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REAL ESTATE NEWSLETTER

NEWS

Safe from harm

Government announces ring-fencing of arrears and extends protection for commercial tenants

Following its call for evidence on commercial leases, the government has once again extended the existing protection for tenants. This means that landlords will not be able to forfeit for non-payment of rent or exercise the right to exercise CRAR, to recover rent through the seizure of a tenant's goods, until 25 March 2022. The restrictions on the service of statutory demands and winding-up petitions have been extended for a further three months to 30 September 2021.

Perhaps of greater significance is the proposed introduction of new legislation to help protect those businesses forced to remain closed during the COVID-19 pandemic. Arrears accrued during periods of closure since March 2020 are to be ring-fenced to allow landlords and tenants to continue to work together to agree how those arrears are to be dealt with. In the absence of agreement, the parties will be subject to a binding arbitration process. Although the government has reiterated that those tenants who are able to pay should do so, the announcement has not gone down well with the property industry, particularly those landlords exposed to the hardest hit retail, food and beverage and hospitality sectors.

The government's response to the issue is an indication of the significance of commercial leases and their role in the post COVID-19 recovery. It also amounts to unprecedented intervention in commercial landlord and tenant relationships where the parties have traditionally been bound by the provisions of their contract. The new legislation comes on top of the government's proposed review of both the Landlord and Tenant Act 1954 and the business rates regime. These are interesting times for the property industry, business occupiers and real estate practitioners.

CASES ROUND UP

All rise

Court of Appeal interprets inflationary rent review clause

Woden Park Limited v Monsolar IQ Limited: [2021] EWCA Civ 961

The Court of Appeal has decided that a rent review formula that had the effect of repeating inflationary increases was clearly a drafting mistake and should be corrected so as to provide a true inflationary rent increase. The lease of a solar farm contained an annual rent review linked to the RPI. However, although the rent to be increased was that payable immediately before the relevant review date, the base index figure throughout the term continued to be the RPI figure immediately before the lease was granted. A literal interpretation of the clause would quickly result in an extortionate rent significantly in excess the true rate of inflation during the term.

Although it was not the court's place to correct a commercially unattractive bargain that was not the same as a clause that produced a clearly absurd result. The Court of Appeal distinguished the Supreme Court decision in *Arnold v Britton*. In that case, the Supreme Court decided that a service charge provision agreed at a time of unusually high inflation and which resulted in an excessive service charge should be construed literally. A 10% increase on a compound basis reflected the commercial

intention of the parties when the leases were granted back in 1974 and this had simply turned out to be a very bad deal for the tenant.

Should I stay or should I go

Contracting out of security of tenure

TFS Stores Limited v Designer Retail Outlet Centres (Mansfield) General Partner Limited: [2021] EWCA Civ 688)

The Court of Appeal has considered the procedure for contracting out of the security of tenure provisions of the Landlord and Tenant Act 1954. The tenant claimed that leases of six of its retail units had not been validly contracted out and that it enjoyed security of tenure. The contracting out procedure requires the tenant to make a declaration to the effect that it has received a warning notice from the landlord and that it understands that the relevant tenancy will be excluded from the protection afforded by the Act. The declaration (which can be a simple declaration or, more commonly in practice, a statutory declaration) must be in the form, or substantially in the form prescribed by the Act. In particular, the declaration must identify the premises and state the term commencement date. Because the actual date is not always known when the declaration is made, it is not uncommon to use general wording instead of a specific date. In this case, the term commencement date was given as "a date to be agreed", "the date on which the tenancy is granted" or as a date determined in accordance with an agreement for lease. The tenant argued that the general wording was not sufficient to identify the lease in question.

The Court of Appeal held that every term commencement permutation met the requirements for excluding security of tenure from the relevant lease. As the contractual term of commercial leases continues to become shorter and shorter, and the termination process more flexible, the percentage of contracted out leases has increased. If a tenant enjoys security of tenure, its lease can only come to an end in accordance with the Act. This can be a complicated, lengthy and expensive process for landlords wishing to obtain possession at the end of the contractual term. To be effective, the contracting out procedure must be completed by the persons who will be the landlord and tenant before the lease is granted, or before the tenant becomes contractually bound to enter into the lease. The government has promised to review the Landlord and Tenant Act 1954 as part of its wider consideration of the commercial landlord and tenant relationship.

New life

Pandemic clause not allowed on lease renewal

Poundland Limited v Toplain Limited: unreported

This County Court judgment considers the impact of the COVID-19 pandemic on the terms of a lease being renewed under the Landlord and Tenant Act 1954. Although the parties had agreed a rental figure for a new five-year lease, the tenant proposed a number of changes to the lease including a new COVID clause that would reduce the rent and service charge by 50% if the tenant was unable to trade by reason of a lockdown. The court refused the tenant's request for a rent suspension triggered by lockdown. It was not fair and reasonable for the landlord to share the risk of a pandemic and the tenant was likely to be entitled to government assistance in the event of an enforced closure of its business. The court was able to distinguish the recent *WH Smith* case on the basis that the parties in that case had already agreed to the inclusion of a COVID-19 clause and had simply asked the court to determine the appropriate trigger for the rent suspension.

The court considered a number of other new terms proposed by the tenant. In particular, the court refused to impose a condition that an authorised guarantee agreement should only be given if reasonably required by the landlord. Unlike in the *Wallis Fashion Group* case, the current lease had been entered into after the Landlord and Tenant (Covenants) Act 1995 came into effect and the parties had been aware of its effect on privity. In relation to COVID-19, a proposed suspension of the landlord's right to forfeit and an exception from complying with the insurer's requirements during lockdown were both refused. Although monthly rents were agreed, the tenant's proposal to pay these in arrears was refused as was a suggestion that the service charge should be capped at 10% of the annual rent. The tenant was more successful in obtaining certain qualifications to the tenant indemnity and also in making it clear that any energy efficiency improvement works required to be carried out under the MEES Regulations should be at the landlord's cost.

Down down

Effect on rent of COVID-19 on lease renewal

S Franses Ltd v The Cavendish Hotel (London) Ltd: unreported

The Supreme Court had previously ruled that, for the purposes of S30(1)(f) the Landlord and Tenant Act 1954, the landlord's intention to carry out redevelopment works cannot be conditional on whether the tenant leaves the premises voluntarily. Because the landlord's scheme of works was purely designed to satisfy the requirements of S30(1)(f), the tenant of business premises on Jermyn Street was entitled to renew its leases under the Act. This subsequent decision relates to the terms of those new leases. In particular, the County Court considered the amount of rent payable under the new leases and the effect of COVID-19 on the West End retail market.

Expert evidence showed that 11 of the 57 shops on Jermyn Street were vacant at the time of the trial. The rent under the old lease was £220,000 and the court decided that this should be reduced to just £102,000. The court also had to consider the interim rent that it was reasonable for the tenant to pay for the period from the expiry of the old leases until the grant of the new leases and awarded £160,000. The case serves as a stark reminder of the significant effect of lockdown on rental values in London's West End and the wider retail sector.

I want to break free

Tenant had satisfied requirement for vacant possession

Capitol Park Leeds Ltd v Global Radio Services Ltd: [2021] EWCA Civ 995

The tenant of a business unit near Leeds had a right to break that was conditional upon it giving vacant possession of the premises on the break date. The tenant served the break notice and comprehensively stripped out the premises before it vacated. The items removed included landlord's fixtures and elements of the building including ceiling tiles, ceiling grids, fire barriers, floor finishes, pipework, lighting, smoke detection systems and radiators. In doing so, the judge at first instance decided that the tenant had not given vacant possession of the premises. The premises were defined in the lease to include all fixtures and fittings and a number of these had been removed. By not giving back the premises as defined in the lease, the tenant had failed to comply with the break clause.

The Court of Appeal has allowed the tenant's appeal and held that the tenant had given back the premises in accordance with the condition to the break clause. The requirement to give vacant possession meant that the landlord had to receive the premises free from "people, chattels and interests", it did not relate to the physical state of the building. There was no condition requiring the tenant to have complied with all its covenants and the tenant was only required to give it back with vacant possession in the conventional sense. The landlord retained the ability to claim damages for dilapidations and breach of the tenant's reinstatement obligations in relation to the state of repair and condition the building was yielded up in. The decision is good news for tenants but case law confirms that the requirement for yielding up with vacant possession remains a potentially problematic hurdle for tenants to overcome.

Out of time

Landlord of AST granted possession by Court of Appeal

Minister v Hathaway and another: [2021] EWCA Civ 936

Landlords of residential assured shorthold tenancies are, at least for the time being, able to apply for possession under S21 of the Housing Act 1988. The no fault ground for possession applies at the end of the contractual term as well as during any statutory periodic assured shorthold tenancy that has subsequently come into effect. The landlord's ability to serve a S21 notice is subject to a number of conditions, including the provision of a valid energy performance certificate. The requirement for an EPC was introduced in 2015. The issue in this case was whether the requirement for an EPC applied. The original assured shorthold tenancy was granted in 2008 for a fixed term of one year. At the expiry of the original term the tenant remained in occupation under a statutory periodic tenancy. No EPC had been served on the tenant at any time. The landlords served a S21 notice in 2018. The tenant claimed that the lack of an EPC rendered the notice invalid.

The Court of Appeal dismissed the tenant's appeal and held that an EPC had not been required. The need for an EPC applied to assured shorthold tenancies granted on or after 1 October 2015. The tenant's statutory periodic tenancy was deemed to have been granted on the expiry of term of the original tenancy in 2009 and thereafter it continued from month to month. The requirement for an EPC did not apply to all assured shorthold tenancies in existence on 1 October 2018. It only applied to assured shorthold tenancies granted on or after 1 October 2015. The government has proposed the abolition of no fault S21 notices to provide residential tenants with greater security to remain in their homes. However, there is concern that its abolition will deter many landlords who have hitherto relied on the flexibility afforded by S21 and lead to a reduction in the stock of available private- rented accommodation.

School's out

Supreme Court considers reverter of school land

Rittson-Thomas and Others v Oxfordshire County Council: [2021] UKSC 13

Under the School Sites Act 1841, land conveyed for educational purposes reverts to the original owner upon the land ceasing to be used as a school. In 1914 and 1928, Robert Fleming conveyed plots of land to Oxfordshire County Council for use as a playground for a local school. In the 1990s, the Council decided to relocate the school and the plans for the development of a new school would be funded in part by the subsequent sale of the existing premises. Once the new school was built and operational, most of the old premises were sold to a third party developer for £1,355,000. A number of Robert Fleming's heirs claimed that the land gifted to the Council by him should have reverted to his estate under the Act and that they should receive the proceeds of sale. This was because the use of the old school had ceased before the land was sold and therefore the reverter had already been triggered by the time of the sale. The Council contended that the proceeds could be used to fund the development of the new school. The Act allows for the proceeds of sale to be used for the purchase of another school site or to improve other school premises.

The Supreme Court found in favour of the Council and adopted a purposive interpretation of the Act. The ability to sell the school land included the power to sell with vacant possession and that required the pupils and staff to be relocated. In addition, the school site did not cease to be used for the purposes of the Act if, at all material times, the Council intended to apply the proceeds for the purchase or improvement of another school site. The Court's broad and practical approach ensured that the original benefactor's intention for the land to be used for the purposes of the school was preserved. The Act should allow the proceeds of sale to continue to be used for educational purposes.

Green door

Doors were not landlord's fixtures

Marlborough Knightsbridge Management Ltd v Fivaz: [2021] EWCA Civ 989

The Court of Appeal has considered whether the tenant of residential premises was entitled to replace the front doors to his two flats. The leases of the flats included a tenant covenant not to remove any of the landlord's fixtures without permission. The real issue was whether the doors were fixtures and therefore formed part of the land as opposed to personal property or tenant's fixtures that could be removed at the end of the lease. The Upper Tribunal decided that the doors formed part of the demised premises and were not landlord's fixtures. Accordingly, the tenant had not been in breach of the particular covenant.

The Court of Appeal considered whether the doors formed part of the demise. Although a door might not form part of the structure, it was an integral part of each flat and its absence would amount to a derogation from grant. The doors were an essential element of each flat and formed part of the "demised premises". Although a landlord might wish to control what the tenant could do to the doors, a covenant not to remove landlord's fixtures did not achieve this. The tenant had not breached of that covenant. In other leases, the tenant might have been in breach of other tenant covenants, for example in relation to alterations.

Crown

Court considers effect of title vesting in the Crown

Pall Mall 3 Ltd v Network Rail and another: [2021] EWHC 1835 (Ch)

The High Court was required to consider whether land with the benefit of right of drainage lost that easement following the disclaimer of the freehold title. The easement in question is a right of drainage through a drain on land adjoining to a railway line. The right had been acquired by prescription for the benefit of freehold land previously owned by a company. That company was dissolved and the freehold title passed to the Crown as *bond vacantia*. It was then disclaimed by the Treasury Solicitor and reverted to the Crown by escheat. The Crown Estate Commissioners then sold the land to the claimant. The drain had been damaged by works carried out by the defendant and the claimant sought an order for the drain to be reinstated and an award of damages for the unlawful interference. The defendant argued that the easement had been lost following the disclaimer of the freehold title.

The court held that the easement was not extinguished by escheat. Any easements enjoyed by the freehold land were not destroyed. Although the freehold estate had come to an end, the land and the rights benefitting it remained. The prescriptive easement remained attached to the land and the claimant had acquired the benefit of the right of drainage when the land was transferred to it by the Crown Estate Commissioners.

OUR RECENT TRANSACTIONS

We are advising Derwent London on its arrangements to work with Native Land for the redevelopment of 100 George Street, London W1 as a high quality apartment building in the heart of Marylebone. The building forms part of Derwent London's larger mixed use development at 19-35 Baker Street.

We are advising Jones Lang LaSalle on its new docklands office at 20 Water Street. The lease includes the first legally binding green lease clause on the Canary Wharf Estate. We previously advised JLL on its new London headquarters at 1 Broadgate.

We are advising Derwent London on the sale of Angel Square, London EC1 to Tishman Speyer for £86.5 million.

AND FINALLY

Message in a bottle

A message sent by a teenager on holiday in Rhode Island in 2018 has been found three years later by another teenager in the Azores.

Thin blue line

A Liverpool drug dealer has been caught after police analysed fingerprints from a picture of him holding a favourite pack of stilton cheese.

Puff

Dolphins are believed to deliberately target pufferfish as they enjoy getting high on the fish's nerve toxin.

Jane Edwarde
T +44 (0)20 7090 5095
E jane.edwarde@slaughterandmay.com

John Nevin
T +44 (0)20 7090 5088
E john.nevin@slaughterandmay.com

572764850