Briefing

Real Estate

BURGES SALMON

December 2015

Real Estate Disputes Case Review 2015

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.

December 2014

Landlord protecting tenant's deposits

A landlord's ability to seek possession of residential premises under section 21 of the Housing Act 1988 was considered when the tenant's deposit had not been protected in an authorised scheme at the time of service of the notice.

Charalambous took a tenancy of a residential property in 2002 and paid a deposit. The tenancy expired and was renewed twice, each time with the same deposit being carried over to the new tenancy. The contractual term of the third tenancy ended on 17 August 2005 and a periodic tenancy arose. On 17 October 2012 the landlord served a notice under section 21 at which point the statutory regulation of tenancy deposits had been introduced with effect from 6 April 2007.

The trial judge held that the section 21 notice was valid despite the deposit not having been paid into a tenancy deposit scheme. The Court of Appeal held that the section 21 notice was invalid and landlord was unable to regain possession based on the invalid notice.

The Court decided that there is not a requirement for a landlord to register a deposit where there was no authorised scheme at the time the deposit was received (in considering the meaning of "received" the Court applied the decision in *Superstrike*). However, a landlord could only make use of section 21 of the Housing Act 1988 to end an AST where the deposit was protected in an authorised scheme at the time the notice was served. Where the landlord had failed to protect the deposit during the grace period it could only rely on section 21 by returning the deposit to the tenant.

Charalambous and another v Maureen Rosairie Ng and another [2014] EWCA Civ 1604

January 2015

Assignment of the reversion and the liability of the original landlord

The freeholder and landlord, Mr Sandhu, assigned the reversion to his company, Sandhu Investments Limited in 2002. Subsequent correspondence sent to the tenants was not consistent when referring to the identity of the landlord.

Sandhu Investments Limited failed to insure the property properly. Accordingly, when the property subsequently burned down there was a lack of insurance monies. This led to a claim by the tenants against Mr Sandhu personally but not against the company. The tenants succeeded and proceeded to issue bankruptcy proceedings against Mr Sandhu.

Although the action had been pursued against Mr Sandhu rather than the company, the failure of Mr Sandhu to obtain a release on assignment from liability for the landlord's covenants meant that he remained liable for the breaches that had occurred after the assignment. The tenants therefore succeeded in their action.

This case highlights that if a Landlord is seeking to sell the reversion then they should consider pursuing the notice procedure in section 8 of the Landlord and Tenant (Covenants) Act 1995 so that they may obtain a release from continuing liability for the landlord's covenants after assignment.

Reeves v Sandhu [2015] EWHC 985 (Ch), [2015] BPIR 899

Landlord's intention to redevelop

The landlord, Greathall, served a s.25 notice opposing the grant of a new tenancy to Mr Hough which relied upon the redevelopment ground, s.30(1)(f) of the Landlord and Tenant Act 1954 ("LTA").

Mr Hough's case throughout was based upon a novel interpretation of the impact of amendments to the LTA that were introduced by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (RRO). The RRO changed the wording in the LTA from requiring a landlord to state whether it "would oppose" a tenant's application for a new tenancy to stating why it "is opposed" to such a grant. Mr Hough duly argued that this meant that the landlord was required to show the necessary intention to redevelop on the date that the landlord served the s.25 notice, not at the date of the eventual hearing.

At first instance the Court held that the relevant date to ascertain the landlord's intention was still the date of the hearing. It was therefore immaterial that the landlord did not have the requisite intention at the time that it served the s.25 notice – all that mattered was that it did have the intention at the date of the hearing. The Court therefore dismissed the tenant's application for a new business tenancy and ordered the tenant to provide vacant possession.

Mr Hough's subsequent appeal was unanimously dismissed by The Court of Appeal who found that there was no evidence that the amendments by the RRO were intended to alter the settled law on when a landlord must show its intent for the purposes of relying on s30(1)(f) of the LTA.

Hough v Greathall Ltd [2015] EWCA Civ 23

February 2015

Remedies for right to light interference

Scott and another v Aimiuwu and another [2015]

A right to light claim was brought by Mr and Mrs Scott against Mr and Mrs Aimiuwu following the latter's building of a substantial rear extension during 2012/3 which interfered with the light to four windows in the Scotts' house.

The Scotts had not pursued an urgent interim injunction to prevent the Aimiuwus proceeding with their works but, at trial, sought an injunction that would have required the Aimiuwus to cut their extension back by approximately 92 square meters.

The Court refused to grant an injunction and awarded damages of £31,499 instead. In doing so the Court held that requiring demolition works to the extension would have been oppressive and punitive, especially given that the rooms affected were only 'secondary accommodation' as they were, respectively, a garage and bathroom. The effect on these rooms could, therefore, be adequately compensated by an award of damages. Furthermore, the judge indicated that although the rule that each room should enjoy 50% of light was a useful rule of thumb, that this could be altered depending on all the circumstances.

A further factor in the Aimiuwus' favour was that they had proceeded on the basis of their planning permission and upon expert advice that they had received that the interference to the Scotts' property was not material.

Significantly on when assessing damages the Court held that they should be calculated based upon what reasonable parties would have negotiated to settle the matter at an early stage rather than relying on the diminution of value of the Scotts' house or a share of the profit for the Aimiuwus.

March 2015

Historic restrictive covenants point to a building scheme

The parties in this case owned adjoining plots of land both of which had originally been sold by the same vendor over a century ago. At the time of their respective sales both plots had been sold subject to restrictive covenants that prohibited the construction of more than one or two detached residences on each plot.

The Claimant, Birdlip, sought and obtained planning permission to construct two houses in addition to the existing one on their plot. They also sought a declaration that their plot was not bound by the restrictive covenant. The Defendants sought to uphold and enforce the restrictive covenants to prevent this development.

The Court held that it was first necessary for the extent of the estate to be defined at the date of crystallisation of the scheme in order. Although the plans in the various conveyances were not always consistent in defining the boundaries of the estate, the differences in this case were held to be immaterial and the estate could still be defined by reference to a 1908 plan. In considering this, the judge also inferred that the laying out of the estate in lots was evidence of an intention that the covenant should be for the common benefit of purchasers.

Having reviewed the covenants, the Court held that they were substantially the same and that they appeared to be based upon a standard form contract. Furthermore, the covenants themselves had existed for over a hundred years and had been treated as enforceable in earlier litigation. The Court duly held that, on the balance of probabilities, there was an intention for the covenants to be for the benefit of the purchasers and that a building scheme had been established. The Claimant was, therefore, bound by the restrictive covenants.

Birdlip v Hunter and another [2015] EWHC 808 (Ch)

April 2015

Supreme Court provides guidance on penalty clauses

The Supreme Court provided guidance on the enforceability of penalty clauses and some certainty about the scope and application of the rules.

First, ParkingEye managed a car park at a Retail Park allowing visitors 2 hours free parking. If visitors overstayed a parking charge of £85 was payable, which is reduced to £50 if paid within 14 days. On 15 April 2013 Mr Beavis parked for nearly 3 hours and refused to pay the parking charge. Liability turned on two issues, first whether the charge constituted a penalty and secondly whether it was unfair under the UTCC Regulations 1999.

Second, El Makdessi agreed to sell Cavendish 474 of the Group's shares. The price was payable in stages with interim and final payments. The contract provided for breaches upon which El Makdessi would not be entitled to receive the interim and/or final payments. The issue before the Court was whether these clauses were valid and enforceable.

In Parkingeye the Supreme Court held that the parking charge did not constitute a penalty. Although ParkingEye did not suffer any loss as a result of the overstaying, the level at which the charge was set was not extravagant or unconscionable.

In El Makdessi the Court held that the price adjustment clause and the forced share sale clause were primary obligations and did not engage the penalty rule.

The penalty rules apply to commercial and consumer cases. The penal character of clause depends on its purpose, which is a question of construction and the evidence of the commercial background is relevant in the ordinary way. The traditional four tests in Dunlop Pneumatic Tyre Co are useful for cases concerning standard damages clauses. For more complex cases a broader approach which focuses on the nature and extent of the innocent party's interest in the performance of the relevant obligation is more suitable.

ParkingEye Ltd v Beavis [2015] EWCA Civ 402 and Cavendish Square Holding BV v El Makdessi and ParkingEye Ltd v Beavis [2015] UKSC 67 (Supreme Court)

May 2015

Continuous and apparent rights of way

In 1998 the owner of a large residential, agricultural and sporting estate sold two separate parcels to the Claimants and Defendant respectively. The land was criss-crossed by various farm tracks and two public bridleways.

The Claimants argued that they were entitled to rights of way across the Defendant's land at two different points: first to access a track and gain access to a public road; and secondly to cross another stretch of track on foot or horseback. This was of particular importance as the Claimants ran a livery stable from their property and wanted to use the rights of way so that riders could reach a nearby bridleway.

The Claimants argued that they had been granted express rights of way under the contract for sale and, in the alternative, that such rights could be implied in three ways; under Section 62 of the Law of Property Act 1925 and / or under the doctrine established by Wheeldon v Burrows (1879) 12 Ch 31 and / or due to there being a common intention between the seller and the Claimants that the land conveyed was to be used in a definite and particular way.

The Claimant failed at first instance but succeeded in their claim in the Court of Appeal. The Court of Appeal dismissed the claim for an express grant but did consider that the criteria for an implied grant had been met.

Usually it is an essential component for the creation of an easement that the properties be owned by different parties. In this case, however, the Court found that Section 62 could operate to grant easements where there had been common occupation if exercise of the rights had been continuous and apparent. The relevant test was what features were observable at the date of the conveyance and what had the use of the claimed rights been.

In respect of the first way, it had been established in the High Court that the claimed route had been used once a month in the period immediately preceding the sales. The Court of Appeal considered that this sufficient to count as enjoyment under Section 62. There had also been continuous and apparent use of the second right of way, including vehicular use.

In deciding upon the extent of the rights, the Court held that when construing a private right of way such as this, the more onerous must include the less onerous. Accordingly, on the assumption that under section 62, the transfer had included a right to use the way with vehicles, the grantee would also be entitled to use the way on foot or on horseback (but not to drive animals).

Wood and another v Waddington [2015] EWCA Civ 538

June 2015

Unambiguous wording prevails against commercial common sense

Britton and others were the tenants of 25 chalets at Oxwich Leisure Park whose leases were granted between 1974 and 1991. Each chalet was let for a period of 99 years. A dispute arose between the tenants and the landlord as to the interpretation of a clause requiring the tenants to pay service charge.

The leases required the tenants to pay an initial annual service charge of £90 which increased at a compound rate of 10% every year. On this basis, for a lease granted in 1980, the current annual service charge was £2,500; and by 2072 would reach a staggering £550,000.

The tenants argued that the reference to the 10% increase in the clause should be read as stipulating what the upper limit was to the service charge. They acknowledged that this interpretation would require the Court to imply additional wording to the clause.

The tenants, having failed in the Court of Appeal, appealed to the Supreme Court.

The Supreme Court, by a majority of 4-1, upheld the landlord's interpretation again. In the leading judgment, Lord Neuberger emphasised that the Court should identify the parties' intentions by reference to what a reasonable person would have understood them to be using the language in the contract to mean. The language used in a provision was therefore of fundamental importance and should not be diminished by placing undue reliance on commercial common sense.

Accordingly, the fact that the consequences of the language used worked out badly – or even disastrously – for a party was not a reason for departing from their natural meaning. It is not the Court's function to relieve a party from the consequences of an imprudent miscalculation, or from poor advice.

It was clear that the tenants had struck a very bad bargain by failing to appreciate the compounding effect of the 10% per annum increase. However, the nature of the clause was unambiguous and so they were bound by it.

Arnold v Britton and others [2015] UKSC 36

July 2015

Relief from forfeiture and extensions of time in consent orders

Safin commenced proceedings against the Estate of Dr Badrig for possession of a flat that had been let under a long lease.

At a hearing on 5 April 2012, an order was made to forfeit the lease and for the Estate to pay arrears of rent and service charges amounting to £22,770.29. The Estate applied for relief from forfeiture and the order was stayed, with a trial listed for January 2014.

The parties subsequently settled the matter two days before trial and documented this by way of a consent order. The order provided for relief from forfeiture if the Estate satisfied certain conditions including payment of the outstanding arrears and costs as well as undertaking works to the flat by 6 March 2014. Time for compliance with these conditions was of the essence.

On 5 March 2014, the Estate sought permission to extend the time limits for compliance. As the Estate had failed to satisfy the conditions by 6 March 2014, Safin duly sought a warrant of possession. The Estate then satisfied the conditions prior to the date fixed for execution of the warrant.

When the Court considered the application for an extension of time it allowed the extension on the basis that Safin had achieved what it wanted in so far as the arrears, costs and interest had been paid and the works had been completed before the hearing. Safin appealed, citing the fact that the parties had agreed that time be of the essence and that there must be exceptional circumstances for the Court to extend those timescales and go against the parties' contractual intention under the consent order.

The Court of Appeal dismissed the appeal. The Court concluded that the judge had properly exercised his discretion in varying the terms of the consent order. Furthermore, it held that the Court did have jurisdiction to extend time limits within a consent order, even if the parties had agreed that time would be of the essence and that this discretion was not limited to situations where there were unusual circumstances.

The factors considered by the Court included the fact that the Estate's application had been within the time limits for compliance and that the conditions had been satisfied prior to the hearing. The Court was also mindful that there was a potential windfall for Safin as the value of the long residential lease £1m – considerably more than the amounts that had been due to Safin.

Safin (Furzecroft) Ltd v The Estate of Dr Said Ahmed Said Badraig (Deceased) [2015] EWCA iv 739 (10 July 2015)

August 2015

Framework agreements can be Qualifying Long Term Agreements

The Royal Borough of Kensington & Chelsea owned a number of tenanted blocks and wanted to enter into framework agreements, under which it intended to place orders for future works to the properties.

Before it entered into those framework agreements, the Borough sought a determination from the Upper Tribunal (Lands Chamber) on a number of issues, including whether the agreement was a Qualifying Long Term Agreement as defined by the LTA 1985.

The Tribunal held that framework agreements could be a QLTA as the proposed agreement was for four years and that it was possible that individual tenants would be required to contribute more than £100 in any (12 month) accounting period. As part of this the Tribunal accepted that it was not necessary for the costs to the tenant to definitely exceed £100 - it was sufficient that they might be.

The Tribunal also held that for the LTA 1985 consultation requirements to apply, the costs must be incurred under the framework agreement. The Tribunal considered the proposed framework agreements and held that the works covered by those agreements had been identified with sufficient particularity and that the nexus between the agreement and the costs was therefore such that the associated costs could be said to have been incurred under the framework agreements. This was the case even if the works were also governed by a separate "call-off" agreement.

The Royal Borough of Kensington & Chelsea v Lessees of 1-124 Pond House, Pond Place, London SW23 and others [2015] 0395 UKUT

September 2015

Landlord's right to forfeit versus tenant's administration pre-pack assignment

In September 2014, administrators were appointed over Strada restaurants (trading under SSRL Realisations Limited). The restaurant was tenant of a unit in a shopping centre in Bloomsbury.

The tenant's administrators proposed to assign the lease for a premium in order to fulfil their obligations under Schedule B1 to the Insolvency Act 1986 ("Schedule B1"). The assignment was part of a pre-pack sale to Strada Trading Limited.

The landlord objected to the proposed assignment because the assignee was a newco and no AGA was offered. The lease specified various requirements the landlord could request as a condition of consent pursuant to section 19(1A) of the Landlord and Tenant Act 1927.

In December 2014 the landlord served a notice under s.146 of the Law of Property Act 1925 to forfeit the lease due to the tenant's insolvency. It then applied to the court for permission to forfeit due to the administration moratorium (Schedule B1 requires that the landlord obtain either the administrators' consent or the Court's permission to exercise its right to forfeit by peaceable re-entry).

The Court considered that the administrators' object was primarily to realise property under para 3(c) Schedule B1 of the Insolvency Act 1986 and not to achieve a better result than winding up because the administrators had not identified any unsecured creditors. The premium on assignment would only benefit the secured creditors.

The Court gave the landlord permission to forfeit the lease because the administrators had not satisfied the landlord's requirements under the alienation provisions of the lease, the proposed assignee was a newco and no AGA was offered. In addition, the landlord was able to show that it had alternative tenants willing to take the property. As items were specified in the lease under s.19(1A) of the Landlord and Tenant Act 1927, the landlord was not unreasonable in refusing its consent.

In December, the Court of Appeal dismissed the administrators' application for permission to appeal.

Re SSRL Realisations Ltd (In Administration) (Lazari Investments v Saville & Ors) [2015] EWHC 2590 (Ch).

Court considers whether landlord or tenant owns Banksy street art

A mural, attributed to street artist Banksy, had appeared on the side wall of an amusement arcade in September 2014. The tenant of the arcade removed the section of the wall with the mural and made good the damage. It then shipped the part of the wall with the mural (which was said to be valued at around £470,000) to the US for sale on the advice of an art dealer.

The landlord of the building sold any interest it had in the artwork to a charitable art foundation. The foundation then brought a claim against the tenant for the return of the mural.

The tenant argued that it was obliged to remove the mural under its repair covenant in the lease and that, once removed, the mural became a chattel belonging to the tenant by virtue of an implied term in the lease, so it could therefore sell if it wanted.

The court held that, although the repairing covenant was engaged, the tenant had to justify why the method it used to "repair" the wall was reasonable. On the facts, the tenant could have used less invasive methods of repair, such as painting over the mural or chemical cleaning of the wall. Therefore, it was not entitled to remove and replace the wall to comply with its repair covenant.

The court also held that, once the part of the wall was removed, it became a chattel but remained the property of the landlord. Although it could be argued that there is an implied term in a lease that items of little or no value become the property of the tenant once removed, this term could not be implied for items of substantial value.

The Creative Foundation v Dreamland Leisure Limited and others [2015] EWHC 2556 (Ch)

October 2015

Restored company, restored freehold

In this case a property development company, Fivestar, entered into a loan arrangement with a lender. The security for this loan was over a freehold interest in commercial property in Croydon that had been let out to a third party.

Fivestar defaulted upon the loan, the lender appointed LPA Receivers and the lender later put Fivestar into administration. The administrators realised certain sums for the benefit of Fivestar's creditors but did not take steps to sell the property itself, over which the Receivers were appointed. The administrators then gave notice to dissolve Fivestar on the basis that there were no further assets that remained to be realised.

At the time of the dissolution the tenant was negotiating with the Receivers for a new tenancy under the Landlord and Tenant Act 1954. As the current lease was due to expire, the tenant issued a claim for a new lease. Due to Fivestar's dissolution, the tenant served notice of its claim on the Treasury Solicitor who promptly disclaimed the Crown's interest in the freehold.

The lender then applied for Fivestar to be restored to the register and for an order that the disclaimed property be re-vested in Fivestar. The Treasury Solicitor and the solicitors for The Crown Estate confirmed that they did not object to the proposed restoration and re-vesting.

The Court held that the effect of Fivestar's restoration was that the freehold interest was retrospectively re-created and re-vested in Fivestar in all respects as if it had never been dissolved and the freehold had never been disclaimed. This was consistent with the approach taken by the Courts in respect of leasehold interests that have been disclaimed.

The Court recognised that the decision meant that this line of caselaw did create a sense of limbo in which leases or freehold titles could, at some stage, be restored to the register. The Court was, however, less concerned in this case as the risk to the Crown of dealing with land that might be subject to an unexpected restoration could either be dealt with by disclaimer or by disposing of the bona vacantia property.

Re Fivestar Properties Ltd [2015] EWHC 2782 (Ch)

November 2015

LPA Receivers do not owe a duty of care to a bankrupt mortgagor

The Claimant bought a buy-to-let residential property in 2001 and later re-mortgaged it, with the loan being secured by way of a first legal charge. The Claimant subsequently fell into arrears in 2009 and the lender appointed LPA Receivers over the property.

The Receivers obtained their own building insurance policy and informed the Claimant in March 2009 that he should cancel his own policy, which he did. The Claimant was declared bankrupt in September 2009. During the Receivers' appointment and before the Claimant's discharge from bankruptcy, there was a leak in the vacant property which caused significant damage. The Claimant discovered this and informed the Receivers who failed to take any action to remedy the leak or make a claim on the insurance.

The Receivers' appointment was terminated in April 2010 and a year later the Claimant was discharged from bankruptcy. The Claimant undertook repairs at his own expense and completed these in May 2011. The trustee-in-bankruptcy then transferred the property back to him in August 2011.

The Claimant issued a claim against the Receivers seeking damages for breach of duty due to their failure to submit a claim under their insurance policy in a timely manner. The Claimant also argued that, had they been paid by the insurer, they would have been obliged / authorised by the lender, to use those monies on repair, thereby avoiding the need for the Claimant to do the repairs himself.

At first instance the claim was dismissed because the Receivers did not owe the Claimant a duty of care following the bankruptcy order in 2009. Additionally, as the repairs were carried out by the Claimant prior to the property being transferred back to him, the repairs had been undertaken voluntarily without agreement from the trustee-in-bankruptcy. As such, the Receivers could not be said to have caused the Claimant the loss.

The Claimant appealed on the basis that he remained mortgagor in spite of the title vesting in the trustee-in-bankruptcy because he remained liable under the mortgage during the period of his bankruptcy.

The Court of Appeal dismissed the appeal firstly because an LPA Receiver only owes a duty of care to the mortgagor if he retained an interest in the equity of redemption. In relation to the insurance claim, therefore, the Receivers owed a duty exclusively to the trustee-in-bankruptcy.

In respect of causation, the Court did not consider there to be sufficient evidence to establish that the lender would have directed the Receivers to spend any of the insurance money on repairs, as opposed to reducing the mortgage liabilities.

Purewal v Countrywide Residential Lettings Ltd and others [2015] EWCA Civ 1122

December 2015

No implied right to apportionment on a break (even with a break premium)

The facts in this case have been well publicised. The appeal before the Supreme Court concerned a tenant's break clause in a commercial lease that had been granted for a term expiring on 2 February 2018.

The lease required rent to be paid in advance on the usual quarter days. It also contained a break clause to determine the lease on 24 January 2012. That break would only have effect if on the break date there were no arrears of Basic Rent or VAT on Basic Rent and if the tenant had made an additional payment of £919,800 plus VAT to the landlord.

The tenant exercised its right under the break clause to determine the lease on 24 January 2012, paying the reserved premium and after paying the full quarter's rent due on 25 December 2011. The issue before the Supreme Court was whether the tenant could recover from the landlords the apportioned rent in respect of the period after the break date – i.e. the two months from 24 January to 24 March 2012.

The Supreme Court unanimously (5-0) rejected the Claimant's claim for an implied term for reimbursement on the grounds that such a term was unnecessary to make the contract workable or internally coherent.

Furthermore, whilst there was judicial differences expressed over the ambit of what is involved in contractual construction and interpretation, the judges emphasised the 'usual role' is resolving ambiguities in the language actually used in the contract before considering any need for the use of 'the extraordinary power' involving the imposition of additional terms.

Turning to the general approach to be adopted in the implication of terms into contracts, the Court held that a term will only be implied where it is strictly necessary for business efficacy. The test is not one of absolute necessity but it is a case of whether, without the term, the contract would lack commercial or practical coherence. Accordingly, if a term lies uneasily with the express terms of the contract, it will not be implied. It would also be insufficient, for example, to rely solely on whether the parties would have agreed to it had it been suggested to them.

Equally, it was important to consider the settled law as at the date that the document was executed as this would inform the reasonable man's view of the contract. In the instant case it was clear that the settled law was that there was no right to apportionment, regardless of whether the lease ended by forfeiture or upon the exercise of a break clause.

As part of their decision, the Supreme Court also considered the influential decisions in Privy Council in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988 as well as the five tests set out by Lord Simon in BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings (1977) 52 ALJR 20, 26. In respect of Belize, the Court confirmed that it did not provide authoritative guidance on the law of implied terms. With regards to Westernport, the Court advised that the 5 tests were of use but that they should not be applied too rigidly.

The Supreme Court also confirmed that an earlier decision in Ellis v Rowbotham [1900] 1 QB 740 had been decided correctly when it held that rent payable in advance was not apportionable under the Apportionment Act 1870 and that it could only be apportionable by clear and unambiguous drafting in the contract.

Marks & Spencer Plc v BNP Parabis Securities Services Trust Company (Jersey) Ltd [2015] UKSC 72

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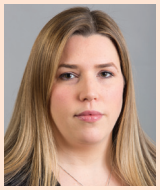

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