SHEPHERD+ WEDDERBURN

PROPERTY DISPUTES UPDATE

Autumn 2015



In our Autumn update, we begin with a focus on relief from forfeiture. We also discuss a case where a local authority was successfully sued after it provided an incorrect search result, give an overview of the assets of community value regime and look at a recent case where the tenant "repaired" a wall by removing a mural attributed to Banksy. Finally, we invite you to our next London breakfast seminar on "Rent Review – what matters now" on 1 December 2015.

Court's discretionary power to award relief from forfeiture

A recent Court of Appeal decision highlights the court's approach to an application for relief from forfeiture in circumstances where the forfeiture would result in a windfall for the landlord.

In the case of *Freifeld v West Kensington Court Ltd*, the head lessee had unlawfully sub-let a restaurant without the landlord's consent. It was accepted at trial that this was a deliberate breach.

At first instance, the High Court held that this was a "cynical" breach of contract, meaning that the lessee faced considerable difficulty in being able to claim relief. By way of reminder, the court will only grant relief from forfeiture if the following conditions are satisfied:

- the tenant remedies the breach or pays compensation in relation to any breaches which are not capable of remedy; and
- the court is satisfied that the tenant will comply with its obligations in the future.

In *Freifeld*, the head lease was worth between £1m and £2m, meaning that forfeiture represented a significant windfall to the landlord. Therefore, the Court of Appeal had to consider whether it would refuse relief given the bad behaviour of the lessee. The Court of Appeal held that:

- relief could still be granted even where a breach had been deliberate. It was within the court's discretion to consider whether depriving the tenant of such a valuable asset was proportionate in all the circumstances; and
- the advantage of the forfeiture to the landlord was another factor to be taken into account.

In the end, the Court of Appeal opted for a compromise – relief from forfeiture was granted on condition that the tenant assigned the lease within six months. The court was at pains to stress that the decision should not be seen as encouragement for tenants to breach their lease covenants. However, the court did note that a "balance will have to be struck" in each case and "there may well be cases where even substantial value has to be passed to the landlord, if no other way of securing the performance of the tenants' covenants can be found".

Although this decision may seem to provide some comfort to tenants, in reality tenants, particularly those with valuable assets, are well advised to take care in observing their lease obligations to avoid running the risk of forfeiture. The decision also serves as a reminder of the uncertainties at play given the court's wide discretionary power to grant or refuse relief from forfeiture.

Case: *Freifeld and another v West Kensington Court Ltd [2015] Civ 806*

Compliance with conditions for relief from forfeiture

The Court of Appeal has considered whether the court can intervene in extending the time for complying with conditions in a Consent Order that sets out the terms of settlement and states expressly that time is of the essence.

The landlord, Safin (Fursecroft) Ltd, commenced proceedings in February 2012 for possession of a flat on the grounds of non-payment of rent and various other breaches of covenant. The tenant, Dr Badrig, had died in 2002 and the Defendant in the action was his estate, represented by his son. The Defendant duly applied for relief from forfeiture in July 2012.

In January 2014, two days before the trial of the Defendant's application for relief, the parties attended a settlement meeting and agreed the terms of a Consent Order that granted relief from forfeiture if the Defendant complied with various conditions set out in the Order. The conditions involved remedying the various breaches by certain dates, with time being expressly of the essence in relation to compliance. On the day before the condition requiring payment of arrears and costs was due to be satisfied, the Defendant applied for:

- the Consent Order to be set aside on the grounds that Mr Badrig had been medically unfit to enter into it and had been badly advised; or alternatively
- seeking an extension of time.

It was common ground by the time of the oral hearing on 23 July 2014 that all the things required by the Consent Order had been done.

What was in dispute was the timescale in which they had been done. The court decided that it had power to extend time, and that, on the facts of the case, it was a proper exercise of the court's discretion to do so.

In due course, the matter came before the Court of Appeal, which also considered whether the court had power to extend time limits in a Consent Order in the context of relief from forfeiture. It concluded that it did. The Court of Appeal found it relevant that

i. an application for an extension of time had been made before the expiry of the time limit;

ii. all the conditions had been satisfied by the time the application was heard; and

iii. the forfeiture was in respect of a long lease of residential premises, the value of which exceeded the amount due to the landlord by almost £1m.

The first point to note from this case is that the court will exercise its discretion and has power to extend the time for compliance with conditions relating to relief from forfeiture even when there are conditions expressly stating that time is of the essence. The second is that this is another illustration of the reluctance of the courts to debar tenants of long or valuable leases from relief, but the third point is that it shows just how tortuous and longwinded forfeiture proceedings can be when the tenant is really determined.

Case: *Safin v Badrig [2015] EWCA Civ 739*

Local authority successfully sued for incorrect search result

In the case of *Chesterton Commercial (Oxon) Ltd v Oxfordshire County Council* the local authority provided an incorrect search result which was then relied upon by a developer, who purchased land in Henley-on-Thames, intending to redevelop it for residential use.

The local authority provided the buyer with a search result in June 2007 which stated that the property was not a highway maintainable at public expense. The local authority failed to disclose that there was longstanding uncertainty as to whether part of the land at the front of the property was part of the highway and that it had been investigating the matter since 2005. The ongoing investigation was not disclosed on the highway plan until August 2007. The local authority finally concluded in 2010 that the land at the front of the property had always been part of the public highway.

Relying on the search result obtained, the buyer completed its purchase of the property in September 2007. It had difficulties selling car parking spaces on the front part of the property as a result of the highway plan, which by that stage disclosed the uncertainty as to whether the car parking spaces were public highway.

The High Court held that the search result amounted to a statement that the land was private land capable of being transferred and sold. The local authority had a statutory duty to keep the list of streets that were highways maintainable at public expense up to date and it had failed to do so. The buyer relied on the search result as an express representation and the local authority knew that the buyer would want to know whether the land was private or not.

It therefore determined that the local authority was liable in tort to a member of the public. It had owed a duty of care, had breached it, and was therefore negligent.

The court was also satisfied that the conditions for liability for negligent misstatement were met as it was foreseeable that, on the basis of an incorrect search result, a buyer might proceed and pay a higher price for land it believed was not public highway. The buyer was awarded damages for the sum overpaid, based on the price it could have obtained for the car parking spaces, together with associated costs.

This case provides both a warning to local authorities that they must keep their highway records up to date and reassurance to buyers who rely on local authority search results.

Local authorities owe a duty of care to the public when they are performing search inquiries. This duty was held to have been breached.

Case: *Chesterton Commercial (Oxon) Ltd v Oxfordshire County Council [2015] EWHC 2020 (Ch)*

Section 21 Notices – new process now in force

As of 1 October 2015 the Assured Shorthold Tenancy Notices and Prescribed Requirements Regulations 2015 (SI 2015/1646) came into force in England after passing through Parliament on 9 September 2015. Most notably these new Regulations deal with s.21 notices. A s.21 notice is a landlord's notice requiring possession of residential premises let on an assured shorthold tenancy pursuant to section 21 of the Housing Act 1988.

The new Regulations give tenants the statutory right to claim back rent paid in advance, in respect of a period falling after a s.21 notice brings the tenancy to an end. They also restrict a landlord from taking retaliatory eviction under s.33 of the Deregulation Act 2015, and provide that the landlord cannot serve a s.21 notice unless it has complied with its obligations to provide to the tenant:

- An energy performance certificate
- A copy of a gas safety certificate
- The Department for Communities and Local Government's booklet, "How to rent: the checklist for renting in England"

These changes only apply to ASTs granted on or after 1 October 2015 and which relate to properties in England.

A new prescribed form of s21 notice, called Form 6A, must be used for all ASTs created on or after 1 October 2015, except for periodic tenancies that came into being after 1 October 2015 and which were fixed term ASTs created before 1 October 2015. A link to the form can be found here.

The Smoke and Carbon Monoxide Alarm Regulations 2015

The Smoke and Carbon Monoxide Alarm Regulations 2015 (SI 2015/1693) also came into force in England on 1 October 2015. These Regulations relate to the provision of smoke alarms and carbon monoxide detectors in the private rented sector.

The amendments look to impose obligations on landlords in order to reduce the number of injuries or deaths from smoke or carbon monoxide poisoning in the private rented sector. The Regulations make it an obligation to install smoke and carbon monoxide alarms in premises used as living accommodation. Additionally, for any new tenancy granted after 1 October 2015 there is an obligation to ensure that smoke and carbon monoxide alarms are in proper working order at the start of any new tenancy.

The Small Business, Enterprise and Employment Act 2015 (Commencement No. 2 and Transitional Provisions) Regulations 2015

The Small Business, Enterprise and Employment Act 2015 (Commencement No. 2 and Transitional Provisions) Regulations 2015 (SI 2015/1689) bring into force sections 35 and 36 of the Small Business, Enterprise and Employment Act 2015 as of 1 October 2015 which amend the Landlord and Tenant Act 1954 (LTA 1954) so as to exclude residential properties used as home business premises from the security of tenure provisions of the LTA 1954.

This provides welcome clarity for landlords as it simplifies the lease termination process.

Assets of Community Value

The 'right to buy' provisions contained in the Localism Act 2011 are causing concern to some property owners. Owners of older properties such as pubs, parks and community buildings may worry that such legislation will force them to sell at a loss to local pressure groups or national charities.

The effects of this legislation are often misunderstood, however. Whilst there are provisions that can restrict a property owner's right to sell for a period of time, it is clear that in England the provisions do not create either a 'right to buy' or an indefinite restriction on sale, and moreover they do not dictate the price at which a

property may be sold.

It should be noted that the above position only applies to England. In Scotland 'right to buy' provisions do exist.

The Localism Act 2011 allows local community groups to apply to have a property registered as an asset of community value (ACV). The current owner of the proposed ACV will have eight weeks to oppose such an application and it is important that an appeal is made in this window as there are no provisions to declassify after this point.

Whilst being classed as an ACV does affect what planning permission will be granted over the property, general day-to-day use is not affected. It is on the proposed sale of a property that the ACV provisions come into effect. On deciding to dispose of a property, the owner of an ACV must:

- give notice to the local authority of its intention to sell; and
- not enter any legally binding agreement with any buyer of the property for six weeks from that notice.

In this six week moratorium, any local community group may request to be considered as a bidder for the property. If such a request is made, the stop on sale is extended from six weeks to six months. In that time the owner may only sell to the community group.

Whilst the prospect of a six month delay on any sale presents a hurdle, a number of points should be highlighted:

- Even if a community group is considered as a bidder, the owner is under no obligation to sell to or deal with it in any way. After the expiry of the moratorium (either six weeks or six months), the owner is free to sell to any party at any price on any terms.
- Whilst an owner cannot finalise a sale, negotiations with third parties and other steps can still take place during a moratorium.
- The moratorium runs from when the owner notifies the local authority of its intention to sell but this notice can take place far in advance of any proposed buyer being identified.
- There are a number of disposals exempted from the legislation. These include ACVs being sold as part of a going concern, under an existing legal agreement, occupied buildings and the grant of leases under 25 years.

As a final point, the six month moratorium is intended to help local community groups raise capital. Although the delay to the sale process is unwelcome, owners of ACVs may appreciate an extra bid for the property, especially if a community group's offer is close to the market rate.

A property being classified as an ACV does present an administrative burden on owners and may prevent sales where a short turnaround is essential. However, the effect on a property's eventual re-sale value should be minimal as long as an owner is prepared to wait.

Bricks and mortar and Banksy

A tenant of a building in Folkestone removed a section of wall from the building and then made good to the standard required by the lease. That would not normally lead to proceedings in the High Court, but this particular section of wall contained a mural attributed to Banksy.

After removing the section of wall that contained the recently spraypainted mural, the tenant had it shipped to the United States to be sold, acting on the advice of an art dealer. An interim injunction was obtained to prevent the tenant from dealing with the mural. A claim was brought for delivery up of the mural on the basis that it had become part of the land once sprayed onto the wall and that once it had been removed, it became a chattel and belonged to the landlord.

Some of the tenant's arguments had a certain logic. For example, it contended that by removing the section of wall that had been defaced with graffiti and making good it was complying with its covenant to keep the premises in good and substantial repair and condition. As regards ownership, the tenant argued that an implied term in the lease meant that the mural became the tenant's property once it had been removed.

The court considered that in the event that the mural constituted disrepair, the tenant could remedy the disrepair by painting over the mural, cleaning the wall or removing and replacing of the section in disrepair. It found that removing the section of wall was not an objectively reasonable method of complying with the repair covenant in the circumstances. The court was not persuaded by the tenant's arguments on ownership and drew a distinction between chattels of no or low value and valuable items.

It seems that graffiti can have value after all.

Case: *The Creative Foundation v Dreamland Leisure Ltd and others [2015] EWHC 2556 (Ch)*

Look out for our next breakfast seminar

Please join us for our next property breakfast seminar, entitled "Rent Review – What Matters Now", which will be held in our London office on Tuesday 1 December 2015 from 8:15am. We will begin with a brief overview of the current legal landscape, and then our external speaker, Nigel Vaughan, a partner of GN2 LLP, will discuss from his perspective as Arbitrator some of the issues facing the parties and how to maximise chances of achieving your desired outcome if your rent review is referred to a third party for determination.

Nigel is an experienced arbitrator and member of the President of the RICS Panel for Arbitrators and Independent Experts. His talk will provide a useful insight into the process.

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.

Guy Harvey
T +44(0)207 429 4948
M +44(0)752 567 9660
E guy.harvey@shepwedd.co.uk

Katie Logan
T +44(0)207 429 4683
M +44(0)791 206 9345
E katie.logan@shepwedd.co.uk

Alastair Brown
T +44(0)207 429 4993
M +44(0)789 448 0939
E alastair.brown@shepwedd.co.uk