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PROPERTY DISPUTES UPDATE

Spring 2016



In our spring issue we have a mixed bag: we look again at how competition law affects property agreements, highlight the need for clear drafting, set out key points from another decision flowing from the Good Harvest and House of Fraser cases on the validity of assignments, and finish on an onward and most definitely upward note as we report the latest news on the 22 Bishopsgate tower in the City of London. We start, however, with a case that should reassure landlords whose tenants return the keys.

Surrender of Lease by Operation of Law

Surrendering a lease may be done by one of two ways:

1. Expressly surrendering it by deed.
2. Surrendering it by operation of law.

So what is surrender by operation of law?

This method of surrender is inferred where the conduct of the landlord and tenant amounts to an acknowledgment that the tenancy has ended, or where their conduct is otherwise inconsistent with the continuation of the tenancy. The important point to emphasise is that it is the conduct of the parties that determines whether or not the lease has been surrendered, not their intention. A landlord may unknowingly accept the termination of a lease without intending to do so.

This raises the obvious concern for landlords as to what conduct on their part will be deemed as accepting the surrender of a lease. For this we can take guidance from the recent case of *Padwick Properties Ltd v Punj Lloyd Ltd*. The Court had to decide whether a landlord had accepted a surrender of a lease from a company that had gone into administration.

The administrators of the tenant company wrote to the landlord's solicitors stating that the tenant had vacated the property and that the landlord was now responsible for the safety and security of the premises. The administrators then returned the keys some weeks later. Soon after, the company went into liquidation and the liquidators disclaimed the lease. The landlord served notice on the company's guarantor requiring it to enter a new lease, and demanded payment due under the disclaimed lease. In response to this the guarantor stated that the lease had been surrendered, and thus the guarantor was neither obliged to enter into a new lease nor to pay outstanding sums under the lease. As for what the landlord had done in response to all this: it had accepted the keys, boarded up the property and marketed it for sale. One might assume, and indeed the guarantor argued, that this conduct by the landlord showed that it had accepted the surrender, and thus the guarantor was justified in its stance.

Whilst you could argue that the landlord must have intended for the lease to be surrendered and that its conduct amounted to an acknowledgment of that, you could also argue that it was merely protecting its interest in the property, and indeed this latter argument is the one that found favour with the Court in this case.

The Court determined that a landlord is always within its rights to protect the security of its premises, and in the event of a tenant being unable or unwilling to pay its rent the landlord may maintain its right for rent against that tenant until a new tenant is found. In this instance, the cost to the landlord of employing security was around £2,000 per week, and as such boarding up the premises was a cheaper alternative to maintaining satisfactory security. This was viewed as a reasonable response, especially as after the tenant had vacated the property it became a 'hang out' for local youths and

the property suffered some damage. The boarding up was merely seen as a necessary step to preserve the landlord's interest in the lease. Similarly, the landlord had also only accepted the keys due to the fact that the administrators had threatened to throw them away, and as such the landlord was merely protecting its interest in the property.

The point to take away from this case is that whilst it is the conduct of the parties, not their intention, that is to be considered when addressing whether a lease has been surrendered by operation of law, it is for the tenant to prove that the lease has been determined due to such conduct. The facts of each case must be considered, and even acts such as boarding up the premises and accepting keys to a property may not be inconsistent with the continuation of a lease.

Case: *Padwick Properties Ltd v Punj Lloyd Ltd [2016] EWHC 502*

Competition law and restrictive covenants

A recent case involving Tesco follows on from the case of *SIA Maxima Latvija v Konkurences Padome*, which we discussed in our last Property Disputes Update. *SIA Maxima* related to whether an existing tenant was able to rely on a non-compete clause in its lease in order to refuse permission to allow competitors to open shops within the same shopping centre. The European Court of Justice referred the question of whether the clause had an anti-competitive effect back to the Latvian court. The Latvian court's decision is awaited.

The challenge in the Tesco case was with regard to a restrictive covenant in a 1997 agreement, which was executed when Tesco bought land from a property developer named High Peak Developments ("High Peak"). The agreement prohibited High Peak from using retained land surrounding a Tesco store in Whaley Bridge, Derbyshire for the sale of food, convenience goods or pharmacy products.

In July 2015 High Peak entered into a conditional agreement with a bargain discount retailer (B&M Bargains) to build a new shop on the retained land on condition that the restrictive covenant was released. High Peak agreed to pay Tesco for an express release of the covenant but after protracted negotiations Tesco decided not to proceed with the release after all.

Land agreements were originally outside the scope of UK competition law. That changed on 6 April 2011 when the Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010 came into force. More recently, in October 2015 a streamlined procedure to allow small and medium sized businesses to litigate competition claims in a fast track procedure for seeking compensation through the Competition Appeal Tribunal (CAT) was introduced.

High Peak issued proceedings in the High Court and also through the CAT. This enabled High Peak to challenge the enforceability of the covenant and also to seek damages for loss of rent whilst negotiations between the parties had been ongoing.

Confronted with cases in both the High Court and the CAT, Tesco decided to settle High Peak's claim.

Agreements involving land are increasingly coming under scrutiny and there has been more publicity recently about the impact of competition law on such agreements. The result of heightened awareness and the new fast track procedure may be an increase in the number of such cases brought before the courts.

Both landlords and tenants would be well advised to re-evaluate existing restrictions in leases and purchase agreements, consider the possible repercussions and potentially consider negotiating different terms.

More specifically, where restrictive covenants have been put in place, for example due to the requirements of a particular anchor tenant in a retail development, landlords and tenants will want to check whether the covenants are enforceable, especially where there is a commitment not to grant a lease to a particular type of tenant in what may be seen as a potentially anti-competitive way.

Case: *Shahid Latif & Mohammed Abdul Waheed v Tesco Stores Limited; Case 1247/5/7/26*

The Curse of Ambiguous Drafting Strikes Again

As we reported last summer, the court will not always apply a test of commercial sense when called upon to decide how a clause in a contract should be interpreted. Sometimes the court will find that words should be interpreted literally regardless of the commercial consequences, as confirmed by the Supreme Court in the case of *Arnold v Britton* last year.

A recent High Court decision has shown how the principles in *Arnold v Britton* will be applied. In *Dooba Developments Ltd v McLagan Investments Ltd*, the buyer entered into a conditional sale agreement to purchase a property for £12m. The agreement provided that completion was to occur after one of two dates. The relevant date for the purposes of the case was called the 'Unconditional Date'. It was defined as "*the date upon which the last of the Conditions is discharged by*

satisfaction or waiver in accordance with the provisions of Schedule 4". There was also a longstop date.

As one of the four conditions had not been satisfied by the longstop date, the buyer served notice on the seller to rescind the agreement. However, there was disagreement between the parties and the buyer therefore applied to court for a declaration that its notice had properly rescinded the agreement.

The terms of the relevant clause were:
"…if all of the Conditions have not been discharged… by the longstop date then either Asda or Dooba may rescind this agreement by giving the other not less than ten working days notice."

The court had to decide if either party could rescind:

1. if any one of the four conditions remained satisfied at the longstop date; or only
2. if all of the four conditions remained unsatisfied at the longstop date.

In its decision, the court considered the principles set down in *Arnold v Britton*, in particular the fact that when interpreting a written contract, the intention of the parties will be construed in light of what a reasonable reader of the clause would understand the parties' intention to be. On this basis, the court held that although both options were possible, the correct interpretation from reading the agreement as a whole was that it could be rescinded where option 1 applied, so if any of the four conditions was outstanding either party could rescind. As such, the buyer had been entitled to rescind the contract.

Like *Arnold*, this decision is a salutary reminder that extreme care is required when drafting and negotiating contracts, particularly when dealing with conditions and their consequences should they not be satisfied.

Case: Dooba Developments Ltd v McLagan Investments Ltd [2016] EWHC 151 (Ch)]

Can a tenant assign its lease to its guarantor?

Although it is now a decade since the Landlord and Tenant (Covenants) Act 1995 (the Act) came into force the courts are still being asked to clarify how it works.

The Act applies to all leases granted on or after 1 January 1996 and provides for the release of the landlord, tenant and any guarantor from their obligations in a lease after they have ceased to have an interest in the property.

In the leading case of K/*S Victoria Street v House of Fraser* in 2011 the Court of Appeal decided that a clause in an agreement requiring that a lease be assigned to a specific assignee with the outgoing tenant's guarantor becoming the assignee's guarantor was void. This was because it would frustrate the purpose of the Act. The Court of Appeal mentioned a situation where an outgoing tenant's guarantor became the assignee, rather than the assignee's guarantor, but stated that it was not necessary for it to decide that issue in the case before it. Lord Neuberger did, however, comment that *"it would also appear to mean that the lease could not be assigned to the guarantor, even where both tenant and guarantor wanted it."*

This question was calling out to be clarified and that was achieved in the case last month of *EMI Group Ltd v O & H Q1 Ltd*, where the High Court had to decide the status of a purported assignment of the lease of a shop in Worcester by the tenant, HMV, to its guarantor, EMI.

The court found that EMI had not actually been released from its liability for a single moment. At the time of the assignment, two things had happened simultaneously. EMI was released as guarantor under the HMV lease at the exact same moment that it became bound as the new tenant under the lease. Those were not steps that happened in sequence, with a release as the first step followed afterwards by an assumption of new liabilities. The court reiterated that the whole thrust of the Act was that a person should not remain liable under a tenancy after the tenant with whose liability he was associated had been released from his liability.

This case answers the question that the Court of Appeal had left hanging. It is now clear that a tenant cannot assign its lease to its guarantor. Any such assignment will be void.

Cases: *(i) K/S Victoria Street v House of Fraser (Stores Management) Ltd and others [2011] EWCA Civ 904*

(ii) EMI Group Ltd v O & H Q1 Ltd [2016] EWHC 529 (Civ)

Tall tales: 22 Bishopsgate

There has been much media coverage in recent months of the impact of proposed high rise developments on rights of light enjoyed by nearby buildings, both in the City of London and elsewhere. The proposed 62 storey development at 22 Bishopsgate, on the site of the partially built Pinnacle, or "Helter-Skelter" skyscraper, is the latest of these to receive widespread attention. It is anticipated that 22 Bishopsgate will be the tallest building in the City.

Potential rights of light claims had been identified in respect of over 90 legal interests with regard to the proposed 22 Bishopsgate development. Progress in agreeing releases of rights of light with the many affected parties has been very slow. To give an indication of the

size of the problem and the scale of risk remaining, by early 2016 heads of terms for releases had only been agreed for 17 of the 90 legal interests.

The risk arises from the fact that an affected party that takes a claim to court may be granted an injunction in respect of interference with its right to light. That is a major risk for developers, not only in terms of completing the development on schedule and as designed, but in terms of access to funding to allow the development to be built in the first place.

Given the slow progress and the need to start work imminently in order to meet a project completion date of 2019, the 22 Bishopsgate owners approached the City of London Corporation (the "Corporation") with a view to persuading it to use its powers under section 227 of the Town and Country Planning Act 1990 (the Act) to acquire the site temporarily in order to engage the provisions of section 237 of the Act, which would override rights of light in return for payment of compensation. This would remove the risk of injunctions being granted in favour of adjoining owners.

The Corporation resolved in principle earlier this month to use its statutory powers in order to facilitate the development.

This decision will be welcomed by developers, particularly within the City of London, as another sign that local authorities are prepared to intervene to help ensure that major redevelopment schemes can proceed as planned.

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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