SHEPHERD+ WEDDERBURN

PROPERTY DISPUTES UPDATE

Winter 2016



In our Winter update, we report on the long running M&S break notice case now that the Supreme Court has handed down its judgment. We then give an update on the onerous new requirements for landlords which come into force under the Immigration Act 2014 and look at a trio of recent decisions ranging from the European Court ruling on non-compete covenants to what constitutes a "tree" for the purposes of a Tree Preservation Order. Finally, we invite you to our London breakfast seminar on Cyber Crime on 10 February 2016.

The Marks and Spencer break clause saga

In December 2015 the Supreme Court finally handed down its unanimous judgment in the long running Marks and Spencer break clause case. The question for their lordships was whether a term could be implied when the tenant exercised a break option to terminate its lease part way through a quarter to the effect that the landlord had to refund the proportion of rent paid in advance for the remaining unused period of the quarter.

A break notice was served by the tenant of the third floor of The Point in Paddington Basin, London in accordance with the six months' notice period required by the lease, terminating the lease on 24 January 2012, and the lease duly ended on that date. In February 2012, the tenant claimed a refund of the rent, insurance charge, car parking licence fee and service charge that it had paid in advance according to the terms of the lease but which related to the unused period after the break date. There was no express term in the lease entitling the tenant to such a refund. It was the tenant's assertion that there was an implied term, however, that if the lease were terminated on 24 January 2012 the landlord would repay monies relating to the period after the break date.

The Supreme Court, led by Lord Neuberger, agreed with the Court of Appeal and held that the court should not imply a term into the lease that allowed the tenant a refund of sums it had paid in advance in accordance with the express provisions of the lease. The court stressed that for a term to be implied into a contract it must either be necessary for business efficacy or so obvious that it goes without saying. The result of this decision may be greater certainty when it comes to the interpretation of leases, or any contract for that matter, but this may sometimes be at the expense of a fair result. Tenants would be well advised to negotiate express wording in their leases to entitle them to a refund if they have a break option.

Case: *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited [2015] UKSC 72*

Action Required: Tenants' Right to Rent

On 1 February 2016 new requirements for landlords will come into force under the Immigration Act 2014. These will apply to tenancies starting on or after 1 February 2016. To find out whether someone can legally rent private residential property in England it will be necessary to check any person over the age of 18 who will be living in the property as their only or main home. This applies to lodgers in private households as well as tenants in rented accommodation. Checks need to be carried out within 28 days before the start of a new tenancy and apply whether an individual is named under the tenancy or not.

Amendments have been made as regards the types of documents landlords and agents should obtain when carrying out right to rent checks. These documents are set out in the Right to Rent Document Checks User Guide which can be found here.

The checks that landlords are required to make include that:

1. the documents are genuine and belong to the tenant;
2. the dates for the tenant's right to stay in the UK have not expired;
3. the photos are of the tenant;
4. the dates of birth are the same in all the documents (and that they are believable);
5. the documents do not look like they have been changed or are sufficiently damaged to indicate the same; and
6. if any names are different (e.g. due to marriage) that supporting explanatory documents are provided.

It is important for the landlord to take complete copies of the documents reviewed and keep them whilst the tenancy continues and for one year afterwards. Should there be a time limit on the tenant's stay in the UK, the landlord must follow up with them one year after the initial check or alternatively, if sooner, upon the due expiry date of the tenant's right to reside in the UK.

If a tenant does not pass a check landlords must inform the Home Office. Yes, it's official, and from 1 February 2016, landlords will be required to be amateur immigration officers. Furthermore, should landlords rent to someone who is not allowed to rent in the UK landlords can be fined up to £3,000.

Landlords may want to pass those duties to a managing agent. In such instances it is prudent for landlords to procure confirmation in writing that the agent will indeed carry out the checks as required.

Non-compete covenants in commercial leases – European Court Ruling

The Court of Justice of the European Union (CJEU) has ruled that a non-compete covenant in a commercial lease does not automatically infringe EU competition law.

The recent decision in *SIA Maxima Latvija* (*"Maxima"*) v *Konkurences Padome* (*"Competition Council"*) Case *C-345/14* has clarified whether an existing tenant is able to rely on a non-compete clause in a commercial lease in order to refuse its permission to allow competitors from opening shops within a shopping centre. This decision is relevant to both commercial landlords and tenants.

Previously the Latvian Competition Council had fined Maxima, an operator of large shops and hypermarkets, for having concluded commercial leases, 12 of which contained a clause granting Maxima as 'anchor tenant' the right to oppose other tenants from letting premises in a particular shopping centre.

The Latvian Competition Council insisted the leases restricted competition under Latvian competition law and that it was not necessary to carry out any further examination of the circumstances. Maxima appealed this decision first to the Regional Administrative Court and then to the Latvian Supreme Court. A preliminary ruling was then requested by the Latvian Supreme Court from the CJEU.

The CJEU set out that an agreement such as a commercial lease may infringe Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) if it has either an anti-competitive object or effect. An anti-competitive object is established through the prevention, restriction or distortion of competition within the internal market. Analysis of anti-competitive effect is only required where the context of the agreement does not show a significant degree of harm upon competition.

The CJEU ruled that the agreements did not have an anti-competitive object. The CJEU then analysed the availability or accessibility of commercial land to new competitors, the existence of other administrative, economic or regulatory barriers of entry and the ability to close off a particular market by such measures. It then ruled that there was also no anti-competitive effect.

The ruling is helpful because if landlords and tenants apply the systematic analysis adopted by the CJEU in the Maxima case they will be better able to identify whether their agreements' non-compete covenants infringe competition law.

Can an easement exist to use leisure facilities like a golf course or swimming pool?

The High Court has considered whether the right to use leisure facilities such as a golf course, tennis court or a swimming pool can constitute an easement.

A company owned land on which 26 timeshare units were built. As is usual, each timeshare owner had the

exclusive right to occupy a particular unit at specified periods each year. The estate that adjoined the timeshare land housed leisure facilities including a tennis court, golf course, gardens, squash courts and a swimming pool. The timeshare owners claimed that they had easements over those facilities, so could use them free of charge. These facilities were also open to the general public on a paying basis. When the timeshare land was transferred to the company's predecessor in title in 1981, one of the entries in the property register of the timeshare land was that the timeshare land had the benefit of a set of rights. They included a right for the transferee, its successors in title, lessees and the occupiers from time to time to use the leisure facilities on the transferor's adjoining estate. The point raised was whether this was a right capable of running with the land, effectively binding successors in title.

The court decided that the right to use the leisure facilities was an easement. This meant that the timeshare owners had a right to use the leisure facilities free of charge. After noting that there was no English or Scottish case that had authoritatively determined whether an easement could exist to use something like a golf course, swimming pool or tennis court, the court decided that there was "no legal impediment" to the grant of such an easement, provided that when looking at all the circumstances there was an intention to grant an easement rather than just a personal right. This case is therefore a reminder that there is no closed category of what can constitute an easement.

Case: *Regency Villas Title Ltd and others v Diamond Resorts (Europe) Ltd and another [2015] EWHC 3564 (Ch)*

Seeds of Change?

What is a tree? The answer is not as obvious as you may think. In fact, the question recently came before the Court of Appeal, and the court helpfully clarified the meaning of "tree" for the purposes of tree preservation orders ("TPOs") and tree replacement notices ("TRNs") under the Town and Country Planning Act 1990.

In *Distinctive Properties (Ascot) Ltd v Secretary of State for Communities and Local Government*, Distinctive Properties owned a large site subject to a TPO. In 2012, Distinctive Properties hired contractors to fell two acres of land within the ambit of the TPO. This led to the Local Planning Authority serving a TRN requiring Distinctive Properties to plant 1,280 trees of a particular species and height. Distinctive Properties appealed against the TRN on the basis that it contended that only 27 trees had in fact been removed. The LPA argued that assessing the extent of the damage was fraught with difficulty given the nature of the works that Distinctive Properties had carried out. In any event, the appeal was rejected by the inspector.

Distinctive Properties appealed to the High Court on a number of grounds, including that the inspector had been wrong to find that a "seedling" was a tree for the purposes of either a TPO or TRN although it did accept that a sapling (being a tree between 60 and 90 centimetres in height) fell within the definition of a tree. The High Court was not impressed with this distinction between "sapling" and "seedling" and dismissed Distinctive Properties' appeal accordingly.

The case then came before the Court of Appeal. Distinctive Properties again argued that whilst the definition of "tree" included saplings, it did not extend to "seedlings" or "potential trees". Both terms had been referred to in the inspector's decision. In considering the definition of "tree", the Court of Appeal had regard to the High Court's decision in the aptly named *Palm Developments Ltd v Secretary of State for Communities and Local Government [2009] EWHC 220 (Admin)*, where Cranston J had held that "*saplings of whatever size are protected by a woodland tree preservation order*".

Taking this into account, the Court of Appeal held that a tree is a "tree" throughout its life span save for when it is merely a seed. As such, a "seedling" would also be a tree for the purposes of a TPO or TRN and the court therefore dismissed Distinctive Properties' argument that a seedling was not a tree.

The clarification of the meaning of "tree" in the context of TPOs and TRNs will be helpful to landowners of woodland. Moreover, the case highlights the need for landowners to exercise caution before instructing felling of woodland subject to a TPO.

Case: *Distinctive Properties (Ascot) Ltd v Secretary of State for Communities and Local Government [2015] EWCA Civ 1250.*

Look out for our next breakfast seminar

Please join us for our next breakfast seminar, entitled "How would you handle a cyber-security incident", which will be held in our London office on Wednesday 10 February 2016.

If you would like to attend this seminar, please register here.

Key contacts

If you require advice or further information on any of the matters raised in this update, please get in touch with any of our London property disputes lawyers listed below, or your usual Shepherd and Wedderburn contact.

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