REF/2015/0430 and REC/2016/0019

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) Palo Alto Limited (2) Peter Weiss (3) David Hedges

APPLICANTS

and

Alnor Estates Limited

RESPONDENT

AND IN THE MATTER OF AN APPLICATION UNDER SECTION 108(2) LAND REGISTRATION ACT 2002

BETWEEN

Alnor Estates Limited

APPLICANT

and

(1) Palo Alto Limited (2) Peter Weiss (3) David Hedges

RESPONDENTS

Property Address: 24 Vulcan Street, Southport, PR9 0TW
Title Number: MS227658

Made By: Judge Elizabeth Cooke

DECISION

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1. Palo Alto Ltd, Peter Weiss and David Hedges hold a lease of Unit 2, 24 Vulcan Street; I refer to them collectively as "the Tenant". That lease ("the lease") was granted for a term of one year, with provision for renewal. The Tenant has applied for registration

as proprietor of a 2,000-year lease of Unit 2, on the basis that the lease is a perpetually renewable lease and is converted to a 2,000-year term by section 145 and Schedule 15 to the Law of Property Act 1922. The Landlord objected and the dispute was referred to this tribunal pursuant to section 73 of the Land Registration Act 2002. Following that reference the Landlord applied for rectification of the lease, if and only if it is found to be perpetually renewable, so as to provide for two renewals only. This tribunal has jurisdiction to rectify a document such as the lease, by virtue of section 108 of the Land Registration Act 2002.

2. The Tenant holds three other leases of units in the same building. It is agreed by the parties that this reference is to be regarded as a test case and that the outcome for all four units must be the same.

3. A hearing of the reference and of the rectification application was listed in Liverpool on 3 February 2016. At that hearing both parties sought an adjournment so that I could decide, on the basis of written submissions, whether the tribunal had jurisdiction to hear the reference. The Landlord argued that the lease, being in writing, was not a "grant" and therefore did not fall within paragraph 5 of Schedule 15 to the Law of Property Act 1922. Accordingly, it was argued, even if the lease was perpetually renewable it would be converted by Schedule 15 into an equitable lease for 2,000 years and could not be registered, so that the tribunal would have no jurisdiction under section 73 of the Land Registration Act 2002. My decision, dated 27 April 2016, was that the lease was created by grant and that if it is perpetually renewable it falls within paragraph 5 of Schedule 15 to the Law of Property Act 1922 and will become a legal lease for 2,000 years. I have appended a copy of that decision to this decision.

4. I then heard both the reference and the application for rectification in Liverpool on 1 September 2016. The Tenant was represented by Mr Paul Sweeney of counsel and the Landlord by Mr Nicholas Jackson of counsel; I am grateful to both of them for their assistance. It is right also to acknowledge that the skeleton argument for the Tenant was written by Mr Weiss, with small amendments by Mr Sweeney. By agreement between the advocates the case for the landlord was presented first, and evidence was given by Jane Key and Brian Nicholson, both of whom are directors of the Landlord company. For the Tenant, evidence was given by Mr Weiss and Mr Hedges.

5. In the paragraphs that follows I set out the facts, which were largely not in dispute (the dispute between the parties is as to their intentions); I then consider whether the lease is perpetually renewable, and conclude that it is; finally I examine the law relating to rectification and its application to the facts, and explain my conclusion that the lease should be rectified.

The facts

6. These are the facts as agreed or, where I indicate that there is a dispute, as I find them.

7. On 9 July 2011 Mr Weiss met Ms Key and Mr Nicholson at unit 2, which had been advertised as to let in a local paper. Both Ms Key and Mr Nicholson were directors of KeyMove 4, a letting agency which was acting for the Landlord, as well as being directors of the Landlord. It was a short meeting; Mr Weiss looked round the unit and there was a brief discussion between him and Ms Key as to the terms on which the landlord was willing to let the unit. He made it clear that he wanted it as an office for his advertising sales business, and he mentioned Palo Alto Ltd, and his business associate Mr Hedges. Ms Key made it clear that it was let as seen, and it is common ground that it was not fit for office accommodation as it stood. The rent demanded was £35 per week. Mr Weiss paid to Ms Key a deposit of £35, in return for which Ms Key and Mr Nicholson cancelled their meeting with another prospective tenant immediately afterwards. A short document was signed to record that deposit, on a form headed "KeyMove 4"; Mr Weiss signed it. The space on the form for a "planned commencement date" is left blank, and the printed text goes on to reserve the property for the applicant until that date – but of course there was no planned date at this point, so the form does not quite work. But it records the payment of the deposit and it ensured that the next viewing was cancelled. It was agreed that Ms Key would send a draft lease to Mr Weiss.

8. As to what was actually said on 9 July 2011 it is not in dispute that Ms Key told Mr Weiss that he could have a lease for one year with an option to renew. She agreed at the hearing that she probably did not say that the option would be "for one year", although in her witness statement she said she did. Her evidence was that she explained, although Mr Weiss disputes this, that the Landlord's practice was to grant short leases on a simple form, but that if a term of more than three years was wanted the lease would have to be drafted by solicitors; and she says that Mr Weiss said he did not want to involve solicitors. She was asked how she could be sure that she said

this, and her answer was that every time she rents a commercial property "my spiel is exactly the same". This rings true and I find that Ms Key did give that explanation to Mr Weiss.

9. I also find that Ms Key made Mr Weiss aware of the nature of the Landlord's business, letting small units "as seen" to start-up businesses, some of whom stay on for years "on periodics" as she put it, some of which fail at an early date.

10. Following that meeting Ms Key and Mr Nicholson researched the status of Palo Alto Ltd and noted that it had been formed only a fortnight previously; they therefore required the lease to be taken by Mr Weiss and Mr Hedges as well. The draft lease sent to Mr Weiss by Ms Key was all of two pages long, and included the following provisions:

> "The tenancy is granted for a period of one year with an option to renew at the end of the term".
>
> "The tenant shall not be entitled to assign the benefit of this Agreement in any circumstances".

11. Mr Weiss discussed this with Mr Hedges and sent the draft back with those provisions amended as follows, and with the amendments printed in bold and in italics:

> "The tenancy is granted for a period of one year with an option to renew at the end of the term ***for a further one year on the same provisos and agreements as are herein contained including the option to renew such tenancy for a term of one year at the end thereof."***
>
> "The tenant shall not be entitled to assign the benefit of this Agreement without ***the consent of the Landlord which will not be unreasonably withheld.***

12. Ms Key and Mr Nicholson say that they read the amendment to the renewal clause as providing for two renewals rather than one. The Tenant does not accept that evidence, and I revert to that disagreement later.

13. Mr Weiss, Ms Key and Mr Nicholson met again, this time with Mr Hedges too, on 16 July and signed the lease. It was at that meeting that Mr Nicholson was asked by Mr Weiss if the Landlord would do anything to improve the condition of the unit and Mr Nicholson said no, the unit was let as seen. Mr Nicholson pointed out that it would be unsuitable for an office with staff as there was only one toilet.

14. The lease was completed and the Tenant moved in. The Tenant later took on leases of three other units, which are identical in all relevant respects to the lease. The Tenant has done a lot of work to the unit (although the Landlord has also done work to help the tenant; Mr Nicholson said that the Landlord had renewed the floor and walls, and that was not challenged). The Tenant is still there and has applied to register title to a 2,000-year lease, to this unit and to the other three as I explained above.

Is the lease perpetually renewable?

15. I have to decide first whether the lease is perpetually renewable. The problem is one that is familiar to landlord and tenant lawyers, and is explained in *Woodfall., Law of Landlord and Tenant* ("Woodfall") at 18.014 and following. To summarise: a lease that contains an option for the tenant to renew "on the same terms and conditions as this lease", or similar, appears to require that the option to renew be itself reproduced in the renewed lease, with the result that the lease is perpetually renewable. The courts lean against this construction because it is so rarely what both parties intended and is so contrary to good business sense while creating a windfall for the tenant, and so a simple clause requiring renewal on the same terms will not be construed as a right to perpetual renewal. But if a lease says something like "on the same terms and conditions as this lease including this option" then it is inescapable that the option to renew has to be repeated in each renewed lease, with the result that the lease is perpetually renewable. *Parkus v Greenwood* [1950] 1 Ch 644 is a classic example, where the new lease was to contain "the like agreements and provisions as are herein contained, including the present covenant for renewal".

16. Accordingly the renewal clause in the Landlord's original draft does not generate a right of perpetual renewal. But the amended clause is another matter. I repeat its words here for ease of reference:

> "The tenancy is granted for a period of one year with an option to renew at the end of the term ***for a further one year on the same provisos and agreements as are herein contained including the option to renew such tenancy for a term of one year at the end thereof."***

17. The words create the classic self-replicating provision. The Landlord agrees that those words can create a perpetually renewable lease, but it says that they do not do so here. Mr Jackson argued that although the renewal clause in the lease is unambiguous, it is not clear, because "mental gymnastics" (as he put it) are required to understand it. But

it remains the law that a clause providing for perpetual renewal means what it says, despite the well-known fact that such a clause is usually included by inadvertence, where a party has not spotted its effect.

18. Mr Jackson also argued that because the law leans against perpetual renewability I must make a separate finding of common intention before I can find that the lease was perpetually renewable. But that is not what Woodfall says, nor what the courts have said. As Sachs LJ put it in *Caerphilly Concrete Products Ltd v Owen* [1971] EWCA Civ 1 ("*Caerphilly Concrete*"):

> "An examination of the relevant decisions discloses an area of law in which the courts have manoeuvred themselves into an unhappy position. On the one hand in judgment after judgment, for instance, Baynham's case, 3 Vesey, page 295 (1796) at page 298, Moore v. Foley (1801) 6 Vesey, page 232 at pages 235 and 236, and Swinburne v Milburn, 9 Appeal Cases, page 844 at page 850, it has been proclaimed that the courts lean against holding that a lease is to that extent renewable. On the other hand, by strict adherence to precedent relating to the phrase "including the present covenant" when following a covenant conferring a right to a rental or the like covenants and provisos as are contained in the first lease, they appear to have bound themselves to hold that the use of a certain set of words (to which I will refer as "the formula") causes the lease to be perpetually renewable, even when no layman -at least if he has some elementary knowledge of business -would dream of granting such a lease and if aware of the meaning of the technical effect of the particular phraseology would almost certainly be aghast at its devastating effect and refuse to sign. One reason for the courts so binding themselves is said to be that the formula is one the effect of which is well known to trained conveyancers, and that this is advantageous, however much of a trap it may constitute for others.

19. Mr Jackson suggested that since the early 1970s the courts have taken a more sympathetic approach and, in particular, have searched for the parties' intentions. But I do not find any authority for the proposition that the lease is not perpetually renewable unless the parties intended it to be so. The Landlord's best hope is perhaps the decision of Nourse J in *Marjorie Burnett Ltd v Barclay* [1981] EGLR 41 ("*Marjorie Burnett*").

20. *Marjorie Burnett* concerned a seven year lease which contained a provision enabling the tenant to give notice towards the end of the term of a desire to take a new lease. In that event

> "then the landlord will at or before the expiration of the term hereby granted … grant to the tenant a new lease of the premises hereby demised for a further term of seven years, to commence from and after the expiration of the term hereby granted at a rent to be agreed between the parties."

21. As Nourse J put it "There are then provisions for the rent to be fixed in default of agreement. Then come the final words of the clause…:

> 'And such lease shall also contain a like covenant for renewal for a further term of seven years on the expiration for the term hereby granted'."

22. Nourse J was able to construe that clause as conferring two rights to renew only because the final words, just quoted above, were not part of the covenant for renewal itself; he concluded therefore that the lease did not require that they be replicated in the second renewed lease. He regarded the renewal clause as providing expressly for two renewals only.

23. However, the drafting of the relevant clause in *Marjorie Burnett* was distinctly different from the words of the lease. I am not able to find that the words in the lease differ from the classic perpetual renewable clauses in a way that enables me to say that the clause was not self-replicating.

24. There were two grounds for the decision in *Marjorie Burnett*; one was as set out above, and the other was the fact that the lease provided for rent reviews every seven years. Nourse J said that a 2,000-year term was "completely inimical" to the provision for rent review every seven years.

25. There are no rent reviews in this lease. It is well-established that the absence of a rent review clause does not change matters (there was no provision for the rent to be reviewed in the perpetually renewable lease in *Caerphilly Concrete)*; the renewal clause still means what it says. Certainly the lease is drafted as a short lease – it consists of a statement of the parties and the premises, barely a page of provisions, and the execution clauses, and there is no repairing covenant. On the other hand the second amendment to the draft does give the tenant the right to assign the lease with the Landlord's consent, such consent not to be unreasonably withheld, which is consistent

with a much longer-term arrangement than a year's tenancy. The Tenant's right to determine on two months' notice, and the covenant to vacate at the end of the term unless a new lease is agreed, are not necessarily inconsistent with a long-term arrangement at the Tenant's option. So the terms of the lease, taken as a whole cannot assist the Landlord in the construction of the option to renew. I note the decision in *Plumrose v Real and Leasehold Estates Investment Society* [1970] 1 WLR 52 where Foster J was able to look at the context in order to construe the lease as conferring an option to renew once only, but the context in that case was a previous lease which expressly prevented perpetual renewal. There is nothing of that nature to assist the Landlord here.

26. As *Barnsley's Land Options* puts it at p.246:

> "By adopting a blinkered approach to this problem of interpretation the courts have abandoned all pretence of construing the lease according to the parties' true intentions. … It is open to the House of Lords to reverse these decisions and to produce a result more in harmony with business realities.

27. But the House of Lords did not do so, nor has the Supreme Court.

28. I have considered whether recent developments in the law relating to the construction of contracts might be said to have changed the law relating to perpetually renewable leases. It is now well-established, as a result of the decision, and the dicta of Lord Hoffmann, in *Investors' Compensation Scheme Ltd v West Bromwich BS* [1998] 1 WLR 896 (HL) (*"Investors Compensation")* that the courts will construe a document by finding the meaning it would convey to a reasonable person having the background known or available to the parties (that is how Lady Justice Arden summarised it in *Cherry Tree Ltd v Landmain Ltd* [2012] EWCA Civ 736 at paragraph 20). That background includes absolutely anything which would have affected their understanding, although it still excludes as irrelevant the parties' negotiations.

29. The Landlord therefore suggests that the discussion of 9 July 2011 constitutes part of the background material, being not only a negotiation but also an agreement as to the terms of the lease and the option; that the parties were contemplating something lasting no more than three years (because beyond that the Landlord would have required the services of a solicitor to draft the lease); and that both parties would have had in mind the context of the Landlord's usual business practice, letting units

essentially to start-up businesses which sometimes stayed on a long time but quite often disappeared at an early stage.

30. I am not convinced that the discussion of 9 July 2011 amounted to an agreement rather than to negotiations. Moreover, none of the recent authoritative decisions on construction has related to a renewal clause in a lease and the question of perpetual renewability, and I would hesitate to read in the more generic learning on construction any change in this well-established case law. I regard *Caerphilly Concrete* as continuing to state the law in this area and as binding on this tribunal.

31. The lease is perpetually renewable, and is therefore converted by paragraph 5 of Schedule 15 to the Law of Property Act 1922 into a 2,000 year term.

Rectification

32. That being the case, the Landlord seeks rectification of the lease so as to bring it to an end after two renewals. Here we enter very different territory where evidence of intention is crucial, and therefore I need to make some further findings of fact about the parties' intentions. I then consider the legal basis for rectification.

The parties' intentions

33. Mr Weiss and Mr Hedges both said that they intended the lease to be perpetually renewable. The Landlord did not challenge that and I accept that that was their intention when they submitted their proposed amendments to the draft lease.

34. Ms Key and Mr Nicholson both said that they intended the lease to be twice renewable, and read the renewal clause to provide for two renewals. That evidence was challenged, but I accept it, for the following reasons.

35. First, Ms Key and Mr Nicholson both gave evidence with a demeanour of care and conscientiousness. Mr Nicholson accepted graciously Mr Sweeney's correction of his recollection as to the date on which he spoke with Mr Weiss about the condition of the property. Both appeared to me to be doing their best to tell the truth and to explain to the best of their recollections what was said. Both were very clear that they had not intended a perpetually renewable lease and it is clear to me that the possibility of such a thing had not crossed their minds.

36. Second, I find it entirely understandable that Ms Key and Mr Nicholson should have misunderstood the clause in this way. They had in mind the discussion on 9 July

where Ms Key made it clear that the Landlord would not agree to a term longer than three years without having a lease professionally drafted. Mr Nicholson read through the amended clause at the hearing like this:

> "The tenancy is granted for a period of one year with an option to renew at the end of the term for a further one year " – there's one renewal, said Mr Nicholson - "on the same provisos and agreements as are herein contained including the option to renew such tenancy for a term of one year at the end thereof." – there's the second renewal, said Mr Nicholson.

37. Mr Weiss told me confidently that a 15-year-old of average intelligence would have known that the lease, with his amendment, was perpetually renewable. I do not believe that that is or was his opinion, and his opinion is in any event irrelevant. The long history of case law on such leases demonstrates that people all too easily do not spot the implications of such a clause. Indeed, in *Caerphilly Concrete* it took careful explanation to show why the option to renew was not limited to two renewals; it is worth recalling Russell LJ's words:

> As a matter of history, when a covenant by a lessor conferred a right to renewal of the lease, the new grant to contain the same or the like covenants and provisos as were contained in the lease, the courts refused to give literal effect to that language, which if taken literally would mean that the second lease would contain the same covenant (or option) to renew, totidem verbis, and so on perpetually. The reference to the same covenants was construed as not including the option covenant itself. This limited the tenant's right to one renewal. In order therefore to make it plain that the covenants to be contained in the second lease (to be granted under the exercise of the option to renew) were to include also the covenant to renew, draftsmen were accustomed to insert phrases such as "including this covenant", so as to achieve a perpetually renewable lease. As I have indicated, if they did not do this, the second lease would not contain any option clause.
>
> The operation of the words of inclusion was not limited to requiring the second lease to contain a covenant to renew once more only, which would have been the outcome if the words of inclusion had been omitted in the second lease. This was because the words of inclusion could not properly be construed as

requiring the second lease to contain the same covenants other than the covenant to renew but additionally to include an option to renew once more only - a total of three terms. The words of inclusion defined or explained what was meant by "the same covenants", that is to say, as including the covenant to renew. Consequently in the second lease, in order to comply with the words of definition or explanation, the covenants referred to therein to be contained in the second lease must contain the same wording including the inclusion.

38. This is not easy material. The wording of the clause leads inexorably to the conclusion that the lease is perpetually renewable, but it is not easy to see this at first sight. Ms Key and Mr Nicholson are not legally trained. They know about their own lettings business. They have tenants who stay on for many years, and they have never brought a business lease to an end; but the possibility of a perpetually renewable lease did not occur to them. They understand now, as Ms Key said in her evidence, that the lease contains no provision for the Landlord to bring it to an end, but they were wholly unaware of that fact when the lease was granted.

39. Third, it is wholly implausible that the Landlord should have intended a perpetually renewable lease with no provision for rent review.

40. Mr Weiss tried to persuade me that the lease provided a good rate of return on capital for the Landlord over the first 100 years and that in financial terms the perpetually renewable lease was a good deal for the Landlord: "I would like to be in Alnor's shoes" he said. He produced a schedule designed to demonstrate what he said, but was not able to explain the basis for his valuation of the freehold. No professional valuation evidence was produced; Mr Weiss is not an expert witness and is not entitled to give opinion evidence of this nature. Mr Sweeney said that his client's evidence on valuation was confused. I pay no regard to it.

41. It was also argued that the fact that the tenant was going to have to invest a lot of money in the refurbishment of the unit pointed towards a long term agreement. I do not accept that. It was made clear on behalf of the Landlord that the unit was sold as seen. The Tenant was free to spend money on it but did not have to; it was permitted, in the terms of the lease, to use it as an office but did not have to. Nothing in the Landlord's simple form of lease points to anything longer than a simple short-term letting.

42. So although the Tenant intended a perpetually renewable lease the Landlord intended two renewals only, and seeks rectification of the lease to that effect by the addition of wording to the renewal clause; Mr Jackson suggested "that I add the words "… but not beyond three years" or "but not exceeding a total of three years".

The legal basis for rectification

43. Rectification is an equitable remedy, available at the court or tribunal's discretion where a written agreement does not record what the parties to it agreed.

44. Rectification for common or mutual mistake is available where the parties, objectively at least, reached an agreement and then, unbeknown to either, the document they execute does not reflect that agreement – for example, both parties might be mistaken about the meaning of a particular word. Mr Jackson referred me to the judgment of Etherton LJ, as he then was, in *Daventry DC v Daventry Housing Ltd* [2011] EWCA Civ 1153, at pp 1355-6, where a number of situations are discussed. For all types of common or mutual mistake, where the parties make the same mistake or different mistakes, there must be a prior agreement (although there need not be a contract). Mr Jackson urged me to find that there was agreement at the meeting on 9 July 2011, but I am not persuaded that there was even objective agreement about the length of the lease or the nature of the option (which means that the parties words and actions demonstrated agreement), let alone subjective agreement (which means that they had the same thing in mind).

45. Too much was left unresolved at the end of that short meeting (whether it lasted for fifteen minutes as Ms Key said or five minutes as Mr Weiss said). The parties to the lease were unknown. The offer of an "option to renew" was not clear. It was clear that the Landlord would not grant a term of more than three years without having the lease professionally drafted, and it was clear that Mr Weiss was not interested in that possibility. The payment of the deposit of £35 secured a reservation of the property so that Mr Weiss had time to look at a draft lease before either party committed itself, without having other viewings going on, but did not settle any terms. It is clear from the evidence what the Landlord intended but there is insufficient evidence of Mr Weiss' words or actions for me to be able to conclude that he agreed with Ms Key as to how long the lease should be or the nature of the option to renew.

46. Even if there was agreement on 9 July, the agreement changed. Both parties intended that the lease would do something different from what had been discussed on 9 July; according to Ms Key and Mr Nicholson it was going to provide for two renewals, whereas according to Mr Weiss and Mr Hedges it was going to be perpetually renewable. On both parties' accounts, the lease was not intended to reflect an agreement made at the initial meeting. Accordingly the conditions for common mistake or mutual mistake are not met, and I must consider Mr Jackson's alternative case on unilateral mistake.

47. The courts have been very restricted in their approach to unilateral mistake as a ground for rectification, where one party knows what the contract means and the other party does not. To rectify a contract in these circumstances is to impose upon one party a term to which it definitely did not agree. In the second edition of *Rectification* (2012) HH Judge Hodge QC sets out the three exceptions where the court will be prepared to do this. It will do so where the contract is unilateral, which is not the case here, or where there is fraud, which is not alleged here. The third exception is where one party knew of the other's mistake. The leading case is *Thomas Bates & Sons Ltd v Wyndham's (Lingerie) Ltd* [1980] 1 WLR 505, where Buckley LJ said:

> "I think in any such case the conduct of the defendant must be such as to make it inequitable that he should be allowed to object to the rectification of the document. If this necessarily implies "some measure" of sharp practice, so be it; but for my part I think that the doctrine is one which depends more upon the equity of the position."

He went on to say:

> For this doctrine … to apply I think it must be shown:
>
> (1) first, that one party (A) erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain;
>
> (2) secondly, that the other party (B) was aware of the omission or the inclusion and that it was due to a mistake on the part of (A);
>
> (3) thirdly, that (B) has omitted to draw the mistake to the notice of (A).
>
> (4) And I think there must be a fourth element involved, namely that the mistake must be one calculated to benefit (B).

If these requirements are satisfied, the court may regard it as inequitable to allow (B) to resist rectification to give effect to (A)[f]s intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake.

48. I have inserted numbers in that quotation, following the layout in Hodge on *Rectification* at page 472.

49. It follows from the findings I have already made that the first of those four conditions is satisfied. The Landlord was mistaken about the effect of the amended renewal clause; the lease did not provide for just two renewals as Ms Key and Mr Nicholson thought, but was perpetually renewable.

50. But did the Tenant know – through its officers or agents, Mr Weiss or Mr Hedges – of that mistake? If they did, then condition 3 is met, on the Tenant's own case. Condition 4 is self-evident. Accordingly, if I find that the Tenant, through its representatives, knew of the mistake then I can consider whether it would be inequitable to allow it to resist rectification.

Did the Tenant know about the Landlord's mistake?

51. I said at paragraph 37 above that I did not believe that Mr Weiss believes or believed that the meaning of the renewal clause was obvious to a fifteen-year old of average intelligence. It requires some thought, and many people have been caught out by such clauses which is why they are taught with some care in law schools. But did he know that Ms Key and Mr Nicholson were mistaken? I am sure that he did, for the following reasons

52. First, Mr Weiss knew perfectly well that the Landlord was not prepared to use this simple form of lease for a long term. Admittedly a perpetually renewable lease is not a fixed term lease and is not technically a lease for more than three years, but its effect is likely to be the same and Mr Weiss knew that a term of more than three years was not on offer in this simple form.

53. Second, he was aware of the nature of the Landlord's business because Ms Key explained this to him at their meeting. The Landlord lets small units to new businesses, some of which last but many of which fail at an early stage. Mr Weiss knew that a perpetually renewable lease would not be consistent with the Landlord's business and usual letting pattern.

54. Third, Mr Weiss' and Mr Hedges' evidence about the drafting of the clause undermines their credibility. Mr Weiss' evidence was that he is not legally qualified and has no legal training. He said that he drafted the amended renewal clause in discussion with Mr Hedges, and that he intended the lease to be perpetually renewable. Only later when he did some research did he discover that he had used a "well-known conveyancing formula", as he put it. Mr Hedges agreed that the two of them had "thrashed out" the clause together.

55. I find the evidence of Mr Weiss and Mr Hedges on this point wholly unconvincing. It is not plausible that they produced by accident, and with no knowledge of the law ofr of the cases, wording so close to what we find in *Parkus v Greenwood* and other cases (see paragraph 15 above) and I do not believe that that is what happened.

56. Accordingly I find that Mr Weiss and Mr Hedges have not been candid about the way in which the clause was drafted. They did not invent it from a blank slate; I believe that they were aware, or at least that Mr Weiss was aware, of the relevant case law and drafted their amendment in the light of that. That undermines their credibility on the major point in dispute here, which is whether they knew about the Landlord's mistake. Of course they did; they set out to create it and the Landlord fell into the trap.

57. Is it inequitable for the Tenant to resist rectification? I have no hesitation in finding that it is. It is inequitable both because of the conduct of the Tenant and because of the effect on the Landlord. As to the latter, it is well-known that a perpetually renewable lease is a disastrous encumbrance on a landlord's title unless – as is not the case here – it happens to make provision for a market rent throughout its life-span. The effect of a perpetually renewable lease here is that the Landlord has in effect parted with a freehold interest in the unit for a rent which reflects its value as a storage unit in 2011. As to the Tenant's conduct, I do not have to find that there was sharp practice but it is clear that Mr Weiss took advantage of the Landlord's representatives. He knew perfectly well what he was doing, and that the clause he was putting forward said something very different from what had been discussed and something to which the Landlord would certainly not deliberately agree.

58. Accordingly the lease is to be rectified so that the renewal clause reads as follows (I have underlined the words to be inserted):

"The tenancy is granted for a period of one year with an option to renew at the end of the term for a further one year on the same provisos and agreements as are herein contained including the option to renew such tenancy for a term of one year at the end thereof, but the tenancy shall not be renewable once it has run for three years."

Conclusion and costs

59. I noted above (paragraph 2) that this application and reference are (taken together) a test case and that the parties have agreed that my decision is to determine the outcome for the leases of the other three units too. The legal position as to the other three leases is that they are perpetually renewable, but that the conditions for rectification for unilateral mistake are met. Accordingly it will not be open to the Tenant to claim that any of the other three leases is perpetually renewable and any application for the registration of 2,000 year leases will be rejected by the registrar, because the parties are bound by this decision.

60. As to costs, it is usual in this tribunal for costs to follow the event. Here there have been elements of success on both sides; the Tenant has established that the lease is perpetually renewable, but the Landlord has succeeded in its application for rectification and accordingly the Tenant's application to Land Registry will be cancelled. If either party wishes to apply for its costs it must do so within 28 days of the date of this decision, along with a schedule of its costs incurred since the reference to this tribunal. If the other party wishes to make submissions about whether it should pay costs or about the amount of the costs it may do so within 14 days of the date of the application, and the applicant will then have 14 days in which to reply. If I make an order for costs I will then either assess costs summarily or make an order for detailed assessment by a costs judge, depending upon the amount claimed and the extent of the disagreement between the parties.

Dated this Wednesday 28 September 2016

Elizabeth Cooke

BY ORDER OF THE TRIBUNAL

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

ORDER

Case Number:	**REF/2015/0430**
Title Number:	**MS227658**
Property:	**24 Vulcan Street, Southport, PR9 0TW**
Applicant:	**Palo Alto Limited, Peter Weiss & David Hedges**
Respondent:	**Alnor Estates Limited**

UPON READING:

1. the Applicants' response, dated 1 March 2016, to the Respondent's submissions on jurisdiction;
2. the Applicants' application for costs dated 22 March 2016;
3. the Respondent's email in response to that application for costs, dated 23 March 2016;
4. the Respondent's answer to item 1 above, attached to an email to the Tribunal dated 30 March 2016;
5. the Applicants' request for permission to serve a rejoinder to item 4 above, dated 31 March 2016;
6. the Respondent's email to the Applicant and to the Tribunal, dated 1 April 2016, objecting to that application;
7. the Applicants' rejoinder to item 4 above, sent by email to the Tribunal and the Respondent dated 5 April 2016 ; and
8. the Respondent's email to the Applicants and to the Tribunal dated 6 April 2016 reiterating its objection to the rejoinder.

ORDER

1. The Respondent's application made orally on 3 February 2016 to strike out the Applicants' statement of case or to have the proceedings transferred to the court on the basis that the Tribunal has no jurisdiction is refused.
2. The reference and the application for rectification are to be listed for a one-day hearing in Liverpool.
3. Both parties are to write to the Tribunal within fourteen days of the date of this order with any dates to avoid between June and October.
4. Costs of the hearing on 3 February 2016 and occasioned by the application made on that date to be costs in the reference

REASONS

1. The Applicants are the tenants under a lease ("the lease") in writing dated 30 September 2011 of Unit 2, 24 Vulcan Street, Southport. The Respondent is the landlord, and the registered proprietor of 24 Vulcan Street. The Applicants are also the tenants under three more identical leases of units within 24 Vulcan Street, and the parties are in dispute about the same issues in relation to all four leases, but this reference relates only to Unit 2.

2. The lease contains the following provision:

> "The tenancy is granted for a period of one year with an option to renew at the end of the term for a further one year on the same provisos and agreements as are herein contained including an option to renew such tenancy for a term of one year at the end thereof.

3. On 17 November 2014 the Applicants applied to HM Land Registry for the registration of the lease (along with the three other leases) as a 2,000 year lease on the basis that the clause quoted above renders it perpetually renewable, so that it is a 2,000 year term by the operation of s145 and Schedule 15 to the Law of Property Act 1922. The Respondent objected and in due course the matter was referred to this tribunal.

4. The Respondent says that the clause does not render the lease perpetually renewable. If it does, however, the Respondent applies for rectification of the lease and of the three other leases by an application made to the tribunal dated 15 October.

5. The reference was to be heard by me in Liverpool on 3 February 2016. At that hearing counsel for the Respondent submitted that the tribunal did not have jurisdiction to hear the reference. The basis for that submission was that the lease, being made in writing and not by deed, was not a "grant" and therefore did not fall within paragraph 5 of Schedule 15 to the Law of Property Act 1922. Instead, he argued, it could take effect only as a contract to grant a 2,000 year lease and therefore, being an equitable lease, was not registrable, with the result that the tribunal could not have jurisdiction to make any direction to the registrar about its registration or otherwise.

6. Rule 9(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 states:

> "The Tribunal must strike out … the proceedings or case … if the Tribunal
> (a) does not have jurisdiction in relation to the proceedings … and
> (b) does not exercise any power [to transfer the proceedings to the court]."

7. Accordingly, if I had been persuaded by the Respondent's submissions on jurisdiction I would either have struck out the proceedings or have transferred them to the court.

8. On 3 February counsel for both parties were anxious to have some time to develop their submissions on this point and I therefore agreed to an adjournment. I gave permission for the Applicants to make a written response to the Respondent's application and for the Respondent to make an answer to that response.

9. The Applicants submitted a response dated 1 March 2016, pursuant to my direction, and the Respondents made an answer dated 30 March 2016.

10. On 31 March 2016 the Applicants asked for permission to serve a rejoinder to that response, and on 7 April 2016 they sent to the tribunal and to the Respondent the rejoinder that they wished to submit. The Respondents, by emails dated 6 and 8 April, objected to the Applicants' being given permission to serve a rejoinder and asked the tribunal to disregard it.

11. By email dated 22 March 2016 the Applicants asked for an order that the Respondents pay the cost of the hearing on 3 February and asked for a payment on account of £1,750 plus VAT. The Respondent by email dated 23 March 2016 objected to that application.

12. Accordingly I deal first with the procedural application relating to the service of a rejoinder, and with some further procedural points, then with the application itself, and finally with costs.

The application to serve a rejoinder, and further procedural points

13. The Applicants' wish to serve a rejoinder is prompted by the content of the Respondent's answer. They say that the Respondent has changed its position in relation to its interpretation of the requirements of section 145 and Schedule 15 to the Law if Property Act 1922. If I have understood correctly the Applicants complain that the Respondent has changed its position in relation to the status of written leases.

14. I see no change of position in the Respondent's answer and do not understand the complaint made by the Applicants. I see no need for the service of a rejoinder, and indeed the rejoinder served adds no useful argument and would not assist me.

15. Accordingly permission to serve a rejoinder is refused and I take no account of the purported rejoinder that was sent to the tribunal on 7 April 2016.

16. Some further procedural points can conveniently be dealt with here. The Applicants' response dated 1 March 2016 is a written document together with some enclosures. The Respondent objects at paragraph 7 of its answer dated 30 March 2016 object to the enclosure of a letter from Nether Edge Law, giving some legal advice to the Applicants, and asks for 14 days to respond to it if the Tribunal is minded to have regard to it. I do not consider that the Applicants required any permission to add whatever enclosures they wished to their written response. However, the letter from Nether Edge Law does not assist me in my analysis of the law and I pay no regard to it.

17. At paragraph 8 of its answer the Respondent asks for 14 days to respond to any relevant issue identified by the Tribunal arising from the Applicants' enclosure, with its response, of copies of the 2014 edition of the on-line "Short Guide for Users" of the Land Registration Division and of two cases (*Jayasinghe v Jayasinghe* [2010] EWHC 265 and *Long v Tower Hamlets LBC* [1996] EWHC Ch 1. As will appear I make a brief reference to *Long v Tower Hamlets LBC* in my analysis below. Otherwise the material supplied is not relevant to what I have to decide; no useful purpose would be served by allowing the Respondent to make further submissions about this material and I do not do so.

18. On the other hand, the Applicants say that the Respondent is estopped from questioning the Tribunal's jurisdiction because it had accepted the Tribunal's jurisdiction until the day of the hearing. That argument cannot avail the Applicants because jurisdiction cannot be conferred by consent:

19. Furthermore, the Applicants say that the Respondent's application on 3 February should be refused because of procedural impropriety because it should have been supported by a witness statement. I disagree, because the application related to a matter of law and would not have been assisted by a witness statement; moreover, rule 8(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 states that an irregularity in procedure does not render void any step taken in proceedings.

20. I can now turn to the substantive issue I have to decide.

Jurisdiction

21. The Respondent argues that the tribunal has no jurisdiction, for the reasons outlined in paragraph 5 above.

22. Section 145 of the Law of Property Act 1922 reads as follows:

> "For the purpose of converting perpetually renewable leases and underleases ... into long terms, for preventing the creation of perpetually renewable leasehold interests and for providing for the interests of the persons affected, the provisions contained in the Fifteenth Schedule to this Act shall have effect."

23. The relevant provision of Schedule 15 is paragraph 5(1), which provides for the conversion of any term (that is, a lease), granted after 1 January 1926 with a covenant for perpetual renewal, to take effect as a 2,000 year lease:

> "A grant, after the commencement of this Act, of a term, subterm, or other leasehold interest with a covenant or obligation for perpetual renewal, which would have been valid if this Part of this Act had not been passed, shall (subject to the express provisions of this Act) take effect as a demise for a term of two thousand years or in the case of a subdemise for a term less in duration by one day than the term out of which it is derived, to commence from the date fixed for the commencement of the term, subterm, or other interest, and in every case free from any obligation for renewal or for payment of any fines, fees, costs, or other money in respect of renewal."

24. I have to decide whether the lease was "the grant ... of a term". If it was not, paragraph 5 is inapplicable and it cannot take effect as a 2,000 year lease. Instead paragraph 7 of the Schedule would convert it into an agreement for such a lease. It is well-established law that an agreement for a lease is an equitable lease. The Respondent says, but the Applicants do not agree, that if the lease is converted into an equitable lease it will not be registrable because only legal leases can be registered – and that therefore the tribunal can have no jurisdiction, since this tribunal has

jurisdiction only to give the registrar directions about applications made to the registrar.

25. Why, then, does the Respondent say that the lease was not a grant? The Respondent's argument is that a grant must be made by deed. Without a deed, the Respondent says, there is no grant; instead, the legal interest takes effect in possession. It appears that this point may have been raised by Land Registry on the applicants' initial application, and it was also raised by Judge Gatty of this Tribunal in the course of an earlier interlocutory decision. So the point is a serious one, and it is not new, but it was not pursued by the Respondent until the day of the hearing.

26. The Respondent cannot point to any direct authority for the proposition that a grant can only be made by deed. But reference is made to an argument made by counsel, Mr Richard Scott, in *Centaploy Ltd v Matlodge Ltd* [1974] Ch 1. The case was about a lease at a weekly rent which could only be determined by the tenants, and the question was whether the lease was valid. Mr Scott pursued a number of arguments and raised the possibility that this was a perpetually renewable lease. He said:

> "(4) If the court should construe these documents as granting perpetually renewable leases, they can only take effect as agreements for such grants, since they are not under seal. This may be material in construing the provisions of the Land Registration Act 1925 and the Law of Property Act 1925, ss. 52 and 54. A periodic tenancy has been held to be within section 54 (2) of the latter Act. The wording there is "taking effect," not "to be granted". See also Law of Property Act 1922, Sch. 15, paras. 5 and 7. A lease with a covenant for perpetual renewal "takes effect" as a term for 2,000 years. Such a lease must be granted by deed. If there is a purported grant under hand for a term of years which is required to be created by deed, the document can be construed as an agreement for the grant of such a term."

27. The Applicants say that counsel was referring here to a long lease that was required, in any event, to be created by deed. It is not clear to me that that is the case. Mr Scott appears to be referring to the lease on the basis that it was a perpetually renewable weekly tenancy; yet it was of apparently indefinite duration. The final sentence of the passage quoted supports the Applicants' interpretation. Be that as it may, this is an argument of counsel, and despite the great distinction of that advocate (later Lord Scott of Foscote) it is of no authority.

28. Legal writing includes a multitude of references to the "grant" of a lease other than by deed. Several instances can be found in *Megarry and Wade, The Law of Real Property* (8th edition, 2012) – for example at paragraphs 17-042 and 17-045 reference is made to the grant of an oral tenancy. Munby J, as he then was, in *Long v Tower Hamlets LBC* [1996] EWHC Ch1, at paragraph 54, twice refers to the "parol grant" of a lease ("parol" means oral). But it may be said that that is an informal usage and is not conclusive.

29. The Applicants have referred me to a number of other texts but I think it unnecessary to quote them. The quotations the Applicants have supplied do not answer the question before me.

30. The Applicants point out (at paragraph 17 of their response) that the lease itself describes itself as a grant. But that is not the point; the issue is not whether it calls itself a grant but whether, in law, it *is* a grant.

31. So to resolve that question we have to go back to the basic grammar of land law contained in the provisions of the Law of Property Act 1925 ("the 1025 Act").

32. Section 51 of the 1925 Act reads as follows:

> "(1) All lands and all interests therein lie in grant and are incapable of being conveyed by livery or livery and seisin, or by feoffment, or by bargain and sale; and a conveyance of an interest in land may operate to pass the possession or right to possession thereof, without actual entry, but subject to all prior rights thereto.
>
> (2) The use of the word grant is not necessary to convey land or to create any interest therein."

33. That provision, like much of the 1925 Act, has long roots in history. Its effect, when first enacted in the nineteenth century, was not to impose a requirement but to relieve conveyancers of the need for a physical ritual known as livery of seisin. It did not impose any additional requirements, but enabled conveyancers to create interests by a simple grant.

34. So what is a grant? Section 52 gives a partial answer:

> "(1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.
>
> (2)This section does not apply to—
>
> (d) leases or tenancies or other assurances not required by law to be made in writing…"

35. Accordingly a conveyance (meaning, here, a document creating or transferring an interest in land – such as a lease) must be made by deed unless certain exceptions apply. One of the exceptions is a lease not required to be made in writing. Section 54 f the LPA 1925 tells us that "leases taking effect in possession for a term not exceeding three years" need not be created in writing.

36. Accordingly these three sections together tell us that interests in land (such as the lease) "lie in grant", meaning that they can be created by a grant without the need for the ritual of livery of seisin; that a grant must be made by deed save for certain exceptions; and that one of those exceptions is a lease taking effect in possession for a term of no more than three years.

37. The lease took effect in possession (rather than at a date later than the date of the written lease); it was for a term of one year; and although the lease was in writing, it did not have to be in writing (section 54); therefore the creation of the lease was a grant even though it was not made by deed.

38. The Applicants argue that if the lease is equitable it is nevertheless registrable with possessory title. I do not have to decide that and cannot do so because it has not been fully argued; I observe that I find the suggestion that an equitable lease can be registered with possessory or qualified title entirely implausible. But that is not now relevant. My decision is that the tribunal has jurisdiction because a written lease for a term of no more than three years is created by grant, and therefore if it is perpetually renewable it falls within paragraph 5 of Schedule 15 and will become a legal lease for 2,000 years. Accordingly I have no doubt about the tribunal's jurisdiction.

39. I should add that the registrar is not bound, by my decision as to jurisdiction, to take the same view of the status of the perpetually renewable lease (if indeed this is one). If my eventual decision is that this lease is perpetually renewable and cannot be rectified – and at present I have an open mind on both those issues – then the registrar must decide whether or not to register it. I cannot order him to do so although I hope that the tribunal's view might be persuasive. I can only require him either to cancel the application or to give effect to it as if the Respondent's objection had not been made. If I make the latter direction and if he makes a decision with which the Applicants disagree, their recourse if any will be to judicial review.

Costs and other matters

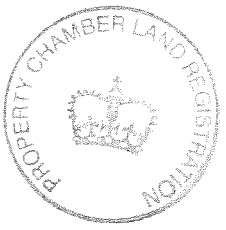
40. On 3 February 2016 I reserved the costs of the hearing and of the application. The Applicants ask for costs in any event and for a payment on account. They have been successful on this issue, but I do not think that there is any special reason to penalise the Respondents in any event for the costs of the application. It was properly made, the issue having been raised earlier (see paragraph 25 above). It should have been pursued sooner, but the Applicants cannot have been taken by surprise by it and must have expected it to be an issue.

41. Accordingly I determine that the costs of the hearing on 3 February and the further costs occasioned by the application shall be costs in the reference. I have given directions for the listing of the reference for a hearing, at which I must decide whether the lease is a perpetually renewable lease and, if it is, whether it can be rectified in accordance with the Applicants' application.

Dated this Wednesday 27 April 2016

Elizabeth Cooke

BY ORDER OF THE TRIBUNAL



Elizabeth Cooke

54. Third, Mr Weiss' and Mr Hedges' evidence about the drafting of the clause undermines their credibility. Mr Weiss' evidence was that he is not legally qualified and has no legal training. He said that he drafted the amended renewal clause in discussion with Mr Hedges, and that he intended the lease to be perpetually renewable. Only later when he did some research did he discover that he had used a "well-known conveyancing formula", as he put it. Mr Hedges agreed that the two of them had "thrashed out" the clause together.

55. I find the evidence of Mr Weiss and Mr Hedges on this point wholly unconvincing. It is not plausible that they produced by accident, and with no knowledge of the law ofr of the cases, wording so close to what we find in *Parkus v Greenwood* and other cases (see paragraph 15 above) and I do not believe that that is what happened.

56. Accordingly I find that Mr Weiss and Mr Hedges have not been candid about the way in which the clause was drafted. They did not invent it from a blank slate; I believe that they were aware, or at least that Mr Weiss was aware, of the relevant case law and drafted their amendment in the light of that. That undermines their credibility on the major point in dispute here, which is whether they knew about the Landlord's mistake. Of course they did; they set out to create it and the Landlord fell into the trap.

57. Is it inequitable for the Tenant to resist rectification? I have no hesitation in finding that it is. It is inequitable both because of the conduct of the Tenant and because of the effect on the Landlord. As to the latter, it is well-known that a perpetually renewable lease is a disastrous encumbrance on a landlord's title unless – as is not the case here – it happens to make provision for a market rent throughout its life-span. The effect of a perpetually renewable lease here is that the Landlord has in effect parted with a freehold interest in the unit for a rent which reflects its value as a storage unit in 2011. As to the Tenant's conduct, I do not have to find that there was sharp practice but it is clear that Mr Weiss took advantage of the Landlord's representatives. He knew perfectly well what he was doing, and that the clause he was putting forward said something very different from what had been discussed and something to which the Landlord would certainly not deliberately agree.

58. Accordingly the lease is to be rectified so that the renewal clause reads as follows (I have underlined the words to be inserted):

"The tenancy is granted for a period of one year with an option to renew at the end of the term for a further one year on the same provisos and agreements as are herein contained including the option to renew such tenancy for a term of one year at the end thereof, but the tenancy shall not be renewable once it has run for three years."

Conclusion and costs

59. I noted above (paragraph 2) that this application and reference are (taken together) a test case and that the parties have agreed that my decision is to determine the outcome for the leases of the other three units too. The legal position as to the other three leases is that they are perpetually renewable, but that the conditions for rectification for unilateral mistake are met. Accordingly it will not be open to the Tenant to claim that any of the other three leases is perpetually renewable and any application for the registration of 2,000 year leases will be rejected by the registrar, because the parties are bound by this decision.

60. As to costs, it is usual in this tribunal for costs to follow the event. Here there have been elements of success on both sides; the Tenant has established that the lease is perpetually renewable, but the Landlord has succeeded in its application for rectification and accordingly the Tenant's application to Land Registry will be cancelled. If either party wishes to apply for its costs it must do so within 28 days of the date of this decision, along with a schedule of its costs incurred since the reference to this tribunal. If the other party wishes to make submissions about whether it should pay costs or about the amount of the costs it may do so within 14 days of the date of the application, and the applicant will then have 14 days in which to reply. If I make an order for costs I will then either assess costs summarily or make an order for detailed assessment by a costs judge, depending upon the amount claimed and the extent of the disagreement between the parties.

Dated this Wednesday 28 September 2016

Elizabeth Cooke

BY ORDER OF THE TRIBUNAL