IN THE HIGH COURT OF JUSTICE **Claim No.9 TR 90003**

QUEEN'S BENCH DIVISION

TRURO DISTRICT REGISTRY

BETWEEN

DENNIS PHILLPS and ROYNA GODDARD

(suing on behalf of themselves and other owners of 97 Holiday Chalets at Point Curlew, St. Merryn, Padstow, Cornwall)

Claimants

and

(1)
MARTIN FRANCIS (2)

REBEKAH KATHERINE FRANCIS

Defendants

Mr Rawdon Crozier for the Claimant
Mr John Virgo for the Defendant
Hearing date: 3rd March 2010

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Judgment

[I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.]

1. This is a dispute between the freehold owners and estate managers of a site at Point Curlew, St Merryn, Padstow, Cornwall, the defendants, and a number of the owners of holiday chalets at that site. The dispute relates to the service charges which the defendants seek to claim under the terms of the various 999 year leases which the claimants have. I am invited to determine, as a preliminary issue, whether the matter is properly before me sitting as a deputy judge of the High Court of Justice or whether the matter is governed by the provisions of sections 18 to 30 of the Landlord and Tenant Act 1985, as amended by the Landlord and Tenant Act 1987, in which event, as a result of amendments made by the Housing Act 1996, disputes over service charges should be addressed to a Leasehold Valuation Tribunal from whose decisions an appeal lies to the Lands Tribunal.

2. The proceedings were issued in the High Court of Justice in the first place because the initial relief sought by the claimants was an injunction against the defendants preventing forfeiture of the leases because of non-payment of the service charges which the various claimants were challenging.

3. It is the claimants' case that there is concurrent jurisdiction both before a Leasehold Valuation Tribunal and the normal courts. Their reason for so asserting is because of the provisions of section 27A of the 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002 , which provides at subsection 1 as follows:

> "(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to --
> (a) the person by whom it is payable,
> (b) the person to whom it is payable,
> (c) the amount which is payable,
> (d) the date at or by which it is payable, and
> (e) the manner in which it is payable."

4. The submission made by Mr Rawdon Crozier, for the claimants, is that the use of the word "may" indicates that the jurisdiction of a leasehold valuation tribunal is concurrent with that of the ordinary courts of law. He referred me also to subsection (7) of section 27A which provides:

> "(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of the court in respect of the matter."

5. Mr John Virgo, for the defendants, submitted that where a leasehold valuation tribunal had jurisdiction under the provisions of the statute to resolve disputes about service charges that jurisdiction was exclusive. He submitted that the ordinary courts of law retained jurisdiction to deal with those matters that were specifically so provided for by the legislation.

6. If Mr Crozier is right that does mean that the present application is a rather sterile and academic exercise. He has issued this application on the

claimant's behalf in the High Court, and if he is right that the jurisdiction of the High Court is concurrent with that of a leasehold valuation tribunal the court could continue with the hearing even though the matter could be referred to a leasehold valuation tribunal. It would however no doubt be of assistance to know at the main hearing whether or not the restrictions and limitations imposed by the statutory provisions apply. So far as Mr Virgo's position is concerned, he argues on behalf of the defendants that the provisions of the 1985 Act, as amended, do not apply to the service charges which his clients seek to impose and therefore the dispute is one properly determined by the ordinary courts of law and is not one in which a leasehold valuation tribunal has any jurisdiction.

7. In my judgment if Parliament had intended to provide for the exclusive jurisdiction in this area of a leasehold valuation tribunal it would have used far clearer language than it has in fact adopted in the wording of section 27A. I find that the use of the word "may" does mean that in those cases where a leasehold valuation tribunal does have jurisdiction it is a jurisdiction which is concurrent with that of the ordinary courts. No doubt it would be more convenient in the great majority of cases for such disputes to be canvassed before a tribunal which is expert at trying such issues. But I can see no reason why, in an appropriate case which is otherwise before one of the normal courts of law, the provisions relating to service charges contained in sections 18 to 30 should not be resolved by such a court.

8. I turn therefore to the principal issue that has been debated before the court namely whether or not the provisions contained in sections 18 to 30 of the Landlord and Tenant Act 1985, as amended, can apply to the leases of the holiday chalets in this case. Both Mr Crozier and Mr Virgo are agreed that the resolution of this issue depends upon the meaning of the word "dwelling".

9. The contention advanced by Mr Crozier on behalf of the claimants is that the word "dwelling" should be given its ordinary and natural meaning,

namely that a dwelling is where someone resides and that it is sufficient for such premises to come within the purview of the Act if they are residential premises, as distinct from business premises. The meaning does not connote it being a principal residence. It is quite wide enough to encompass a holiday home. He submitted that the 1985 Act, as originally enacted, afforded this protection in relation to service charges to tenants of “flats”. The amendment to section 18(1) of the 1985 Act by the 1987 Act which substituted the word "dwelling" for "flat", thus extended its operation to tenants of dwellings. He submitted that the legislative purpose of the amendment brought about by the 1987 Act was to extend the protection afforded to dwellers in flats in relation to service charges to all dwellings in order to prevent abuses of service charges by landlords: there was no reason to think that abuses were less likely in the case of dwellings which were holiday homes, indeed given that holiday homes were not lived in full time, the potential for abuse by landlords was greater. He submitted that by confining the word "dwelling" to meaning "primary home" that involved cutting down the ordinary natural meaning of the word and that this involved an infringement of "Lord Wensleydale's golden rule" of statutory construction, which, per Lord Simon of Glaisdale in S*tock v Frank Jones (Tipton) Ltd* [1978] 1WLR 231, provided as follows:

> "[Y]ou are to apply statutory words and phrases according to their natural and ordinary meaning without addition or subtraction, unless that meaning produces injustice, absurdity, an anomaly or contradiction, in which case you may modify the natural and ordinary meaning so as to *sort out[?]* such injustice etc but no further."

10. He referred me to two particular cases where the provisions had been considered, namely *Heron Maple House Ltd v Central Estates Ltd* [2002] 1EGLR 35, a decision of Judge Cooke sitting at Central London County Court, and *Ruddy v Oakfirm Properties Ltd* [2007] 3 WLR 524, a decision of the Court of Appeal where Jonathan Parker LJ gave the main judgment. Both cases were concerned with the position of mesne landlords in relation to buildings which included a number separately let flats. The legislative

history was considered: the case of *Horford Investments Ltd v Lambert* [1976] Ch 39, where the Court of Appeal had held that the policy of the Rent Acts was to protect the tenant in his home, whether the threat was to extort a premium for the grant or renewal of his tenancy, to increase his rent, or to evict him. It was not a policy for the protection of an entrepreneur whose interest was exclusively commercial, that is to say, to obtain from his tenants a greater rental income in the rent he had contracted to pay his landlord. Both Judge Cooke and Jonathan Parker LJ considered anomalies that would arise which ever way they resolved the issues before deciding in both cases that the *Horford* case was to be distinguished and that mesne landlords were entitled to the protection of the 1985 legislation, as amended. Judge Cooke noted that it seemed likely that the amendment to the 1985 Act to extend its provisions to dwellings was because of the imposition of service charges following the sale of council houses. It is pertinent to set out paragraph 78 from the judgment of Jonathan Parker LJ which was as follows:

> "I also reject the suggestion that there is any significant relationship between the service charge provisions and the Rent Acts. As the judgments in the *Horford Investments* case [1976) Ch 39 make clear ... the decision in that case was materially influenced by the underlying policy of the Rent Acts. The policy underlying the service charge provisions in the 1985 Act and earlier Acts is, however, a different policy in that its emphasis is not so much on protecting the tenant in his home as on providing him with a way of challenging unreasonable charges sought to be levied by his landlord. I can, for my part, see no reason why the policy considerations which led this court in the *Horford Investments* case to decide that a tenancy of a block of flats is not within the protection of the Rent Acts should lead to the conclusion that a tenant of a flat in a block who happens also to be a tenant of another flat (or flats) in the same block, and/or of the common parts in the building, is not, for that reason, within the protection of the service charge provisions. …"

11. He invited me not to follow the decision of George Bartlett QC, President of the Lands Tribunal, in *King v Udlaw* (2008) L & TR 28, (2008) 20 EG 138, where there had come up for decision precisely the same question that I am called upon to resolve namely whether the protection afforded to a tenant of a dwelling under the provisions of sections 18 to 30 of the Landlord and Tenant Act 1985, as amended, extended to tenants of holiday chalets. Although both sides accepted that that decision is not binding

upon me I consider it fully below.

12. The submission by Mr Virgo on behalf of the defendants was that the 1985 Act and the 1987 Act provided protection for tenants in their homes: that the word "dwelling" connoted the place where someone resided as their home: by definition that could not extend to a place that could not be dwelt in full-time such as a holiday home. He argued that it was a basic tenet of the common law that there should be freedom of contract and that parties should be free to enter into such contracts as they might wish and on such terms as they might choose and that in so far as a statute might purport to restrict freedom of contract it should be construed restrictively so as to limit the extent to which such freedom might be curtailed only so far as was a clear and necessary construction of the statute. He referred me to the legislative history of the statutory provisions: he reminded me that they emanated from two separate statutory regimes, namely on the one hand the Rent Acts and on the other the Housing Acts. The purpose of the Rent Acts had been to prevent landlords abusing their market power in relation to the provision of accommodation. The Housing Acts applied to council houses occupied by tenants as their principle home. Under the ‘right to buy provisions’ a tenant who occupied such a dwelling as his principle home was given the right to buy it. Such properties had service charge restrictions, as set out at sections 45 to 51 of the Housing Act 1985. In 1987 those provisions were repealed and replaced by the amended provisions at sections 18 to 30 of the Landlord and Tenant Act 1985. He submitted that the that the substitution of the word "dwelling" for "flat" in section 18 strongly implied that the home occupancy definition of dwelling was simply being carried across and to be understood in the same way.

13. He drew to my attention that all the leases of the claimants’ properties in the instant case expressly limited their use to that of a holiday chalets: indeed it restricted their use to a specified period of the year: he argued that it was therefore plain that these properties could not be used by the tenants as their primary accommodation and that essentially the terms of the leases were defining a use more akin to business use. He cited by way

of example leases of business premises such as a retail complex, with a number of retail outlets which were all required to enter into leases in substantially the same terms: no one would suggest that this statutory framework could apply to such leases. He argued by way of analogy that the leases of these holiday chalets were effectively equivalent to those of such retail outlets and that therefore they fell outside the ambit of the 1985/87 legislation.

14. Mr Virgo drew attention to the fact that in *Heron Maple House Ltd v Central Estates Ltd* [2002] 1EGLR 35, and *Ruddy v Oakfirm Properties Ltd* [2007] 3 WLR 524 the tenancies did relate to dwellings and that were being used as principle homes. He submitted that *King v Udlaw* was correctly decided: the units were only to be used for the purposes of a holiday under the terms of the leases: they were subject to similar planning restrictions and one could not in ordinary parlance described the units as dwellings. The decision fitted in with the policy behind the Rent Acts and the Housing Acts which were not intended to provide protection for commercial and quasi commercial type operations such as holiday parks. These types of premises were not intended as permanent homes, not least for the burden which they would otherwise impose on the local infrastructure: they were to be seen as commercial operations and restricted to non-permanent use. There was a clear distinction to be drawn between seasonal occupancy and occupation of dwelling as a home.

15. I was told that there is no binding authority which determined this issue. I was however referred to the case of *King v Udlaw* (2008) L & TR 28, (2008) 20 EG 138, where the President of the Lands Tribunal held specifically that the service charge provisions in the Landlord and Tenant Act 1985, as amended by the 1987 Act, did not apply to holiday chalets and a number of more recent decisions of rent assessment panels where precisely the same issue had arisen for consideration and it was held that the service charge provisions did apply and that *King v Udlaw* had been wrongly decided. See *Glendorgle Tenants Association v Blue Chip Hotels Ltd (2008) RPTS* (Southern Rent Assessment Panel) RAC 9 June 2008,

Kingsdown Park Chalets Owners Association (2009) RPTS (Southern Rent Assessment Panel) RAC 25th of August 2009 and *Lee Cliff Park RTM Co Ltd v Parmigiani* (Southern Rent Assessment Panel) LVT 24 November 2009.

16. I turn therefore to the case of *King v Udlaw* (2008) L & TR 28, (2008) 20 EG 138, the decision of Mr George Bartlett QC, the President of the Lands Tribunal. As noted above he had to consider precisely the same issue as arises in the present case. Although that decision is not binding upon this court it is nevertheless a decision by a tribunal well versed in this area of law and therefore one that commands considerable respect. The appellants held 99 year leases of holiday bungalows in a holiday park that was owned by the respondent. They were liable under the terms of their leases to pay an annual contribution towards the respondents' costs of maintaining the park and providing services. Although each bungalow possessed all the amenities necessary for residential accommodation, planning permission had been granted for their use as holiday dwellings only and prohibited use as permanent residential accommodation. The appellants applied to a leasehold valuation tribunal, under section 27 A of the 1985 Act, as amended, for a determination of their liability to pay service charges to the respondent. That tribunal determined that it had no jurisdiction to deal with the application since the charges in question were not payable by a tenant of a "dwelling", within the meaning of section 18 (1) of the At. It found that restriction prevented the bungalows from being dwellings for those purposes. That decision was upheld by the President of the Lands Tribunal on appeal.

17. Counsel for the appellants had referred to the statutory definition of dwelling in section 38 of the Act as:

> "A building or part of the building occupied or intended to be occupied as a separate dwelling together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it"

18. He contrasted that definition with the definition in section 16 (b) of the 1985 Act:

> "Lease of a dwelling house" means a lease by which a building or part of the building is let wholly or mainly as a private residence, and "dwelling house" means that building or part of a building.

19. He referred to cases under the planning legislation and submitted that the amendments to the Act ought not to be construed narrowly so as to exclude holiday accommodation.

20. Counsel for the respondent referred to a number of authorities dealing with the meaning of the word "dwelling" including *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 AC 301, *Caradon District Council v Paton* [2003] 3EGLR 57 and C*url v Angelo* [1948] 2 All ER189. He submitted that the policy behind sections 18 to 30 of the 1985 Act was to prevent unreasonable demands from being forced against tenants and, as a set of restrictions on the contractual autonomy of the parties, they ought to be given a narrow construction. If there was no imperative in the Act for saying that "dwelling" meant more than the tenant's principal, settled and central home, then no wider a construction should be adopted. The policy of the Act was to protect the interests of tenants in their homes.

21. The President described the point in issue as a narrow one. He referred to the consideration given to the meaning of "dwelling house" in a number of the cases decided under the planning legislation including *Gravesham Borough Council v Secretary of State of the Environment* (1982) 47 P & CR 142, and *Moore v Sec of State of the Environment* (1999) 70 7 P&CR 114, (where the Court of Appeal endorsed McCullough J's approach that before a building could be described as a dwelling house it must be occupied as the permanent home of one or more persons or the like), *Bloomfield v Secretary of State for the Environment, Transport and the Regions* [1999] EWHC 217 (Admin). He contrasted these with the authorities decided under the housing and rent restriction legislation, where the policy behind the legislation had been particularly relied on for

the purpose of construing "dwelling" and "dwelling house". He referred to *Skinner v Geary* [1931] 2 KB 546, *Haskins v Lewis* [1931] 2 KB 1, C*url v Angelo* [1948] 2 All ER189, *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1AC 301 and *Caradon District Council v The Paton* [2003] 3EGLR 57. In his judgement he then continued at paragraph 21:

> "The basic distinction between these two sets of authorities is that in some statutory contexts "dwelling" may imply use as a home, whereas in others there is no such implication. It is a matter therefore, of examining the statutory context and the policy behind the statutory provisions in order to see whether "dwelling" is used with or without the implication of use as a home."

22. The President then analysed the statutory history of the legislation, comparing it with be analogous provisions of the Housing Act 1985. He referred to counsel for the appellant's argument that the amendments made by the 1987 Act were intended to widen the scope of the protection conferred by sections 18 to 30, in particular by applying them to the houses that had been the subject of similar provisions under the Housing Act 1985: that the definition of "house" in that Act was a wide one and not confined to a dwelling used as a home, arguing that in widening the scope of the protection conferred by those sections, Parliament had done so by using the term "dwelling", as already defined in section 38, rather than "dwelling house", as defined in section 16, where the qualifying words "let as a private residence" appeared. He dealt with this argument by stating "I do not think that any clear conclusions can be drawn from this sort of examination. Indeed, there is an obvious contrary argument, which is set out at paragraph 26 of his judgment. He continued, at paragraph 27, as follows:

> "My conclusion, however, is that the answer to the point in issue is to be derived not from an examination of the detail of a language used in the provisions and the changes that have been made to them, but from a more general consideration. It is clear from Uratemp that "dwelling", where it appears in legislation conferring protection on tenants, will convey its ordinary meaning of the occupiers' home unless there is something that suggests that it should not be so limited. I can see nothing that would suggest that, in respect of sections 18 to 30, the protection conferred should be extended to premises that are not a person's home. It goes without saying that the planning cases, concerned as they are with legislation in a quite different field, provide no assistance.

23. He then analysed the Court of Appeal decision of *Ruddy v Oakfern Properties Ltd* [2006] EWCA Civ 1389, [2007] Ch 335 to which I have referred above when setting out Mr Crozier's submissions, before concluding:

> "My conclusion, therefore, is that the LVT was right. There is no reason to give to the word "dwelling", as it applies to sections 18 to 30, any meaning other than the one it ordinary bears in legislation giving protection to tenants. It imports a requirement that the dwelling should be occupied as a home and it is therefore excludes from the operation of sections 18 to 30 these holiday bungalows because of their use is restricted to providing holiday accommodation. The appeal is dismissed."

24. Mr Virgo asserted that the apparently conflicting decisions from the rent assessment committees could be explicable on their particular facts. In the *Glendorgle* case the units could have potentially been correctly construed as dwellings where one could cook, eat and sleep: there was no restriction in the lease preventing it is being used as a principal dwelling. The only restriction was contained in the planning controls. There was therefore no reason to deny the parties the contractual provisions which they had agreed. He submitted that if the decision went wider then it was wrongly decided. Similarly the *Parmigiani* case on its particular facts was correctly decided. He submitted that the *Kingsdown* decision did not help as it had been based on a concession that there could be could residence "for eight months of the year": there had not been full argument on the point.

25. In my judgment it is significant that the definition contained in section 38 of the Landlord and Tenant Act 1985 defines "dwelling" as "a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it". The definition does not confine the use of the word to a principal home. In common parlance one regularly talks about a "holiday home". There seems to be absolutely no reason why someone cannot have two or more homes. The legislative history may well be interesting but the 1987 Act does not purport to be a "consolidation statute". If it had been, then of course the original meaning would have been carried over into the new consolidated legislation. Parliament has

chosen to definition of “dwelling” in the Landlord & Tenant Act 1985 and has not adopted that from the Housing Act: the Landlord & Tenant Act defionition is specifically not limited to defining “dwelling” as a main home. Following the guidance of the House of Lords in *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 AC 301which makes it clear that the meaning to be attached to the word “dwelling”is very much context specific I find that the word is not limited to use of a main home as a private residence.

26. It may well be, as Mr Virgo pointed out, that the exclusion of holiday lettings from landlord and tenant legislative protection is not in any sense novel: see section 9 of the Rent Act 1977 and section 1 (2) and Schedule 1, paragraph 9 of the Housing Act 1988. Plainly it would be inappropriate for there to be security of tenure for someone taking a lease of holiday accommodation. But in my judgment that does not undermine another principle about which Parliament has been concerned namely that unscrupulous landlords should not be able to exploit tenants who are required to contribute to the management costs of an estate. Judge Cooke in the *Heron Maple House* case referred to the chequered history of service charges. He noted that the service charge is a very necessary instrument where blocks of property are let on leases but are managed together and have common services: but he noted also that the casebooks are full of examples where this necessary and beneficial institution has been subject to abuse: repairs done by companies owned by of the landlord, landlords business expenses tacked on to the service charge, in some cases frankly dishonest overcharging, and in other cases a complete lack of particularity as to what the charge covered. He stated therefore that Parliament had intervened on a number of occasions to provide a regime that protects the residential tenant, noting that none of the legislation applied to lettings of premises that were not residential premises. Although no doubt some of the chalets are owned by people or businesses to let out on short term holiday lets, it is apparent that many of them are used by the lessees as second homes or holiday homes where they spend considerable time. Such tenants are every bit as much deserving of being protected from

unscrupulous landlords as are tenants of accommodation which is their primary home. The fact that some of the tenants may not be as deserving of protection because their status is primarily a commercial one is not a reason for depriving all the tenants of appropriate protection.

27. In my judgment the correct approach therefore is, as Mr Crozier submitted, to apply the normal rules of statutory construction, namely that the words in the statute are to be according to their natural and ordinary meaning without addition or subtraction unless that meaning produces injustice, absurdity, anomaly or contradiction. Whilst, as pointed out in argument there will be some anomalies whichever decision is preferred, I agree with Mr Crozier that it is appropriate to have regard to what Jonathan Parker LJ said at paragraph 78 in *Ruddy v Oakfern Properties Ltd* [2007] 3 WLR 524 at page 540, namely that the policy underlying the service charge provisions in the 1985 Act and earlier acts is a different policy from the underlying policy of the Rent Acts in that its emphasis is not so much on protecting the tenant in his home as on providing him with a way of challenging unreasonable charges sought by his landlord. The policy reasons which justify a restriction on freedom of contract in my judgement apply just as much to leaseholders of holiday chalets as they apply to tenants of large blocks of flats. The fact that Parliament may not have intervened to restrict the freedom of contract in relation to the tenants of retail units in a shopping development does not, in my judgement, compel the court to align tenants of holiday chalets with tenants of commercial properties. In most instances the bargaining power of the latter will be much closer to that of the landlord than will be the case in relation to the bargaining power of the tenant of a single holiday chalets. For that reason, if no other, an appropriate distinction can be drawn between them.

28. On this preliminary issue therefore I determine that the provisions of sections 18 to 30 of the Landlord and Tenant Act 1985, as amended, will apply to the service charges which the landlords seek to impose.