respect of the dog-barking and abusive behavior; but there is a risk that a standard of possession and control will seem to require this kind of connection as an element of liability. It seems necessary to say, for clarity, that the relevance of possession and control in this case lies not in the indication of Mrs Waring's proprietary connection to land per se, but rather in the indication of her ability and responsibility to take steps to abate the nuisance.

Conclusion

This is a clear and principled decision, which usefully develops the law stated in *Lawrence* by clarifying the related question of when licensors should be liable for the nuisances of their licensees. It coheres with a more general understanding of nuisance as a property tort, and with the underlying ideas of possession and control entailed by an orthodox understanding of ownership. The operating principle itself might more usefully have been presented in express terms of possession and control, rather than with recourse to the language of occupation, but nothing in this observation is intended to detract from the accuracy of the decision, nor the basis on which future cases should proceed. The decision does not mean that one needs to be in possession and control of land to be liable for nuisance; rather it means that where one is in possession and control of land, liability may follow where one is aware of activity on the premises that may amount to a nuisance, unless steps are taken to abate the nuisance.

Robin Hickey

Murdoch v Amesbury: Land Registry Adjudication and Jurisdiction

Murdoch v Amesbury [2016] UKUT 3 (TCC)

Boundary disputes; Determination of boundaries; First-tier Tribunal; Jurisdiction

In *Murdoch v Amesbury*[1] the appellants applied to HM Land Registry for a determined boundary (DB) application between their property and that of the respondents. The respondents disputed: (1) both the start and end points of the application boundary line, putting forward an alternative boundary line;[2] and (2) the accuracy of the plan submitted by the appellants contending that it failed to be accurate to the technical standard required. Agreeing with point (2) the First-tier Tribunal[3] judge made a finding that the DB plan line failed for lack of accuracy. However, she did not, on this basis, simply cancel the application but, in response

[1] *Murdoch v Amesbury* [2016] UKUT 3 (TCC).

[2] *Murdoch v Amesbury* unreported 20 August 2013 LRD REF 2012/0496 at [4] before Tribunal Judge Hargreaves. The respondent proposed two alternative boundary lines in fact.

[3] The Land Registration Division (LRD) of the First-tier Tribunal of the Property Chamber was prior to 2013 the Adjudicator to HM Land Registry (the Adjudicator or HM Land Adjudicator).

to point (1) she determined where the true boundary line lay, the line determined being neither that of the DB application nor the alternative line of the Respondent.

The appellants appealed on the basis that "the learned judge lacked jurisdiction to decide the position of the legal boundary."[4] HH Judge Dight sitting in the Upper Tribunal (Tax and Chancery) allowed the appeal. His judgment is problematic for the system of land registry adjudication. It purports: (1) to remove boundary disputes, as contained within s.60 of the Land Registration Act 2002 (LRA 2002) DB applications, from the jurisdiction of the Tribunal; and (2) to decide that the powers of the Tribunal are restricted to giving orders upon the Land Registry that give effect to or cancel an application.

This casenote will argue that such a restrictive view of LRA 2002 and of the powers of the Tribunal is incompatible: (1) with a law of land registration that works as a complete system; and (2) with the Overriding Objective. The analysis comprises three sections: first the Tribunal's jurisdiction to determine "matters referred" under the LRA 2002, s.108; second, the Tribunal's power to refer matters out to court under LRA 2002, s.110(1) and its powers regarding directions under rules; and third, the LRA 2002, s.60 jurisdiction and the requirements of an application under the rules.

The Section 108 jurisdiction: "determining matters referred"

LRA 2002, s.108 provides:

> "(1) The adjudicator has the following functions -
> (a) determining matters referred to him under s.73(7) …"[5]

The problem is how to construe "matters referred" since the statute fails to define what they are. The leading authority on "matters referred" is the Court of Appeal in *Chief Land Registrar v Silkstone*.[6] Rimer LJ, giving the sole judgment, held that:

> "A reference to an adjudicator of a "matter" under s.73(7) confers jurisdiction upon the adjudicator to decide whether or not the application should succeed, *a jurisdiction that includes the determination of the underlying merits of the claim that have provoked the making of the application* (emphasis added)."[7]

The reason that the Court of Appeal gave such a wide construction to "matters referred" was, it is submitted, to allow the new law of land registration and, within it, HM Land Registry adjudication, to work effectively and as a complete system.[8] Thus, in registered land, an applicant with an underlying case relating to a property right can resolve it through the 2002 Act's comprehensive system of applications to HM Land Registry. If the application is disputed the Land Registry will refer it to an impartial tribunal,[9] the function of which is to determine the matter.[10] Rules

[4] *Murdoch* [2016] UKUT 3 (TCC) at [83].
[5] LRA 2002, s.73 makes provisions for objections to applications to HM Land Registry.
[6] *Chief Land Registrar v Silkstone* [2011] EWCA Civ 801; [2012] 1 W.L.R. 400.
[7] *Chief Land Registrar v Silkstone* [2011] EWCA Civ 801; [2012] 1 W.L.R. 400 at [44]; and quoted in *Murdoch* [2016] UKUT 3 (TCC) at [82].
[8] See Law Commission, *Land Registration for the Twenty-first Century: A Consultative Document*, Law Com. No.254, para.1.5 "The need to develop principles appropriate to registered land".
[9] LRA 2002, s.73.
[10] LRA 2002, s.108(1)(a).

support this complete system. As Briggs J in the High Court stated: "it is … plain from the panoply of procedural powers given to the Adjudicator … that a decision to decide a matter himself may properly involve a trial."[11] Pre-2002, under the Land Registration Rules 1925,[12] HM Land Registry could hold its own hearings to resolve such disputes. Few were resolved by this means, the Land Registry exercising its power to refer most disputes to the courts.[13] The post-2002 system represents a sea change from its predecessor, as discussed more fully by Harrington and Auld,[14] in this journal.

The Adjudicator in the 2006 case of *Matson v Maynard*[15] held that: "the underlying issue is the true position of the boundary. That is what is being sought when an application for a determined boundary is made."[16] Applying *Silkstone* and tribunal case law[17] the Tribunal in *Murdoch* did not lack jurisdiction to find the legal boundary. However, the Upper Tribunal judge distinguished *Silkstone* as "a case which considers and examines an express jurisdiction: it does not seek to find an inherent jurisdiction where none exists on the face of the statue."[18] In other words, the judge held that the Tribunal, in determining the legal boundary, was acting like a court. By implication the court was the only proper jurisdiction in which to decide a boundary dispute.

The use of the Section 110(1) discretion; the powers of the Tribunal

LRA 2002, s.110 provides:

> "(1) In proceedings under s.73(7), the adjudicator may instead of deciding a matter himself, direct a party to the proceedings to commence proceedings within a specified time in the court for the purpose of obtaining the court's decision on the matter."[19]

The issue in *Murdoch* was whether, in choosing not to require the issue to be referred to the court, the Tribunal judge made an inappropriate exercise of her discretion. In the leading case concerning the exercise of the discretion, *Jayasinghe v Liyanage*[20] Briggs J held that: "[the Tribunal] could have concluded that the Overriding Objective might be better served by directing the Appellant to issue proceedings in court."[21] Placing the Overriding Objective as primary consideration,

[11] *Jayasinghe v Liyanage* [2010] EWHC 265 (Ch); [2010] 1 E.G.L.R. 61 at [18].
[12] Land Registration Rules 1925 (SI 1925/1093), r.299.
[13] Land Registration Rules 1925, r.299(3).
[14] Kate Harrington and Charles Auld, "The new Land Registration Tribunal: neither fish nor fowl?" (2016) 80 Conv Issue 1, 19.
[15] *Matson v Maynard* unreported 17 August 2006 HM Land Adjudicator REF/2004/0579/2006/0261.
[16] *Matson* unreported 17 August 2006 HM Land Adjudicator REF/2004/0579/2006/0261 at [52].
[17] Other disputed s.60 DB application Tribunal cases include: *Musset v Shuttlewood* unreported 16 July 2007 HM Land Adjudicator REF/2005/1745 before Deputy Adjudicator Rhys; *Semple v Anthony* unreported 13 January 2012 HM Land Adjudicator REF/2011/0522 [9], [25], [36] before Adjudicator Mr. Cousins; *May v Starr* unreported 16 September 2014 LRD REF/2013/0353 before Deputy Adjudicator McAllister.
[18] *Murdoch* [2016] UKUT 3 (TCC) at [81].
[19] LRA 2002, s.110(1).
[20] *Jayasinghe v Liyanage* [2010] EWHC 265 (Ch); [2010] 1 E.G.L.R. 61.
[21] *Jayasinghe* [2010] EWHC 265 (Ch); [2010] 1 E.G.L.R. 61 at [29]. Also Briggs J held: "The procedural code regulating the discharge by the Adjudicator of functions conferred by the Act is set out in The Adjudicator to Her Majesty's Land Registry (Practice and Procedure) Rules 2003 (SI 2003 No 2171). Those rules … expressly incorporate the Overriding Objective, in a form which, although modified to suit the particular functions of the Adjudicator, broadly corresponds with that to be found in the Civil Procedure Rules: see paragraph 3." at [14].

the Tribunal is likely to choose to make a judicial determination as to the boundary, even if it is not on the line of the DB application, rather than refer such a determination to the court, as Tribunal case law shows:

> "If it happens that the Applicant's plan does not exactly reflect where the boundary is, in the light of all the evidence which the Adjudicator has heard, it would be entirely unhelpful to the parties to refuse to make a judicial determination of the exact line of the boundary. The parties will have spent a great deal of time and money on obtaining a definitive ruling on the boundary line …"[22]

By the time parties have presented evidence at the hearing it is "entirely unhelpful" to direct them to issue proceedings in court. This would fail to better serve the Overriding Objective. However, in *Murdoch* the Upper Tribunal judge reasoned that "[the s.110 power] is the power that the learned Judge should have used in this case",[23] the primary reason being the Tribunal's limited powers as given in Rules. This argument, if true, trumps the Overriding Objective as primary consideration.

Rule 40 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules provides:

> "(1) The Tribunal must send written notice to the registrar of any direction which requires the registrar to take action.
>
> (2) Where the Tribunal has made a decision, that decision may include a direction to the registrar to -
>
> (a) give effect to the original application in whole or in part as if the objection to that original application had not been made;
>
> or
>
> (b) cancel the original application in whole or in part.
>
> (3) A direction to the registrar under paragraph (2) must be in writing, must be sent or delivered to the registrar and may include—
>
> (a) a condition that a specified entry be made on the register of any title affected …"[24]

HH Judge Dight interpreted r.40 as follows:

> "… the power of the Adjudicator/Tribunal to give directions to the Registrar is binary in that he may direct the Registrar to give effect to or cancel the original application but nothing else… Nor is there any power to give a direction requiring the Registrar to give effect to other findings and conclusions made by the Adjudicator/Tribunal …"[25]

[22] *Musset* unreported 16 July 2007 HM Land Adjudicator REF/2005/1745 at [6].
[23] *Murdoch* [2016] UKUT 3 (TCC) at [77].
[24] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169), r.40(2), as quoted in *Murdoch* [2016] at [73] without subs.(3); and as quoted in *Bean and Saxton v Katz and Katz* [2016] UKUT 168 (TCC) at [25].
[25] *Murdoch* [2016] UKUT 3 (TCC) at [74].

If this interpretation is correct, the Tribunal's limited powers are not wide enough to be able to address the resolution of a boundary dispute. This therefore takes such a dispute outside the system of Land Registry adjudication.

In the subsequent case of *Bean v Katz*[26] the Upper Tribunal took an opposite view. This was an appeal of a disputed s.60 DB application in which the Tribunal had made an order that went beyond the terms of the application. Judge Cooke recognised the problematic nature of the decision in *Murdoch*: "I have to discuss it [*Murdoch*], in order to make it clear that the First-tier Tribunal was able to make the order it made."[27] She disagreed with the judgment of HH Judge Dight on r.40 powers, deciding that r.40 allows the Tribunal to make directions giving effect to a DB application subject to a condition which alters part of the line of the application.[28] This is due to the r.40 provisions: (1) that success may be in whole or in part—r.40(2); and (2) that the Tribunal may add a condition to its direction—r.40(3).

The *Murdoch* conclusion comes from an underlying policy view that puts the primacy of general property law before a law of land registration that works as a complete system. *Bean* originates from the opposite policy view. It is submitted that the latter position is the correct one. Otherwise, the Tribunal would be greatly impeded from resolving "matters referred". It would be unable effectively to dispose of nuanced matters of substantive land law. Take, for example, a disputed application for an easement by prescription whereby the Tribunal finds an easement does exist but not in the exact terms of the application.[29] Such a finding would necessitate either a LRA 2002, s.110(1) referral to the court, so that it could give the right order, or a cancellation of the application ahead of it being started again. This would subvert the "underlying merits" dictum of *Silkstone* which supports the integrity of the land registration system. It is also incompatible with the Overriding Objective which is the primary consideration once the wider view of the Tribunal's powers is employed.

The Section 60 jurisdiction; the requirements of an application under the rules

So far the analysis has considered the jurisdiction and powers of the Tribunal. The judge also decided that there is no jurisdiction for *any* court or tribunal to determine a legal boundary under LRA 2002, s.60 which means that such a determination can only be made within the inherent jurisdiction and hence powers of the court. Section 60 provides:

> "(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.

[26] *Bean and Saxton* [2016] UKUT 168 (TCC).
[27] *Bean and Saxton* [2016] UKUT 168 (TCC) at [5].
[28] *Bean and Saxton* [2016] UKUT 168 (TCC) at [26]–[27].
[29] For an interesting example, see *Worcester County Council v Askew* unreported 16 June 2006 HM Land Adjudicator REF/2005/0261, before Deputy Adjudicator Clarke. The applicant applied for the closure of the possessory title of the respondents. The Deputy Adjudicator ordered that a notice be entered in the register that the title was subject to public rights of way, which he held to be "the essence of the case". As such the applicant had succeeded and was awarded costs even though its application was cancelled ([68]–[70]).

(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 the boundary of a registered estate to be determined and may, in particular, make provision about -

(a) the circumstances in which the exact line of a boundary may or must be determined,

(b) how the exact line of a boundary may be determined,

(c) procedure in relation to applications for determination, and

(d) the recording of the fact of determination in the register or the index maintained under section 68.

(4) Rules under this section must provide for applications for determination to be made to the registrar."[30]

The judge inferred that LRA 2002, s.60(1) and (2), asserting the general boundaries rule, prevent ss.60(3) and (4) from being used to find the exact legal boundary:

> "Sub-sections 60(1) and (2) refer to general boundaries, which necessarily have room for doubt as to precisely where on the ground the legal boundary is to be found. By contrast, however, I infer that the purpose of section 60(3) is to prevent potential disputes between adjoining land owners in the future and provide a public record of boundaries which cannot be disputed on grounds of inaccuracy."[31]

Based on this inference the judge in *Murdoch* decided that a s.60 DB application is merely about the technical accuracy of the plan submitted, and does not consider matters of title. Section 60 refers neither to a plan nor to title but ss.60(3) and (4) refer to rules. These rules do refer to plan and title. The Land Registration Rules,[32] rr.117–123 cover DB applications. Rule 119 provides:

"(1) Where the registrar is satisfied that—

(a) *the plan, or plan and verbal description, supplied in accordance with rule 118(2)(a) identifies the exact line of the boundary claimed*,

(b) *the applicant has shown an arguable case that the exact line of the boundary is in the position shown* on the plan, or plan and verbal description, supplied in accordance with rule 118(2)(a), and

(c) he can identify all the owners of the land adjoining the boundary to be determined and has an address at which each owner may be given notice,

he must give the owners of the land adjoining the boundary to be determined (except the applicant) notice of the application to determine the exact line of the boundary and of the effect of paragraph (6).

[30] LRA 2002, s.60.
[31] *Murdoch* [2016] UKUT 3 (TCC) at [62].
[32] Land Registration Rules 2003 (SI 2003/1417).

…

(6) Unless any recipient of the notice objects to the application to determine the exact line of the boundary within the time fixed by the notice (as extended under paragraph (5), if applicable), the registrar must complete the application.

(7) Where the registrar is not satisfied as to paragraph (1)(a), (b) and (c), he must cancel the application."[33] (emphasis added)

Concerning what the rules say about the requirements of an application the judge in *Murdoch* focused on the requirement of accuracy in r.119(1)(a):

> "… the details and plan to be provided by the applicant for a determined boundary is to have a very high degree of accuracy, a tolerance of 10mm. The required accuracy is, in my judgment, the key to understanding the scope of this subsection (referring to LRA 2002 60(3)) …"[34]

It is noteworthy that the "very high degree of accuracy, a tolerance of 10mm" is taken from the Land Registry Practice Guide 40 and does not appear in the rules.[35] In *Bean* Judge Cooke took issue with HH Judge Dight's conclusion that "it is the accuracy of the identification of the line, rather than title to the line, which is the focus of the application according to the rules." She declared it obiter and held, in contrast:

> "it is important that I make it clear that the First-tier Tribunal has jurisdiction to dispose of determined boundary references … where the objection is not to the quality of the plan but to what the plan says about the boundary and where therefore it is necessary to look at the title to the properties concerned."[36]

Judge Cooke's analysis was that the basis of an objection to a DB application is two-fold. It is based either: (1) on the accuracy of the plan—r.119(1)(a); or (2) on whether the line on the plan is that of the boundary—r.119(1)(b). The latter is a question of title to the land, either side of the line, which must be resolved in order for the Tribunal to follow the scheme of the rules:[37] "It is therefore inevitable that the First-tier Tribunal will make findings about the position of the boundary, in order to give reasons for its decision."[38]

Which is right, the *Murdoch* view or that of *Bean* depends on the approach to policy. The *Murdoch* view is founded upon a policy which puts the rules and principles of general property law, and the property rights that they affect, before the integrity of the system of land registration. The latter view subsumes them within the system of land registration. Practically this is done through applications to HM Land Registry and, when these are disputed, land registration adjudication. If the *Murdoch* view is correct then either: (1) all title-dispute DB applications are forced to go via the courts; or (2), as described by Deputy Adjudicator Rhys in

[33] Land Registration Rules 2003, r.119.

[34] *Murdoch* [2016] UKUT 3 (TCC) at [62].

[35] HH Judge Dight takes the "tolerance of 10mm" from: Land Registry Practice Guide 40 (PG40), first published 13 October 2003, updated 25 June 2015, see: *https://www.gov.uk/government/publications/land-registry-plans-guide-overview/practice-guide-40-guide-overview-of-land-registry-plans* [accessed 25 July 2016] at [3.3.2].

[36] *Bean and Saxton* [2016] UKUT 168 (TCC) at [20].

[37] *Bean and Saxton* [2016] UKUT 168 (TCC) at [21].

[38] *Bean and Saxton* [2016] UKUT 168 (TCC) at [22].

Musset v Shuttlewood below, the application may be forced to go through a wasteful iterative process in adjudication:

> "It has been said that the Adjudicator … is obliged either to find for or against the plan put forward by the Applicant and attached to form DB. Accordingly, if there is any part of this plan which does not truly reflect the correct boundary, the entire application must be rejected and the Applicant must start again. This is not a view which I share."[39]

The position in *Bean* must therefore be the correct one as that of *Murdoch* undermines the system of land registration, within which how land registration adjudication operates, and ignores the Overriding Objective. *Murdoch*'s deciding principle should be rightly restricted to its dictum that an application fails for lack of plan accuracy whereas its view on the question of title should not be followed.

Conclusion

Those who believe that the new law of land registration must hold together as a complete system would not conceive of a DB application provision within LRA 2002 as merely addressing a technical matter, i.e. how accurate the plan is, and leaving substantive questions of title to the inherent jurisdiction of the courts. But for those who believe in the primacy of general property law over a system of land registration such a view, as apparently espoused in *Murdoch*, is not unnatural. This view sees the 2002 Act as an incomplete scheme, reliant on the inherent jurisdiction of the courts to plug the gaps in it: it need not be complete since, according to this view, land registration is primarily a matter of machinery, not of substantive law. The argument applies equally to the interpretation of the powers of the Tribunal. The *Murdoch* view interprets such powers restrictively as either giving effect to or cancelling an application and "nothing else". This means that in many cases the Tribunal would lack the powers to resolve the dispute because of a substantive finding that takes its resolution outside of the terms of the application.

It is submitted that the view that sees land registration as a complete scheme is the right one. It fits within the context of the central aim of LRA 2002 to move real property law from the principles of unregistered land to those of registered land. The 2002 Act introduced a comprehensive system of applications to HM Land Registry in order to allow parties to resolve matters of registered land. When disputed, HM Land Registry refers such matters to Land Registry adjudication for determination. This is why the Court of Appeal in *Silkstone* gave such a wide construction to "matters referred:" a "jurisdiction that includes the determination of the underlying merits of the claim that have provoked the making of the application." Within this complete scheme Land Registry adjudication plays a key role. This is why its effective functioning is important. The Tribunal has operated within the remit of the *Silkstone* construction on "matters referred" as shown by its case law, as does the decision in *Bean*. Tribunal judges should follow the dicta

[39] *Musset* unreported 16 July 2007 HM Land Adjudicator REF/2005/1745 at [6].

of *Bean* confident that any appeal based on *Murdoch* would fail if escalated to the Court of Appeal.

Hugh-Guy Lorriman*

Forfeiture Revisited: *Magnic*, *Safin* and *Freifeld*

Magnic Ltd v Ul-Hassan [2015] EWCA Civ 224; Safin (Fursecroft) Ltd v Badrig's Estate; [2015] EWCA Civ 739; [2016] L. & T.R. 11; Freifeld v West Kensington Court Ltd [2015] EWCA Civ 806; [2016] 1 P. & C.R. 5

LT Breach of contract; Breach of covenant; Landlords' rights; Proportionality; Relief against forfeiture

Introduction

Where a landlord exercises its right to forfeit a lease as a result of non-payment of rent or the breach of some other covenant, the tenant is entitled to ask the court for relief. The jurisdiction to grant relief is equitable in origin (although now placed on a statutory footing[1]) and is therefore discretionary. However, for many years the consistent practice of the courts has been to grant the tenant's request provided that the landlord can be restored to the position it would have been in had the breach not been committed. Only in exceptional cases involving "stigma" attaching to the premises concerned is the court likely to refuse the tenant's application.[2]

Despite the relatively settled understanding of the principles underlying the exercise of the discretion to grant relief from forfeiture, those principles were considered by the Court of Appeal on no less than three occasions in 2015 in *Magnic*,[3] *Safin*[4] and *Freifeld*.[5]

In this article we consider where those three decisions have taken us and tentatively question whether that is a good place for us to be. Our conclusion is that some of the reasons underpinning the very considerable benevolence shown to tenants may no longer apply in all cases and that accordingly the balance may have tipped too far against landlords.

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[1] In the case of non-payment of rent the jurisdiction to grant relief is now (in the High Court) under s.38 (1) of the Senior Courts Act 1981 or (in the County Court) under s.138 of the County Courts Act 1984. In the case of other breaches of covenant, the relevant provision is s.146 of the Law of Property Act 1925.

[2] See, generally, *Woodfall: Landlord & Tenant* (London: Sweet and Maxwell), paras 17.165–17.168.

[3] *Magnic Ltd v Ul-Hassan* [2015] EWCA Civ 224.

[4] *Safin (Fursecroft) Ltd v Badrig* [2015] EWCA Civ 739.

[5] *Freifeld v West Kensington Court Ltd* [2015] EWCA Civ 806.