Neutral Citation Number: [2024] EWCA Civ 1544

Case No: CA-2023-002301

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
UPPER TRIBUNAL JUDGE ELIZABETH COOKE
[2023] UKUT 220 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2024

Before:

LADY JUSTICE KING
LORD JUSTICE NUGEE
and
LADY JUSTICE FALK

- -

Between:

159 – 167 PRINCE OF WALES ROAD RTM COMPANY LTD	**Appellant**
- and –	
ASSETHOLD LTD	**Respondent**

- -
- -

Niranjan Venkatesan and Armando Neris (instructed by **Mayer Brown International LLP**) for the **Appellant**
Justin Bates KC and Sophie Gibson (instructed by **Scott Cohen Solicitors Limited**) for the **Respondent**

Hearing dates: 19 and 20 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 13 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction and factual background

1. This appeal concerns the right to manage ("RTM") legislation contained in the Commonhold and Leasehold Reform Act 2002 (the "CLRA"). The Appellant, 159-167 Prince of Wales RTM Company Limited ("RTM Co"), is a company that was formed in May 2021 by some of the leaseholders of flats at a property in North London with a view to taking over its management. The Respondent, Assethold Limited ("Assethold"), is a company that on 10 October 2019 had purchased both the freehold and a 999-year headlease of the property from, respectively, Millcastle Properties Limited and Millcastle (POFW) Limited (together, "Millcastle").

2. The dispute arises from the fact that, when RTM Co served its claim notice under s.79 of the CLRA in June 2021, it was still Millcastle rather than Assethold that was the registered owner of the freehold and the headlease. Assethold has subsequently become the registered owner of the freehold pursuant to an application apparently made in 2022, but not of the head lease, the registered owner of which (Millcastle (POFW) Limited) was dissolved in September 2021.

3. RTM Co addressed its claim notice to both Assethold and Millcastle Properties Limited. Assethold served a counter-notice contending that the requirements of the legislation had not been met. RTM Co applied to the First-tier Tribunal ("FTT") seeking a determination that it had met those requirements, but a day before the hearing it applied to withdraw its application, which was then dismissed by consent.

4. Assethold then submitted a costs application under s.88(4) of the CLRA, seeking the costs both of its initial assessment and response to the RTM claim and of the proceedings in the FTT. The total sum claimed was £14,747.22. In response to that application RTM Co asserted that Assethold was not a "landlord" as s.88(1) required, because it had no legal interest in the property.

5. The FTT determined the application on the papers. It accepted RTM Co's argument that Assethold was not a "landlord" and that RTM Co therefore had no liability for its costs.

6. Assethold's appeal to the Upper Tribunal ("UT"), which was also determined on the papers, was allowed. Judge Elizabeth Cooke (the "judge") concluded that RTM Co was estopped from denying that Assethold was the landlord for the purpose of recovering costs under s.88. The judge awarded costs of £11,747.22 and Tribunal fees of £495.

7. RTM Co now appeals with the permission of the UT, and with the benefit of a costs capping order made by this court. For the reasons which I will explain, I would allow the appeal.

8. We are grateful for the assistance provided by the parties' representatives in determining this appeal. In particular, we are very grateful for the provision of *pro bono* representation by Mr Venkatesan and Mr Neris for RTM Co and for the very thorough manner in which the appeal was prepared by them, which was of significant assistance to the court. We would also wish to commend not only the oral advocacy of Mr Venkatesan and Mr Bates KC but also the oral submissions that Ms Gibson made at Mr Bates' invitation in response to questions from the Bench, which were delivered with notable clarity and skill.

The legislation

9. The RTM legislation is contained in Chapter 1 of Part 2 of the CLRA. Its provisions were described in detail in the recent Supreme Court decision in *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Co Ltd* [2024] UKSC 27, [2024] 3 WLR 601 ("*A1 Properties*"). The most relevant provisions for present purposes are set out below.

10. Section 71 introduces the Chapter as follows:

> "**71. The right to manage**
>
> (1) This Chapter makes provision for the acquisition and exercise of rights in relation to the management of premises to which this Chapter applies by a company which, in accordance with this Chapter, may acquire and exercise those rights (referred to in this Chapter as a RTM company).
>
> (2) The rights are to be acquired and exercised subject to and in accordance with this Chapter and are referred to in this Chapter as the right to manage."

11. The legislation goes on to specify the circumstances in which the RTM can arise and the process for obtaining it. This involves an initial stage in which a company is formed for the purpose and qualifying tenants (broadly, tenants under long leases) are invited to participate in it, followed by the service by the company of a "claim notice". Section 79(6) provides that the claim notice must be served as follows:

> "(6) The claim notice must be given to each person who on the relevant date is—
>
> (a) landlord under a lease of the whole or any part of the premises,
>
> (b) party to such a lease otherwise than as landlord or tenant, or
>
> (c) a manager appointed under Part 2 of the Landlord and Tenant Act 1987 (c. 31) (referred to in this Part as "the 1987 Act") to act in relation to the premises, or any premises containing or contained in the premises."

By s.79(1) the "relevant date" is the date of the claim notice. Under s.79(8) a copy of the claim notice must also be given to the qualifying tenants.

12. Section 84 enables a person "given a claim notice by a RTM company under section 79(6)" to serve a counter-notice which may challenge the company's entitlement to acquire the RTM. It also provides a procedure for the RTM company to apply under s.84(3) to the appropriate tribunal (for present purposes, the FTT) for a determination that it was in fact entitled to acquire the RTM.

13. Section 88 provides as follows:

> "**88. Costs: general**
>
> (1) A RTM company is liable for reasonable costs incurred by a person who is—
>
> (a) landlord under a lease of the whole or any part of any premises,
>
> (b) party to such a lease otherwise than as landlord or tenant, or
>
> (c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,
>
> in consequence of a claim notice given by the company in relation to the premises.
>
> (2) Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.
>
> (3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before the appropriate tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.
>
> (4) Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by the appropriate tribunal."

14. It can be seen that the list of persons in s.88(1) is identical to that in s.79(6). The effect of s.88 is that such persons (and only them) can claim costs incurred in consequence of a claim notice. This will include costs of the initial consideration of a claim and costs of an unsuccessful application by the RTM company to the FTT. The FTT's role is to determine the amount of the costs in the event of a dispute.

15. Section 89 deals with withdrawn claims. Section 89(2) provides that the RTM company's liability under s.88 is for costs incurred up to the time of withdrawal.

16. Section 90 deals with the RTM acquisition date where a claim is successful, which in the case of an opposed claim is three months after the FTT's determination becomes final.

17. Sections 96 to 103 apply where the RTM has been acquired. The RTM company takes over functions previously undertaken by a landlord both as to management and the grant of approvals, and it may enforce tenant covenants. Certain statutory functions are also transferred. See generally *A1 Properties* at [42]-[44]. Most relevantly here, s.96(2)-(5) provide:

> "(2) Management functions which a person who is landlord under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company.

> (3) And where a person is party to a lease of the whole or any part of the premises otherwise than as landlord or tenant, management functions of his under the lease are also instead functions of the RTM company.
>
> (4) Accordingly, any provisions of the lease making provision about the relationship of—
>
> (a) a person who is landlord under the lease, and
>
> (b) a person who is party to the lease otherwise than as landlord or tenant,
>
> in relation to such functions do not have effect.
>
> (5) "Management functions" are functions with respect to services, repairs, maintenance, improvements, insurance and management."

18. Section 112 contains definitions. It relevantly provides:

> "(2) In this Chapter "lease" and "tenancy" have the same meaning and both expressions include (where the context permits)—
>
> (a) a sub-lease or sub-tenancy, and
>
> (b) an agreement for a lease or tenancy (or for a sub-lease or sub-tenancy),
>
> but do not include a tenancy at will or at sufferance.
>
> (3) The expressions "landlord" and "tenant", and references to letting, to the grant of a lease or to covenants or the terms of a lease, shall be construed accordingly.
> …
> (5) Where two or more persons jointly constitute either the landlord or the tenant or qualifying tenant in relation to a lease of a flat, any reference in this Chapter to the landlord or to the tenant or qualifying tenant is (unless the context otherwise requires) a reference to both or all of the persons who jointly constitute the landlord or the tenant or qualifying tenant, as the case may require."

The grounds of appeal and Respondent's notice

19. In outline, RTM Co's grounds of appeal are as follows:

(1) Estoppel has, in effect, no role to play in determining whether Assethold was to be treated as the landlord for the purposes of s.88.

(2) The effect of the UT's decision was to enlarge the FTT's jurisdiction in a manner not permitted by the statutory scheme.

(3) There was, in any event, no estoppel because the judge had not applied the correct test of detrimental reliance, and there could not have been reliance on the facts.

20. Assethold has raised two issues by way of Respondent's notice that were before the UT but which it was unnecessary for it to decide given its conclusion that there was an estoppel:

    (1) Equitable ownership was sufficient to make Assethold a "landlord" for the purposes of s.88.

    (2) Alternatively, Assethold and Millcastle "jointly" constituted the landlord within s.112(5) of the CLRA.

The Tribunal decisions

21. The FTT (Judge Jeremy Donegan) observed that no explanation had been given for the delay in registering Assethold as the owner of the freehold and headlease, despite over three years having by then elapsed. Copies of Land Registry forms of transfer (TR1s) had been supplied but without the necessary signatures from Assethold, and no correspondence with the Land Registry had been disclosed.

22. The FTT concluded that Assethold was not a "landlord" such that the claim notice was not given to it under s.79(6)(a) of the CLRA, because when it was served Assethold had no legal interest in the property, only equitable rights. It was also not suggested that s.79(6)(b) or (c) was relevant. Assethold therefore had no standing to serve a counter-notice or to claim costs under s.88. The fact that the claim notice was served on Assethold and that it was named in RTM Co's application to the FTT did not give rise to an estoppel. Assethold was simply not the landlord and this was unaffected by any misunderstanding of the law. RTM Co therefore had no liability for costs under s.88.

23. The UT reached the opposite conclusion and found that an estoppel was created. The judge was obviously struck by what she regarded as the unfairness of RTM Co pursuing an application against Assethold in the FTT and then seeking to deny a liability for costs.

24. The judge found support for her conclusion that an estoppel had arisen in the Court of Appeal's decision in *Benedictus v Jalaram* (1989) 58 P&CR 330 and the decision of the Lands Tribunal in *Plintal SA v 36-48A Edgewood Drive RTM Co Ltd* LRX/16/2007 (2008). The judge preferred the reasoning in the *Plintal* case to the UT's approach in *The Lough's Property Management Ltd v Robert Court RTM Company Ltd* [2019] UKUT 105 (LC).

25. The judge did not address in detail exactly how the estoppel was said to arise. At [49] she referred to the possibility of an estoppel being created either by representation or convention and to the fact that RTM Co had named Assethold as the landlord in its application to the FTT. Paragraph [39] contains a more explicit statement that "by issuing proceedings [RTM Co] was asserting that [Assethold] was the landlord". On the question of reliance, the judge said this at [49]:

> "As to detrimental reliance, the act of engaging with the proceedings and the incurring of costs are clearly detriments."

Discussion

26. It is most logical to address the points raised by the Respondent's notice first. I will then address ground (3) of the appeal.

Was Assethold a landlord in fact?

27. Assethold's case is that a buyer of property in the "registration gap" between completion of a purchase and its registration at the Land Registry is a "landlord" for the purposes of s.79(6) and the costs provisions in s.88. Mr Bates submitted that equitable ownership of the freehold and headlease had passed to Assethold in October 2019 when it had purchased them from Millcastle, and that was sufficient to make Assethold a landlord at the date of the claim notice even though Millcastle had remained the registered, and therefore legal, owner of both interests at that date. The critical focus of the legislation was on the persons whose management functions would be lost to the RTM company, as confirmed by *A1 Properties* at [67]. Beneficial ownership had passed at the time of Assethold's purchase. Buyers in the registration gap could exercise almost all of the rights which would be exercisable once registered title was acquired, including powers as a landlord. It was Assethold, not Millcastle, that was in fact responsible for the management of the property. Mr Bates did not suggest that any distinction should be drawn for these purposes between s.79, which explicitly directs attention to the position as at the date of the claim notice, and s.88. He also relied on s.112(2) and (3) of the CLRA.

28. I do not agree that an equitable owner can be a "landlord" for the purposes of ss.79(6) and 88 of the CLRA. In its ordinary and natural meaning, a "landlord under a lease" means the landlord as a matter of law. Both the freehold and headlease interest were existing registered estates. Their legal owners at the relevant time were the two Millcastle entities, not Assethold, because under s.27(1) of the Land Registration Act 2002 the transfers did not operate at law unless and until they were completed by registration. Until Assethold became the registered owner the legal estate remained vested in Millcastle. It could not therefore be said that Assethold was a landlord under any lease of the premises.

29. There is some support for this in an RTM context in the Upper Tribunal decision in *Assethold Ltd v 7 Sunny Gardens Road RTM Co Ltd* [2013] UKUT 509 (LC) ("*Sunny Gardens*"), where the Deputy President observed at [29] that a "tenant" under the legislation is the person in whom the legal estate created by a lease is vested for the time being, and that "the 2002 Act is not concerned with beneficial interests". That statement was repeated by the Law Commission in its 2019 Consultation paper "Leasehold home ownership: exercising the right to manage" (Consultation Paper 243) at paragraph 3.27, which said this:

> "**Trustees**
> 3.27 The RTM legislation is not concerned with beneficial interests [footnoting *Sunny Gardens*] so, where the lease is held on trust, the trustee is, or the trustees are, the qualifying tenant. Section 109 of the 2002 Act extends a trustee's powers to permit participation in the RTM, unless there is express provision in the trust deed to the contrary."

30. The approach taken in *Sunny Gardens* is consistent with the general approach of the courts in other areas. For example, in *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd* [2001] Ch 733, 742, Mummery LJ said this in the context of an assignment of a lease which had not been registered:

> "…it is necessary to keep clear and distinct the position between the transferor and the transferee and the position of a third party. Transfer of the beneficial title is not, in this context, relevant to the legal relationship between the lessees and the lessors….
> As between lessors and lessees, there is binding Court of Appeal authority in *Gentle v Faulkner* [1900] 2 QB 267 for the proposition that assignment means, in the absence of a context showing an extended meaning, an assignment of the legal estate, and not of the beneficial interest, eg by declaration of trust of the lease. It is not a matter of intention to assign, a point highly relevant to the passing of beneficial title, but of whether a defined event has occurred. That event is not completion, as Mr Dowding contended; it is the transfer of the legal title to the lease…"

31. Section 112(2) provides for a specific extension of the concept of a lease to include, where the context permits, an agreement for a lease, but nothing is said there that indicates that agreements to transfer existing interests may have the effect of treating the transferee as a landlord either in place of or in addition to the transferor. That is so irrespective of whether such an agreement has been completed by an unregistered transfer.

32. This construction is supported by the context and purpose of the legislation. Addressing context first, as Mr Venkatesan pointed out s.79(6) and the identical wording in s.88(1) refer to "(a) landlord under a lease of the whole or any part of any premises [or] (b) party to such a lease otherwise than as landlord or tenant…" (emphasis supplied). The implication is that a landlord or tenant is a party to a lease, and that paragraph (b) is getting at other parties, such as a management company, that may also execute a lease.

33. Other provisions reinforce this. In particular, s.96(2) and (3) (set out at [17] above) transfer management functions which a landlord or other party has "under the lease", rather than functions that they may have as a result of any other arrangement, such as the terms of a sale of the landlord's interest or indeed any contractual management arrangements. Section 96(4) is similarly directed at terms of the lease which make provision about the relationship between landlords and other parties in relation to management functions.

34. Section 98 relates to grants of approvals. Section 98(2) confers on the RTM company functions of that nature which are held by a person who is "(a) landlord under a long lease of the whole or any part of the premises, or (b) party to such a lease otherwise than as landlord or tenant". Section 98(3) disapplies any provisions of the lease that govern the relationship between a landlord and such other party in relation to those functions. Again, these provisions obviously refer to functions that the relevant person has by virtue of the terms of the lease rather than by virtue of anything else.

35. A further example is s.100, which deals with tenant covenants. Among other things it provides at sub-section (5) that powers of entry that a landlord or other party have under the lease to determine whether a covenant is being complied with are exercisable by the RTM company. Again, the focus is on rights that exist under the terms of the lease.

36. In its written submissions Assethold suggested that its approach was supported by *Sackville UK Property Select II (GP) No.1 Ltd v Robertson Taylor Insurance Brokers Ltd* [2018] EWHC 122 (Ch), [2018] L&TR 22 ("*Sackville*"). In fact *Sackville* does not

support Assethold's argument, rather the reverse. In that case Fancourt J considered the Landlord and Tenants (Covenants) Act 1995 ("LTCA"). As Fancourt J explained, s.3 of the LTCA provides for the benefits and burdens of covenants to pass at the point of assignment and s.28(1) expressly defines "assignment" to include an equitable assignment. However, even though that legislation applied on the facts of *Sackville* it did not prevent the conclusion that a break option in the lease in question could not be exercised by an unregistered equitable assignee of the lease. This was because the LTCA did not affect the requirement in the lease for notice exercising the break option to be given by the "Tenant", namely the entity in which the lease remained vested: [34].

37. The LTCA was of course already in place when the RTM legislation was enacted in 2002, so one question is whether its existence might indicate that the concept of a landlord for RTM purposes should be regarded as being more extensive than I have indicated, bearing in mind that covenants relevant to RTM functions may transfer under the LTCA without a transfer of the legal estate. However, I do not think that is so. By virtue of s.1 of the LTCA, s.3 generally applies only to leases granted after that Act was passed, whereas the RTM legislation will be equally relevant to leases granted beforehand. For those older leases the LTCA would not confer privity of estate between a purchaser and another party to a lease pending registration. We were not told whether the leases in issue in this case were granted before or after 1995 (or indeed some before and some after), but the point is a more general one. The construction of the legislation cannot sensibly vary depending on when a particular lease was granted.

38. In *Sackville* Fancourt J also considered s.24 of the Land Registration Act 2002, which provides that a person "entitled to be registered as the proprietor" of a registered estate is entitled to exercise "owner's powers". "Owner's powers" is relevantly defined in s.23(1) as the power to make dispositions permitted by the general law (subject to limited exceptions) and to charge the estate. That relatively narrow definition did not assist on the facts of *Sackville* because the right under the lease did not fall within it, and in any event s.24 has not been interpreted as conferring a power to undertake transactions that only a registered proprietor can.

39. This last point was considered by Newey J in the earlier case of *Skelwith (Leisure) Ltd v Armstrong* [2015] EWHC 2830, [2016] Ch 345 in the context of an unregistered assignee of a charge, where he explained the principle to apply in the following terms at [57]:

> "It is apparent … that a person who is entitled to be registered as a proprietor, but who has not been, will not necessarily enjoy all the powers that he would have had if registration had been effected. It follows that section 24 of the LRA 2002 cannot mean that the powers of a person entitled to be registered as a proprietor are automatically to be equated with those of a registered proprietor. The distinction between legal and beneficial ownership evidently continues to matter. … It has, as it seems to me, to be asked whether an equitable owner would be 'permitted under the general law' to make dispositions of the relevant kinds. That implies, in my view, that a person who has no more than equitable ownership of a charge will not be entitled to exercise a power unless the terms of the particular statute or other instrument conferring the power allow for its exercise by someone lacking legal ownership."

It was rightly not suggested that s.24 has any direct application in this case, but the relatively strict approach taken to it is worthy of note. A rationale, suggested by Norris J in *Pye v Stodday Land Ltd and another* [2016] EWHC 2454 (Ch), [2016] 4 WLR 168 at [37], is that to read s.24 more broadly would be to deprive s.27 of any real effect.

40. *RM Residential Ltd v Westacre Estates Ltd* [2024] UKUT 56 (LC) concerned the right of a purchaser of a landlord's interest to enter property, conduct works and apply for a dispensation from the statutory requirement to consult tenants in advance. Mr Bates relied on a passage at [35]-[44] which contains general statements about the position of a buyer in the registration gap. However, the leases in question fell within s.3 of the LTCA because they were granted after 1995 and the legislation relating to consultation also expressly extended to persons who had the right to enforce payment of the service charge.

41. Assethold further relied on the very recent UT decision in *Avon Freeholds Ltd v Cresta Court E RTM Company Ltd* [2024] UKUT 335 (LC) ("*Cresta Court*"), on which we heard submissions from Ms Gibson. That case concerned the application of the invitation to participate provisions in the CLRA to an individual, Ms O'Connor, who had been granted a long lease that had not been registered by the date of the claim notice. In other words, Ms O'Connor had been in a registration gap, but following the grant of a new lease rather than a sale of an existing interest. The freeholder challenged the proposed acquisition of RTM on the basis that Ms O'Connor had not been served with an invitation to participate in the RTM company.

42. As the UT held, at the relevant time no legal lease was in existence. Rather, Ms O'Connor held an equitable lease. The UT concluded that this was sufficient to require notice to Ms O'Connor, albeit that the effect of *A1 Properties* was that the claim notice was not invalid on the facts.

43. *Cresta Court* is clearly distinguishable. The UT relied on the specific inclusion of agreements for lease in s.112(2)(b), and reasoned that because agreements for lease are equitable leases (if specific performance would be available) it would be incomprehensible if other forms of equitable lease were not also included ([55]). The UT's conclusion therefore related a) to an interest in land which existed only in equity, and b) in the context of the specific provision for agreements for lease. In contrast, in this case there are existing legal interests that were vested in Millcastle and there is no equivalent to s.112(2)(b) that applies to an agreement to transfer them.

44. The conclusion that the intention was to confine the concept of a landlord to holders of legal interests is also supported by the purpose of the RTM legislation, as discussed in some detail in *A1 Properties*. I accept that the overall objective of the legislation is to facilitate the transfer of management functions to a tenant-managed company and that the procedure is intended to give those who are likely to be affected by that the chance to object. Critically, however, the process was intended to be "as simple as possible to reduce the potential for challenge by an obstructive landlord": *A1 Properties* at [25], quoting a paragraph from the consultation paper that accompanied the draft bill which Lord Briggs and Lord Sales (with whom Lord Hamblen, Lord Leggatt and Lord Stephens agreed) said should be regarded as "a general statement of the purpose of the CLRA".

45. The requirements of the legislation are prescriptive. Section 79 requires the claim notice to be served on a number of different persons which include each landlord. We now know

that a failure to serve a claim notice as required makes it voidable rather than void: *A1 Properties* at [87], but there remains a real risk that those unwilling to acquiesce in a transfer of management will seek to obstruct the process with claims that not all relevant persons have been notified and their potential objections addressed, which RTM companies would need to spend time and incur costs in dealing with.

46. Although Assethold was in fact served in this case, an RTM company may well have no means of knowing that a landlord has sold its interest or otherwise parted with equitable ownership. Lord Briggs and Lord Sales noted that there were some unavoidable difficulties in identifying landlords, such as landlords under short term leases that will not appear on the register ([99]), but the aim of having a simple process would be further, and materially, undermined if the difficulties were compounded by including equitable owners of interests that are registered. Rather, RTM companies should so far as possible be able to rely on the entries on the register.

47. I do not consider that this is outweighed by Assethold's actual role in managing the property or the difficulties caused by delays in obtaining registration. It is open to a buyer in Assethold's position to mitigate the potential risks by ensuring that the terms of its acquisition make appropriate provision for the seller to pass on notices or take other steps in relation to leases, including acting as the buyer directs following completion and prior to registration. A properly drafted provision of that nature would not only have required Millcastle to pass on any claim notice but would have permitted Assethold to instruct Millcastle how to respond to it and to take other steps on its behalf.

48. In my view that is the answer to Mr Bates' reliance on the statement in *A1 Properties* at [67] that the "ordinary expectation" is that:

> "persons whose property or contract rights are to be taken away or subject to significant qualification should have a fair opportunity in the course of the procedure to be followed before that occurs to raise any arguments of substance they may have to oppose that outcome."

While that is of course true, the solution for buyers in the position of Assethold lies in their own hands.

49. It is instructive to consider the provision made by the legislation for what the Supreme Court termed "invisible" stakeholders. Section 79(7) provides:

> "Subsection (6) does not require the claim notice to be given to a person who cannot be found or whose identity cannot be ascertained; but if this subsection means that the claim notice is not required to be given to anyone at all, section 85 applies."

Section 85 contains a procedure to apply to the FTT for an order enabling acquisition of the RTM despite the lack of a claim notice.

50. Section 85 applies only if no person can be identified who falls within s.79(6). If any such person can be identified then service on them, if not objected to, can enable the acquisition to proceed without an application to the FTT. This is so even if a person who has not been identified has a real interest in the matter. As Lord Briggs and Lord Sales said in *A1 Properties* at [75]:

> "…Parliament was content to leave those stakeholders who were given claim notices to protect the interests of any invisible stakeholders who might be thought likely to wish to oppose the scheme."

51. This rather underlines the point that it is consistent with the purpose of the legislation that addressees of claim notices will not necessarily include all those with a legitimate interest in scrutinising the proposed acquisition.

52. It could of course be suggested that the existence of s.79(7) would ameliorate the problems that would arise from including equitable owners within the concept of "landlord". However, I am persuaded that it would not do so to a significant degree. In particular, the Supreme Court found the test to be an objective one. The test is not what the RTM company in fact knows, but "whether that stakeholder could or could not be found or identified" ([78]). This reflects the use of the word "cannot" in s.79(7). There may be considerable scope for argument and uncertainty about what due diligence would be required to establish whether an equitable owner "cannot" be found or identified.

53. Mr Bates submitted that we should decide the appeal on a narrow basis by reference to the particular features of Assethold's position, including its actual role in managing the property and the fact that the RTM company was evidently aware of that. The source of that knowledge was not spelt out but a reasonable inference is that the explanation lies in service charge demands: we were shown a service charge demand issued by an agent in 2020 that named Assethold as the "freeholder". (Mr Bates did not seek to address the further difficulty that the tenants' legal relationship may be with the lessee under the headlease, still named on the register as a now-dissolved entity, and not the freeholder.)

54. However, there is no basis for the approach proposed by Mr Bates in the legislation. Section 79(6) covers the categories of person most likely to be affected by a transfer of management, but it neither requires that the persons who must be served include all those who are in fact affected, such as managers under contractual arrangements or invisible stakeholders, nor (as further discussed in *A1 Properties*) is it confined to such persons. "Landlords" who are legal owners may either be involved in management or not, but they are still landlords. Similarly, the concept of "landlord" either does or does not include an equitable owner. There is no basis in the legislation to distinguish between different categories of equitable owner. The same applies to the identically worded costs provision in s.88(1). Other persons have no right to costs, irrespective of their interest in the management of the property.

55. In addition, Mr Bates' suggested approach would only compound the difficulties faced by RTM companies further, because it would require distinctions to be drawn between different types of equitable owner depending (for example) on whether they were a buyer under a completed but unregistered purchase or whether they had been shown to be involved in management, rather than being a beneficiary under some other form of trust arrangement.

56. Since Assethold was not a "landlord" it is equally impossible to treat it as a landlord "jointly" with Millcastle within s.112(5) of the CLRA, as Assethold alternatively argued. In any event s.112(5) clearly refers to co-ownership, where two or more persons are jointly entitled to the same interest, whether as joint tenants or tenants in common. It would neither be a natural use of language, nor consistent with well-understood principles of property law, to describe the different interests of a legal and equitable

owner of property as a joint holding. Nor would such an approach allow either of them to be treated as a "landlord" individually rather than collectively.

57. In conclusion on this issue, therefore, Assethold could not have been a "landlord" at the date of the claim notice because it did not hold a legal interest in the property.

58. In these circumstances it is unnecessary to consider whether Assethold had in fact established equitable ownership given the very limited evidence before the FTT, which Mr Venkatesan submitted did not justify any finding to that effect. I should just note that, in addition to the evidential issues, Ms Gibson properly drew our attention to the existence of a continuing debate about the precise nature of the interest held by a purchaser of a registered estate whose title is as yet unregistered: *Megarry & Wade, The Law of Real Property*, 10th ed. at 6-053, footnote 352.

Was there an estoppel?

59. I have reached a different conclusion to the judge as to whether an estoppel was established in this case.

60. A preliminary point is this. The UT held that there was either estoppel by representation or estoppel by convention. There was no discussion about broader concepts of abuse of process, which can provide a separate basis for a form of estoppel by conduct determined by means of a broad, merits-based assessment: see *Malik v Malik* [2024] EWCA Civ 1323 for a very recent example. There was no Respondent's notice on this point, so the scope of the appeal is confined to whether the UT was wrong to conclude that estoppel by representation or estoppel by convention had been established, and specifically whether the judge fell into error in relation to the requirement in those forms of estoppel for detrimental reliance.

61. Although the focus of this ground of appeal was on detrimental reliance, some context is necessary. The logical starting point is the fact that Assethold had itself represented through its agent that it was the freeholder in the 2020 service charge demand referred to at [53] above. Given the tendency for objections to be raised against RTM proposals on any available ground it is therefore hardly surprising that the claim notice was served on Assethold as well as on Millcastle. If RTM Co had appreciated that a transfer might be pending registration (although there is nothing to indicate that it did at that stage), it might have been concerned that the registration could become effective after the date it checked the register. Or it may simply have adopted a precautionary approach because it did not know whether an entity in Assethold's position might be treated as a landlord even though its name did not appear on the register.

62. The claim notice itself did not name Assethold as a landlord. It was written in a manner that catered for different types of addressee, by saying that "[i]f you are a leaseholder" then the notice was sent for information, and that "[i]f you are either of: the freeholder; a head-lessor; another party required to be served with the claim notice under the lease or by virtue of the act" then the claim notice had been sent on the date specified. I understand Mr Bates' argument that this latter formulation is intended to cater for the fact that qualifying tenants must also be sent copies of a claim notice, rather than being intended to show equivocation as to whether an addressee is within s.79(6). However, the effect is that there was no express representation that Assethold was a landlord, and I do not understand the judge to have concluded that there was. Rather, the judge relied

on the later stage at which proceedings were initiated. I note that this is not easy to reconcile with an award of costs that reflects the initial assessment of the RTM claim as well as the cost of proceedings.

63. Assethold then served a counter-notice. While this equally did not name Assethold as the landlord, it was necessarily implicit in it that Assethold considered that it was entitled to serve it. Counter-notices which challenge the acquisition of the RTM have the important procedural effect of preventing the acquisition from proceeding until they are disposed of. Under s.84(1) a counter-notice can be served by a person given a claim notice "under section 79(6)", not by anyone else. Assethold clearly did not fall within s.79(6)(b) or (c), so in circumstances where it had already represented through its agent that it was the freeholder, the counter-notice must be taken to have amounted to a representation by Assethold to RTM Co that Assethold was entitled to serve it under s.79(6)(a), that is as a landlord. It is worth bearing in mind that Assethold was at that stage, as now, represented by experienced solicitors, whereas RTM Co was unrepresented.

64. The counter-notice had a generic format and did not explain the specific problems with the claim notice. However, it did correctly point out that where a counter-notice is given which challenges the acquisition of the RTM then the acquisition will not proceed unless agreement is reached or the tribunal determines that the acquisition is one to which the RTM company is entitled.

65. In the absence of agreement, this left RTM Co with the options of withdrawing its claim at that stage, pursuing an application to the FTT under s.84(3) for a determination that it was entitled to acquire the RTM, or taking the view (at this stage still without any information as to Assethold's precise status beyond the representation in the service charge demand) that Assethold was not, after all, a landlord despite its provision of a counter-notice. It is not surprising that it chose the second option. It is true that the form it completed in order to do so included Assethold's name and address, and details of its solicitors, in the box marked "Address of Landlord", but it is hard to see what else it could do. In reality it was simply responding to Assethold's own representation of its status and making the application that it was required to make in order to proceed with its claim in the face of Assethold's objection.

66. As far as estoppel by representation is concerned, as Lord Scarman explained in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* [1986] AC 80, 110, its essence is a representation that is intended to induce the person to whom it is made to adopt a course of conduct which results in detriment or loss. More recently, in *Steria Ltd v Hutchinson* [2006] EWCA Civ 1551 at [93] Neuberger LJ described the "classic requirements" as follows (albeit with the qualifier that they were relatively broad brush):

> "(a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise."

67. There must therefore be a causal connection between a representation and the action that causes detriment. Action taken based on an independent belief as to the position will not suffice. The representation must have caused or at least influenced the relevant conduct:

see for example the judgment of Robert Goff J in *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 1 All ER 923, 936.

68. There was no relevant evidence before the FTT or UT on this issue beyond Assethold's engagement in the proceedings. However, it is clear that it was the (professionally advised) Assethold, not RTM Co, which had the knowledge of its status in relation to the property and the position with the Land Registry. It was Assethold which chose to incur costs in considering and responding to the claim notice with a counter-notice, despite not in fact being a landlord, and making it clear that the claim could not proceed further without its objections being resolved. RTM Co merely responded to that by applying to the FTT. It was Assethold that then chose to engage in the FTT proceedings by disputing RTM Co's entitlement, including by providing a statement of case which responded to the objection that Assethold's objections had not been explained and which explained for the first time that registration of the transfer of the freehold title to it was pending.

69. In those circumstances I do not consider that it could properly be concluded on the evidence that the inclusion of Assethold's name on RTM Co's application to the FTT demonstrated an intention to induce Assethold to adopt any particular course of conduct (except perhaps to drop its opposition), or that it was reasonably foreseeable that Assethold would rely on the fact that it was named in the form as the landlord in deciding to incur costs by engaging in the proceedings. There is also no evidence that Assethold did so rely in fact.

70. RTM Co completed the form to initiate proceedings in the face of Assethold's objection rather than, for example, to encourage Assethold to incur costs in maintaining its opposition: RTM Co was obviously trying to get the scheme through. Further, naming Assethold as the landlord could be no more than a statement of RTM Co's understanding of its status, something about which Assethold not only had far more information but which had been the subject of its own representation to RTM Co through its counter-notice. There is nothing to indicate that Assethold engaged in the proceedings for any reason other than its wish to object to RTM Co's proposal, founded on its own independently formed view as to its status, a view which it continues to maintain in this court. There is therefore no basis to conclude that Assethold challenged the acquisition in the FTT because it was named on the form as the landlord. Further, that would not have been a reasonable response on Assethold's part. The necessary causal connection between any representation on the part of RTM Co and the detriment found by the UT of engaging in the proceedings and incurring costs is therefore absent.

71. Assethold gains no assistance from *Free Grammar School of John Lyon v Mayhew* (1997) 29 HLR 719. In that case landlords served a notice under s.25 of the Landlord and Tenant Act 1954 which was not in the prescribed form. The tenant served a counter-notice requesting a new tenancy under s.26, resulting in costs being incurred by the landlords. This court held that, while the s.25 notice was invalid, the judge had been entitled to find that the tenant knew that the wrong form had been used and that by serving the counter-notice he had accepted the validity of the notice, on which the landlords had relied to their detriment. Leggatt LJ dismissed an argument that there was no evidence of reliance because on the facts of that case it was "indisputable that the landlords relied on the section 25 notice, and that they relied on nothing else" (p.724). Further, as Leggatt LJ went on to explain they had refrained from serving a new notice in the correct

form in reliance on the tenant's representation. In contrast, in this case reliance has not been established.

72. The alternative of estoppel by convention is similarly problematic. In *Tinkler v Revenue and Customs Comrs* [2021] UKSC 39, [2022] AC 886 at [45]-[53], Lord Burrows approved Briggs J's statement of the law of estoppel by convention in non-contractual dealings in *Revenue and Customs Comrs v Benchdollar Ltd* [2009] EWHC 1310 (Ch), [2010] 1 All ER 174 at [52]:

> "In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings … are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

The only caveat added to this by Lord Burrows was to amend principle (i) to clarify the need for conduct to have "crossed the line".

73. Lord Burrows went on to say this:

> "51. It may be helpful if I explain in my own words the important ideas that lie behind the first three principles of *Benchdollar*. Those ideas are as follows. The person raising the estoppel (who I shall refer to as "C") must know that the person against whom the estoppel is raised (who I shall refer to as "D") shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption.
>
> 52. It will be apparent from that explanation of the ideas underpinning the first three *Benchdollar* principles that C must rely to some extent on D's affirmation of the common assumption and D must (objectively) intend or expect that reliance…"

74. This is very far from the present case. Even assuming there was a shared assumption which "crossed the line" to the effect that Assethold was a landlord, the chronology does not support any assumption of responsibility by RTM Co in the sense described in Briggs J's principle (ii), or any reliance by Assethold on a common assumption rather than its own view of the matter within principle (iii). RTM Co was responding to Assethold's

own representations as to its status. It was Assethold, not RTM Co, that was in possession of the true facts and put itself forward as the freeholder.

75. In these circumstances there is no need to address Mr Venkatesan's further arguments that it is unclear from the UT decision whether the representation said to exist was that Assethold was a landlord for CLRA purposes generally or solely for the purposes of s.88, that no representation of the latter kind was given and that "reading down" a broader representation was not possible (*NRAM plc v McAdam* [2015] EWCA Civ 751, [2016] Bus LR 232 at [55]).

Grounds (1) and (2), and Benedictus v Jalaram

76. My conclusions on the Respondent's notice and ground (3) of the appeal mean that it is unnecessary to decide the other grounds of appeal. They raise a difficult question as to whether the statutory costs regime in s.88 permits an estoppel as to whether a person is a landlord or whether, as Mr Venkatesan submitted, that issue is a matter of statutory construction only, with the FTT's jurisdiction to determine the amount of costs due in the event of a dispute being incapable of being enlarged by agreement or estoppel. Mr Venkatesan relied on *Essex County Council v Essex Incorporated Congregational Church Union* [1963] AC 808, *Secretary of State for Employment v Globe Elastic Thread Co Ltd* [1980] AC 506 and *Dutton v Sneyd Bycars Co Ltd* [1920] 1 KB 414 to argue that the issue went to the FTT's jurisdiction, which could not be enlarged. Mr Bates rested his case in opposition to this on the later Court of Appeal decision of Stocker and Bingham LJJ in *Benedictus v Jalaram*, one of the cases relied on by the UT (see [24] above). *Benedictus v Jalaram* is not a straightforward decision, but it illustrates that the distinction between what is jurisdictional and what is not is not easy to apply. It would be preferable to leave a decision on that issue to a case where the result matters.

77. I should however address one aspect of *Benedictus v Jalaram*, which is Mr Bates' submission that it demonstrates that an estoppel by convention can arise simply from the pleadings in a case. The point arose because tenants had sought a new tenancy under s.26 of the Landlord and Tenant Act 1954, which they could only do if they were at that time in occupation of the premises. In response to this the landlords applied for interim rent, as the tenants knew they would. Some years later the tenants sought to challenge the landlords' claim for rent by maintaining that they had not in fact been in occupation. The judge struck that challenge out as an abuse of process.

78. On the issue of estoppel by convention, Stocker LJ accepted at p.341 that the matters reflected in the pleadings were capable of establishing an estoppel by convention and that estoppel was established. But this was subject to the caveat that he was not willing to reach a conclusion on the facts due to the unlikely possibility, which could have been addressed by evidence, that the landlords in fact knew that the tenants were not in occupation. Bingham LJ made a similar point at pp.343-344, but expressly noting the requirement for proof of reliance and observing that he was inclined to think that the judge was wrong to find for the landlords "in reliance simply on the documents before him".

79. The *ratio* of the case was that the judge's conclusion that there was an abuse of process was upheld, because the tenants could not approbate and reprobate. So the comments about estoppel by convention are strictly *obiter*. But it is notable that their Lordships were unwilling to conclude that an estoppel was established by the documents in the

absence of oral evidence. The facts of *Benedictus v Jalaram* were extreme. The persons alleged to be estopped were obviously aware of whether they had been in occupation, whereas in this case it was Assethold and not RTM Co that would have had the best understanding of its position. The need for evidence of reliance is accordingly even clearer in this case.

Conclusion

80. In conclusion, I would allow the appeal. The FTT reached the correct conclusion that Assethold was not entitled to recover costs under s.88 of the CLRA.

Lord Justice Nugee:

81. I agree.

Lady Justice King:

82. I also agree.