[2016]UKUT0395(TCC)

Appeal number UT/2015/0174

Rentcharges – leases created pursuant to section 121(4) of the Law of Property Act 1925 - registration - mortgage by demise

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

JONATHAN HOWARD ROBERTS
JANET ANN THAIN
MORGOED ESTATES LIMITED

APPELLANTS

- and -

LAURA LAWTON & DANE EDWARD LAWTON
MICHAEL JOHN HANLEY
MARTIN LIBMAN
SAMANTHA JAYNE HANLEY
IAN PARKER
DAVID CHRISTOPHER STAPLEY
RACHEL SARAH FORD & PHILLIP MELLOR HOPWOOD
GERARD DESMOND HURST & SIOBHAN LORRAINE HURST

RESPONDENTS

TRIBUNAL: JUDGE ELIZABETH COOKE

Sitting in public at The Royal Courts of Justice Strand London on 01 July 2016

DECISION

1. This is an appeal against a finding of the Land Registration Division of the First-tier Tribunal ("the FTT") that certain leases are not able to be registered at HM Land Registry.

2. The First and Second Appellants, Mr Roberts and Ms Thain, made a series of applications between January and March 2013 to register their title to long leases of the Respondents' properties, granted to them not by the Respondents but by the Third Appellant by virtue of a statutory provision. The Respondents objected to those applications. The applications and objections were referred to the FTT and were there consolidated and dealt with together. On 1 October 2015 Judge Mark made an order striking out the proceedings and directing that the Chief Land Registrar cancel the application to register the leases on the basis that they were mortgages by demise and unable to be registered. This is an appeal from that order.

3. I heard the appeal on 1 July 2016 in the Royal Courts of Justice. Mr Roberts represented the Appellant and presented very helpful written and oral argument about the technical issue being appealed. Two of the Respondents, Mr Hanley and Mr Libman, made written submissions about the appeal; Mr Hanley attended the appeal and represented himself and Mrs Samantha Hanley. Neither he nor Mr Libman presented any argument about the appeal itself; their submissions were confined to their objections to the registration of the leases, on which I say more later. In the paragraphs that follow I set out the background to this appeal, I explain why the appeals must be allowed because the leases are capable of registration, and I then consider how these eight disputes should be disposed of.

The background

The law relating to rentcharges

4. The reason why the First and Second Appellants hold long leases of the Respondents' properties is that the Third Appellant, Morgoed Estates Ltd (of

which they are directors), owns rentcharges in respect of each of the Properties. The Appellants say that Morgoed Estates Ltd has become entitled (pursuant to s 121 of the Law of Property Act 1925 ("the LPA")) to grant to the First and Second Appellants leases of the properties as a result of the non-payment of the rentcharge.

5. To explain rentcharges in freehold land we have to go back to the nineteenth and very early twentieth century when the growing population in our cities meant that a lot of housing was needed relatively quickly. Ingenious ways were found of making this financially possible, often with interesting legal outcomes. Popular in Bristol and Manchester was the rentcharge, whereby freehold land was sold in exchange for a capital sum lower than its full value together with a liability to pay an annual sum, secured by a rentcharge. The new owner in effect deferred some of the capital payment and was able to pass it on to the new owners of the houses he or she built.

6. The liability to pay the annual sum was permanent, as was the rentcharge. Accordingly legislation has been enacted to make rentcharges more manageable. For example, because land subject to a rentcharge may have been sub-divided, the Rentcharges Act 1977 enables the owner of one of the properties to apply for a statutory apportionment so as to be liable only for that part of the rentcharge that relates to his or her own property. Importantly, sections 8 to 10 of that Act provide a statutory mechanism for redemption; the owner of the land charged may apply to the Secretary of State who will calculate the price of redemption, receive the payment (which is passed on to the person who owns the rentcharge) and issue a redemption certificate. Some of the Respondents have redeemed the rentcharges on their property; all those who have not already done so can do it now, although redemption does not affect the rentcharge holder's right to take action to recover past arrears (section 10(3) of the Rentcharges Act 1977).

7. Section 121 of the Law of Property Act 1925 ("the LPA") is headed "Remedies for the recovery of annual sums charged on land" and makes available to the rentcharge holder a number of remedies for non-payment. He

or she can, for example, take possession of the property and use the income from it to clear the arrears and associated costs (subsection 3). Alternatively he or she can grant to trustees a lease of the property for the following purpose

> "to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by nonpayment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed" (section 121(4))

either by selling or mortgaging the lease or by taking income from the land.

8. Those remedies are available when an amount due under the rentcharge remains unpaid for 40 days, whether or not the owner of the relevant property has been asked to pay it. I have set out section 121 of the LPA in full in an appendix to this decision.

9. There is no provision in the Rentcharges Act 1977 for a lease granted pursuant to section 121(4) ("a rentcharge lease") to come to an end when the arrears are cleared. The rentcharge lease, once granted, is a permanent arrangement for the payment of the rentcharge ("to raise and pay the annual sum and all arrears thereof due or to become due", in the words of section 121 quoted above). The lease could be sold to raise money for that purpose, and once sold it would continue in the hands of the purchaser lessees. There is therefore no provision for a rentcharge lease to come to an end once the rentcharge has been redeemed.

10. The Rentcharges Act 1977 prevents the creation of any new rentcharges of the kind I have described, and those that remain in existence – such as those that are the subject of this appeal – will be extinguished in 2037.[1]

[1] The exceptions are estate rentcharges, which remain useful as a way to secure the performance of positive obligations, as to which see section 2(3) and (4) of the Rentcharges Act 1977 and *Making Land Work: Easements, Covenants and Profits à Prendre* Law Com No 327 (2013) at paragraph 5.25.

11. Meanwhile the value of those that still exist has been eroded by inflation. A rentcharge requiring a payment of £2 per annum imposed 150 years ago requires a payment of £2 per annum today. In many – presumably thousands – of cases they are no longer collected and have been extinguished by limitation.[2] Accordingly, anyone buying a house on which a rentcharge is payable could be forgiven for thinking that it was unlikely to be a source of bother. The Respondents in the present appeal may have thought that. How wrong they were.

The factual background to this appeal

12. A rentcharge is a property right, and as such it can be bought and sold. Morgoed Estates Ltd is in the business of buying and managing rentcharges, and it owns about 15,000 of them (as well as a portfolio of ground rents of similar size). It is therefore entitled not only to a minuscule income from each of the properties concerned (which of course adds up) but also to the price of redemption of the rentcharges where property owners decide to bring them to an end.

13. In the case of the properties belonging to each of the Respondents to this appeal, the rentcharge was, according to the Appellants, arrears early in 2013 in sums that now range from about £6 to about £15. Morgoed Estates Ltd therefore granted a rentcharge lease of each property to its directors, the First and Second Appellants, as its trustees, and they sought to register the leases. The leases are granted for a term of 99 years. No rent is reserved, obviously, because any rent would go to the landowner (one of the Respondents, in each case). Once registered the existence of the leases will make each property unsaleable even if the tenant chooses not to take possession. The practice of the First and Second Appellants is to surrender the lease once the arrears and its costs are paid off, and they say that they have never sold a rentcharge lease. It will readily be understood that the costs far exceed, in each case, the value of the arrears – for example, Mr Hanley told me at the hearing of this appeal that he was asked to pay £650 in respect of the grant and registration of the

[2] Pursuant to section 15 of the Limitation Act 1980.

lease. Once the lease is in existence, therefore, it amounts to a stranglehold on the property owner whose freehold is worthless in the presence of the lease.

14. Mr Roberts told me that he and the Second Appellant hold a large number of registered rentcharge leases, and that other rentcharge holders have taken the same course so that many hundreds of rentcharge leases are currently registered. Normally the leases are registered despite objections on the part of the property owners relating to the amount due or the level of costs claimed. Land Registry regards their objections as groundless, because they do not relate to the pre-conditions in section 121, and accordingly is not obliged to refer them to the FTT. However, in the present cases, and one other (as to which see paragraph 15 below), the objections were not regarded as groundless – it appears that the Land Registry lawyer in these particular cases took a different view and references were made. I return to the validity of the Respondents' objections below. Whether valid or not, those objections had the effect of bringing the application to the FTT.

The procedural background

15. At the time when the applications to Land Registry in respect of the leases of the Respondents' properties were referred to the FTT, the FTT was already dealing with an application by the same Applicants in respect of property owned by Mr Brendan Keegan, referred to it in 2012. That reference was heard in July 2014. At that hearing Judge Mark raised a possibility that neither party had thought of, namely that the rentcharge lease was a mortgage by demise and therefore not registrable (I explain this below). In his decision delivered on 1 October 2014 Judge Mark held that that was indeed the case, and directed the registrar to cancel the application to register the leases.

16. The Applicants sought permission to appeal, which Judge Mark refused, as did the judge of the Upper Tribunal on a paper application. The application for permission was listed for an oral re-hearing in the Upper Tribunal; the parties then settled the matter before the hearing so that HH Judge Purle, sitting as a judge of the Upper Tribunal, was not called upon to give or refuse permission, but he indicated that he would have done so had the matter not settled.

17. Judge Mark then made an order in the eight references that are the subject of this appeal, directing the Chief Land Registrar to cancel the applications to register the leases on the basis that following his ruling in the proceedings against Mr Keegan the Applicants' case was bound to fail; but in the same order, dated 1 October 2015, he gave leave to appeal in light of HH Judge Purle's indication. That is the appeal I have heard, and I turn now to the substance of the appeal.

Are the rentcharge leases unregistrable?

18. Certain property rights cannot take full effect unless they are registered at HM Land Registry, including a lease granted for a term of more than seven years (Land Registration Act 2002, section 4). Accordingly the First and Second Appellants seek to register their leases; without such registration, it would be difficult to sell the leases, and if the Respondents were to sell their land the purchaser would take free of the leases (unless they were protected by a notice on the register of the Respondents' title).

19. Judge Mark took the view that the rentcharge leases are not what they seem and are in fact a form of mortgage, and one that is unregistrable. That is a puzzling proposition. Why did Judge Mark take the view that this was the case?

20. It is uncontroversial and a matter of general knowledge that a mortgage is a security right. When money is lent, typically by a Building Society or bank, to finance the purchase of land the lender takes a mortgage of the land to secure the loan. If the loan is not repaid the security can be realised to repay the loan; the mortgagee has power to take possession of the land and sell it so as first to repay the loan and then to return the balance if any to the borrower. A security right is there to protect the lender in the event that things go wrong. It is not something put in place when matters have already gone wrong.

21. A legal definition of a mortgage is to be found in s 205(xvi) of the LPA: " "Mortgage" includes any charge or lien on any property for securing money or money's worth". Judge Mark also quoted the classic definition of Lindley LJ

in *Santley v Wilde* [1899] 2 Ch 474, CA: "… a conveyance of land or assignment of chattels as security for the payment of a debt or the discharge of some other obligation for which it is given". That definition reflects the older practice of actually conveying land as security, transferring the freehold or granting a lease to the mortgagee so that from the very start of the arrangement the mortgagee had an ownership right which it could sell if need be. The LPA narrowed down the possibilities by providing, in s 85(1), that the only way to create a legal mortgage of freehold land is:

> "… either by a demise for a term of years absolute, subject to a provision for cesser on redemption, or by a charge by deed expressed to be by way of legal mortgage."

22. So a mortgage can still take the form of a lease if it makes provision for "cesser on redemption", that is, for the lease to come to an end when the loan is repaid.

23. The "charge by deed by way of legal mortgage" is the usual modern arrangement whereby neither the freehold nor a lease passes to the mortgagee, but the mortgagee can take possession and sell nevertheless in the event of default (subject to the provisions of the LPA and to the rules of equity developed over centuries for the protection of mortgagors). The Land Registration Act 2002 sought to make that method pretty much universal by prohibiting the registration of title to a mortgage by demise – that is, a mortgage which takes the form of a the grant of a lease.

24. And that is what Judge Mark thought the rentcharge lease was. He may have been prompted to take that view by the backsheet of the lease of Mr Keegan's property, which read "Demise to secure payment of rentcharge"; he referred to that description in reaching his conclusion, after a brief consideration of the definition of "mortgage" in the LPA and of the above provision in section 85. He did not explain how the rentcharge lease could be said to be "subject to a provision for cesser on redemption", as it must be if it is to be a mortgage by demise (see s 85 LPA, quoted above). Mr Roberts suggests, and I think he may be right, that Judge Mark may have believed that the statutory provisions

for redemption of a rentcharge, to which I have referred above (paragraph 6), mean that the rentcharge lease met that condition. But the rentcharge lease, once granted, continues in existence even when the arrears have been repaid unless it is surrendered voluntarily. There is no question of its coming to an end, as Judge Mark supposed, or to its being held on trust (his paragraph 40). Section 121(4) provides that once the lease is in place the rentcharge holder can continue to make use of it to recover future payments. Moreover, the lease continues despite the redemption of the rentcharge itself (see paragraph 9 above) and even beyond the extinguishment of rentcharges in 2037 (as Judge Mark noted in his paragraph 38).

25. A rentcharge lease functions as a remedy, not as a security right. The rentcharge itself is the security for the liability, and the creation of the rentcharge lease is the realisation of that security; the rentcharge lease can be created once things have gone wrong and its function is to put things right. It is not a mortgage by demise for that general reason, as well as for the technical reason that it is not subject to a provision for cesser on redemption.

26. Accordingly there is no difficulty in concluding that the appeal must be allowed.

The disposal of these references

27. The Respondents have objected to the registration of the rentcharge lease in each case for reasons that relate to the payments demanded.

28. Payments, of course, are small – generally a couple of pounds per year on each property. The maximum arrears owed on any of the Respondents' properties, according to the figures Mr Roberts gave me at the appeal hearing, was £15; I make no finding as to whether there are any arrears on any of the properties concerned. Payment is required by Morgoed Estates Ltd by cheque or postal order only; the company does not accept standing orders or bank transfers. So it is very easy for arrears to occur through inadvertence.

29. Some Respondents have refused to pay because they have never been given information that would confirm that Morgoed Estates Ltd owns the rentcharge;

Morgoed Estates Ltd refuses to provide a copy of the 1903 deed that created the rentcharge without payment of an administration charge of £60. That was why Mr Keegan (see paragraph15 above) would not pay, and it is also why Mr Libman refused to pay, according to his submissions on the appeal.[3] Judge Mark described the conduct of Morgoed Estates Ltd as "manifestly unreasonable" in this respect.

30. Mr Hanley, who attended the appeal, is understandably indignant that Morgoed Estates Ltd sent rent demands to the wrong address – since he was not living at the property – and then on discovering his address (by searching at HM Land Registry) decided not to bother to send a demand to the correct address but to grant a lease straight away. He takes the view that Morgoed Estates Ltd is in business not to collect rents, or the proceeds of redemption, but to collect its administration charges for the grant of the lease.

31. Furthermore, three Respondents complain that they have tendered arrears but that payment has been refused. Mr Hanley tendered the arrears demanded, on 21 March 2013, but Morgoed Estates Ltd would not accept it, because it required not only the arrears of rent but also the administration charge for the grant of the lease. Mr Libman tried to pay his arrears on 2 March 2013, but again Morgoed Estates Ltd refused.

32. The conduct of the Appellants is troubling and it is not surprising that the Respondents object to it and that Judge Mark expressed concern about it. At the hearing on 1 July 2016 I expressed the view that the proceedings might be an abuse of process, and I invited written representations on that point from the parties following the hearing. I have read representations from the Appellants and from Mr Hanley. I am persuaded that the proceedings are not an abuse of process because the conduct complained about does not affect the Appellants' right to registration of their leases, which is the point of the proceedings. It is clear from s 121 of the LPA that the right to grant a

[3] Mr Libman also suggested that the rentcharge itself is not a legal rentcharge, so that the right to grant a lease under section 121(4) of the LPA does not arise, but that is not correct; a rentcharge created by deed in 1903 is legal and does not have to be registered.

rentcharge lease arises once there is 40 days of arrears, provided that the rentcharge remains in existence and even if payment was not demanded. That right is unaffected even if the Appellants have provided no information about their entitlement to the rentcharge, even if they have sent demands to the wrong address, and even if they have refused arrears after the grant of the lease.

33. The real source of discomfort here is the fact that the passage of time and the effects of inflation mean that the grant of a rentcharge lease in these cases is a wholly disproportionate remedy. Section 121(4) of the LPA, and its statutory predecessor s 44 of the Conveyancing Act 1881, was no doubt an efficient and useful provision when drafted, but inflation has made it toxic. The remedy – draconian as it is - is out of all proportion to the wrong. It is understandable that the extinguishing of existing rentcharges was deferred, by the Rentcharges Act 1977, to 2037, but it is unfortunate that the opportunity was not taken to reform the remedies available to the rentcharge holder in the meantime.

34. These appeals must be allowed, and the Upper Tribunal can either re-make the decision of the First-tier Tribunal that has been appealed, or remit the matter to the First-tier Tribunal. Because the objections to the Appellants' application for registration of the leases have not yet been heard or decided upon, save that some submissions have been made about limitation (or so it appears from the order of Judge Mark), it was suggested at the hearing that if the appeal were allowed I should remit the eight references from Land Registry to the First-tier Tribunal.

35. However, it appears that many of the Respondents' objections, relating as they do to the way payments were demanded, cannot avail them and would be likely to be struck out in the First-tier Tribunal. There are potentially just two legal reasons why the Appellants might not be entitled to register their leases, namely (1) the presence of anything in the rentcharge deed that negated the possibility of a lease being used as a remedy, and (2) the rentcharge having been barred by limitation. These are matters that could be dealt with by me on paper without a hearing. Accordingly I invite the Respondents to let the Upper

Tribunal know within 28 days of the date of this decision whether they are willing for me to give directions for the resolution of the matter on paper in the Upper Tribunal, and for those who are willing I will do so.

36. In those cases where the Respondent does not so consent I will remit the matter to the First-tier tribunal for determination. This will be appropriate where there is a dispute of fact, and therefore in any cases where the Respondent can show that the rent was not 40 days in arrears when the lease was granted. Other objections relating for example to the refusal of arrears after the grant of the lease, to the manner of sending rent demands, or to the level of administration costs demanded are without hope of success in the FTT – because they do not affect the Appellants' right to grant and register the leases - and the Respondents will be putting themselves at risk in terms of legal costs if they nevertheless require the matter to be remitted to the FTT.

37. As to the costs of this appeal Mr Roberts indicated at the hearing that if the appeal succeeded the Appellants would claim only travel costs and copying in connection with the appeal, and I am grateful for that indication. I will not make any orders for costs at present but will await the Respondents' indication, in accordance with paragraphs 36 ad 37 above, as to how they want matters to proceed.

Judge Elizabeth Cooke

TRIBUNAL JUDGE
RELEASE DATE: 01 SEPTEMBER 2016

Appendix

Law of Property Act 1925

121. Remedies for the recovery of annual sums charged on land.

(1)Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the annual sum shall have such remedies for recovering and compelling payment thereof as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

(2)…

(3)If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by nonpayment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

(4)In the like case the person entitled to the annual sum, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by all or any of the means hereinafter mentioned, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by nonpayment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed:

Provided that this subsection shall not authorise the creation of a legal term of years absolute after the commencement of this Act, save where the annual sum is a rentcharge held for a legal estate.

The surplus, if any, of the money raised, or of the income received, under the trusts of the deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

The means by which such annual sum, arrears, costs, and expenses may be raised includes—

(a) the creation of a legal mortgage or a sale (effected by assignment or subdemise) of the term created in the land charged or any part thereof,

(b) the receipt of the income of the land comprised in the term.

(5)This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and has effect subject to the terms of that instrument and to the provisions therein contained.

(6)…

(7) The powers and remedies conferred by this section apply where the instrument creating the annual sum comes into operation after the thirty-first day of December, eighteen hundred and eighty-one, and whether the instrument conferring the power under which the annual sum was authorised to be created came into operation before or after that date, unless the instrument creating the power or under which the annual sum is created otherwise directs.