

## Tim Cowen

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Tim practises in property litigation. He has particular expertise in landlord and tenant, including commercial leases, residential tenancies and leasehold enfranchisement. Other specialties include mortgage disputes, all aspects of real property, questions of title, conveyancing problems, property-related insolvency and professional negligence cases. He has also represented a number of local authorities in property matters and related judicial review. Tim regularly contributes to our property bulletin and lectures on commercial property topics.

### Cases for Tim include:

*Allen v Matthews CA [2007] EWCA Civ 216*

#### Adverse possession claim

Tim was led by Jane Giret QC in the Court of Appeal in this adverse possession case with a colourful history. The land in question was a scrap metal yard in the East End of London owned by our client, Mr Allen. He was convicted and imprisoned in 1987 for committing fraud on the estate of his own father, who had been brutally murdered in 1986. Our client was charged but cleared of the murder itself. While our client was in prison, Mr Matthews and others went into occupation of the yard and operated businesses there. Mr Matthews claimed title to the land by adverse possession. The first trial of the matter in the Central London County Court was aborted after witnesses were attacked in the court building. At the second trial under heavy security, HHJ Collins found that Mr Matthews would have been in adverse possession for more than 12 years but that there had been a written acknowledgment of title which defeated Mr Matthews' claim. The document relied upon was a letter from solicitors purporting to act for a company which had been squatting in the yard. In fact the company had been dissolved before the letter was written. Mr Matthews appealed to the Court of Appeal who overturned the trial judge. They held that it is necessary for ss29 and 30 Limitation Act 1980 for the recipient of an acknowledgment of title to know from whom it was truly sent.

*Painter v Hutchison HC ChD Lewison J [2007] EWHC 758 (Ch)*

#### Property - Offshore trusts - Tax evasion

Tim represented Mr & Mrs Painter with David Peters in a 10-day trial in the Chancery Division. The case concerned a house which the Painters lived. Mrs Painter was the registered owner but she had signed a deed of trust which said that she held the property on trust for an offshore Trust Company. This was an attempt at tax evasion by Mr Painter, but he later disclosed the true position to the Inland Revenue. Mr Hutchison claimed to be the beneficiary of the offshore trust and claimed that the house was beneficially his. Mr & Mrs Painter accepted that the purchase money for the house came from the offshore trust, but they claimed that the payment out of the trust represented money which they had invested in the offshore trust themselves. Mr Hutchison claimed all the money was his because of the state of account between him and Mr Painter on various business joint ventures. After 3 days of cross examination of Mr Hutchison, Lewison J held that Mr Hutchison had deliberately lied and had fabricated and forged documents in an attempt to support his case. A number of legal issues on trust law arose including (1) the effect of the offshore trust company having no knowledge of the signing of the deed by Mrs Painter in their favour (2) whether the deed signed by Mrs Painter was a sham and (3) whether the illegal purpose of that deed (tax evasion) and the fact that Mr painter had come clean to the tax authorities affected the Painters' case. The judge resolved all these issues in favour of Mr & Mrs Painter and made a declaration that Mrs Painter was the sole beneficial owner of the house.

## **Re Woodbourne Sports & Social Club**

### **Property - Lease renewal**

Tim represented the club in an unusual lease renewal application. The original 28 year lease in 1978 was of some sports fields in Solihull. It contained a contractual option allowing the club to renew the lease and the claim was brought under that clause. The clause simply said that upon exercising the option the club was entitled to a new lease; it was completely silent on the question of rent and terms of the new lease. There was another clause expressly allowing the club to remove any buildings it had erected. The landlord initially contested the club's entitlement to a new lease at all, then conceded. The dispute then concerned the terms of the new lease, especially rent and reviews. During the first term, the club had erected a club house/pavilion. The club argued that this was a tenant's fixture and should be disregarded for the purposes of rent. The landlord argued that the new building had become part of the land and should be valued with it. HHJ Purle QC heard this point (with a couple of others) at a preliminary issue hearing and found in a 40 page judgment in favour of the club on the grounds (1) that in the absence of a formula for rent, the court would set a "fair" rent and that it would be "fair" not to ask the club to pay rent for a building which it had paid to erect; or in the alternative (2) that the building was a tenant's fixture and should be disregarded on that ground. The judge therefore declared in favour of the club that the initial rent of the new lease and any future rent review should be conducted by disregarding the effect of the new building on rent. There was also a preliminary issue relating to whether the new lease should contain the same renewal clause (which also contained an option to purchase the freehold) as was in the old lease. The judge resolved that issue in favour of the club as well and declared that the renewal/option clause should be in the new lease. The landlord is appealing to the Court of Appeal.

## **Olewatt Limited v First Base Piccadilly Limited Before Mr Justice Eady, Appeal to QBD**

### **Commercial Leases - Implied Terms - Serviced Offices**

Tim acted for the tenant in this unusual commercial lease renewal. The issue on the appeal was whether the Judge below was entitled to fix the disputed terms of the new lease with regard to the effect those terms would have on the rent (which was also to be determined by him).

The tenant occupied a suite of rooms in an office building on Piccadilly. The landlord usually licenses out rooms as serviced offices for a licence fee. The sorts of services the landlord provides (such as cleaning in the common parts, furniture, telephone system, photocopying etc) go way beyond what is normally provided as part of the landlord's obligations in an ordinary office lease. The licence fee (about £80 per square foot) is therefore much higher than a commercial rent would be for equivalent space (about £36 psf including ordinary service charges).

The tenant, Olewatt Ltd, is a commodity trader who initially occupied a suite of rooms under the usual licence. In 2001, it asked the landlord to convert from a licence to a lease, for the same suite of rooms. The landlord reluctantly agreed and sent the tenant a draft lease which was outside the protection of the Landlord and Tenant Act 1954. The proposed rent was at the same very high level as the licence fee had been. Before signing the lease, the tenant made handwritten changes to the document which (a) brought the lease within the 1954 Act and (b) deleted the landlord's obligation to provide any services. The landlord (without consulting its lawyers) signed without noticing the effect of the amendments. The tenant, however, did not amend the very high rent.

The tenant won the first set of proceedings in 2003, when the landlord unsuccessfully tried to persuade the Chancery Division that the lease was outside the 1954 Act. The tenant then applied for a new lease. CPR Part 55 required this to be commenced in the county court. The landlord then attempted to oppose the lease renewal on the statutory ground of offering suitable alternative accommodation. The landlord's offer was of exactly the same suite of rooms, but on a short lease excluded from the 1954 Act. The judge had no difficulty, on the trial of a preliminary issue in 2004, in deciding that the offer was neither "alternative" accommodation nor were its terms reasonable under the statutory test.

This left only the terms and rent of the new lease to be determined by the county court. The trial took place in June 2005 before the same judge who had heard the preliminary issue. At the trial, the landlord argued that the terms of the new lease should contain a landlord's obligation to provide the full range of services contained in the standard licence agreements. This would, of course, result in a rent at the £80 psf level. The tenant's position was that the new lease should be along the lines of the current lease, namely a minimal level of services. This would result in a rent closer to the £36 psf level. The unchallenged evidence of the tenant was that it has not used the extra services and did not want them. The trial judge found in favour of the landlord and the tenant appealed. The route of appeal for a final decision on a Part 8 claim in the county court is to a single High Court judge.

On the appeal, the tenant's argument (as below) was that (a) the 1954 Act requires the court to have regard to the current tenancy and (b) that the landlord could only succeed if it could satisfy the test set by the House of Lords in *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726, namely that the burden is on the party seeking to depart from the current lease to show a good reason. The tenant said that the trial judge had not applied these tests properly.

The trial judge:

1. had been particularly impressed by what he regarded as the commercial reality of the situation: namely that the tenant had occupied in a serviced office environment and had since 2001 been prepared to pay a high rent commensurate with fully serviced offices.
2. noted that if the tenant succeeded, then its rent would be slashed.
3. felt that it would be unfair on the other occupiers for the tenant to opt out of paying for the services which the landlord had to provide and pay for regardless of whether or not any particular occupier used or wanted them. The trial judge made an analogy with a hotel, in which a guest could not have his bill reduced on the basis that he had not used the swimming pool or the gym.

The landlord on the appeal said that the trial judge was entitled to reach those conclusions because (1) he had found that the current lease did, in fact, contain the extra services as a consequence of the commercial reality and (2) the test in O'May was wide enough to allow the trial judge to take into account all relevant circumstances.

The tenant won on the appeal before Eady J. He held firstly that the trial judge had no legal basis to interfere with the contractual freedom of the parties by implying any further services into the express written lease. Secondly he held that the trial judge was not entitled to take into account the matters which he did under the test in O'May.

The statute makes it clear that the terms need to be determined before the rent is assessed. By taking into account the effect of

various different services on the rental level, the trial judge had been putting the cart before the horse. Eady J fixed the services in the new lease at the minimal level and remitted the matter back to the county court for a rent assessment.

This case is important in establishing the legitimate range of factors the court can take into account when applying the familiar O'May test.