Briefing

BURGES SALMON

Real Estate

December 2013

Real Estate Disputes Case Review 2013

In case you have missed the last 12 months' most significant property cases, or would like a reminder, listed below is our monthly review of the more important cases.

December 2012

Consent to underletting

The tenant, Ansa, sought a declaration that Towerbeg's refusal to consent to the sub-letting of a 42-acre area of land was unreasonable. Ansa held two long leases which included a covenant *"not to assign, underlet or part with possession of the demised premises or any part thereof without the previous consent in writing of the [landlord] which consent shall not be unreasonably withheld".*

In November 2011, Ansa agreed to grant underleases to a third party company (F), subject to Towerbeg's consent. However, Towerbeg refused to give its consent. It stated that it had good reason to believe that Ansa was in breach of the leases by parting with possession to F. It also expressed concern at F's financial standing, and indicated that its application for planning permission would be prejudiced if F were to become the tenant. Towerbeg served section 146 notices on Ansa purporting to forfeit the leases.

The High Court decided in Ansa's favour. For the purposes of a covenant such as this, the parting with possession had to be complete. The test for possession, in contrast to mere occupation, lay in the right to exclude others, including the tenant, from the premises. At the date of Towerbeg's forfeiture notices, Ansa still had responsibilities on the site and had not entirely given up possession. Therefore, there was no breach of the covenant.

Towerbeg's consent to the underlease had been unreasonably withheld because: (1) Towerbeg did not have good reason to believe that Ansa had parted with possession; and (2) F had operated in the UK for over 100 years and, in 2011, only 11% of companies had a lower risk of failure than F.

Ansa Logistics Limited v Towerbeg Limited [2012] EWHC 3651 (Ch)

Break clauses

The tenant, Canonical UK, claimed that it had served a valid notice to break its lease. The break clause included the following conditions:

- the rents due under the lease were to be paid up to and including the break date;
- the tenant was to pay to the landlord, on or before the break date, a sum equivalent to one month's rent.

The break date was in the middle of the June quarter and the landlord invoiced the tenant as usual for the full June quarter's rent which the tenant then paid. However, Canonical UK did not pay the premium of one month's rent. They argued that as the break date fell part way through the June quarter, only two months' rent was due so the lump sum payment could be taken from the balance of the rent paid on the June quarter day.

The landlord, TST, took the view that the lease had not been terminated as Canonical UK had not paid the premium. The High Court held that TST's view was correct. The use of the word *"proportionately"* in the lease did not reduce the liability to pay the rent where the lease was terminated during the quarter.

The obligation under a lease to pay rent quarterly in advance was not modified by the conditions of a break clause which operated if the rent had been paid up to and including the break date. The conditions in the break clause had not been complied with and TST was entitled to treat the lease as continuing.

Canonical UK Ltd v TST Millbank LLC [2012] EWHC 3710 (Ch)

January 2013

Burdens of covenants

Ridgewood claimed damages against Valero for breach of 10 agreements permitting it to develop petrol stations owned by Valero.

Ridgewood's solicitors had protected the agreements (to grant a building lease) at the Land Registry. Before Ridgewood could obtain planning permission, Valero sold the benefit of its interest in the properties, and included in the sale documents a covenant that the purchaser would perform Valero's obligations under the original development agreements. However, there was no requirement on the purchaser to enter into a direct relationship with Ridgewood.

Ridgewood alleged that the effect of the sale was that Valero was in breach of the agreements, had rendered them impossible to perform, and had committed a repudiatory breach.

Valero argued that the Landlord and Tenant (Covenants) Act 1995, section 3, which provides that all landlord and tenant covenants pass with assignment of the reversion, applied to the agreements, as the definition of *"tenancy"* in section 28 includes *agreements* for a tenancy.

The court held that the transfer of the property had not provided for the seller's positive covenants (concerning the grant of the building leases conditional on the obtaining of planning permission or on the exercise of an option) to be enforceable against the purchaser. The covenants were not annexed to the property under the Landlord and Tenant (Covenants) Act 1995 s.3, as the Act does not apply to options to take a lease that have not been exercised, nor to conditional agreements to grant a lease.

Ridgewood Properties Group Ltd v Valero Energy Ltd [2013] EWHC 98 (Ch)

February 2013

Positive covenants

This was an appeal brought by the freehold owners of bungalows in a holiday village against the first instance decision that they were bound by covenants requiring them to pay maintenance costs to Kerdene, the village owners.

The original transfers of the plots included rights over the roads and communal facilities and also a covenant by the transferee to pay an annual sum in respect of the cost of maintaining these facilities. Kerdene had acquired the village and sought to recover repair costs under the positive covenants in the transfers. Some of the bungalow owners were successors in title to the covenants in the transfers. The issue was whether the positive covenants were enforceable against successors in title under the equitable benefit and burden principle in *Halsall v Brizell* [1957].

The appeals were dismissed. The court held that the payments were related to the rights granted in their favour (i.e. the use of the communal facilities) which they continued to exercise. Although the continued exercise of those rights was not made expressly conditional upon payment, the payment was intended to ensure that they remained capable of being exercised. The payment was also intended to provide a contribution to the cost of maintaining the roads and other facilities over which the owners of the bungalows were granted rights. Further, the covenant by the original site owner to carry out the repairs was not sufficient to sever any link between the payment covenant and the rights enjoyed by the bungalow owners.

Therefore the first instance decision was upheld and the payment obligations continued.

Wilkinson v Kerdene Ltd [2013] EWCA Civ 44

March 2013

Residential service charges

Residential landlords have statutory consultation requirements under Section 20 of the Landlord and Tenant Act 1985 (as amended) whenever they seek to enter into 'qualifying long term agreements' or carry out 'qualifying works' and then recover such costs under their tenants' service charge obligations. If a landlord fails to comply with these requirements, the landlord can only recover £250 from each tenant for works and £100 in relation to long term agreements unless the Leasehold Valuation Tribunal (LVT) grants dispensation.

Prior to 6 March 2013, the LVT did not readily grant dispensation and, as a result, in some cases relatively technical breaches prevented landlords recovering the full amount of their expenditure. However, this was changed by the Supreme Court in the case of *Daejan Investments Limited v Benson and others [2013] UKSC 14*.

In this case there were five tenants and the landlord's works amounted to £280,000. The landlord applied for dispensation. Had dispensation been refused, Daejan would have only been entitled to recover £1,250.

Lord Neuberger identified in his judgment that the correct question to be asked in a case of non-compliance was whether the decision to grant dispensation to the landlord would cause the tenants to suffer any relevant prejudice. The court further suggested that, where tenants do suffer prejudice, the LVT should, in the absence of some good reason to the contrary, take that prejudice into account when deciding whether to grant dispensation. Further, the LVT could make any dispensation conditional on the landlord reducing the amount claimed by way of service charge by an assessed amount referable to the assessed prejudice the tenants have suffered.

It should be noted that Daejan had offered to reduce the amount it sought to recover from the tenants by £50,000, which may have influenced the court to grant dispensation in its favour.

April 2013

Leasehold enfranchisement

The tenant of a mixed used property comprising a shop on the ground floor with a flat above applied to enfranchise under the Leasehold Reform Act 1967. The residential part occupied about one-third of the building and resulted from a recent conversion carried out by the tenant in breach of covenant. There was no inter-connection between the shop and the flat. Instead, the flat was accessed from a fire escape at the rear of the building. The issue was whether it was reasonable to call the property a "house". The judge concluded that the property was not a house, and dismissed the claim.

The Court of Appeal agreed with the trial judge. The lack of connection between the shop and the flat was an important factor in distinguishing the House of Lords decision in *Tandon v Trustees of Spurgeons Homes [1982]*, in which a shop with a single flat above was held to be a house "reasonably so called" where the living accommodation above was physically connected with the shop unit below. In any event, the tenant could not rely on his own wrongdoing (conversion of the non-retail part in breach of a covenant in the lease) to claim to assert his statutory rights.

Henley v Cohen [2013] EWCA Civ 480

May 2013

Break clauses (again)

A High Court decision has cast some doubt on how landlords should deal with rent overpayments following the operation of a tenant's break clause.

It is established law that, where a break is conditional upon payment of rent, then the full rent for the relevant period must be paid, even if the break falls part-way through the period. It has also long been widely accepted that the landlord was entitled to keep the rent for the post-break period once the lease had come to an end.

However, in the case of Marks and Spencer Plc v BNP Paribas, the High Court held that M&S was entitled to reimbursement of over £750,000 in respect of rent and other charges it paid prior to exercising a break clause in its lease. The lease required M&S, as a condition of the valid exercise of its break clause, to have paid all rent and other charges due up to the break date. Rent was payable quarterly in advance. M&S served the break notice to expire on 24 January 2012. It complied with the rent payment clause by paying the rent falling due on 25 December 2011 in full. M&S subsequently sought to recover the part of the rent and other payments it had made in December 2011 that related to the period after the break date (i.e. from 24 January to 24 March).

Mr Justice Morgan determined that the rent relating to the post-break period was repayable to M&S. He reached this decision on the basis that there was an implied term in the lease that the parties intended this should happen.

However, caution should be taken when considering the implications of this decision. This is a first instance judgment which will not be binding in subsequent cases. Further, the facts in this case are slightly unusual as M&S also had to pay a premium of a year's rent as a condition of the break. This may have been significant, as the requirement to pay this premium could be taken as evidence that the parties had already agreed compensation for any post-break void period, and therefore, cannot have intended the landlord to be doubly compensated by keeping the rent as well. In addition, the landlord had raised an apportioned invoice for the final quarter, excluding the rent for the post-break period. Again, this could have been a persuasive factor for the court when it decided that the parties had impliedly agreed a reimbursement term in the lease.

It is understood that this case has been appealed and is to be heard by the Court of Appeal in March next year.

Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and another [2013] EWHC 1279 (Ch)

June 2013

Guarantees

The guarantee was contained in a lease which prohibited any structural modifications. The landlord and tenant entered into a licence allowing the tenant to alter the premises. Under the terms of the licence, the tenant's covenants in relation to repair extended to the additional areas of the site created by the permitted alterations. As a result, despite the fact that the guarantor was unaware of the licence, the scope of the guarantor's potential liability increased.

The tenant subsequently became insolvent, and the landlord attempted to make a claim against the guarantor. The guarantor argued that the licence constituted an adverse and substantial variation to the terms of the lease, and that it should not be held liable under the guarantee. The High Court accepted the guarantor's argument, and released the guarantor from its responsibilities under the guarantee.

This case highlights the importance of landlords seeking a guarantor's consent prior to entering into any contracts or arrangements which significantly vary a lease agreement.

Topland Portfolio No. 1 Limited v Smith News Trading Limited [2013]

July 2013

Holding Over – Tenant at Will or Periodic Tenant?

Before a contracted-out lease ended, the parties' agents entered discussions about a renewal on similar terms. After lease expiry, it took almost 20 months of occasional negotiation before heads of terms were agreed. The tenant then decided that it needed larger premises, and made alternative arrangements. Two months later, the tenant's agent suggested to the landlord's agent that the tenant should continue to hold over until their new premises were available in about six months' time. The landlord's agent did not reply and the tenant stayed on paying rent until further discussions started over the arrangements for the tenant to vacate. Finally, the tenant told the landlord that its new premises were available and purported to give three months' notice to leave. The landlord applied to court for a declaration that the tenant was occupying as a periodic tenant and not as a tenant at will. The landlord argued that the earliest the tenant could terminate at common law would be on one year's notice expiring on a term day, so the tenant had to pay rent at over £170,000 per annum plus service charge and insurance rent for another 13 months.

The court held that the parties' behaviour following lease expiry was inconsistent with an assumption that the tenant could be asked to leave without warning, which is the essence of a tenancy at will. From the point that it became clear that the tenant would want to move out the tone of what little correspondence passed between the agents, and the fact that no-one was interested in ending the arrangement, or pressing for formal documents to be signed, suggested an understanding that the tenant would be given some notice to vacate the premises. As the tenant was unsure how long it wanted to stay, no agreement could be implied about a fixed term. No lease under English law can be for an indefinite term, so the only form of occupation arrangement which could be implied from the circumstances was a periodic tenancy.

Barclays Wealth Trustees (Jersey) Ltd v Erimus Housing Ltd [2013] EWHC 2699

Tenant Insolvency

In the Game administration, PWC were appointed as administrators immediately after the March 2012 quarter day, with the result that substantial rent payments were avoided. This has been challenged by a consortium of landlords.

The High Court followed the earlier decisions in *Goldacre and Luminar*, and held that pre-administration rent could not rank as an expense of the administration. The Court, however, granted permission to appeal as the matter is of concern to administrators and landlords generally and the amounts involved are significant. The Court of Appeal will consequently now be asked to overturn the well-established principle that rent failing due pre-administration is not payable as an administration expense even if the property is used for the benefit of the administration for the majority of the quarter.

If Goldacre and Luminar are overturned by the Court of Appeal, it seems likely that landlords will require payment on a daily basis for all rent and service charges during which a property is retained for the benefit of the administration.

Dilapidations

Tenant not liable for supercession

The claimant landlord, PGF, was entitled to damages for breach of repairing and reinstatement covenants, both from the head tenant and from the under tenant. The head tenant was entitled to damages for disrepair and failure to reinstate from the under tenant.

A licence to alter the premises was granted at the same time as an underlease. The licence contained a direct covenant by the under tenant with the head landlord to reinstate the premises in accordance with the terms of the lease. At the end of the term, PGF decided that the building's 1970s metal cladding needed replacing in order to modernise the property, and it carried out an extensive refurbishment. A schedule of dilapidations and reinstatement was served on both the tenant and the under tenant, and proceedings were issued.

This case provides an important review of section 18(1) of the Landlord and Tenant Act 1927 and the landlord's works rendering valueless the repairs. The Court disregarded old refurbishment reports, as they did not definitely state that the landlord would do any works. However, the refurbishment works were held to be supercession, and went beyond repair. Accordingly, the tenant was only liable for the costs of patching work. Replacement of carpets was also supercession; the measure of damages was a "reasonable compromise" figure.

The loss of rent calculation in this case was unusual. The cladding repairs would have taken 25 weeks; landlord's refurbishment (which would have been carried out regardless) would have taken 20 weeks. However, the landlord was only allowed to recover loss of rent for the 5 weeks' difference.

PGF ii SA, PGF ii (Lime) SA v Royal Sun Alliance Insurance Plc, London & Edinburgh Insurance Company Limited [2010] EWHC 1459 (TCC)

August 2013

Rectification

The Court of Appeal decision in *Ahmad v Secret Garden (Cheshire) Limited* is a useful reminder of the principles which will be applied by the Court when making an order for the rectification of a contract.

Mr Ahmad was the landlord of a property, the tenant of which was the respondent company. S was the owner of the respondent company. The parties went through a standard form of business lease (LS2), agreeing that it would be amended to reflect the particular terms agreed between them. They then signed a written agreement for a lease on those terms (Lease 1), which was not enforceable, but which reflected the parties' agreement as to some of the terms that should be in the lease. S and Mr Ahmad subsequently signed a lease in form LS2 which did not contain the amendments shown in Lease 1 (Lease 2). S took possession, but soon fell into difficulties paying the rent. Mr Ahmad began possession proceedings, and relet the property to a third party.

The respondent contended that Lease 2 ought to be rectified because it did not set out the full terms that the parties had agreed. The judge held that the parties had both been mistaken as to the effect of the terms of Lease 2 and had mistakenly believed that it would take effect in combination with Lease 1. Accordingly, they had executed Lease 2 under a mistake and it ought to be rectified. The Court of Appeal held that the judge had been entitled to make an order for rectification on the facts. The judge had been correct to conclude that the parties were mistaken as to the effect of Lease 2 and that it should be rectified to incorporate the amendments to LS2 which the parties had agreed in Lease 1. Further, a party should not be able to dissociate itself from its agreement simply because it becomes commercially undesirable.

Ahmad v Secret Garden (Cheshire) Ltd [2013] EWCA Civ 1005

September 2013

Damages

The claimants claimed damages from D, their neighbour, for damage to their house allegedly caused by tree roots from D's property. When the claimants noticed damage, in the form of cracks to their property, they informed D that a hedge on D's property was the most likely cause of the damage, and asked for the hedge to be removed, which it was. A further cause of damage was found to be an oak tree on the claimants' own property and another on D's. The claimants obtained approval from the local authority, Harrow LBC, to fell the trees, and both were removed.

However, the claimants contended that the risk of damage to their property from subsidence had been caused by the hedge and D's oak tree, and was, or ought to have been, reasonably foreseeable, and that D had failed to act reasonably to prevent the damage. D admitted that the damage was caused in whole or in part by the hedge and was contributed to both by D's and the claimants' oak trees, but denied that the damage was reasonably foreseeable.

The High Court found in favour of the claimants. D's hedge was the effective cause of the damage to part of the claimants' property. Both oak trees had equally caused the other damage. On the evidence, D did not have actual knowledge about the risk of damage to property, but a reasonably prudent landowner ought, in the period leading up to the time of the damage, have been aware that there was a general risk of subsidence damage to the property caused by tree roots, particularly on clay subsoil. Given that the risk of damage caused by the hedge was foreseeable, D was under a duty to take steps to eliminate that risk. D's failure to take the appropriate steps meant that D was liable in nuisance for the damage caused by that failure.

However, the Court held that it would have been reasonable for the claimants to have communicated with D and informed D of the risks of damage and actual damage to their property. As a result, their damages were reduced by 15% to reflect the claimants' responsibility for the damage caused to their property by that failure. D was liable only for the damage caused by the hedge.

Khan v Harrow LBC [2013] EWCA 2687 (TCC)

October 2013

Trespass – Hypothetical negotiation and aggravated damages

Eaton appealed against a judgment assessing the damages payable to it by Stinger, which had committed trespass. At the initial hearing, Eaton obtained summary judgment on its claim for trespass, and was awarded the sum of £6,000 by way of "negotiating damages". The case raised two points of law; whether, on an assessment of damages on the negotiating basis, the parties in the hypothetical negotiations for a licence fee were to be taken to be negotiating for a licence period equivalent to the actual duration of the trespass which had occurred, or some more extensive period, and whether the court could, or should, make an award of aggravated damages in favour of a company.

The appeal was dismissed, and the court found in favour of Stinger. The fundamental question was what was to be taken to be the subject matter of the hypothetical negotiations for the licence fee. Although the hypothetical negotiations had been adopted as a convenient means of valuing the benefit to Stinger which resulted from its tortious conduct, the accuracy of the valuation depended on the negotiations centering on the period and extent of the trespass which actually occurred. The nature and duration of the trespass dictated and shaped the nature of the valuation exercise. Eaton was not willing at the date of trespass to grant a permanent licence, and neither did Stinger obtain such a right. Therefore, Eaton had no claim for the loss of opportunity to negotiate a substantial licence fee. It was limited to recovering what Stinger would have paid for the rights which it illegally obtained. The damages awarded should compensate the loss suffered to reflect what Stinger had gained from its trespass.

The court further held that aggravated damages could be awarded in cases of trespass where a defendant's conduct had been high-handed, insulting or oppressive. Such an award was designed to compensate a successful claimant for distress and injury to feelings, which, in the case of a company, was not possible.

Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA [2013] EWCA Civ 1308

Mediation

The case involved three dilapidations claims brought by PGF, the landlord, against OMFS, the tenant. During the course of proceedings, several Part 36 offers were made by both parties. PGF though, invited OMFS to mediate on two separate occasions, yet OMFS failed to respond to these invitations.

The matter settled before trial following the acceptance of a Part 36 offer. PGF argued that OMFS ought not to have the benefit of the usual costs protection due to its lack of response to invitations to mediate. The judge at first instance agreed with PGF and held OMFS were not entitled to their costs for the 'relevant period', i.e. from 21 days following the date the offer was made.

OMFS appealed. The Court of Appeal was not persuaded and held that, not only was the silence tantamount to a refusal to mediate, but that the silence itself was unreasonable.

This case demonstrates the risk of a party ignoring invitations to mediate. If a party does not wish to mediate, it should set that out clearly in correspondence to the other side with valid reasons.

PGF II SA V OMFS Company 1 Limited [2013] EWCA Civ 1288

The Real Estate Disputes team

Richard Bedford
Partner
+44(0)117 902 2749
richard.bedford@burges-salmon.com

James Sutherland
Senior Associate
+44(0)117 307 6902
james.sutherland@burges-salmon.com

Abbie Mundell
Associate
+44(0)117 307 6003
abbie.mundell@burges-salmon.com

Charlotte May
Associate
+44(0)117 307 6286
charlotte.may@burges-salmon.com

Douglas Scott
Associate
+44(0)117 307 6879
douglas.scott@burges-salmon.com

David Benjamin
Solicitor
+44(0)117 902 7746
david.benjamin@burges-salmon.com

Thierry De Poerck
Solicitor
+44(0)117 307 6830
Thierry.DePoerck@burges-salmon.com

Andrew Cammish
Solicitor
+44(0)117 307 6815
andrew.cammish@burges-salmon.com

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Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX   Tel: +44 (0) 117 939 2000   Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF   Tel: +44 (0) 20 7685 1200   Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

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