simons* [1923] 1 Ch 373 at 380 in which it was stated that the defendant in that case retained the legal possession of the whole of the premises at all material times and that a lessee that retains such possession does not commit a breach of a covenant against parting with possession by allowing other people to use the premises. As regards the case of *Jackson v Simons* itself Mr Johnson submitted that, having regard to the facts of the present case, that case was not helpful as it concerned a different kind of arrangement and was examining whether there had in effect been an assignment or a subletting. As regards *Horsey Estate Limited v Steiger* [1899] 2 QB 79 Mr Johnson submitted that this was not of assistance as it was concerned with whether letting someone into possession pending completion involved a breach of the covenant against assignment or underletting. Also this case did not (of course) consider the effect of trusts under the 1996 Act or the provisions of the Land Registration Act. Mr Johnson also referred to *Scribes West v Relsa* [2005] 1 WLR 1847 but submitted that this was not a case on point as it concerned the operation of section 141 of the Law of Property Act 1925.

49. Mr Johnson returned to paragraph 173 of the decision of the F-tT where the F-tT set out various reasons which led it to conclude that there had been a parting with possession (see paragraph 16 above). As regards each of those points which the F-tT set out in its sub paragraphs (a) – (g) Mr Johnson submitted as follows:

(a) Ms Reiner's purpose in selling the flat could not alter the trustee/beneficiary relationship which came into existence pending completion by registration.

(b) The contract provided that vacant possession of the flat was to be given on completion, but the contract did not provide that Mr Wismayer was to enjoy (contrary to section 6 of the 1996 Act) the legal right to possession after completion to the exclusion of Ms Reiner.

(c) Mr Wismayer took control of the flat on completion and enjoyed the right of occupation (which in fact he did not enjoy himself but he allowed a vulnerable employee to occupy on an occasional basis). However such rights were rights of occupation and not the legal right to possession.

(d) What was contemplated by Ms Reiner and Mr Wismayer is irrelevant. What must be examined is whether the completion of the contract carried with it a transfer or grant of the legal right to possession of the flat – pending registration it did not do so.

(e) The fact that the full purchase price was paid on completion does not alter the analysis in (d) above.

(f) Mr Wismayer did not sublet the flat after completion and would not have had power to do so – he had no ability to grant the legal right to possession of the flat to anyone because the legal right to possession had not been transferred or granted to him.

(g) Mr Wismayer did not require the consent of Ms Reiner to use the flat following completion because he had a right to occupy (the word "occupy" is stressed) as a beneficiary under the trust. But this did not mean that Mr Wismayer enjoyed the legal right to possession of the flat.

50. In summary the relevant question to ask is whether on completion of the transfer there was a complete exclusion of Ms Reiner from the legal possession of the flat for all purposes. Having regard to the matters set out above the answer is no. Accordingly there was no parting with possession.

51. Mr Johnson pointed out that if his submissions were correct and that there had been no parting with possession then the appeal must succeed and the question of whether consent to the proposed assignment by Ms Reiner to Mr Wismayer had been sought from the RTM Company and whether it had been unreasonably withheld would not in those circumstances arise. However he went on to submit that if, contrary to his first point, there had been a parting with possession then (a) there had been an adequate application to the RTM Company for consent to the proposed assignment by Ms Reiner to Mr Wismayer and (b) by 29 July 2015 the circumstances were such that the RTM company was unreasonably withholding its consent to this assignment – with the result, in accordance with common law principles, that Ms Reiner was entitled to complete the assignment without the RTM Company's consent, see Woodfall's Law of Landlord and Tenant Vol. 1 at paragraph 11.128.

52. Having regard to section 98 of the 2002 Act it was the consent of the RTM Company and not the consent of Triplark which was required to be sought. Mr Johnson accepted, as recognised in Woodfall at paragraph 11.128, that it is essential that consent to the assignment etc is sought beforehand and that, however unreasonably a refusal of consent might have been, there would be a breach of covenant if in fact the assignment (or here parting with possession) had been made before consent to the assignment had been requested.

53. On the factual question of whether an application for consent to the assignment had been made to the RTM Company Mr Johnson submitted that realistically, if the exchange of emails and correspondence is looked at in the round, the RTM Company by 17 June 2015 at the latest was seised of an application for licence to assign to Mr Wismayer. There had been a sufficient application in writing for the purposes of section 1(3) of the Landlord and Tenant Act 1988. The present is a very unusual case where the proposed assignee, namely Mr Wismayer, was the sole director of the RTM Company. Mr Johnson submitted it would be ridiculously and unfairly technical to ignore the written material passing between Mr Wismayer and Ms Reiner or their respective solicitors on the basis that this was directed towards the contractual relationship between the two of them personally and to conclude that there could only be a proper application for consent if Ms Reiner or her solicitors had communicated a formal written application for consent expressly to the RTM Company. At the relevant time Mr Wismayer being the sole director of the RTM Company had control of the RTM Company. The RTM Company knew, through Mr Wismayer's knowledge derived from written material, that a consent to an assignment to Mr

Wismayer was being requested by Ms Reiner. Mr Johnson particularly drew attention to page 369 of the bundle where on 18 June Mr Wismayer sends a draft licence to assign to Ms Reiner which he says he will copy to her solicitors. This was sent in response to Ms Reiner's email of 17 June pressing Mr Wismayer for a draft licence. Accordingly the application for licence had been made in writing by 17 June at latest. If the foregoing is correct then Mr Johnson submitted the appellants did not need to rely upon page 407 and following of the bundle where Ms Reiner's solicitors sent the licence to assign signed by Ms Reiner to the RTM Company – however if it was necessary to rely on this then upon receipt by the RTM Company (on 20 July 2015) of this document there could be no further doubt and there was a clear application by Ms Reiner that the RTM Company would itself sign the licence and permit the assignment to Mr Wismayer.

54. Accordingly there was a valid application to the RTM Company for consent to assign by 17 June 2015. This triggered the obligations placed upon the RTM Company by section 1 of the 1988 Act as applied by section 98, 99 and schedule 7 paragraph 13 of the 2002 Act – this paragraph 13 providing that the reference in section 1(2)(b) of the 1988 Act to the covenant is to the covenant as it has effect subject to section 98 of the 2002 Act.

55. Section 98(2) of the 2002 Act transfers the function of granting or refusing consent to a proposed assignment to the RTM Company. The only exception is that provided for by section 98(4). This provides that if the RTM Company wishes to grant consent to the proposed assignment it cannot do so without giving 30 days' notice to the appropriate person (here Triplark). Thus the only restriction on the RTM Company is if it wants to grant consent. The RTM Company has power, without giving any notice to Triplark, to refuse consent.

56. On the basis that the RTM Company has power, without giving notice to Triplark, to refuse consent it necessarily follows that the RTM Company has power to refuse consent whether it is doing so reasonably or unreasonably. If the RTM Company refuses consent unreasonably then the normal common law consequences apply and the tenant can proceed with the transaction without obtaining consent (and can do so even though Triplark has not been notified of the application). It is not permissible to conclude that the RTM Company is competent (without notification to Triplark) to refuse consent, provided such consent is reasonably withheld, but is not competent to refuse consent if that gives rise to a situation where consent has been unreasonably withheld.

57. In answer to questions from the Tribunal Mr Johnson submitted that if on day one an application is made by a tenant to the RTM Company for a consent to an assignment (or for consent to some other operation where consent is required under the lease), then on day two the RTM Company has no power to grant consent, see section 98(4). However the RTM Company does have power on day 2 to refuse consent on an obviously unreasonable basis (for instance the assignee's name begins with X) with the common law consequence that the tenant can then complete the assignment without consent. This is the inevitable consequence of the statutory

provisions even if the RTM's decision on day two to refuse consent for a spurious reason is a step deliberately taken by the RTM Company to ensure that the tenant can proceed with the transaction without consent (on the basis it is being unreasonably withheld) even though on day two there would be no power in the RTM Company to grant consent.

58. Mr Johnson submitted that even on a date (such as on day two in the foregoing example) when the RTM Company is subject to the statutory prohibition contained in section 98(4) upon it granting consent, it can still properly be said that the RTM Company is unreasonably withholding consent. Mr Johnson recognised there could be scope for abuse by a deliberate refusal for spurious reasons, but that should not affect the proper construction of the statute. The functions of granting consent for certain transactions have been taken away from Triplark and granted to the RTM Company. Mr Johnson referred to *Go West Limited v Spigarolo* [2003] EWCA Civ 17 where the court cited the analysis of Sir Richard Scott V-C in *Norwich Union Life Insurance Society v Sophomore Limited* [1999] 1 WLR 531 regarding the purpose of the 1988 Act:

> "The Act was intended to remedy the state of affairs in which a landlord, by his dilatory failure to respond to an application for consent to an assignment or to subletting, could cause substantial financial damage to the tenant without the tenant having any remedy for that damage. A tenant might lose a valuable property transaction because of the landlord's failure to deal expeditiously with the application for consent. It is clear that it was an intention of the Act to remedy that state of affairs. The Act creates a statutory duty requiring landlords to attend promptly to applications for consent to assignments, or underletting or parting with possession of premises comprised in a tenancy where there is a covenant not to do those things without consent."

In order to fulfil the intention of the 1988 Act it is necessary in a case where there is a right to manage company such that section 98 of the 2002 Act applies, that the right to manage company is under an obligation promptly to notify the relevant person (here Triplark) under section 98(4) on pain of being held to be unreasonably withholding consent if such notification is not promptly given.

59. In the present case the giving of notice to Triplark should have been done promptly. Although if notice is given to Triplark then such notice must be a 30 days notice, the step of giving notice to Triplark does not require anything like 30 days. Such notice could and should have been given by the RTM Company to Triplark within a matter of days of the application to the RTM Company for consent for the assignment to Mr Wismayer. On the basis that the application for consent was made on or about 17 June 2015 there had clearly elapsed more than a reasonable time (and indeed more than 30 days) by 29 July 2015. Even if, upon proper analysis, consent to the assignment was not sought from the RTM Company until 20 July 2015 there had elapsed by 29 July more than a reasonable time for notification to be given to Triplark. No such notification had been given. The RTM Company was in breach of its duties under the 1988 Act. The RTM Company was therefore unreasonably withholding its consent and the assignment could properly be completed without consent. Parliament has sanctioned the transfer of the functions of Triplark, for the

purposes of giving any consent, to the RTM Company whether Triplark likes it or not. Triplark is bound by the consequences of any unreasonable withholding of consent by the RTM Company.

60. Accordingly there was here an unreasonable withholding of consent by the RTM Company as at 29 July 2015. There was no breach of the covenant in the underlease by the completion by Ms Reiner of her sale of the flat to Mr Wismayer and by her in consequence allowing him into possession of the flat (if she did so).

61. Mr Johnson addressed what he described as the "appeal to the merits" advanced in argument by Ms Stevens-Hoare, being an argument based upon the fact that Mr Wismayer was in effect wearing two hats, both as the controlling mind of the RTM Company and also as the proposed assignee. Mr Johnson recognised Mr Wismayer's evidence that he intentionally decided not to notify Triplark in accordance with section 98(4) because that would have given rise to a 30 day delay – and very probably thereafter the delay by reason of the section 99 procedures. Mr Wismayer wished to avoid such delays. As regards any argument appealing to the merits Mr Johnson advanced the following submissions:

(1) It has never been suggested that while he was the sole director of the RTM Company Mr Wismayer lacked capacity, because of his position in this transaction, to take any step on behalf of the RTM Company. Mr Wismayer did have capacity to act for the RTM Company and that company is stuck with Mr Wismayer's conduct. It is possible that Triplark might have some claim for damages against the RTM Company for breach of duty, but this does not affect the legal analysis that the RTM Company was unreasonably withholding its consent.

(2) The crucial person whose position needs to be considered is the lessee, namely Ms Reiner and not the position of Mr Wismayer. It is Ms Reiner who remains the lessee and who is at risk of being the defendant in forfeiture proceedings. Ms Reiner is an innocent party in all this. Accordingly in considering the general merits the position of Ms Reiner should be remembered.

(3) Also any general appeal to the merits depends upon (as Mr Johnson put it) casting Mr Wismayer as the villain of the piece and arguing that Mr Wismayer's conduct was outrageous. The appellants on the contrary say that it was Mr Wismayer who could be described as a white knight who saved Ms Reiner's ability to sell her flat.

Submissions on behalf of the respondent

62. On behalf of Triplark Ms Brie Stevens-Hoare QC advanced the following arguments.

63. It was relevant when considering whether there had been a parting with possession to examine the terms of the contract of sale and how the parties to the contract treated the property after completion. The contract required a sale with vacant possession. Ms Reiner delivered up the keys and moved out of the flat and gave up all control over the flat to Mr Wismayer on 29 July 2015 when he paid the purchase price and the transfer was executed. Since the completion date Mr Wismayer has been able to deal with every aspect of the flat. Mr Wismayer in evidence frankly accepted that since the completion date he had enjoyed control over the property. He had obtained everything he understood he was entitled to get from his purchase, save only being registered at the Land Registry. Also Ms Reiner had done everything required of her so far as concerns her contractual obligations with Ms Wismayer. Ordinarily she would have been required under the contract to obtain consent to the assignment, but the contract expressly altered that requirement and placed the responsibility for obtaining consent to the assignment upon Mr Wismayer.

64. Turning to the authorities, *Lam Kee Ying* makes clear that the question of whether there has been a parting of possession must depend upon all the facts and circumstances of the case. The question is whether Ms Reiner has excluded herself from possession. As recognised in *Akici* the question was whether Ms Reiner has effectively ceded possession to Mr Wismayer. On the facts of the present case Ms Reiner has ceded possession to Mr Wismayer. The control of the property was granted to him. Upon completion he obtained control and Ms Reiner gave up control over the property. This distinguishes the situation from Mr Wismayer merely having occupation.

65. The case of *Pincott v Moorstons* was of limited assistance because there had not been any declaration of trust and accordingly the question which arises in the present case did not arise there.

66. Ms Stevens-Hoare accepted that, having regard to section 27 of the Land Registration Act 2002, the legal title to the underlease remained vested in Ms Reiner who had the powers provided for by section 23 and in respect of whom section 6 of the Trusts of Land and Appointment of Trustees Act 1996 applied. The following points however must be noted.

67. Having regard to section 24 of the Land Registration Act Mr Wismayer also had the ability to exercise the owner's powers.

68. After the completion date Ms Reiner had in relation to the flat "all the powers of an absolute owner", see section 6(1) of the 1996 Act. However these powers were only conferred for the purpose of exercising her function as trustee. Her function as trustee was the function of a bare trustee. All the rights of enjoyment of and possession to the land were after completion vested in Mr Wismayer – the sale was with vacant possession on completion. Mr Wismayer had paid the purchase price. Ms Reiner could only exercise her powers as a bare trustee consistently with the transaction which had given rise to the existence of this trust. Section 6(5) expressly

provides that in exercising her powers under section 6 Ms Reiner was required to have regard to the rights of Mr Wismayer as beneficiary. Also by virtue of section 6(6) Ms Reiner's powers under section 6 were not to be exercised in contravention of any rule of law or equity. A bare trustee has no right to claim possession of the trust property from the beneficiary. The beneficiary under such a bare trust is entitled to the absolute possession of the property as against the trustee. Accordingly Ms Reiner did not have any power to make any decisions or take any actions in relation to the flat after the completion date as though she personally was an absolute owner. Anything she did in relation to the flat was always subject to Mr Wismayer's interest. As beneficiary under a bare trust Mr Wismayer enjoyed control of the flat for all purposes. There is nothing in the Land Registration Act or in section 6 of the 1996 Act which prevents the passing over on completion of legal possession to Mr Wismayer.

69. Ms Stevens-Hoare referred to *Horsey Estate Limited v Steiger* at page 92 where consideration was given to an alleged breach by underletting. Lord Russell CJ considered the situation where the defendants had agreed to sell the property and had let the purchaser into possession pending completion of the purchase. The court rejected the argument that the new company had become the defendants' undertenant. Lord Russell CJ stated at page 93:

> "In plain sense and according to the ordinary understanding of men, this is not a case of underletting at all, but merely a case in which the new company has been let in on terms of purchase. Had the covenant been (as is of late years often the case) against parting with possession without licence of the landlord, the plaintiff company would have proved a breach of such a covenant, but they have not established a breach of the covenant in question, which is against underletting only."

Ms Stevens-Hoare submitted that this (obiter) observation was entirely consistent with the principles of *Lam Kee Ying* and was supportive of her argument that there had here been a parting with possession.

70. Ms Stevens-Hoare accepted that if there had not been a parting with possession then the appeal must succeed. She went on to advance arguments directed towards whether, if there had been a parting with possession on completion of the assignment (absent registration), such parting with possession constituted no breach of covenant on the basis that the RTM Company was by 29 July 2015 unreasonably withholding its consent.

71. Ms Stevens-Hoare pointed out that it is essential that consent is first requested and that a reasonable time is allowed to the relevant person (here the RTM Company) for the granting of consent.

72. In order for the relevant duties under the 1988 Act to arise it is necessary (see section 1(3)) that there is served on the person who may consent to the proposed transaction (here the RTM Company) a written application by the tenant for consent

to the transaction. Ms Stevens-Hoare submitted that no such written application was ever properly made to the RTM Company. All of the documentation relied upon, properly understood, involved communications between Ms Reiner (or her solicitors) as vendor and Mr Wismayer (or his solicitors) as the potential purchaser of her flat. These communications did not involve communications between Ms Reiner (or her solicitors) and the RTM Company asking the RTM Company for consent to the proposed assignment. Ms Stevens-Hoare drew attention to the fact that much of the communications, including in particular the communications regarding a licence to assign, were communications to or from Mr Wismayer at his personal email address and not at the RTM Company address. Section 1(3) of the 1988 Act requires clarity as to when these statutory duties arise. This means that there must be a clear written application to the RTM Company for consent to the proposed transaction. Also any statement by Mr Wismayer that a licence would be provided is dealing with the physical document which may become a licence rather than with the actual granting of a licence to assign. Even the return of the signed licence by Ms Reiner (received by the RTM Company on 20 July 2015) was not an application for consent to assign. Having regard to the terms of the contract Ms Reiner did not need to obtain a licence to assign and upon the proper construction of the documents she never asked the RTM Company for licence to assign.

73. Even if there was some proper application for licence to assign made by or on behalf of Ms Reiner to the RTM Company, it cannot be said that the RTM Company by 29 July 2015 was unreasonably withholding its consent to the proposed assignment.

74. The primary reason for this is that the RTM Company did not by 29 July 2015 give notice to Triplark (whether 30 days notice or any notice) of the application by Ms Reiner for consent to assign to Mr Wismayer. In these circumstances section 98(4) applies and provides:

> "The RTM company must not grant an approval by virtue of sub section (2) without having given…. [the appropriate notice to Triplark]."

As the RTM Company had not given notice to Triplark the RTM Company was in a position governed by section 98(4) and was under a statutory prohibition that it must not grant consent to the proposed assignment. Ms Stevens-Hoare submitted that if on a particular date the RTM Company was commanded by statute not to grant consent to the proposed assignment it could not simultaneously be said on that date that the RTM Company was unreasonably withholding its consent to the proposed assignment. Section 98(4) makes the RTM Company incompetent to grant consent to the proposed assignment until the proper notice has been given to Triplark. If Triplark raises objections then once again the RTM Company cannot override this – instead the matter must go under section 99 to the First-tier Tribunal. Mr Johnson's argument would drive a coach and horses through the rights of the landlord, which have been preserved in circumstances where a right to manage company is in place through the provisions of section 98(4). It cannot be right that the RTM Company was simultaneously prohibited from granting consent but able unreasonably to withhold consent so as to allow the transaction to go ahead without consent.

75. Throughout the relevant period no notice had ever been given to Triplark – this was the result of the deliberate decision of Mr Wismayer on behalf of the RTM Company not to notify Triplark. Accordingly at no time prior to 29 July 2015 could the RTM Company have granted consent. Therefore at no time prior to 29 July 2015 could (or did) the RTM Company unreasonably withhold consent.

76. If the foregoing were wrong and it were possible for the RTM Company unreasonably to withhold consent even though no notice had been given to Triplark, then the question arises as to what is a reasonable time for the RTM Company to deal with the application for consent to assignment (if one was made). Ms Stevens-Hoare referred to *Go West Limited v Spigarolo* especially at page 1149. A reasonable time would depend upon all the circumstances of the particular case and would be a reasonable time after the making of the application for permission to assign. All the circumstances of the case included the following circumstances in the present unusual case, namely Ms Reiner had handed over all responsibility for obtaining licence to assign to Mr Wismayer; he was not only the purchaser but the sole director of the RTM Company; there was a clear conflict of interest; the parties in signing the contract in the terms they did realised there might be a problem regarding obtaining consent; the parties took the risk that no consent would be obtained. Ms Stevens-Hoare drew attention to the fact that Mr Wismayer deliberately did not pass on to Triplark notice that an application for consent was being sought by Ms Reiner to assign to Mr Wismayer. Ms Reiner was party to this because of the terms in the contract whereby she had handed over all responsibility for seeking consent to Mr Wismayer. In all the circumstances of the present case the deliberate inaction by Mr Wismayer cannot give rise (in favour of Ms Reiner and Mr Wismayer) to an unreasonable withholding of consent by the RTM company. Mr Wismayer's deliberate failure to inform Triplark was a device to get round the statutory scheme as recognised by sections 98 and 99 of the 2002 Act. In all these circumstances the appellants are not entitled to a finding that the RTM Company unreasonably withheld its consent to the proposed assignment.

Discussion

77. There is before the Tribunal, upon this appeal by way of rehearing, an application by Triplark as landlord under a long lease of a dwelling for a determination that a breach of a covenant in Ms Reiner's underlease has occurred. The relevant covenant is set out in paragraph 2 above. It is not suggested there has been any assignment (because of the want of registration at the Land Registry) or any subletting. The question is whether on 29 July 2015, upon the completion of the sale of the flat to Mr Wismayer, Ms Reiner parted with possession of the whole of the flat.

78. I accept that the law regarding what is involved in parting with possession is to be found in *Lam Kee Ying* as applied in *Akici*, which in turn was applied by the Court of Appeal in *Clarence House v National Westminster* [2010] 1 WLR 1216, the latter being a case in relation to which both parties made further submissions (with my consent) after the close of the hearing.

79. It is important to distinguish between a true parting with possession and a circumstance where a lessee, who in law retains the possession, allows another to use and occupy the relevant premises. The question is whether the agreement between Ms Reiner and Mr Wismayer and the completion of that agreement on 29 July 2015 wholly ousted Ms Reiner from the legal possession of the flat so as to amount to a complete exclusion of Ms Reiner from the legal possession of the flat for all purposes.

80. The passage cited in paragraph 40 above from the decision of the Privy Council in *Lam Kee Ying* is also cited and applied in *Clarence House* at paragraph 31. This decision concerned a case where there had been a "virtual assignment" by NatWest to an assignee of a lease of office premises which were at all material times the subject of a subtenancy to an occupying business tenant. Under the virtual assignment the assignee was, as between itself and NatWest, entitled to all the benefits and subject to all the burdens of the lease including the benefit of being entitled to receive rent from the subtenant. However any control exercised by the assignee was as agent for NatWest. On the question of whether there had been a parting with possession (contrary to the covenant in NatWest's lease) by entering into this arrangement, the short answer was that NatWest was not at any material time in possession at all -- the person in possession was the occupying business tenant under a subtenancy which had been granted sometime earlier with the landlord's consent. An argument was raised whether the assignee had become in possession by reason of being entitled to receive the rents from the subtenant. This argument relied upon section 205 of the Law of Property Act 1925. Bearing in mind that the assignee could not sue in its own name for the rent under the subtenancy but could only collect such rent as agent for NatWest, this argument failed. Certain points however are of significance in the judgement of Ward LJ in *Clarence House*. In paragraph 33(3) Ward LJ stated:

> " The hallmark of the right to possession is the right to exclude all others from the property in question. That is the ordinary and normal sense of the word and that is the meaning which it should be given in this covenant."

Also in paragraph 33(5) the learned judge referred to a long line of authorities, now well established, dealing with breaches of the covenant against parting with or sharing possession and stated:

> "This stream of cases is consistent with the notion that a leasehold covenant against parting with or sharing possession is concerned with the question of whether the tenant has allowed another into physical occupation with the intention of relinquishing his own exclusive possession of the premises to that other."

81. On 29 July 2015 completion of the sale of the flat by Ms Reiner to Mr Wismayer occurred. The contract provided that the property was sold with vacant possession. On 29 July 2015 Ms Reiner executed a land registry document for the transfer of the whole of her registered title in form TR1 as a deed. Clause 7 provided that "The transferor transfers the property to the transferee". Clause 8 recorded that the transferor had received from the transferee a stated substantial sum, which was the

purchase price. On 29 July Ms Reiner moved all her possessions out of the flat and gave up all of the keys to it which she possessed.

82. If one were dealing with a case of the conveyance of unregistered land, then upon the execution of an assignment of an unregistered lease, by way of the completion of a sale, and upon the payment of the price and the letting of the purchaser into the relevant property, the vendor would part with possession of the relevant property. It would amount to a clear example of parting with possession, giving that expression the restricted meaning recognised by the relevant cases, for a vendor to complete the sale of a lease in such a manner. (In unregistered conveyancing there would of course also take effect an assignment upon the day of completion, because there would be no interregnum period pending registration of the purchaser as proprietor). There would have been a parting with possession because the vendor/assignor would have received the full purchase price; would have moved out; would have handed over the property absolutely to the purchaser; and would have no further right to any possession of the property. The sole and exclusive right to possession would be enjoyed by the purchaser.

83. Subject only to the fact that this case involves registered conveyancing, the foregoing in effect is what occurred in the present case. There was a contract for sale with vacant possession. This contract was completed by the execution of the transfer and by the handing over of the purchase price by Mr Wismayer to Ms Reiner and by the handing over of the flat by Ms Reiner to Mr Wismayer. There was a handing over by Ms Reiner to Mr Wismayer of the flat for all purposes with the full right to use it thereafter as he wished to the complete exclusion of Ms Reiner. Unless the particular rules regarding registered conveyancing require a different conclusion there was in my judgment as a matter of form and substance a parting with possession by Ms Reiner to Mr Wismayer. The subjective intention of the parties as to what they were accomplishing on the completion date cannot be determinative, but I consider it to be relevant. The understanding and intention of both Ms Reiner and Mr Wismayer was that the flat was no longer Ms Reiner's; that she had moved out and had no further interest in the flat; that she had done all that Mr Wismayer expected her to do under the contract by way of completion; and that the flat had become entirely Mr Wismayer's. I consider this evidence to be relevant because the question of whether there has been a parting with possession must depend, at least in part, upon the substance of the matter on the ground rather than merely upon the legal documentation. For instance if in the present case there had been some informal arrangement or understanding between Ms Reiner and Mr Wismayer that Ms Reiner could continue to make use of the flat for a period of time after 29 July, e.g. by continuing to store some of her possessions there so that she could collect them whenever it was convenient, then this might be relevant upon whether there had been a parting with possession. There was no such arrangement or understanding.

84. The transfer by Ms Reiner to Mr Wismayer of the underlease constituted a disposition which was required to be completed by registration and which did not operate at law until the relevant registration requirements had been met. See section 27 of the Land Registration Act 2002. It is common ground that these registration requirements were not (and still have not been) met.

85. Ms Reiner remained the owner of the registered estate, namely the underlease, and continued to enjoy the owner's powers as set out in section 23 of the 2002 Act. However she did not enjoy those powers out and out for her own benefit. Instead (as is common ground) Ms Reiner held the underlease in trust for Mr Wismayer.

86. The trust upon which Ms Reiner held the underlease arose upon the execution of the transfer on 29 July 2015. Ms Stevens-Hoare submitted that this was a bare trust. The question whether the trust was or was not a bare trust was not a matter which featured in argument. I do not think that the answer to this question is determinative of whether there was or was not a parting with possession. I should in this context refer to the decision in *Schalit v Nadler* [1933] 2 KB 79 which concerned the question of whether, where a leasehold reversion was the subject of a declaration of trust in favour of a beneficiary, such beneficiary had status to distrain for unpaid rent. As part of the analysis the court examined whether the trust was a bare trust and concluded for the reasons there given (in particular that the trustee would remain liable on the covenants to the landlord) that there was not a bare trust. However in *Clarence House* it appears to be recognised in paragraph 45 that a person may be a bare trustee of a leasehold interest even though (of course) remaining liable on the covenants to the landlord. I do not consider it necessary in the present case to decide whether the true nature of Ms Reiner's trusteeship was that of a bare trustee. What is significant is not the label which is attached to the trust but instead is what were Ms Reiner's rights and obligations in relation to the flat under such trust.

87. Section 6 of the Trusts of Land and Appointment of the Trustees Act 1996 applies. By reason of section 6(1) Ms Reiner had in relation to the flat all the powers of an absolute owner – but she only enjoyed those powers for the purpose of exercising her function as a trustee.

88. As a matter of the general law, and having regard to the terms of the contract and to the fact that Ms Reiner held the underlease as trustee for Mr Wismayer, Ms Reiner as trustee had no right to exercise any powers of an absolute owner in any way which constituted a breach of trust or contract as between herself and Mr Wismayer. Bearing in mind the obligation to give vacant possession upon completion and having regard to the fact that Ms Reiner held the underlease upon trust for Mr Wismayer I conclude that Ms Reiner had no right to exercise or enjoy any right to possession in respect of the flat unless called upon by Mr Wismayer to do so (e.g. if he asked for her assistance in removing squatters). Ms Reiner had no right, in her role as trustee, to exercise any control over the flat or enjoy any use of or possession of the flat unless invited to do so by Mr Wismayer.

89. The fact that during the interregnum period Mr Wismayer, as unregistered purchaser, would not have had the ability to enjoy certain powers (e.g. the power to serve a notice to quit had there been a tenant in the flat) and would have had to ask Ms Reiner as trustee to serve the relevant notice does not mean that Ms Reiner has retained any right to possession of the flat. All the rights over the flat which Ms Reiner continued to hold were rights which she held for the exclusive benefit of Mr

Wismayer. In her personal capacity she was completely excluded from the legal possession of the flat for all purposes.

90. Reverting to the considerations from the decision in *Clarence House* referred to in paragraph 80 above, I observe that the hallmark of the right to possession is the right to exclude all others from the property in question. In my judgement Mr Wismayer after the execution of the transfer on 29 July 2015 did have the right to exclude all others (including Ms Reiner) from the flat. I also notice that parting with possession is concerned with the question whether the tenant has allowed another into physical occupation with the intention of relinquishing the tenant's own exclusive possession of the property to that other. I consider that Ms Reiner did allow Mr Wismayer into physical occupation of the flat with the intention of relinquishing her own exclusive possession of the flat to him.

91. I therefore conclude that on 29 July 2015 Ms Reiner parted with possession of the flat to Mr Wismayer. Such a conclusion is consistent with the obiter remarks of Russell CJ in *Horsey Estate Limited v Steiger,* see paragraph 69 above.

92. It is common ground that the relevant consent that was required for such a parting with possession was the consent of the RTM Company. It is also common ground that no consent of the RTM Company was actually granted to this parting with possession.

93. It follows from the foregoing that this parting with possession amounted to a breach of covenant by Ms Reiner unless as at 29 July 2015 Ms Reiner was, as a matter of common law (see Woodfall paragraph 11.128) entitled to part with possession without the RTM Company's consent by reason of such consent having been unreasonably withheld.

94. The relevant duties upon a landlord (or here the RTM Company) under the Landlord and Tenant Act 1988 only arise where there is served on the person who may consent to a proposed transaction (here the RTM Company) "a written application by the tenant for consent to the transaction", see section 1(3).

95. As recognised by both parties, the present is a most unusual case where during most of the relevant period the sole director of the RTM Company was Mr Wismayer himself, who was also the proposed assignee. I am unable to accept Ms Stevens-Hoare's argument that, having regard in particular to the fact that Mr Wismayer on many occasions used his personal email and was concerned with a transaction involving him personally, the documentation should be construed as involving no written application to the RTM Company for consent to an assignment by Ms Reiner to Mr Wismayer. I agree with Mr Johnson that this ignores reality and would involve standing upon unjustified technicality. The reality is that by at latest 18 June 2015, being the date when Mr Wismayer sent a draft licence (i.e. for the assignment by Ms Reiner to him of the underlease) to Ms Reiner and promised her that he would send a further copy to her solicitors, the position was as follows: by virtue of documents

within the knowledge and possession of Mr Wismayer (who was the sole director and who was in control of the RTM Company) it was clear that Ms Reiner was seeking the permission of the RTM Company to an assignment by her to Mr Wismayer.

96. Accordingly I find that there was a valid application for consent to the proposed assignment which was made in writing to the RTM Company no later than 18 June 2015.

97. The next question which arises is whether such consent was unreasonably withheld by the RTM Company.

98. Mr Wismayer frankly accepted, and I find, that he was aware of the obligation to give notice to Triplark under section 98(4) of the 2002 Act; that he considered Triplark would object to the proposed assignment of the underlease to him; that he recognised that this would give rise to the procedures under section 99; that he considered these would bring an unwelcome delay (which would be an especial problem for Ms Reiner) to the completion of his purchase of the flat; and that in these circumstances he deliberately caused the RTM Company (of which he was the sole director) to omit to notify Triplark of the proposed assignment in accordance with section 98(4). Prior to completion on 29 July 2015 no notice was given to Triplark of the proposed transaction.

99. Section 98(4) provides that in circumstances where the relevant notice has not been given to Triplark the RTM Company "must not grant an approval". Accordingly as from the date of the application to the RTM Company for consent to the assignment (which I have taken as 18 June 2015) up to and including the date of completion on 29 July 2015 the position throughout was that section 98(4) required the RTM Company not to grant an approval to the proposed assignment to Mr Wismayer.

100. I accept Ms Stevens-Hoare's argument that if on a particular date the RTM Company is subject to a statutory prohibition that it must not grant an approval for an assignment, it cannot be said on the self-same date that the RTM Company is unreasonably withholding consent to such an assignment.

101. I accept Ms Stevens-Hoare's submission that the argument advanced by Mr Johnson would effectively remove the protection for a landlord which section 98(4) was intended to confer. Mr Johnson submitted that it was wrong to test his argument by reference to extreme circumstances, but in my judgment it is permissible to do so for the purpose of testing the validity of an argument. Mr Johnson submitted that in circumstances where a right to manage company was precluded by section 98(4) from granting an approval, the RTM Company could in effect allow the proposed transaction to go ahead by deliberately and immediately unreasonably refusing consent, for instance by responding to the tenant's application for consent to an assignment along the lines "I refuse consent because the assignee's name begins with X". This, submitted Mr Johnson, would amount to an unreasonable withholding of

consent, even if deliberately done without notifying the landlord under section 98(4) and with the intention of avoiding the exercise by the landlord of its rights under section 98(4) and 99. This would in consequence allow the tenant to proceed with the assignment without consent. I do not accept that argument. If a right to manage company fails promptly to notify the landlord under section 98(4) of a proposed assignment then that right to manage company might well be in breach of its duty to the tenant under the Landlord and Tenant Act 1988 (as applied by the 2002 Act) in section 1(3) or section 2. However such a breach of duty would give rise to a claim for damages. I reject the suggestion that such a breach of duty by the RTM Company results in the rights of the landlord under sections 98(4) and 99 being extinguished.

102. On this point Mr Johnson urged upon me the analysis of Sir Richard Scott V-C in *Norwich Union Life Insurance Society v Sophomore* see paragraph 58 above. However those observations were made in relation to the situation where there was no right to manage company and no provisions such as section 98(4). Parliament has decided what protection to give to a landlord regarding the granting of approvals in circumstances where there is a right to manage company. Tenants seeking approvals in circumstances where there is a right to manage company may find themselves delayed (albeit perhaps with a claim for damages against the right to manage company) if the right to manage company fails to perform its duties in passing on notification to the landlord. That however is in my view a consequence of the legislation and a recognition of the protection which Parliament has considered appropriate to confer on landlords.

103. At all times up to and including 29 July 2015 the RTM Company was subject to the prohibition in section 98(4) that it must not grant consent to the proposed assignment. It did not grant consent to the proposed assignment. I conclude that it did not unreasonably withhold its consent to the proposed assignment.

104. If the foregoing is wrong and if it is possible for the RTM Company to have unreasonably withheld its consent notwithstanding that it was subject to the prohibition in section 98(4) that it must not grant consent to the proposed assignment, then in my view there was even on this basis no unreasonable withholding of consent. Mr Wismayer was the sole director of the RTM Company until 25 July 2015. He decided upon how the RTM Company should act. It was his deliberate decision not to pass on notice of the proposed assignment to Triplark. Ms Reiner had entered into a contract under which she had passed to Mr Wismayer all responsibility for obtaining consent to the assignment. I reject the suggestion that the present appellants (Ms Reiner and Mr Wismayer) can point to the inaction by the RTM Company (being in-action for which Mr Wismayer was deliberately personally solely responsible) and can say against the RTM Company that it acted unreasonably in withholding consent, by reason of failing to notify Triplark of the proposed transaction. The conduct of Ms Reiner in placing all responsibility for obtaining the RTM Company's licence upon Mr Wismayer (who to her knowledge was the sole director of the RTM Company) coupled with Mr Wismayer's own conduct placed the RTM Company in an impossible position. Ms Reiner and Mr Wismayer are not entitled to say that the RTM Company acted unreasonably.

105. Mr Wismayer ceased to be sole director on 25 July 2015 and was replaced by a new board of directors, Mr Wismayer said in evidence that he did not pass over any documents to the new directors. The omission by the RTM Company, under the management of the new directors, to take any steps in relation to the proposed assignment or to notify Triplark between 25 July 2015 and 29 July 2015 does not in my view constitute any unreasonable conduct by the RTM Company or constitute an unreasonable withholding of consent.

Conclusion

106. For all the reasons set out above I find that on 29 July 2015 Ms Reiner breached covenant 3(8) of her underlease by parting with possession of the flat to Mr Wismayer. I therefore dismiss the appellants' appeal.

107. The parties asked to be allowed to make representations after receiving this decision in respect of any costs order to be made under section 20C of the Landlord and Tenant Act 1985 as amended. Such submissions should be made in writing (and exchanged) within 28 days of the date of this decision.

6 January 2017

His Honour Judge Huskinson