Neutral Citation Number: [2020] EWHC 1278 (Admin)

Case No: CO/3894/2019

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2020

**Before** :

**MR JUSTICE MARTIN SPENCER**

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**Between :**

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| **THE QUEEN on the application of HCP (HENDON) LIMITED** | **Claimant** |
| **- and –** | |
| **CHIEF LAND REGISTRAR (sued as, HM LAND REGISTRY)** | **Defendant** |
| **HENLEY COURT PROPERTIES LIMITED** | **Interested Party** |

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**Mr Anthony Hurndall** (Solicitor, instructed by **Hurndalls Solicitors**) for the **Claimant and Interested Party**
**Miss Katrina Yates** (Counsel, instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 29 April 2020

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# Approved Judgment

**Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.30am on 20 May 2020.**

**MR JUSTICE MARTIN SPENCER :**

## Introduction and Permission

1. By this application, the Claimant seeks to quash by judicial review a decision made on behalf of the Defendant by an assistant registrar at HM Land Registry on 19 July 2019 to register a lease of the second floor of a property at Henley Court, Watford Way, Hendon NW4 4SR concurrently with the existing registered leases of seven first floor flats at the property. In addition, the Claimant seeks a mandatory order, declaration or prohibiting order in respect of the lease in question.

2. This matter came before Murray J on the papers on 30 January 2020 when he ordered that the application for permission to apply for judicial review be listed in court as a rolled-up hearing with the substantive claim to proceed immediately if permission was granted at the hearing. The "rolled-up" hearing came before me on 29 April 2020 when the matter was fully argued. As I have heard full argument and given the fact that this claim raises fundamental issues about the extent to which reliance can be placed on what is contained on the face of the register for the purposes of registered property, it is appropriate for permission to be granted.

## The background facts

3. The property in question at Henley Court is a two-storey high building (ground floor and first floor) with a hipped roof comprising 14 flats or maisonettes which are demised by long leases granted on various dates between 1981 and 2017. Seven of these long leases demised garden maisonettes situated on the ground floor of the building whilst the other seven are the leases relating to the upper floor flats or maisonettes.

4. Although the building is and has at all material times been in almost full occupation, it is dilapidated and in areas dangerous. In February 2018, the freeholder, Henley Court Properties Limited which is joined to this application as an interested party and supports the position of the Claimant, obtained planning consent to build an additional floor. This consent expires on 7 February 2021. The freeholder then granted to the Claimant a lease of the second floor on 14 February 2019. There is also another lease dated 21 January 2019 of which the Claimant sought registration, but it is agreed that, for the purposes of this application, I need consider only the later lease.

5. The lease imposes an obligation on the Claimant to commence work within six months and to implement the consent within 24 months to ensure the restoration of the fabric of the building and its amenities and to make the building safe for the benefit of the Claimant, the lessees and residents of the building. The lease, which is at page 54 of the bundle of documents, describes the property demised as the "second floor" meaning:

> "That part of the building and the airspace directly above the first floor of the building and above the first floor flats, 2, 8, 10, 11, 12, 12a and 14 (as the same are registered respectively at the Land Registry…) and as shown edged in red on the plan from the upper side of the joists or beams of the ceilings above such first floor flats to a height of 3.6 metres above the upper side of the joists and beams of the ceilings above such first floor flats, it being intended that once the

> second floor building works are complete the upper limit of the second floor [the property] shall be the underside of the joists or beams above the ceiling of the proposed second floor flats comprised within and to form part of the second floor building works and as shown in the section on the annexed architect's drawing … the further intention that once such works are complete the second floor shall include the second floor building works within the second floor including the floor and ceiling finishes as well as any wooden boards and blocks, any tiles, any floor coverings and screeds and any plaster and plasterboard."

Thus, the freeholder has demised to the Claimant the area above the joists or beams of the ceilings of the first-floor flats including the roof and roof space.

6. On 15 February 2019, the day following the date that the lease was entered into, the Claimant applied to HM Land Registry to register the lease of 14 February 2019. On 24 June 2019, HM Land Registry sent to the Claimant a Requisition asking the Claimant to deal with a number of points before the application could be completed, the relevant point being stated as follows:

> "Please note that the roof and roof space has already been demised in the leases of each of the first-floor flats numbered 2, 8, 10, 11, 12, 12a and 14 referred to. This being the case we are unable to proceed with the registration of either of the leases in your applications."

The reference to "either of the leases" was a reference to both leases referred to in paragraph 4 above.

7. The Land Registry's Requisition led to a letter of 12 July 2019 from the Claimant's solicitors, Hurndalls, in which, having described the benefit to the property from the proposed development stated:

> "5. The lease is a development lease which is key to these proposals, which have involved several years of work and have been put together at great expense in time and cost. The freeholder and lessees have proceeded with these proposals, and the applicant has purchased the lease, in reliance on, and on the basis of the registers of title for the 14 flats, in particular the property registers. …
>
> 9. The property registers for all seven first-floor flats at Henley Court state in each case that the registered estates consist of and is limited to 'the first floor only'. The use of the 'only' clearly emphasises the restriction of the extent of the estate. If it included any part of the floor above or of the airspace above the first floor it would clearly state this.
>
> 10. While we do not agree, HMLR believes the descriptions in the lease of the first-floor flats include the second-floor or airspace above the flats included in the lease. This is though not relevant, as the property registers, on which the applicant and freeholder have relied and are entitled to rely do not include them – only the first-floor is included in the registered estate of the first-floor leases.

> 11. The principal reason given by HMLR for their refusal, as it appears from their requisitions and correspondence, is that, contrary to rule 5 above [this was a reference to Rule 5 of the Land Registration Rules 2003, see paragraph 10 below] and the Act in general, it contends the property registers are not there to be relied on. In particular it considers that the statement that the registered estate consists of the first floor only is not to be relied on. On HMLR's stated view, the public, and anyone inspecting the registers, is not entitled to rely on these but is bound by and must instead inspect the lease of the building and possibly adjoining buildings to ascertain the extent and description of the estate contained in each such lease, because it is these, HMLR argues, that describe the registered estate not the property registers. If there is a conflict between the two descriptions, then the public must ignore the registers of title, and are bound by the description in the lease.
>
> 12. This view is manifestly wrong and irrational."

This letter articulates the principal issue in this case, namely the extent to which a purchaser of land can rely upon the property registers of the relevant titles, without reference to other documents, and in particular any leases mentioned in the property register, with respect to the extent of the demise of the registered properties in question.

8. HM Land Registry responded on 19 July 2019 in a letter from Mrs Miriam Brown, the Assistant Land Registrar. Having set out the registered numbers of the properties for the first-floor flats, the letter stated as follows:

> "Each register for the existing leases contains a 'floor level note' as follows:
> 2. 'Only the first-floor maisonette is included in the title'
> 8. 'Only the first-floor is included in the title'
> 10. 'The maisonette is the first-floor maisonette'
> 11. 'As to the parts tinted blue on the title plan only the first-floor maisonette is included in the title'
> 12. 'As to the part tinted blue on the title plan only the first-floor maisonette is included in the title'
> 12a. 'The flat is on the first-floor'
> 14. 'The flat is on the first-floor'
>
> **The leases**
>
> Each of the existing leases includes a detailed description of the demised property at Schedule 1, stating that the roof is included. In some cases (2, 8, 12 and 14), the roof space and/or chimney if any, is stated to be included. …
> The new lease purports to comprise the building and airspace above the first-floor flats from the upper side of the joists or beams of the ceilings above such first-floor flats to a height of 3.6 metres. This conflicts with the properties demised in the existing leases and creates an overlap in the demises.

**Response to claim**

Extent

The central issue here is the extent of each of the registered existing leases and how is that extent defined. The register identifies the postal addresses of each flat with a floor level note at A.1 and gives short particulars of the leases at A.2 or A.3. The floor level note identifies where the flat is situated. This accords with rule 5 of the Land Registration Rules 2003.
However the Register cannot be considered in isolation from the lease which contains the complete definition of the extent demised. The text of the lease document itself for each of the existing leases gives further detail on what the demises includes at schedule 1 such as the floors and ceilings, outside walls, one half thickness of walls shared with adjoining flats, staircase and the roof and the roof space (either expressly or by implication). If the register alone is treated as defining the extent of the property and limiting the extent to the first-floor alone, the flats would be potentially be unusable, without for example the staircase to gain access.
It is accepted that in respect of some of the flats (10, 11, 12a and 14) that there is conflicting information as to the extent insofar as the leases state that the roof is included but also to contain a right to access the roof space to install a tv aerial. If the roof is included, by implication the roof space which sits between the accommodation and the roof must be included although the grant of the rights suggests that it is not. This is a defect within the lease which cannot be resolved by HM Land Registry. …

**Effect of new lease**

Although the new lease and existing leases conflict in terms of physical extent, this does not prevent registration as the new lease takes effects as a concurrent lease. In completing the registration, the new lease will be noted on the freehold. It will however be subject to the existing leases for their duration so far as the overlap is concerned."

9. After further debate in correspondence concerning the principles of land registration, the Claimant sought a review of Mrs Brown's decision and this was carried out by the Land Registrar, Sally Cater, on 16 September 2019 in which she wrote:

> "I must decide whether HM Land Registry's decision that part of the land demised by the new lease is also in the demise of the existing leases, and that the new lease must therefore be registered as a concurrent lease is correct. I have concluded that it is correct. I agree with the conclusions drawn by my colleague in her letters of 19 July, 9 August and 29 August and the basis on which she reached those conclusions. I see no point in repeating the points that have been comprehensively covered in previous correspondence.
> When a property is leasehold, the title plan identifies the footprint of the building at ground floor level and the property register includes a note or notes indicating at which level or levels in the building the registered property lies but reference must be made to the lease and any lease plan for details of the extent demised by the lease."

This is thus the decision which the Claimant seeks to quash by these proceedings.

**The legislative framework**

10. The Defendant's functions are governed by the Land Registration Act 2002 ("LRA") and pursuant to the LRA, the Land Registration Rules 2003 ("LRR") make provision for how the register of title is to be kept. By LRR rule 2(2)(a) an individual register must be kept for each estate in land that is vested in a proprietor. Each individual register consists of a property register, a proprietorship register and, where necessary, a charges register. By rule 4(3) "an entry in an individual register may be made by reference to a plan or other document, in which case the Registrar must keep the original or a copy of the document."

11. Rule 5(1) prescribes the content of the property register of a registered estate. It states:

> "5. The property register of a registered estate must contain –
>
> a) A description of the registered estate which in the case of a registered estate in land, rent charge or registered franchise which is an affecting franchise must refer to a plan based on the Ordnance Survey map and known as the title plan;
>
> b) Where appropriate, details of –
>
> i) The inclusion or exclusion of mines and minerals in and from the registration under rule 32,
>
> ii) Easements, rights, privileges, conditions and covenants benefitting the registered estate and other similar matters,
>
> iii) All exceptions arising on enfranchisement of formerly copyhold land, and
>
> iv) Any other matter required to be entered in any other part of the register which the Registrar considers may more conveniently be entered in the property register and
>
> c) Such other matters as are required to be entered in the property register by these rules."

Rule 6 deals with the property register of a registered leasehold estate and provides:

> "6. (1) The property register of a registered leasehold estate must also contain sufficient particulars of the registered lease to enable that lease to be identified.
>
> (2) If the lease contains a provision that prohibits or restricts dispositions of the leasehold estate, the Registrar must make an entry in the property register stating that all estates, rights, interests, powers and remedies arising on or by reason of a disposition made in breach of that prohibition or restriction are excepted from the effect of registration."

The effect of these provisions is that the property register for an individual registered leasehold estate must contain a description of the registered estate and sufficient particulars of the registered lease to enable the lease to be identified but the Registrar

is entitled to make such entries by reference to other documents provided that he keeps the original or a copy of the document.

12. In relation to buildings and different levels, the Claimant refers to, and relies on, Rule 26 LRR which provides:

> "**First registration of cellars, flats, tunnels etc.**
>
> 26.—(1) Subject to paragraph (2), unless all of the land above and below the surface is included in an application for first registration the applicant must provide a plan of the surface on under or over which the land to be registered lies, and sufficient information to define the vertical and horizontal extents of the land'.

In relation to this rule, the Claimant refers to *Ruoff and Roper: Registered Conveyancing*, which, it is submitted, explains that the levels included in the registered estate will be stated in the property register

> 'In the case of a leasehold title to part of a building, the title plan may only identify the footprint of the building at ground floor level as shown on the Ordnance Survey map and the property register will include a note or notes indicating at which level or levels in the building the registered property lies'. (Para 5.029)

Mr Hurndall submits that where there is more than one level within a building, Ruoff gives an example of the level of detail required to 'be carried forward to the register' at paragraph 5.003 which refers to issues as minor as eaves, overhangs, footings and cellars, that differ in extent from the floor plan at ground level, emphasising the need for these to be identified 'so that they can be indicated or referred to on the register or the title plan'.

13. Section 66 (1) LRA provides that any person may inspect or make copies of any part of the register of title and any document kept by the Registrar which is referred to in the register of title.

14. For the purposes of this application, it is important to note that the LRA is not merely a scheme for registering title, it is a scheme of title by registration. This clearly arises from section 27 LRA. At common law, a disposition of land by lease, and the passing of leasehold title, would operate at law when the lease was completed. However, this is displaced by section 27 which provides:

> "If a disposition of a registered estate … is required to be registered, it does not operate at law until the relevant registration requirements are met".

The effect of registration is thus to give legal effect to a disposition that the parties have already created.

15. Once the registration requirements have been met, the entry of a person on the register as the proprietor of a registered estate is conclusive as to title. Thus section 58 LRA provides:

> "If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration."

16. An important further provision in the LRA relates to boundaries and this is strongly relied upon by the Claimant in this case. Section 60 LRA contains the "general boundaries rule" as follows:

> "(1) The boundary of a registered estate as shown for the purposes of the register is a general boundary, unless shown as determined under this section.
> (2) A general boundary does not determine the exact line of the boundary.
> (3) Rules may make provision enabling or requiring the exact line of a boundary of a registered estate to be determined …"

The Claimant relies on this provision as authority for the proposition that the register can be relied upon as showing the general boundaries of the properties, both horizontal and vertical, and whether or not the roof space is included relates to such a large area as to come within the meaning of "general boundary" as opposed to the "exact line of the boundary" which is the distinction drawn in LRA section 60.

**The Issues**

17. The Claimant has raised three reasons for arguing that the decision of the Registrar should be quashed.

(i) First, and principally, it is submitted that the Claimant can and should have been able to rely upon the property register to describe the extent of the title of the existing registered leaseholds for the seven first-floor flats or maisonettes and the absence of any reference in the property register to the roof or roof space, but the restriction to the first-floor, including the word "only", means that the Claimant and interested party were entitled to assume that the roof and roof space had been retained by the freeholder so that the Claimant was not only entitled to take a demise of the roof and roof space but also have the new lease registered without being concurrent;

(ii) In any event if that is wrong and it is in fact necessary to look at the leases, the leases should not be interpreted as including the roof space;

(iii) if that is wrong too, then finally, the lease of 14 February 2019, by its wording, excludes any overlap with the existing leases so that the Claimant is entitled to have it registered so that it is not subject to and concurrent with any of the existing leases.

**First Issue: Claimant's submissions**

18. In relation to the first issue, the Claimant submits that it is a fundamental and trite principle of land registration that the extent of the title, including the general boundaries, should be contained on the property register and that any person, including a prospective purchaser, should be able to rely thereon. Mr Hurndall, who has represented the Claimant and interested party throughout, cites Michell and Brilliant "*A Practical Guide to Land Registration Proceedings* (2015)" where it is stated:

> "**Fundamental principles of Land Registration**
>
> 2.3 Theodore Ruoff, who was appointed Chief Land Registrar in 1963, laid down what he considered to be the three fundamental principles of land registration:
>
> - The Mirror principle – the register of title should reflect accurately and completely, and beyond all argument, the facts that are material to the title;
> - The Curtain principle – the register should be the sole and definitive source of information for proposing purchasers, but should not reveal sensitive information;
> - The Insurance principle – if, as a result of human error, the title is proved to be defective in any way, then the person or persons suffering loss as a result must be able to claim compensation."

The passage goes on to state:

> "It will be apparent from the outline of the system set out below that it does not completely satisfy the principles. In particular the Curtain principle is not wholly satisfied because a proposing purchaser may be bound by certain matters not appearing on the register."

Mr Hurndall further relies on the text "Ruoff and Roper: *Registered Conveyancing*" where the objectives and main features of a registered system are set out in paragraph 3.001. This includes:

> "The principal objectives of the registered system still remain the same, that is to simplify, cheapen and expedite dealings with land and to ensure that the register of title is conclusive. The main features of the system may be summarised as follows:
>
> 1. Registration of title provides an up-to-date and immediately accessible official record of the ownership of land and of legal charges secured on that land.
> …
> 5. For each registered title there is an official plan which identifies the extent of the land comprised in the registered title but does not normally identify the ownership of boundary features. This plan is based on the large-scale maps of the Ordnance Survey with the result that a common unifying and accurate base is provided for all registered titles."

Mr Hurndall also relies on this text for the following where it is stated:

> "It is an important feature of a registration system that the register should be conclusive as to the ownership of registered land."

Mr Hurndall points out that there is no reason whatsoever why, if the roof space was to be included in the registered title, that should not have been put on the property register. Thus Ruoff and Roper say at paragraph 4.003:

> "Describing the registered estate allows for a wide variety of statements to be made in the property register. So, there may be a statement that a cellar or tunnel or a part of a building above ground is excluded from the registered title."

He submits that if it was intended to include the roof space as part of the registered title, that would and should have been so stated on the register.

19. Although Mr Hurndall did not refer to it specifically, it seems to me that a further important paragraph is 4.004 relating to the property register and leasehold estates in land. There *Ruoff and Roper* states:

> "In the case of a registered leasehold estate, the property register will contain (as well as a description of the demised premises) sufficient particulars of the lease to enable it to be identified. … The lease and these other documents remain essential parts of the title notwithstanding registration. So, for example, regard must be had to the lease itself, rather than what appears on the face of the register, in deciding questions relating to the covenants, provisions and conditions of the lease."

It seems to me that the words "the lease and these other documents remain essential parts of the title notwithstanding registration" are significant.

20. Finally, so far as *Ruoff and Roper* is concerned, Mr Hurndall cites in his skeleton argument paragraph 5.012, which states:

> "If a deed on which the registration of a title is founded contains an agreement or declaration as to the ownership of a boundary feature, this will normally be set out or referred in the property register."

I note the use of the word "normally": it seems to me that *Ruoff and Roper* is far from saying that such an agreement or declaration must be set out or referred to in the property register.

21. Mr Hurndall submits that the effect of land registry practice is that whilst the exact line of the boundary and the precise boundary features can be included in the description on the register, if not then the boundary shown by the property register and title plan will be a general boundary and if anyone wants to know the precise boundary details, they would need to look at the lease. In relation to rule 26, Mr Hurndall submits that the law requires that the horizontal and vertical boundaries of a registered leasehold estate, if ascertainable from the lease on first registration, be described in the property register and by reference to the title plan.

22. Mr Hurndall then applies these principles to the register of the freehold of Henley Court. This includes, in the charges register, a schedule of all the leases at the building with a note of the areas included in the registered leaseholds. He says that the land within the leasehold titles is described briefly but clearly and the schedule to the property register notes areas and details of leased areas within the registered estates of the first-floor flats which are much smaller than the roof space or loft level which are at issue here. An example is a note for flat 12 which mentions a small garden area at ground floor level which is a fraction of the size of the flat or of the roof space above the flat. He says that even though this ground floor garden area is not actually described in the lease in

question, it is included (without explanation) on the lease plan. He cites this as an example of the application of the legal requirement mentioned by *Ruoff and Roper* to include all known details as to the extent of the demise on the register. A further example, in relation to flat 12a, is the dustbin enclosure, understood to be less than two cubic metres in volume, which again is mentioned in the schedule on the register. He submits that as the schedule made no mention of any part or level of the building being subject to any registered lease other than at ground floor and first-floor level, the Claimant was entitled to assume without more that the loft or loft space was not included in the registered title of the leases.

23. Mr Hurndall says that this is confirmed by inspection of the individual properties registers for each first-floor flat containing the words set out in Miriam Brown's letter of 19 July 2019 (see paragraph 8 above), for example in relation to flat 8: "Note: only the first-floor is included in the title". Thus he argues that the use of the word "only" in most of the cases goes to emphasise that the title does not extend above the first-floor. He says:

> "On the basis there was no mention of any part of the building above the first-floor being included in any of the registered leasehold estates within the building, and in reliance on the clear statements that only the first-floor flat or maisonette were included in the existing registered titles, the Claimant purchased the lease and took on the obligation to carry out the building and restoration work covered by the planning permission."

**First issue: Defendant's submissions**

24. For the Defendant, Miss Katrina Yates submits that the Claimant's position discloses two fundamental errors:

(i) first, what is in fact the Registrar's discretion as to how to describe a property in the register is elevated to a duty;

(ii) secondly, the Claimant assumes that the description of the title is, and is only, whatever is contained on the face of the property register whilst in fact the leases are registered leases which are incorporated into the property register whereby the leases become part of the register. She submits that it is clear from the LRR that the statutory intention is that anyone inspecting the register should go to the lease in order to see the extent of the registered title. Thus, in the case of these leases, the property register includes the leases themselves and to look only at the register and not to look at the leases is to look at only one part of the registered title.

In relation to rule 26 (see paragraph 12 above) Miss Yates draws attention to the title of that rule being "First registration of cellars, flats, tunnels etc" and she accordingly submits that this a rule which applies to an applicant on first registration and is not a rule that imposes a duty on the Registrar in respect of what has to be included on the face of the register. The duty only extends to providing sufficient particulars for anyone inspecting the register to identify the lease.

25. Miss Yates points out that it is fundamental to the general law of landlord and tenant that a lease is a conveyance or disposition demising a specific parcel of land to a tenant for a defined term and that it is to the lease that the courts routinely look in order to ascertain the extent of the land demised. Nothing in the LRA or LRR, she submits, is intended to defy or displace this general legal proposition, nor do they have that effect. Thus,

    (i) the legislative scheme positively requires attention to be paid to the terms of the lease itself by requiring a description to be included in the property register to enable the lease to be identified ( LRR rule 6) which may be referred to and must be kept by the Registrar and be open to public inspection and on which the public is entitled to rely;
    (ii) Registration completes the parties' disposition by giving legal effect to it (LRA section 27) but it does not cut down or alter the registered estate;
    (iii) Registration is conclusive as to title to the property (section 58) but not as to the horizontal or vertical boundaries to that property (section 60) which remain general and undefined unless determined by a specific procedure;
    (iv) The scheme does not limit the description of the registered estate on the Register of Title and this description does not cut down the extent of the estate owned by the proprietor.

26. Miss Yates further submits that if it had been intended that registration would change the way that leasehold estates are created, this would require very clear words - as is the case with section 27 where there is a clear modification of the common law in relation to the moment at which title passes. She submits that the effect of section 58 (see paragraph 15 above) is to go no further than to deem a vesting in the proprietor of the legal estate as a result of registration where otherwise the legal estate would not be vested in him, but it does not change the nature of the legal estate. Otherwise this would be to deprive a party to a lease which he had bought part of his property, by reason of the registration of the lease.

27. Miss Yates illustrated her submission by reference to the lease for flat 12, dated 13 May 2008. By paragraph 1 it is provided:

> "The lessor hereby demises unto the lessee all that maisonette situated on the first-floor of the building as is shown red on the attached plan and which is more particularly described in the first schedule (all of which premises are hereinafter called "the demised premises")."

Turning to the first schedule, this defines the demised premises as

> "all that first-floor maisonette and staircase leading thereto known as number 12 Henley Court Watford Way Hendon N4 4SR the position of which is shown on the plan annexed hereto and thereon edged red and including herein: …
>
> vi) The roof of the building and the roof space, any chimney above the demised premises between the line level with the mid-point of the vertical walls separating the demised premises from the other maisonettes on the first-floor as referred to in iv) above but excluding all gutters and downpipes attached thereto." (Emphasis added)

Thus she submits that the roof of the building and the roof space above the flat at number 12 is an essential part of the land demised and this takes effect as against the freehold title to the property by virtue of the charges register of the freehold property and is referred to in the property register of flat 12 under title number AGL188489.

**First Issue: Discussion**

28. In my judgment, as submitted by Miss Yates, the position of the Claimant in relation to the first issue proceeds on a misconception that, where a purchaser buys a new lease of land in a registered freehold title and other registered leases are noted in the charges register of the freehold property, a purchaser or a person inspecting the register is entitled to look only at the register and effectively to ignore the registered leases themselves when determining whether the seller has good title. In my judgment, it is necessary for a purchaser to examine both. The purchaser is not buying a registered lease but a new lease and is therefore dependent on what title the seller has to grant the new lease. That will depend on the seller's freehold title but also on the extent of any other leases already granted by it. The register will give a general description of the title and location of any existing leases but, if the person inspecting the register wants to know the precise boundaries of those leases, and in my judgment that includes whether the demise extends vertically to the roof and roof space, he needs also to inspect the leases: it is for this reason, among others, that the registrar is obliged to keep an original or an official copy of the lease and make it available for inspection for anyone inspecting the register (LRR rule 4(3); LRA section 66(1)). This does not, in my judgment, offend against the "Mirror principle" as referred to in *Michell and Brilliant* and again in *Ruoff and Roper*. As Miss Yates submitted, the Registrar has a discretion as to what he should include on the face of the register itself and what should be left to be discovered by an inspection of the lease. It is understandable, in the case of a first-floor flat or maisonette, that the Registrar should have chosen to mention in terms other areas not normally included such as a dustbin area or a part of the garden, even where the fact that these were included is also to be found in the lease. However, in the case of a first-floor flat in a two-storey property it would normally be expected that the roof and roof space above the flat would be included and while this is always a discretionary matter for the Registrar on a case by case basis, I might potentially expect the Registrar to put specific words on the face of the register if the roof and roof space were in fact specifically excluded from the demise in the lease, but not otherwise.

29. Mr Hurndall has submitted that the Registrar has effectively explicitly excluded the roof and roof space by using the word "only" in the property register for each of the first-floor flats but, again as Miss Yates submitted, this has, each time been taken out of context. Take for example the property register for flat 12. This states at paragraph 1:

> "1. (03.07.2008) The leasehold land shown edged red on the plan of the above title filed at the registry and being Flat 12, Henley Court, Watford Way, London N4 4SR.
> NOTE: As to the part tinted blue on the title plan only the first-floor maisonette is included in the title."

When one then looks at the title plan, this is a view of the property from above in two dimensions showing the boundary edge red and the demised premises in blue.

However, being a plan from above, the blue part would, without more, also include the ground floor flat. It is for this reasons that the register specifically states that only the first-floor maisonette is included in the title, this being by specific reference to the part tinted blue on the title plan: by these words, the registrar made it clear that it was not intended to include the ground floor; the inclusion of these words was not intended, and in my judgment did not have the effect, of thereby excluding the roof and roof space.

30. In consequence, where a purchaser or someone otherwise inspecting the register of freehold property which includes in the charges register reference to registered leases and wishes to ascertain whether the roof or roof space is included in the registered title, that person needs to inspect the leases and cannot rely simply on what is contained on the face of the register.

31. In this regard, I am fortified by a dictum in the judgment of Mr Martin Rodger QC sitting in the Upper Tribunal (Lands Chamber) in *Stevens v Ismail* [2016] UKUT 43 (LC). That was a case in which the applicants sought modification of covenants in two leases of flats in order to enable them to combine the flats into a single larger flat. There arose an issue as to whether the continued presence of an earlier lease from 1980 on the property register was conclusive that the applicants' interest was a term which commenced in 1980 and not 1998. Mr Rodger said:

> "Section 629(1) of the 1925 Act makes the register conclusive of the title of the registered proprietor in the registered estate, <u>but it does not limit the description of that estate.</u> The property register for number 68 not only records the existence of the 1980 lease, but also the fact that it had been varied by the 1998 Deed. The registered interest is the original lease as varied. If by operation of law the variation had brought about a surrender and regrant, I would have been prepared to read the entries in the Register in the light of that legal fiction and to conclude that the 1980 lease, as varied to create a new term commencing on 26 August 1998, was the registered interest. As it is, having concluded that the effect of the deed of variation was not a surrender and regrant, there is no inconsistency between the register and the applicant's rights as I have found them to be." [emphasis added]

It seems to me that the dictum that the effect of section 69 of the Land Registration Act 1925 (which had an equivalent effect to section 58 of the Land Registration Act 2002) is to make the register conclusive of the <u>title</u> of the registered proprietor of the registered estate but does not limit the description of that estate is wholly consistent with the position of the Defendant in this case but is inconsistent with the position of the Claimant. In the circumstances, I find in favour of the Defendant in relation to the first issue.

**Issue 2: Whether the first-floor leases include the roof space**

32. The second ground upon which the Claimant relies is a somewhat bold submission that the court should conclude that, despite the clear words in the leases for flat numbers 2, 8 and 12, the roof spaces are not in fact included because the inclusion of the roof space was an error.

33. To take one of the properties as an example, in relation to flat 12 the property demised is, in clause 1 of the lease, stated to be "all that maisonette situated on the first floor of the building as shown as edged red on the attached plan and which is more particularly described in the first schedule". Then if one turns to the first schedule, one finds the Demised Premises more particularly described and paragraph vi. provides:

> "The roof of the building and the roof space, any chimney above the demised premises between the line level with the mid-point with the vertical walls separating the demised premises from the other maisonettes on the first floor as referred to in iv) above but excluding all gutters or downpipes attached thereto." [emphasis added].

Thus, by the clear and explicit words of the lease, the roof space and the roof are included in the demised premises. Nevertheless, Mr Hurndall, for the Claimant, submits that the intention of the freeholder should be assumed to have been to demise either all or none of the roof spaces for the first floor flats rather than only some and on the basis that, in relation to the other flats, the roof space is not mentioned in the leases, and is not specifically mentioned in the charges register for the freehold property, it is to be taken that the roof space was not included for those leases (which are a majority) and the court should therefore conclude that it was not intended to include the roof space for flats 2, 8 and 12 either and the inclusion of those words in schedule 1 was accordingly an error.

34. In my judgment there is no rule of interpretation which would allow the court so to interpret the leases for flat 2, 8 and 12. By the clear and explicit words contained in the lease the roof space is included and it is not legitimate for the court to assume that this was an error or that the parties otherwise intended by reference to extraneous or subjective material private to the parties, so as to exclude the clear and explicit words contained within the lease: *Cherry Tree Investments Ltd v Landmain Ltd* [2013] Ch 305 (CA), at [130], [148]; *Arnold v Britton* [2015] AC 1619 (UKSC), at [15], [19] – [21].

35. In fact, in my judgment, the argument of Mr Hurndall can be turned on its head and used to support the proposition that the roof space was intended to be included in all the leases, not just the ones where the roof space is specifically referred to in the description of the demised premises. Thus, taking as an example the lease for flat 12a, the demised premises in the first schedule to that lease are described as including, inter alia, "ii) the roof of the maisonette including the chimney stack (if any)". Although the roof space is not specifically mentioned, it seems to me that the lease can properly be interpreted as including the roof space when it specifically mentions the roof of the maisonette as it would make little or no sense to demise the flat, and the roof but not the roof space between the flat and the roof. I therefore take the view that, in relation to all the first-floor flats, the effect of the leases and the registration was to include the roof space.

36. Subsequent to the hearing, Mr Hurndall has made further submissions in writing dated 10 May 2020, which I have considered. One of the issues addressed is the Defendant's reliance on the decision in *Davies v Yadegar* [1990] 1 EGLR 71 in which it was decided that where the tenant of an upper flat owned the entirety of the building from first floor upwards, expressly including the roof and roof space, the tenant also owned the airspace above, at least sufficiently to allow it to alter the roof form by the addition of a dormer,

so that this would not constitute a trespass. Mr Hurndall submits that the authority is unhelpful with a building of the present kind, as opposed to a building where two flats had been converted from a house as there, citing Lord Woolf:

> 'I can well see that, in a different situation where one is considering a block of flats containing a number of different premises occupied by different tenants where no tenant has included in his demise the roof, a position different from that which I have indicated could exist. However, in the situation that we are dealing with here of what was once a single residential unit which has been divided into two flats'.

However, in my judgment, the dictum actually undermines the Claimant's case by Lord Woolf's stating "where no tenant has included in his demise the roof". Here the roofs are included in the demise, indicating that Lord Woolf thought that the position in the present case would be no different to the position in *Davies'* case.

37. Having considered Mr Hurndall's further submissions carefully, I have come to the conclusion that they do not persuade me to alter the conclusion that the leases include both the roof and the roof-space.

38. Finally, in relation to this issue, I note that there is a dispute between the parties as to whether, if it is legitimate to have regard to extraneous material at all (which I have found it is not), it can be shown that the roof space was included in the demises for flats 2, 8 and 12 in error. Given that I have concluded that it is not legitimate to have regard to such material in any event, this issue does not strictly arise for decision but, had it done, I would have preferred Miss Yates' submissions on behalf of the Defendant in this regard and therefore not have concluded that inclusion of the roof space was an error. This is, again, despite the further submissions on this issue received from Mr Hurndall on 10 May 2020.

**The third issue: Whether the lease of 14 February 2019 in fact overlaps with the existing leases**

39. The final submission on behalf of the Claimant is that there is in fact no overlap between the lease of 14 February 2019 and the existing leases because, in the definition of a "second floor" within the lease of 14 February 2019, it is stated that the second floor means "that part of the building and the airspace directly above the first floor of the building and above the first-floor flats, 2, 8, 10,11, 12, 12a and 14 (as the same as registered respectively at the Land Registry under title numbers …)" and the title numbers are then given. Mr Hurndall submits that the additional words quoted could only have had the purpose of limiting the demise to exclude any part of the first-floor titles. Accordingly, even if the roof space were included in all the first-floor leases, the Claimant could and should be registered as proprietor of the airspace above the first-floor titles as registered and as long as the lease was not stated to be concurrent and no statement was included that there was an overlap, the question would remain open and no irreversible damage would be done. This would cease to be an issue once development became complete and the Claimant could proceed with this with little risk, taking out insurance if it wished to do so.

40. For the Defendant, Miss Yates reminds the court that, axiomatically, a lease confers on the tenant the right to exclusive possession of the demised premises for the duration of the term: *Street v Mountford* [1985] AC 809 at 821. After granting a lease to a tenant, it is impossible for the landlord to grant exclusive possession of the same demised premises to another tenant for the same term as the landlord has thus alienated the land in question. Having already granted a lease in possession of the demised premises, the only power of leasing which the landlord has left in relation to the same demised premises is to create a lease "to take effect in reversion" upon the existing term: see section 149(5) of the Law of Property Act 1925 and *Wordsley Brewery Co v Halford* (1903) 90 LT 89. Miss Yates submits that, in view of the at least partial physical clash or overlap between the existing leases and the new lease of 19 February 2019, on any proper application of the above principles, the only lawful, rational and reasonable decision open to the Defendant was to register the new lease as a "reversionary" or "concurrent" lease which takes effect subject to the existing leases.

41. Again, in my judgment, Miss Yates' submissions are to be preferred to those of Mr Hurndall. Given that the roof and roof space has been demised already in the existing first-floor flats, the interpretation of the new lease on Mr Hurndall's submissions would be that the new lease relates to the airspace above the roof of the existing building. In my judgment, this makes no sense. It is an impossible conclusion to reach given the express terms of the demise of the 2019 lease, quoted in para 5 above. The freeholder and the applicant could bring the desired result about by a surrender of the overlapping parts or rectification of the lease, but that cannot be achieved by a process of interpretation. Furthermore, it is wholly contrary to the principal submissions of Mr Hurndall that the new lease relates to the roof space above the first-floor flats which are either not already included in the existing first-floor leases or the registration of the first-floor leases did not include the roof space. In my judgment the Registrar was correct to interpret both the new lease and the existing leases as both purporting to include the roof and roof space above the first-floor flats and therefore that the new lease should be registered as a concurrent lease.

42. In all the circumstances and in the light of the above findings, this application must be dismissed.