Neutral Citation Number [2017] EWHC 877 (Ch)

Appeal Ref: CH-2016-00257

# IN THE HIGH COURT OF JUSTICE

# CHANCERY DIVISION

# On Appeal from HHJ Madge, Sitting in the County Court at Central London

Date: 18 April 2017

# Before :

**HHJ** **Karen** **Walden-Smith**

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# Between :

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|  | (1) OCTAGON OVERSEAS LIMITED  (2) CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED | **Appellants/Defendants** |
|  | - and – |  |
|  | ALAN COATES | **Respondent/Claimant** |

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**Justin Bates** (instructed by **Trowers & Hamlins** LLP) for the Appellants

**Amanda Gourlay** (instructed by **Downs Solicitors LLP**) for the Respondent

Hearing Date

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JUDGMENT

The Background

1. Canary Riverside at Canary Wharf, London E14, comprises four blocks of residential apartments including penthouse apartments, a hotel, a gym and various commercial units. The First Appellant is the freehold owner of Canary Riverside. The Second Appellant is the leasehold owner of a large part of Canary Riverside (subject to some minor exclusions) pursuant to six long leases.
2. Pursuant to the provisions of section 24 of the Landlord and Tenant Act 1987, a number of the occupational sub-leaseholder owners of the apartments in the residential blocks applied in 2015 to the First-Tier Tribunal (Property Chamber) (referred to herein as the “FTT (Property)”) to have a manager appointed. By its decision promulgated on 15 September 2016, the FTT (Property) appointed the Respondent, Mr Alan Coates, as manager for a period of three years from 1 October 2016. Once appointed, the manager is answerable to the FTT. In reaching its decision, the FTT (Property) stated, amongst other things, that:

*“It was evident to the tribunal that Mr Coates is really a service charge manager, and the tribunal considers that this is actually what the estate required, a manager who can set budgets, arrange for repairs and maintenance and services to be provided, and then provide financial information to the leaseholders and involve them in decisions involving their homes.”*

1. I understand that the FTT (Property) made a decision on 5 August 2016 and, in accordance with the rules of procedure, the FTT (Property) reviewed that decision on the application for permission to appeal and issued its final decision on 15 September 2016. The hearing itself took 5 days and the FTT (Property) set out in its two decision letters the basis upon which it determined that the Respondent be appointed as the manager, and set out its various criticisms of the Appellants. Once appointed, the manager is answerable to the FTT (Property). The practical purpose of appointing a manager is *“…to secure, through the flexible discretionary machinery of the appointment of a manger, the carrying out of the management functions which they are entitled to enjoy “in relation to” the premises of which their flats are part”* per Mummery LJ in *Cawsand Fort Management Co Ltd v Stafford* [2008] 1 WLR 371.
2. The FTT (Property) refused the Appellants’ application for permission to appeal its decision and the Upper Tribunal (Lands Chamber) (referred to herein as “UT (Lands)”) also refused permission to appeal. The Appellants’ application for permission to judicially review of the decision of the UT (Lands) to refuse permission to appeal, was refused by Lavender J on 6 February 2017. This refusal was on the basis that the findings of the FTT (Property) justified the making of an immediate management order, that the FTT had given consideration to the Appellants’ objections to Mr Coates, and that the UT (Lands) had recognised, in refusing permission to appeal, that there could be an application to the FTT (Property) pursuant to section 24(9) of the LTA 1987” and further that there was no important point of principle or practice or any other compelling reason to hear it so that it did not meet the criteria for the judicial review of a Tribunal decision on the application of the principles set out in *R (o the application of Cart) v UT* [2012] 1AC 633.
3. Certain terms of the management order were stayed so as to facilitate an application for modification to the FTT (Property). I understand that application has now been made but it does not impact upon the matters I have to determine.
4. The Respondent issued proceedings on 4 October 2016 (three days after the management order took effect) seeking an injunction to enforce the decision of the FTT (Property). The application was made at that time as a locksmith was at Canary Riverside and the Respondent was concerned that all keys, service charges and information that the management order required to be passed to the Respondent had not been transferred. HHJ Madge heard the application and made an order on 4 October 2016. He granted an injunction, attaching a penal notice to the injunction, restraining the Appellants from:
   1. Changing any locks to the premises;
   2. Removing any property from the premises;
   3. Interfering with the manager’s exercise of his obligations under the order of 5 August 2016 [which must mean the order of 15 September 2016];

with the balance of the application for an injunction adjourned to 7 October 2016.

1. The Appellants attended the hearing on 4 October 2016 by their solicitor, but had not been notified of the application until 12.30 that day. Representations were made on behalf of the Appellants by their solicitor that they had been endeavouring to do all that was needed to enable the manager to fulfil his obligations and that keys had been given to all those parts of the premises the Respondent was entitled to have access to carry out his functions. HHJ Madge rightly stated that he was in no position to determine who was correct with respect to the provision of keys. The Judge had given the parties the opportunity to reach an agreement between them but there remained a dispute as to precisely what the management order required the Appellants to do and so no compromise was reached. HHJ Madge queried whether the matter was really urgent.
2. On 5 October 2016, the Appellants applied to the court for an order discharging or varying the order of 4 October 2016 on the basis that: the court did not have the jurisdiction to make the order; the order should not have been made or the terms of the order were not appropriate; there were no grounds for the order to have been made as it was ex parte (albeit on short notice).
3. On the return date of 7 October 2016, the injunction was broadened. Again, a penal notice was attached and HHJ Madge expressly found that he had jurisdiction to grant the injunction (based upon the management order made by the FTT (Property)) pursuant to the provisions of section 38 of the County Courts Act 1984 and section 37 of the Senior Courts Act. HHJ Madge ordered that the Claimant (Respondent) had permission to enforce the Tribunal order in the County Court, that the Defendants (Appellants) were to provide all the keys (save for P18 and P20), that throughout 10 October 2016 from 8.30am the Defendants were to give access to the Claimant or his agent access to all rooms on the estate over which it has control and to ask Third Parties to give the Claimant or his agent access and, if not available, to give contact details; to provide by courier by 5pm on 10 October 2016 all documentation relating to those parts of the estate included in the Tribunal order.
4. The Appellants appeal the injunction granted by HHJ Madge on three grounds:
   1. It was wrong to grant the injunction against the Second Defendant (First Appellant), Octagon Overseas Limited;
   2. There is no cause of action which can be enforced by an injunction: it being a claim for an injunction to enforce the decision of the FTT (Property);
   3. The injunction is itself flawed as it is far too broad and/or too vague and insufficiently particularised.
5. Permission to appeal was granted by Arnold J on 13 December 2016 pursuant to the provisions of CPR 52.6 as each ground had reasonable prospects of success. I will take each ground in turn. The appeal raises the important point of whether this is a case in which the court has jurisdiction to grant an injunction where there is no underlying cause of action. It also raises the important issue of the way in which a party is to enforce an order of the FTT.

The First Ground of Appeal – the grant of the injunction against D1

1. The First Ground of Appeal is conceded by the Respondent. The First Appellant does not have any relevant management functions at Canary Riverside. It is the freehold owner which, save for minor exclusions, has been entirely let on long leases to the Second Appellant.
2. While the original application had included Octagon Overseas Limited as a Defendant, at the hearing before HHJ Madge, there was no attempt by the Claimant to convince the Judge that the injunction ought to be extended to D1 and indeed on 7 October 2016 Miss Gourlay, who also appeared before me, set out to the Judge that while he had made the order against the “defendants” plural, *“We have agreed that Octagon Overseas need not have the injunction against them. It was something that was raised by my learned friend. We noticed that you said “defendants” in the order.”*
3. HHJ Madge responded by stating that he had put in the plural and that *“I think that where we are now is that there are injunctions about both defendants, but it should not be served on the individual if that is not…”,* whereas it may have been better simply to acknowledge a slip. The injunction against Octagon Overseas Limited ought not to have been made and ought to be discharged. The Respondent does not dispute that.

The Second Ground of Appeal – the issue as to whether the court had jurisdiction to grant the injunction.

1. This issue is the central point of the appeal, albeit it was a point dealt with very briefly in the judgment of HHJ Madge. In essence he determined that the Court had jurisdiction to grant an injunction by virtue of the provisions of section 37 of the Senior Courts Act 1981 and section 38 of the County Courts Act *“to prevent a party from negating the legitimate functions and duties of a court or tribunal appoint official or from failing to comply with an order of a tribunal”*. He found that as the court had the power to commit *“where the supremacy of the law is being challenged”* the law must also allow a court or tribunal’s appointed official to apply for an injunction, a less draconian step.
2. The Appellants’ contention is that there is no underlying cause of action which can be enforced by the granting of an injunction and that, without such a cause of action, in the circumstances of this case, there is no basis for the granting of an interim injunction.
3. The claim form sets out that it is a claim for an injunction to enforce the decision of the FTT (Property): *“This is a claim for an injunction”*. The Appellants contend that there can be no basis for the making of an interim injunction without an underlying cause of action, relying upon *Siskana v Distos Conpania Neviera SA* [1979] AC 210 HL and the notes to the White Book, volume 2 at para 15-4. The Appellants contend that *Siskana* is still good law and that nothing said by Lord Diplock has been expressly disapproved of by the decision in *Cartier International AG v British Sky Broadcasting* [2016] EWCA Civ 658. The Appellants contend that *Cartier* does not remove the need for an underlying cause of action in seeking an injunction in a case such as this.
4. In *Siskina,* Lord Diplock set out that in order to grant an interlocutory injunction there needed to be the existence of a cause of action on which to found “the action”:

*“A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amendable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.*

*… The High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment …”*

The Court of Appeal in *Watson v Durham University* [2008] EWCA Civ 1266 reiterated the need for an underlying cause of action in order for an injunction to be granted and, in *Marketmaker Beijing Co Ltd & Ors v CMC Group Plc & Ors* [2004] EWHC 2208, Stanley Burnton J. set out that with the exceptions of freezing injunctions and injunctions granted for the purpose of preserving evidence or otherwise protecting the process of the Court, an injunction requires a cause of action. Both *Matchmaker* and *Watson v Durham University* were, of course, decided before *Cartier* but, in my judgment, are still good law.

1. The Respondent relies upon *Cartier.* In *Cartier* the Court of Appeal upheld the decision of Arnold J in which he found that the court had jurisdiction under the provisions of section 37(1) of the Senior Courts Act 1981, despite there being no cause of action vested in the Claimants against the Defendants.
2. Arnold J determined at first instance, that “on a purely domestic interpretation” section 37(1) of the Senior Courts Act 1981, conferred jurisdiction on the court to grant the orders sought, namely injunctions requiring broadband providers to block access to a number of websites allegedly infringing trade marks in respect of a number luxury goods (the allegation being that the websites were selling counterfeit goods). The Court of Appeal affirmed the decision of Arnold J. Kitchen LJ, giving the judgment of the Court, held that *“the courts have shown themselves ready to adapt to new circumstances by developing their practice in relation to the grant of injunctions where it is necessary and appropriate to do so to avoid injustice”* and that, following Lord Woolf MR, the dictum of Lord Diplock in *Siskana* has to be applied with a degree of caution as it is far from an exhaustive statement of the court’s powers to grant an injunction. That decision was, in the particular circumstances of that case, where the Applicants were seeking an order compelling internet service providers to block access to particular sites selling counterfeit goods. It is far removed from the circumstances of this case where the application to the County Court was for an injunction to enforce a management order made in the FTT (Property) with a penal notice attached.
3. Arnold J. set out a list of circumstances in which an injunction may be granted, including in the protection of any legal right; the enforcement of any equitable right; or the restraint of unconscionable conduct (such as a freezing order). In *Fourie v Le Roux* [2007] UKHL 1*,* Lord Scott reiterated that the jurisdiction to grant an injunction must be distinguished from the power to do so and that the practice regarding the granting of injunctions *“as established by judicial precedent and rules of court, has not stood still since [1979] AC 210 was decided.”* Kitchen LJ in *Cartier* held that the preferable analysis involves *“a recognition of the great width of those equitable powers …and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate.”*
4. In my judgment, what both the Court of Appeal and Arnold J. are setting out in *Cartier* is that in appropriate circumstances the court will grant injunctions in new areas where there is a lacuna and there is the need for the court to have such a power when it appears, in all the circumstances, appropriate. That does not, in my judgment, destroy the principle that injunctions, save in particular circumstances, are not freestanding and are incidental to the cause of action. Undoubtedly there is, and continues to be, a development in the law as to the circumstances in which injunctions will be granted so that the court is not “straightjacketed” by the dictum of Lord Diplock in *Siskina*. However, in my judgment that does not assist the Respondent in this case.
5. Section 37(1) of the SCA 1981 provides that *“The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.”* Section 38(1) of the CCA 1984 provides that *“…in any proceedings in the county court the court may make any order which could be made by the High Court if the proceedings were in the High Court.”* Consequently, while the County Court clearly has the ability to grant an injunction it still has to have the jurisdiction to do so which, in most cases, will require an underlying cause of action.
6. In this case, what the Respondent was seeking to do by making a claim for an injunction on October 2016, was to the enforce the FTT (Property) management order which came into operation on 1 October 2016. I should note in passing that, in my judgment, there was no urgency to the matter and no requirement to make an ex parte application (albeit it was on short notice to the Appellants).
7. The enforcement of orders of the FTT is governed by section 176C of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) which provides as follows:

*“Any decision of the First-tier Tribunal or Upper Tribunal under or in connection with an enactment specified in section 176A(2), other than a decision ordering the payment of a sum (as to which see section 27 (enforcement) of the Tribunals, Courts and Enforcement Act 2007), is to be enforceable with the permission of a county court in the same way as orders of such a court”*

1. In order to seek permission to enforce an order of the FTT, an application has to be made in accordance with the provisions of CPR 70 and PD 70.

The relevant parts of CPR rule 70.5 provide:

*“(3) If an enactment provides that a decision or compromise is enforceable or a sum of money is recoverable if a court so orders, an application for such an order must be made in accordance with paragraphs (4) to (7A) of this rule.*

1. *The application –*
   1. *may, unless paragraph (4A) applies, be made without notice; and*
   2. *must be made to the court for the district where the person against whom the order is sought, resides or carries on business, unless an enactment, rule or practice direction provides otherwise or the court otherwise orders.*

*(4A) …*

1. *The application notice must –*
   1. *be in the form; and*
   2. *contain the information Required by Practice Direction 70.*
2. *A copy of the decision or compromise must be filed with the application notice.*
3. *An application other than in relation to a conditional compromise may be dealt with by a court officer without a hearing.”*

PD.70 provides

*“4.1 The information referred to in rule 70.5(2A) must –*

* 1. *be included in the practice form N322B …;*
  2. *specify the statutory provision under which enforcement or the recovery of a sum of money is sought;*
  3. *state the name and address against whom enforcement or recovery is sought;*
  4. *where the decision or compromise requires that person to pay a sum of money, state the amount which remains unpaid; and*
  5. *confirm that, where a sum of money is being recovered pursuant to a compromise, the compromise is not a conditional compromise.”*

1. No application was made by the Respondent in accordance with CPR 70 and its associated PD. The Respondent contends that all that was needed to be done with respect to such an application was done, the only failing was that it was not in practice form N233B and that there can be a remedy of that default by applying CPR 3.10 which provides:

*“Where there has been an error of procedure such as a failure to comply with a rule or practice direction –*

1. *the error does not invalidate any step taken in the proceedings unless the court so orders; and*
2. *the court may make an order to remedy the error*.*”*
3. In *Cardiff CCv Lee* [2016] EWCA Civ. 1034, Arden LJ referred to the case of *Steele v Mooney* and how that signalled an approach which did not give the phrase “error of procedure” in CPR 3.10 an artificially restrictive meaning. Consequently, the remedying of a procedural failure ought not to be given a restrictive meaning in CPR3.10 and the Respondent contends that, save for making the application and including the information required by practice form N322B, the Respondent had complied with the requirements CPR 70 and PD 70. As the Respondent had complied with all the requirements of CPR 70 and its associated practice direction, I agree that CPR 3.10 provides a mechanism by which the court could properly have dispensed with the need for compliance with completing practice form N322B.
4. Consequently, the Respondent was entitled to apply to the County Court to enforce the management order made by the FTT (Property), however that is not the same as applying for an injunction with a penal notice attached. There is no lacuna requiring the Court to grant an injunction in a case such as this. An underlying cause of action is needed, and one did not exist.
5. In this case, what the Respondent was seeking, and what it has obtained, is more than simple enforcement of the FTT (Property) management order. What the court has done is to grant an injunction backed with a penal notice thereby providing the Respondent with new rights not provided by the management order. In fact, the management order expressly provided that the Respondent had liberty to apply to the FTT (Property) for further directions in accordance with section 24(4) of the Landlord and Tenant Act 1987:

*“Such directions may include, but are not limited to:*

1. *Any failure by any party to comply with an obligation imposed by this Order;*
2. *…*
3. *…”*

And that is what the Respondent ought to have done if the management order was not in itself sufficient.

1. The role of the County Court is to assist in the enforcement of orders made in the FTT (Property). It does not create new rights or orders. It is for the FTT (Property) to decide how the management order is to operate and how its agent (the tribunal appointed manager) is to fulfil his obligations pursuant to the terms of the management order. It is for the FTT to make orders and, where appropriate, amend or vary those orders.
2. The Respondent ought to have applied to the FTT (Property) to vary the order made appointing him as the manager in order to provide clarification as to the extent of his obligations and clarification as to the precise extent of the property over which he was appointed as the manager. The County Court does not have power to vary the order made by the FTT and, in my judgment, the injunction sought and obtained in this matter, with the penal notice attached, had the effect of extending the management order made by the FTT (Property).
3. The issue then arises as to whether the FTT (Property) has power to attach a penal notice to the management order. The contention of the Appellants is that if the Respondent wished to have a penal notice attached, with the threat of committal proceedings hanging over the Appellants, then the Respondent ought to have applied to the FTT (Property) in accordance with the liberty to apply provision, to have a penal notice attached. The Respondent relies upon an unreported case I dealt with summarily in the County Court on 13 December 2013, *Taylor v SHG-SH20 Ltd.*
4. In *Taylor v SHG-SH20 Ltd* I accept I made a clear error in referring to CPR 70 as only applying to the enforcement of money judgments, however I do not accept that it was an error to hold that the FTT (Property) has the power to attach a penal notice if it is satisfied that such is necessary to ensure compliance with the management order. Section 24(4) of the Landlord and Tenant Act 1987 provides extremely wide power to the FTT to make provision for “*such incidental or ancillary matters as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters…”*
5. The FTT, just like the County Court, is a creature of statute. It is therefore necessary to consider what powers are given by statute. Section 24(4) of the LTA 1987 could not be more widely worded and, while it was forcefully argued on behalf of the Respondent that as the power to commit vests in the County Court, the power to attach a penal notice must also vest with the County Court, I do not accept those submissions. In my judgment, that is the wrong emphasis. The structure provides for the FTT to make the management order and for the FTT to determine what orders are necessary in order for that management order to be effective. If the FTT determines that it is necessary for there to be a penal order attached to the management order as a result of a failure to comply the terms of the order then section 24(4) of the LTA 1987 gives the FTT (Property) the power to do so.
6. In my judgment, therefore, HHJ Madge erred in granting the injunctions with a penal notice attached on 4 October 2016 and 7 October 2016.
7. There were two ways in which the Respondent could have sought to take steps to ensure that the management order was complied with: the Respondent could have applied to the FTT (Property) for further directions and orders including, if appropriate, for a penal notice to be attached to the management order; and the Respondent could have made an application o the County Court pursuant to the provisions of CPR 70 and section 176C of the 2002 Act for permission for the management order to be enforceable *“in the same way as orders of such a court.”* I do not consider that such applications would have to be made in the alternative, albeit that the Respondent might decide one course was preferable to the other.
8. The injunctions will therefore need to be discharged.

The Third Ground of Appeal – the width of the orders and the substantive merits of the application

1. The injunction granted on 7 October 2016 was more specific than that made on 4 October 2016 but expressly provides, by virtue of paragraph 7 of the order, that the order made on 4 October 2016 do remain in place.
2. The Appellants appeal against the width of the orders made by the injunction granted on 4 October 2016. While it is no longer strictly necessary for me to deal with this given my findings on grounds 1 and 2, it is nonetheless important that I deal with this ground.
3. The injunction granted on 4 October 2016 provided that:

*“1. The defendants whether by their servants or agents or otherwise be restrained from changing any locks to the premises;*

1. *The defendants whether by their servants or agents or otherwise be restrained from removing any property from the premises;*
2. *The defendants whether by their servants or agents or otherwise be restrained from interfering with the managers’ exercise of his obligations under the terms of the First Tier Tribunal order of 5th August 2016.”*
3. The Appellants contend that the first two of these orders is too wide and that the third is too vague and lacks particularisation.
4. With respect to the first order, in my judgment this order is far too wide. The management order did not prohibit the Appellants from changing locks as the management order does not confer any proprietary interest on the Respondent. He was appointed to be the manager with an obligation to the tribunal to carry out the management functions laid out in the management order. While the Respondent was solely responsible for the management of Canary Riverside pursuant to the terms of the management order and that no other party is to exercise a management function, that does not prohibit the freehold owner and long leaseholder (the Appellants) from accessing those areas of Canary Riverside and changing the locks to those areas if they so wished. The evidence of Mr Coates is simply that he had discovered some locks had been changed, without specifying which ones.
5. The circumstances in which a management order is made are likely to be confrontational, with the freeholder or long leaseholder (or whoever had the management powers prior to the order being made) being keen to ensure that nothing further is given beyond that which the management order provides. In my judgment, this first provision of the 4 October 2016 goes further than is required and would need to be reworded to provide for the keys to be provided for those rooms which fall within the ambit of the management order and that no locks are to be changed with respect to those areas. While the Respondent may have wished to see the entirety of Canary Riverside in order that he could better understand his role and obligations, the management order does not provide for it and [had the injunction been appropriate] it ought not to have included this provision. The fact that the Respondent had given an undertaking to return those keys he did not need is not the issue. The injunction ought not to extend the obligations of the Appellants provided for by the management order.
6. The second part of the order is that the Appellants be restrained from removing property from the premises, without any limitation. Again, this prohibition is too wide. The Appellants are entitled to remove their own property. The extent of their obligation is set out in the management order and, again, is not to be extended by the wording of an injunction (if such an injunction is appropriate).
7. Finally, with respect to the third part of the order, the Appellants complain that it is too vague and lacks particularisation. While, in my judgment, it can be acceptable to draft an injunction with reference to another detailed document (such as the management order is in this case) it is necessary for the party seeking and obtaining the injunction to specify those matters which are not being complied with and which require the imposition of an injunction in order to ensure compliance. The Appellants are correct when it is said that they are entitled to know the specific ways in which they are alleged to have failed to comply with the management order.

Conclusion

1. For the reasons I have set out in detail, I allow this appeal on all three grounds. The First Appellant ought not to have been made the subject of the injunctions (a point conceded by the Respondent); the injunctions with the attached penal notices granted on 4 and 7 October 2016 ought not to have been granted for the reasons I have set out; even if the injunctions were properly granted, paragraphs 1, 2 and 3 of the injunction granted on 4 October 2016 ought to be set aside.
2. If the court can accommodate a handing down on 18 April 2017, I plan to hand down this judgment (without attendance of the parties) that morning. I would be grateful if Counsel could agree a form of order before that date.

HHJ Karen Walden-Smith

9 April 2017