Agnew does not enlarge on this type of situation: it is true that the decision applies to "book debts", but book debts are contractual. Therefore financial markets may still be back to the making of fine and uncertain distinctions about the degree of bank account blocking which is enough to prevent a charge from being a floating charge.

It would perhaps have been possible to have it both ways, *i.e.* to preserve the Crown and crew priority for book debts and also to maintain the specific charge, if it were admitted that the right to deal is not the only badge of the floater—there is another badge, *i.e.* it is a charge over a generic class of assets which are not specifically and individually identified. But reintroducing the doctrine of specificity back into the law of security interests is unattractive.

The irony is that the Crown preference is about to go and that *Agnew* is now irrelevant in New Zealand, which has overhauled its personal property security on the lines of the US and most Canadian provinces. England should consider doing the same, but even these personal property security statutes need a radical re-think.

PHILIP R. WOOD

SHAMS, PRETENCES, SUBTERFUGES AND DEVICES

THE statutory security of tenure conferred upon the tenants of private residential property has long been (to mix two metaphors) a fertile battle ground, with landlords and their legal advisers showing great ingenuity in devising agreements designed to circumvent the provisions of the legislation. Most famously, of course, there was the loophole of disguising the lease as a mere licence to occupy, which was effectively closed off by the House of Lords in *Street* v. *Mountford* [1985] A.C. 809. It is perhaps surprising that although security of tenure was first introduced as long ago as 1920, landlords are still able to come up with new devices in the attempt to ensure that they can regain possession of their property whenever they wish. One such device was the recent subject of consideration by the Court of Appeal in *Bankway Properties Ltd.* v. *Pensfold-Dunsford* [2001] 1 W.L.R. 1369.

The plan was disconcertingly simple. The original landlord (a company by the name of Artesian Competitor plc) granted to the appellants, Mr. Pensfold-Dunsford and Mr. Leech, what was expressly stated to be an assured tenancy made pursuant to the

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Housing Act 1988. The tenancy was to run for an initial period of one year from 15 February 1994, being intended thereafter to continue from year to year, with the tenants apparently enjoying indefinite statutory protection. The initial rent was £4,680 *per annum*, payable by monthly instalments of £390, but the lease contained a rent review clause entitling the landlord to increase the rent annually by the rate of inflation, by 10%, or to the current open market rent, whichever was the greater. To this wholly unexceptional rent review provision, however, was added the stipulation that as from 11 February 1996 the rent was to rise to £25,000 *per annum*. This figure was presumably chosen as being the maximum rent permissible under an assured tenancy (Housing Act 1988, Schedule 1, para. 2(1)), but it was clearly a wholly unrealistic rent for what was an ordinary, small flat in Brighton. It was also quite obviously well beyond the means of the tenants, who were known by the landlord to be reliant upon housing benefit. Thus the landlord purported to reserve the right, as from a date less than two years after the grant of the tenancy, to increase the rent to a figure which would make it impossible for the tenants to afford to remain in possession of the property. In all probability they would be expected to exercise their express right to terminate the tenancy by giving 14 days' notice; failing this, the landlord would be able to seek a mandatory order for possession under Ground 8 (Housing Act 1988, Schedule 2) on the basis of the rent arrears which would surely quite quickly ensue. It looked like a simple and foolproof mechanism for circumventing the long term security of tenure which is the usual concomitant of an assured tenancy.

His Honour Judge Kennedy Q.C. in the Brighton County Court certainly thought so. When Bankway Properties took over the reversion and exercised the controversial rent review power, and the tenants inevitably fell into arrears, the judge granted possession of the flat and gave judgment for outstanding rent in excess of £12,000. The tenants appealed.

This was not an example of a "sham" as defined by Diplock L.J. in *Snook* v. *West Riding Investments Ltd.* [1967] 2 Q.B. 786, where both parties have a common intention of misleading third parties or the court by creating rights and obligations other than those which the document appears to suggest. The tenants had never read the lease and were unaware of the contested clause, so could not be said to have shared such a common intention. The judge at first instance also distinguished the present situation from the kind of "pretence" outlined by Lord Templeman in *Antoniades* v. *Villiers* [1990] 1 A.C. 417. In that case the landlord had never really intended to exercise the purported power to introduce

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additional occupiers to share a one-bedroomed flat with the tenant couple, whereas here the rent review provision was intended for use and was used. Rather than a sham or pretence, the judge described it as being an unconcealed and open "device", allowing the landlord legitimately to acquire possession within the terms of the Housing Act. In the Court of Appeal Pill L.J. agreed that the rent review clause was a device, and not a "subterfuge" involving an element of disguise. Arden L.J. also adopted the term "device", although she did see the clause as entailing some form of deception, with what was masquerading as a provision for increase of rent being in substance an attempt to reserve a right to obtain possession effectively on notice. Whatever the terminology, both members of the Court of Appeal then parted company with Judge Kennedy by ruling the device to be impermissible and allowing the tenants' appeal.

An argument that the rent review clause had never been effectively incorporated into the tenancy agreement was summarily rejected by both Arden and Pill L.JJ. The appellants had signed the lease, and although they had never read the document, the landlords had done sufficient to draw the disputed clause to their attention and they were bound by it.

The ground upon which Pill L.J. struck down the rent review provision was that of inconsistency. The lease indicated expressly that it was creating an assured tenancy, a form of tenure to which Parliament has accorded long-term security for the tenant; moreover, all the other terms of the agreement contemplated a lengthy tenancy. The main purpose of the agreement was thus to give rise to an assured tenancy enjoying the protection of the Housing Act 1988; a clause allowing the landlord to increase the rent to a manifestly unaffordable level and thereby to regain possession within two years of the grant of the lease was, in his Lordship's judgment, inconsistent with and repugnant to that purpose.

Arden L.J. allowed the appeal not only on the basis of inconsistency but also on the ground (which she saw as closely related) that this was an improper attempt to evade the mandatory framework for security of tenure laid down for assured tenancies by the legislature. The Housing Act clearly contemplates that an assured tenant who pays the rent genuinely reserved in the lease should not be deprived of possession. The rent review clause in this agreement, her Ladyship ruled, had the effect of preventing the tenants from paying the real rent "by a provision for payment of a sum which was never expected to be paid and which [was] not on

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its true analysis rent at all" (p. 1384). It therefore offended against the scheme of the Housing Act and was unenforceable.

The Court's laudable willingness to scrutinise attempted evasion of statutory protection may however prove to be of limited lasting value, at least as far as the security of residential tenants is concerned. The context in which the lease was granted to Mr. Pensfold-Dunsford and Mr. Leech has subsequently changed. The reason why the original landlord in this case chose to grant an assured tenancy, rather than the more flexible assured shorthold tenancy which could at that time have been created upon service of notice, was in order to take advantage of the tax benefits of the Business Expansion Scheme, which has since been discontinued. Moreover, any tenancy of a dwelling-house granted on or after 28 February 1997 will take the form of an assured shorthold tenancy unless the agreement stipulates otherwise; under such a tenancy the landlord has the right to obtain possession simply by giving two months' notice (Housing Act 1988, s. 21). The Court of Appeal may have shut a stable door, but Parliament has meanwhile dismantled the greater part of the stable.

ROSY THORNTON

FRAUD, TRUSTS AND EQUITIES

MR. and Mrs. Collings were the unremarkable registered proprietors of their house, until they had the misfortune to deal with Mr. Lee. Lee purported to act for them in finding a purchaser for the house, and he found a Mr. Styles. Mr. and Mrs. Collings then executed a transfer of the house to Styles in consideration of £250,000, but "Styles" was simply an alias used by Lee, and no part of the £250,000 was ever paid to them. The net result, therefore, was that Lee fraudulently procured the transfer of the house from Mr. and Mrs. Collings to himself, for no consideration. Once registered as proprietor of the house, Lee mortgaged it to the Leeds Permanent Building Society and took the mortgage proceeds. Mr. and Mrs. Collings remained in actual occupation of the house throughout. When Lee's fraud came to light, Mrs. Collings sought rectification of the register, to reinstate her as proprietor of the house free of the mortgage. (Her husband had died in the meantime, and she had acquired his rights by survivorship.) The Court of Appeal upheld her claim: *Collings* v. *Lee* [2001] 2 All E.R. 332.

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