Real Estate Disputes Case Review 2014

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 this year's important cases.

November / December 2013

Ending an assured shorthold tenancy

In 2006 the parties entered into a six month assured shorthold tenancy (AST) beginning on a Monday with the rent payable weekly. On expiry of the fixed term a weekly statutory periodic tenancy arose. The end of each period of the tenancy was therefore on a Sunday.

On 18 October 2011, the landlord gave the tenant a notice pursuant to Section 21(1) of the Housing Act 1988 requiring possession of the property *"(a) after 1 January 2012 or (b) at the end of your period of tenancy which will end next after the expiration of two months from the service upon you of this notice"*.

The 1 January 2012 was a Saturday and was, therefore, not the last day of a period of the tenancy. Two months after the service of the notice would have been 18 December 2011 and the next Sunday after that was 23 December 2011.

The High Court held that the notice was valid. The tenant duly appealed arguing that section 21(2) prohibited the service of a notice under section 21(1) after the expiry of the fixed term.

The Court of Appeal rejected this interpretation and held that the notice was valid. The Court stated that section 21(1) encompassed cases where a periodic tenancy had followed the expiry of a fixed term AST. Furthermore, where a notice such as this one admitted both a valid and an invalid interpretation, the validating interpretation should be preferred. Accordingly, the reasonable recipient of the notice would have understood that the formula (and thereby the date of 23 December 2011) was valid and that the date of 1 January 2012 was not the last day of a period.

Spencer v Taylor [2013] EWCA Civ 1600

January 2013

Release of sureties

Topland bought a Do It All Site in Morecambe in 2001. The property was let to Payless DIY Limited for 35 years from 1981 with Smiths standing as Surety. Payless went into Administration in 2011 with £280,000 owing to Topland. Topland duly pursued Smiths as Surety.

In the ensuing litigation, Smiths argued that they had not been party to a Licence for Alterations in 1987 which had involved substantial alterations including the construction of a new Garden Centre. Smiths argued that although these changes did lead to an increase in rent they nonetheless increased Payless' repair and reinstatement obligations. As these changes had been agreed without their consent they were therefore released from their liability as Surety. At first instance, Smiths succeeded.

On appeal Topland argued that the definition of Premises included any additions and alterations so Smiths would have been aware that these would be possible with the Landlord's consent. This argument failed because the lease included an express prohibition on structural alterations and, as a result, Smiths could not have foreseen that the Landlord would depart from this. The Court also agreed that Payless' (and as a result, Smiths') potential liabilities had been increased.

Topland also sought to rely on a clause in the lease that stated that any neglect or forbearance or granting of time on the part of the Landlord would not release the Surety. This argument was rejected on the basis that this was a standard provision that related to decisions not to immediately enforce against the tenant for breaches of covenant. Accordingly, this clause did not cover the granting to the tenant of additional rights and obligations and Smiths were released from their obligations as Surety.

Topland Portfolio No. 1 Ltd v Smiths News Trading Ltd [2014] EWCA Civ 18

February 2014

Rent payable by administrators

The High Court decisions in *Goldacre (Offices) Limited v Nortel Networks UK Limited (in Administration) [2010] Ch 455 and Leisure (Norwich) II Limited v Luminar Lava Ignite Limited (in Administration) [2012] EWHC 951 (Ch)* held that

administrators were liable for full payment of sums due under a lease as they fell due but not for any contribution to sums falling due before their appointment. The net effect of this was that the date of the appointment of the administrators became essential as it was possible to avoid liability for a rent period if the administrator was appointed after the rent in question became due.

In the instant case, Game Stores Group Ltd (GSG) held a number of leasehold premises. GSG became insolvent and went into administration on 26 March 2012, the day after the quarter day on which rent was payable in advance under its leases. The administrators later sold the business and many of the assets of GSG to a buyer (Game Retail Ltd (Retail)). The administrators of GSG gave Retail a licence to occupy many, but not all of GSG's properties.

GSG applied to the High Court for directions in relation to the treatment of the amounts payable under the leases. At first instance (and applying *Goldacre* and *Luminar*), the High Court held that the administrators were not liable for the rent and service charge payable on 25 March 2012 but were liable for rent, service charge and insurance premiums payable on or after 26 March 2012. Given the importance of these issues, the landlords were given permission to appeal.

In the Court of Appeal, Lewison LJ stated that the *Goldacre* and *Luminar* decisions had left the law in a very unsatisfactory state as landlords had been left unable to recover value from their property in spite of it being occupied for the benefit of the administration.

The Court of Appeal thus rejected the High Court's rationale in the previous cases and applied instead the 'salvage principle'. Accordingly, for the period that administrators occupy the property for the benefit of the administration, the landlord is entitled to receive the full value of the property, regardless of the fact that the lease was entered into prior to the administration.

The liability of administrators will therefore accrue from day to day for the duration of the administrators' occupation of premises for the benefit of the administration.

The Supreme Court have subsequently rejected the application to appeal the Court of Appeal's decision.

Pillar Denton Ltd and others v Jervis and others [2014] EWCA Civ 180

March 2014

Excessively litigious tenant prevented from taking statutory renewal lease

This case concerned the renewal of a business tenancy under the Landlord and Tenant Act 1954 which was contested on the rarely cited ground contained in section 30(1)(c) of the Act.

Cox and Billingsley were protected business tenants with the right to apply for a renewal lease on expiry of the existing term. Horne & Meredith Properties, as landlord, opposed this renewal citing ground s.30(1)(c), namely that there had either been substantial breaches by the tenants of their obligations under the tenancy or for any other reason connected with the use or management of the holding.

The landlord argued that a catalogue of previous litigation brought by the tenants against the landlord had destroyed the landlord and tenant relationship and that the right to a renewal tenancy should therefore be refused. The landlord presented evidence of 10 separate sets of proceedings over the course of a 16-year period in respect of alleged obstructions to a right of way that had been granted to the tenants under the lease. These claims had resulted in the landlord successfully applying for a limited civil restraint order against the tenants. The costs of contesting these numerous proceedings had been vast - one particular case had led to the landlord incurring legal costs of £300,000.

The County Court agreed with the landlord at first instance and held that the landlords were justified in refusing the grant of a new lease to the tenants. The tenants appealed.

The Court of Appeal considered whether the destruction of the landlord and tenant relationship was capable of being connected with the use or management of the holding and thereby satisfying the requirements of ground s.30(1)(c).

The Court held that there was no requirement for the tenant to be in breach of an obligation for a landlord to rely on ground (c). The litigation in question did concern the use and management of the holding as it related to rights granted under the lease and, when considering the question whether the tenant ought not to be granted a new lease, it was right to consider the tenant's past behaviour. On that basis the judge in the County Court had been entitled to come to his judgment and deny the tenants the right to a renewal tenancy.

Horne & Meredith Properties v Cox and Billingsley [2014] EWCA Civ 423

April 2014

Strict compliance with break clauses

In August 1997 Sun Life Assurance Society (later Friends Life Assurance Society Ltd) entered into an agreement for a lease of premises with A&M Hearing Ltd (later Siemens Hearing Instruments Ltd).

The lease was subsequently granted on 27 January 1999 for a term of 25 years from and including 24 August 1998. The lease included, at clause 19, a tenant's break clause. This required that any notice given by the tenant exercising the right to break "must be expressed to be given under section 24(2) of the Landlord and Tenant Act 1954".

In September 2012, a break notice was served on Friends by solicitors acting for Siemens, indicating an intention to terminate the lease on 23 August 2013. The notice did not refer to the notice being given under section 24(2) of the LTA 1954 but did refer to clause 19 and complied with the clause

in all other respects.

At first instance the High Court held that, in spite of the absence of a reference to section 24(2) of the LTA 1954, the notice was still valid.

On appeal, the Court of Appeal, when considering the validity of the break, focused on the fact that the tenant's option to break was a unilateral contract and that if the offer was to be accepted, it must be on the exact terms agreed in order for it to be turned into a binding contract.

The Court of Appeal considered the specific requirements of clause 19 and held that the word "must" was imperative and that, in the context of unilateral contracts, there could not be substantial compliance. Rather, a purported exercise of an option will be either compliant with both the formal and substantive provisions of the clause or it will not. If, as in the instant case, the notice does not comply with all of the provisions of the relevant clause, that notice is ineffective. Accordingly, the Court of Appeal held that the notice was non-compliant with clause 19 and the break had not been successfully exercised.

Siemens Hearing Instruments Ltd v Friends Life Ltd [2014] EWCA Civ 382

May 2014

Rent apportionment following exercise of a break right

Marks and Spencer were the tenant of a number of separate floors of an office block called The Point in Paddington. M&S exercised its break rights in respect of 4 leases, with each terminating on 24 January 2012.

To ensure that these breaks were effective, M&S were required to pay all of the rents due under each lease for the quarter commencing 25 December 2011 as well as a premium of a year's rent. M&S subsequently sought a refund of those parts of the payments it had made in advance in respect of rent, service charge, car parking and insurance charges, which related to a period after the break date.

M&S succeeded at first instance as the Court held that an apportionment provision should be implied into the lease because the intention was only for M&S to pay the year's rent under each Lease as compensation for terminating early rather than the year's rent and an additional two months' rent. The landlord appealed.

The Court of Appeal rejected the implied term relating to apportionment and stated that the starting point for Courts should be to stay loyal to the wording of the relevant agreements and that if the agreement was silent, that the relevant omission was deliberate. Implying terms was only to be relied upon where it was necessary to give effect to the true intentions of the parties.

In the instant case the effect of this approach was to reject the arguments that a tenant should only pay for what it receives and that the position on a break should be the same as on a lease ending at the end of the term. The requirement to pay a substantial premium on the exercise of the break did not give rise to an implied term that this amount was the totality of compensation payable to the landlord. The parties would have known the implications of the clauses as drafted and should be held to them.

On 11 November 2013, the Supreme Court granted permission to appeal against the Court of Appeal's decision.

Marks & Spencer plc (M&S) v BNP Paribas Securities Services Trust Company (Jersey) Limited [2014] EWCA Civ 603

June 2014

Protected by the corporate veil

In 2006, Sainsbury's agreed to have a Condek modular car park system installed at their North Cheam store. Mr Pashorous, the inventor and designer of the system, represented Condek throughout the negotiations and signed the documents on Condek's behalf. He later supervised the construction and installation of the car park system at the store.

Sainsbury's subsequently brought a claim arguing that the car park had been negligently designed, constructed and installed and that, as a result of this, it needed to be demolished and replaced. Sainsbury's claimed that the works required to replace the car park would cost over £3m and that they would lose an estimated £3.6m in lost sales during those replacement works.

The documents themselves included no warranties or other forms of security. Compounding this, Condek were in liquidation and, owing to a late notification of claim, were uninsured. Sainsbury's therefore sought to add Mr Pashorous and Condek's sub-contractor, NRM, as defendants to the claim. Sainsbury's argued that Mr Pashorous had assumed a duty of care to Sainsbury's as he was the owner, designer and sole beneficiary of the agreement.

The Court struck out the claim against NRM on the basis that there was no contract between NRM and Sainsbury's. In respect of the claim against Mr Pashorus, the Court held that one of the principal benefits of incorporation for inventors was that it limited their liability. If Sainsbury's had wanted to pursue Mr Pashorus personally, it could have insisted upon making Mr Pashorus a party to the contract or it could have obtained further security from him. There was no special relationship or assumption of personal liability by Mr Pashorus.

Sainsbury's Supermarkets Ltd v Condek Holdings Ltd and others [2014] EWHC 2016 (TCC)

July 2014

Landlord's liability for tenant's nuisance

In February and July 2014, the Supreme Court considered a number of principles in respect of private nuisance. The underlying case related to noise nuisance caused by Mr Coventry's motocross and speedway track. The Supreme

Court held that the track operators were liable in private nuisance to Ms Lawrence and Mr Shields, who lived near the stadium in a bungalow that had subsequently burnt down.

In February 2014, the Supreme Court concluded that:

(1) Prescriptive rights to commit what would otherwise be a noise nuisance were possible.

(2) The defence of a claimant coming to the nuisance would not generally succeed except, potentially, if the claimant has changed the use of the land.

(3) A defendant can rely on its activities as constituting part of the character of the locality, but only to the extent that those activities do not constitute a nuisance.

(4) Although of relevance as to whether the Court will award an injunction or compensation, the grant of planning permission will not deprive a property owner of a right to object to what would otherwise be a nuisance, without providing compensation.

The Court duly imposed an injunction limiting the levels of noise that could be emitted from the stadium and track, awarded damages to the claimants and required the respondents to pay a proportion of the claimants' costs.

On 23 July 2014 the Supreme Court proceeded to consider the question of whether the landlords of the motocross stadium and track site were liable for the nuisance of their tenants.

The Court held that the landlord was not liable for his tenant's nuisance because although he had done nothing to stop or discourage the tenant from causing a nuisance, he had not participated actively or directly in the nuisance. Furthermore, at the time of the letting to Mr Coventry the nuisance was not an inevitable or near certain consequence of the letting as the track could have been used for motocross without a nuisance arising.

The Court also held that the purpose of the injunction granted in February was to protect the enjoyment of the bungalow. Accordingly, the injunction should be suspended until such time as it had been built and was fit for residential occupation.

Coventry and others v Lawrence and another [2014] UKSC 13 and Coventry and others v Lawrence and another (No. 2) [2014] UKSC 46.

August 2014

Orders for Sale

The Claimant, Fred Perry (Holdings) pursued a claim against Mr Genis for damages following his sale of counterfeit goods. The Claimant duly obtained Judgment for approximately £133,000 and charging orders over Mr Genis' matrimonial home (worth an estimated £1.2m).

When it became clear that Mr Genis would not sell the property, the Claimant sought an Order for Sale of the property. In such cases the Court has discretion under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) to decide whether or not the order for sale should be made and, if it is made, whether particular conditions are placed upon the sale.

In the instant case Mrs Genis had paid the mortgage payments since June 2012 and had contributed £100,000 towards the original purchase price. Additionally, Mr Genis' children (aged 9 and 14 respectively) attended local specialist schools and it was argued that they may have to move schools if the property was sold.

Accordingly, the Court was required to consider whether the Claimant's commercial interests should take priority over the family interests under TOLATA and the Family Law Act 1996.

The High Court held that, as the sale of the property was the only possible source for payment to the Claimant, that the general policy of giving priority to commercial interests should be upheld and that the Order for Sale should be made. Nevertheless, the Court acknowledged the impact upon Mrs Genis and the children and ordered that the sale be delayed until 31 July 2015 with interest continuing to accumulate in the meantime.

Fred Perry (Holdings) Limited v Genis and another (unreported) 1 August 2014 (High Court)

September 2014

Repeat guarantees are void

In this case, the Tindall companies were the tenants of a portfolio of hotels owned by Adda. The Tindall companies were part of the Hilton Group and their obligations under the leases were guaranteed by the Hilton parent company. The leases were new leases for the purposes of the Landlord and Tenant (Covenants) Act 1995.

Each of the leases under which Tindall occupied the portfolio contained two covenants against assignment of the whole of the premises in question:

> The first was a general restriction on assignment which was a qualified covenant, subject to a number of stringent conditions under the Landlord and Tenant Act 1927.
>
> The second was a covenant permitting assignment to associated companies subject to Tindall satisfying two conditions, (a) that they would provide notice of any assignment within 10 working days and (b) that they would "procure that the Guarantor and any other guarantor of the Tenant shall covenant with the Landlord" as guarantor of the assignee.

Tindall assigned each of the leases to £1 subsidiary companies as part of a corporate restructuring without obtaining Adda's consent. Tindall did give Adda notice of the assignments but did not provide the guarantees envisaged by condition (b). Adda sought a declaration that the assignments were in breach of covenant.

Tindall argued that condition (b) was a repeat guarantee and that pursuant to the *K/S Victoria* case, void and should be struck out. This would mean that the leases effectively gave them an unrestricted right to assign to any associated company provided that they gave the notice as per condition (a).

At first instance the High Court held that condition (b) should be interpreted as imposing an obligation on Tindall to procure a guarantee from a guarantor of equivalent covenant strength to the Hilton parent company. Tindall appealed.

The Court of Appeal agreed with Tindall's submissions that High Court's interpretation went too far and that condition (b) was void. However, the Court went further and held that it should consider the structure of the contract objectively and with common sense. Applying this test, Tindall's reading would provide a windfall to Tindall. The Court therefore deemed conditions (a) and (b) to be part of the same proviso and struck both of them down. Accordingly, the clause was reduced to a standard qualified covenant against assignment.

Tindall Cobham 1 Ltd and others v Adda Hotels (an unlimited company) and others [2014] EWCA Civ 1215

October 2014

Landlord's residential service charge recovery improved

The Court of Appeal has overturned the High Court's previous decision in *Francis v Phillips* in respect of when the consultation regime laid down in Section 20 of the Landlord and Tenant Act 1985 will apply to "qualifying works".

Section 20 limits the landlord's recovery of the cost of qualifying works by service charge to £250 per residential tenant, unless the landlord complies with the prescribed consultation process or obtains a dispensation from the Lands Tribunal.

The central issue was therefore what "qualifying works" meant in this context. The High Court had previously held that all works in a given service charge year should be aggregated together without distinguishing between different sets of works.

The Court of Appeal rejected this approach on the basis that it would embroil landlords in excessive consultations over minor service charge expenditure. Furthermore, the resulting administrative costs would ultimately be borne by the tenants through the service charge.

Instead, the Court stated that the £250 cap should be applied to sets of works. When identifying what amounts to a single set of qualifying works, a common sense approach should be adopted. Accordingly, relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time; and (iv) whether the items are different in character from, or have no connection with, each other.

Francis and another v Phillips and another [2014] EWCA Civ 1395

November 2014

Unilateral termination of tenancy by Joint Tenant does not breach ECHR rights

The Supreme Court has held that a notice to quit served by one joint tenant which operates to determine a joint tenancy does not infringe the other joint tenant's rights under the European Convention on Human Rights.

The instant case involved a claim by a husband, Mr Sims, following the service of a notice to quit by his wife to end their joint tenancy. The tenancy agreement stated that upon service of a notice to quit served by either of the joint tenants that the tenancy would be lost. At that point the landlord (the Council) could elect whether to allow the remaining tenant to stay or to find them alternative accommodation.

Mr Sims argued that in not allowing him to remain, his rights pursuant to Article 8 (right to respect for private life) and Article 1 of the First Protocol to the ECHR (right to peaceful enjoyment of possessions) were infringed.

The Supreme Court held that the Council was within its contractual rights to refuse to allow Mr Sims to remain. The ability to serve a notice to quit benefitted both joint tenants and the consequences of preventing the Council exercising its contractual rights would have been either to force a tenant to stay against their will or to the property being under-occupied. The Council's decision-making process had been both lawful and proportionate. Accordingly, there had been no breach of Mr Sim's ECHR rights.

Sims v Dacorum Borough Council [2014] UKSC 63

The Real Estate Disputes team

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

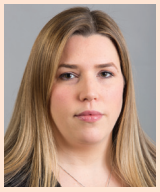
Chris Preston
Senior Associate
+44(0)117 939 2281
chris.preston@burges-salmon.com

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

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

Thierry De Poerck
Solicitor
+44(0)117 307 6830
thierry.depoerck@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

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

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

Annabel Hayday
Solicitor
+44(0)117 307 6074
annabel.hayday@burges-salmon.com

The team has a wide range of expertise in the following:

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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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