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PROPERTY DISPUTES UPDATE

Winter 2015



In this edition of our Property Disputes Update, we highlight that there may be changes on the horizon in bankruptcy thresholds, rights of light and rent refunds after a break has been exercised. We also look briefly at a landlord's intention to redevelop and at a case that illustrates the dangers of not following through to ensure all the formalities are completed. We end with two decisions of interest to those involved with residential property and with an invitation to our London breakfast seminar on 17 March 2015, which will be a practical look at how to close a deal quickly whilst avoiding pitfalls.

Good news for debtors – proposal to raise the £750 bankruptcy threshold

Landlords and other creditors can currently present bankruptcy petitions where a debtor owes them £750 or more.

However, the Government intends to increase the current £750 threshold with effect from 1 October this year.

The draft Order increasing the threshold has been laid before Parliament and, if brought into force, will amend section 267(4) of the Insolvency Act 1986 so that for any petitions presented on or after 1 October 2015 a creditor petitioning for an individual to be made bankrupt must be owed at least £5,000, instead of the current level of £750.

This is bad news for landlords who struggle with individual tenants with a history of low level but persistent arrears.

Legislation: *Draft Insolvency Act 1986 (Amendment) Order 2015*

Not just any leave to appeal

In our summer 2014 update, we reported that the Court of Appeal had overturned the decision in *Marks and Spencer v BNP Paribas* regarding whether a tenant is entitled to a refund of rent paid for the period after the break date. In that decision, it was held that there would be no refund if a tenant exercises a break option between rent payment dates.

The Supreme Court has now granted M&S leave to appeal the Court of Appeal decision. This is an interesting development, given that many commentators believed that the Court of Appeal had effectively reinstated the common view that, in the absence of an express provision to the contrary, a tenant should not be entitled to a refund of any rent paid relating to the period after a break date.

The date of the appeal is yet to be announced but we will keep you updated as to how this progresses.

Case: *Marks & Spencer plc v BNP Paribas Services Trust Company (Jersey) Limited [2014] EWCA Civ 603*

The Law Commission's Final Report on Rights of Light

The Law Commission published its long awaited final report on rights of light in December 2014, setting out its proposals to reform this area of law and also opining that solar panels do not benefit from a right of light.

To the surprise of many, and in a change from what it had proposed in its consultation paper, it has not recommended that the ability to acquire a right of light by prescription, in other words, by showing 20 years' use, should be abolished.

Its key recommendations instead include:

- One single method by which a right of light can be acquired by prescription in place of the current three different methods.
- A statutory notice procedure to enable landowners to require their neighbours to "use it or lose it" in terms of injunctions as neighbours have to decide within a set timescale of not less than eight months whether they plan to apply for an injunction.
- A power to the Lands Chamber of the Upper Tribunal to discharge or modify rights of light if satisfied that they are unused or obsolete.
- A presumption that a right to light has been abandoned if it has not been used for five years.
- A new statutory test to be applied by the courts in cases of alleged interference with a right of light when deciding whether to grant an injunction to order demolition or cessation of works or to award damages instead.

This last recommendation reflects the recent development of the law on the injunction or damages test, as confirmed by the Supreme Court in its recent judgment in the case of *Coventry v Lawrence*, on which we reported in our Spring 2014 property disputes update. With the general election so close, the Government may not have this matter at the top of its legislative agenda, but the report does represent a move forward, and the introduction of more certainty regarding rights of light would certainly be popular with developers and investors.

The report can be read at: http://lawcommission.justice.gov.uk/areas/rights-to-light.htm

Confirmation of the relevant date for the landlord's intention to redevelop

The Court of Appeal has recently confirmed the relevant date at which the landlord's intention should be assessed.

Where a landlord opposes the grant of a new lease because it relies on section 30(1)(f) of the Landlord and Tenant Act 1954 it needs to prove that it has an intention to redevelop the premises.

The wording of section 30(1)(f) is as follows:

> "…that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

In the *Hough v Greathall Ltd* case, which came before the Court of Appeal last month, the tenant argued that the landlord had to make out its intention at the date on which it served its section 25 notice, which had been more than 11 months before the date of the hearing.

The Court of Appeal, however, unanimously held that the date on which the landlord has to prove its intention is the date of the court hearing to determine whether a new lease should be granted.

The reconfirmation that this is the relevant date is welcome news for landlords, who can be comfortable that they have time to assemble proof of their intention between the date on which they serve a notice and the date of the hearing.

Case: *Hough v Greathall Ltd [2015] EWCA Civ 23*

The importance of following through: undated transfers and lease assignments

A recent Court of Appeal decision has reminded tenants who want to assign their leases of the need to comply with all the necessary formalities to effect a valid assignment. If they don't, they are likely to remain liable under the lease covenants.

One of those necessary formalities is that a deed has to be "delivered" in order to take effect. Although there is a presumption that the date in a deed is the date on which it takes effect, this can be rebutted if evidence can be shown to the contrary. In general terms, the legal position is that a deed is delivered when a party demonstrates an intention to be bound. That intention can be demonstrated by words or conduct.

In the case of *Lankester*, the tenant wanted to assign its lease. There were various outstanding issues with the proposed assignment, including the landlord's condition that it would only consent to the assignment if directors provided personal guarantees. These matters were never settled but the tenant vacated and the proposed assignee went into occupation in 2008 and paid rent for over two years.

There was a signed but undated transfer in respect of the lease, which was held by the solicitor acting for both the tenant and the proposed assignee.

When the proposed assignee gave the landlord notice of its intention to vacate in 2010, matters came to a head.

The tenant argued that the transfer had effected an assignment of the lease, at least in equity. It also tried alternative arguments, including that the landlord was estopped from denying that the proposed assignee was now the tenant.

Unfortunately for the tenant, both the Court at first instance and the Court of Appeal held that there had not been an effective assignment, and accordingly the tenant remained liable under the lease covenants.

The signed but undated transfer had not been delivered as it was being held whilst the parties dealt with outstanding matters. As regards estoppel, the landlord's conduct was not enough to show that it had represented to the tenant that it had accepted the assignee in the tenant's place. Moreover, there had not been any implied surrender.

There is a message in this case for both tenants and landlords. Tenants need to follow through and ensure that formalities are completed in order to bring their liabilities under the lease to an end; relying on the circumstances to make out the case for an assignment is unlikely to work. Landlords, on the other hand, should keep track of requests for assignment and tie up loose ends quickly. Even though the landlord was successful in this case, that success will have come at a cost, both in financial and administrative terms.

Case: *Lankester & Son Ltd v Robert David Rennie and Annie Rennie [2014] EWCA Civ 1515*

A common sense approach to consultation, qualifying works and residential service charge

Section 20 of the Landlord and Tenant Act 1985 (the "Act") imposes a £250 limit per tenant on the residential service charge contributions that the landlord can recover in respect of qualifying works (works on a building or any other premises) unless the landlord has either complied with consultation requirements in relation to the works or the consultation requirements have been dispensed with.

When does section 20 require a landlord to consult with its tenants in order to be able to recover more than £250 from each of them?

According to the 2013 High Court decision in the *Phillips v Francis* case the answer was every single time, even for emergency and minor works, once that £250 per tenant limit had been reached in a given year. All works in a year should be aggregated together rather than divided into different "sets" of works.

The Court of Appeal, however, has overturned that and has restored the "sets" approach. It held that the aggregated approach was wrong and that qualifying works should be separated into distinct sets of work. The "sets" approach was considered the common sense approach and the one that Parliament had intended.

This means that landlords and agents can breathe a sigh of relief as the administrative burden of repeated consultations has been lifted.

The Court of Appeal provided guidance to take into account when determining what constitutes a single set of qualifying works as follows:

- Were the items of work physically separated?
- Were the works the subject of one contract?
- Were the works to be done at more or less the same time?
- Were the items of work different in character to each other?

In conclusion, this is a victory for common sense and a relief for landlords, although they must still bear in mind the need to take a genuine approach to improvement works and to comply with the consultation process if they wish to pass costs on to the tenants.

Case: *Francis and another v Phillips and others [2014] EWCA Civ 1395*

Lease extension: authority of the "competent landlord"

In a recent decision, the Upper Tribunal (Lands Chamber) considered the ability of a freeholder to bind an intermediate landlord when agreeing terms for a lease extension of a flat with a tenant.

In the *Howard De Walden Estates* case, the tenant served notice under the Leasehold Reform, Housing and Urban Development Act 1993 (the "1993 Act") on the competent landlord claiming a lease extension.

Under the 1993 Act, the "competent landlord" is the owner of an interest in the flat which satisfies certain conditions. In particular the competent landlord must have an interest with sufficient duration so as to grant a new lease for a term of an additional 90 years plus the residual term under the current lease. The distinction is important as the competent landlord has the authority to conduct all proceedings following service of the tenant's notice. Furthermore, any action taken by the competent

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landlord is binding on all other landlords. That being said, there is the ability for an intermediate landlord to apply to the County Court for directions if a dispute arises and an intermediate landlord can serve notice on the other parties to advise that they are being separately represented for this purpose.

In *Howard De Walden Estates*, the competent landlord and tenant agreed a premium of £269,000 for the lease extension. This was apportioned between the competent and intermediate landlords as £265,000 and £3,400 respectively. The intermediate landlord disputed the apportionment. However, despite this, the competent landlord granted the lease on these terms. The intermediate landlord argued that its notice of separate representation prevented the competent landlord from pressing ahead and agreeing terms by which it was bound.

The Upper Tribunal rejected the intermediate landlord's application. The correct course was for the intermediate landlord to apply to the County Court for directions where a dispute arises and a notice of separate representation will not in itself prevent the competent landlord from binding the intermediate landlord.

This case underlines the need for intermediate landlords to take decisive action if in dispute with a competent landlord in lease extension proceedings under the 1993 Act.

Case: *Howard De Walden Estates Ltd v Accordway Ltd and another [2014] UKUT 486 (LC)*

Hot Property: Closing the Deal

Please join us in our London office on 17 March 2015 at our breakfast seminar entitled "Hot Property: Closing the Deal" from 8.15am, where our speakers, Sally Morris-Smith, Katie Logan and Alastair Brown will be taking a look at some of the challenges and key issues when completing deals in today's property market. If you would like to attend this seminar, please register here.

We also invite you to sign up to our next property webinar entitled "Contracts and Negotiation– a simple guide to protecting your position". The webinar is on 1 April – an easy date to remember! Click here to register.

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The print edition of *Living with Litigation: Tips for Surviving the Disputes Jungle,* has now been made available in eBook, iBook and Kindle editions .

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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

Katie Logan
T +44(0)207 429 4683
M +44(0)791 206 9345

Alastair Brown
T +44(0)207 429 4993
M +44(0)7894480939