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Review

Property@ction

Welcome to the Seventh Edition of the Quarterly Review from Squire Sanders Hammonds' Property@ction Team. In this issue we will look at the following:

(i) Self-Help Provisions – A Double Edged Sword?

(ii) Using signs to assist in protecting land against village green registration

(iii) Dilapidations Protocol

(iv) New Lands Tribunal Rules – a step in the right direction?

(v) Tenancy Deposit Sanctions – Good news for landlords

We welcome all contributions to this review and if you would like to discuss this further please contact any of the editorial team.

Self-Help Provisions – A Double Edged Sword?

Landlords and tenants are familiar with so-called self-help or *Jervis v Harris*[1] provisions.

Leases of commercial premises usually contain, alongside the tenant's covenant to keep the premises in repair, a covenant to repair on notice. The landlord is given power to enter the demised premises, inspect, serve a Notice on the tenant specifying wants of repair and requiring their remedy. Such clauses usually go on to provide that if the tenant does not commence the works specified in the Landlord's Notice within a prescribed period, typically 2 or 3 months, and thereafter proceed with them diligently, then the landlord is permitted to enter the premises, carry out the specified works and recover the cost from the tenant as a debt.

In a broad sense, such provisions are a double-edged sword. The fact that the landlord has a remedy at his disposal other than forcing the tenant to carry out the works or forfeiture for the tenant's failure to carry out the works, may mean that it is less easy to persuade the court to grant either of these remedies – particularly in circumstances where the lease is a long lease with a considerable period left to run. The landlord may not wish to enter the premises and carry out the works and incur the expenditure, but the fact that that remedy is available to him may make it more difficult for the court to grant other remedies, which would be less onerous for the landlord.

In a narrower way too, what appears to be a clause drafted to assist a landlord in circumstances where a tenant is failing to comply with its repairing obligations, may actually make the landlord's life more difficult.

The Defective Premises Act 1972, Section 4 (1) provides that where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.

1 [1996] 2 WLR 220

That section of the Act covers premises where the obligation to repair is an express obligation on the part of the **landlord.** However, Section 4(4) of the Act provides that (even where the obligation to repair in the lease is the **tenant**'s obligation) where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises (in other words a self-help provision), then, as from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position, he shall be treated for the purposes of subsection 4 (1) of the Act as if he were under an obligation to the tenant for that description of maintenance or repair of the premises.

In other words, where a Lease contains a self-help provision, even though the landlord has no direct obligation to repair or maintain the premises, he nevertheless owes to all persons who might reasonably be expected to be affected by defects in the state of the premises (other than the tenant) a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.

The main remedy for breach of the duty imposed by Section 4 of the Defective Premises Act 1972 is damages, broadly assessed to compensate the affected party for loss suffered as a consequence of the failure to repair the premises.

This article does not address criminal liability of the landlord which may arise in similar circumstances.

Using signs to assist in protecting land against village green registration

The problem

It is becoming increasingly common for those opposing development of land to use (some would say misuse) legislation enabling registration of land as a village green as a tool with which to thwart development. This can be the case even after planning permission has been granted for the land in question. Indeed the granting of planning permission can be the very thing that prompts a village green application. In this article we look at the issue of using signs to help protect land against this threat and we highlight some key points to bear in mind when considering a land protection strategy.

The test

Under the provisions of the Commons Act 2006, if land has been used by a significant number of members of a local community for twenty years continuously for lawful sports and pastimes then it could be at risk of an application for registration as a town or village green[2]. The good news is that there are a number of steps that a landowner can take to help minimise the likelihood that land will be registered in the event that such an application is made.

In order to qualify towards the 20-year period of use that must be proven if an application for registration is to be successful, those claiming to have used the land for lawful sports and pastimes must be able to show that their use of that land has been "as of right". In essence this means that the use must be without force, without secrecy, and without the permission of the landowner. It is in relation to the question of whether use of land is without force and without permission that a landowner can use the erection of signs to assist in defeating an application.

The role of signs

The purpose of using signs is to make it clear to anyone seeking to use the land that their use is not permitted by the landowner (a prohibitory sign) or alternatively that their use is with the landowner's permission (a permissive sign).

Prohibitory signs

So what should prohibitory signs say? The short answer is that they must be sufficiently clearly worded to communicate to users of the land that their use is not permitted and constitutes a trespass.

2 Commons Act 2006, s15

By way of example of what will not suffice, in the recent High Court case of *R (Lewis) v Redcar and Cleveland Borough Council*[3] (the subject matter of which was an application to register part of a golf course as a village green) Mr Justice Sullivan stated that in his judgment "*a notice which told the local users that they were trespassers but did not tell them to stop trespassing, and instead warned them that it was dangerous to continue to trespass (because they might be struck by golf balls), would not be sufficient to make it clear to them that the defendant was not acquiescing in their recreational user of the land. Rather it would be an indication that since the defendant was acquiescing in their trespassory use of the land for recreational purposes, it was thought prudent to warn them that if they continued so to use the land then they did so at their own risk, and the defendant could not be liable if they were hit by a golf ball.*"[4]

In the same way that the sign in the Redcar case would not suffice, signs warning of some other hazard on the land (for example, "Danger. Deep water"), or indeed prohibiting a particular type of activity ("Private Land. No Cycling") are unlikely to provide much assistance.

Permissive signs

A landowner will need to bear in mind that where there has already been 20 years' use as of right, the grant of permission by a landowner will not bring this lawful use to an end. As a result the appropriateness of using permissive signs needs to be very carefully considered in light of historic use of the land.

If permissive signs are appropriate then they must make it clear that the permission is not permanent in nature. It should be easily understood from the signs that any permission granted may be revoked at any time. A grant of a permission which is permanent may not prevent subsequent use from being "as of right".

Other considerations

The Act provides a period of grace to those seeking to register land, the practical effect of which is that steps taken today to protect land may have a delayed impact. The applicant can rely on a 20-year period of use that ceased at some point prior to the making of the application. The usual period of grace is two years, but where the qualifying use stopped prior to 6 April 2007 then five years is allowed under transitional provisions[5]. As a result, where signs are erected today that would be sufficient to prevent further use from being "as of right", an applicant could bring an application at any point in the next two years and in so doing could rely upon a 20-year period that expired just before the signs were erected.

This is a rapidly evolving area of law and there are many pitfalls to be avoided in ensuring that signs have their desired effect when it comes to protecting land against registration. It is also important to remember that signs are just one string in the landowner's bow when it comes to protecting their land and a well advised landowner will look to put in place a comprehensive strategy, of which signs are but one element.

Latin Quarter

Nemo dat quod non habet

Literally, "One cannot give what one does not have", so a purchaser for value cannot acquire any more rights than the vendor possesses and a landlord cannot grant to a tenant rights over and above those which he enjoys.

This rule highlights the importance of carrying out thorough investigations into the vendor's title prior to purchasing rights in land. Although there are exceptions to the "nemo dat" rule which may assist the innocent purchaser, these are generally limited to situations where the true owner of the land has done something to suggest that the vendor is entitled to grant the right.

3 [2008] EWHC 1813 (Admin)
4 [2008] EWHC 1813 (Admin) at paragraph 19
5 Commons Act 2006 s15(3) and s15(4)

Dilapidations Protocol

The RICS has since its inception endorsed the Protocol, being annexed to its Guidance note on Dilapidations as Best Practice and it has been accepted by the property litigation industry, in particular the Property Litigation Association (PLA).

Pre-action protocols ensued from the reform of the civil justice system by Lord Woolf in the late 1990s, as a result of concerns that court proceedings had become, in some instances an initial strategy to settle disputes rather than an option of last resort, when all other avenues had been exhausted. With the advent of the Civil Procedure Rules (CPR) in 1999 a number of pre-action protocols have been drafted such as personal injury, professional negligence etc. to govern the behaviour of parties prior to the issue of proceedings.

The Pre-Action Dilapidations Protocol seeks to introduce a set of steps that both parties should follow prior to proceedings being issued, as a result of frustrations in respect of exaggerated stances including over inflated claims, minimal offers and early proceedings for damages by landlords.

The Protocol aims are

- the sharing of information as soon as possible
- the improvement of communication between parties
- the detailing of standards for the content of schedules and claims
- the improvement of pre action negotiations
- settlement prior to proceedings being issued.

The Protocol was issued by the PLA, after consultation with various parties in Spring 2002 and it has been was widely adopted by the industry. The Protocol remained largely unchanged until 2006 and more recently changes were undertaken in 2008.

Despite its loyal following, the Dilapidations Protocol has not been added to the list of formally adopted CPR pre-action protocols. However, in 2009 the PLA presented to the Civil Justice Council which recommended the Protocol is adopted under the Civil Procedures Rules. This is currently with the Rules Committee and notification in respect of adoption is awaited.

Although not yet adopted, the Protocol is recognised as best practice by the PLA and RICS and therefore it is widely agreed that not following the Protocol would be unwise, particularly if argued that the procedure was not relevant. Not following the Protocol could result in adverse cost consequences under the CPR for parties that ignore the procedures provided.

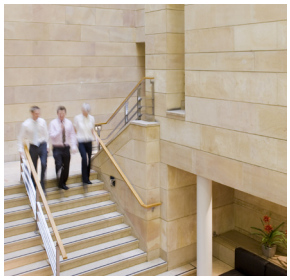
The Protocol does receive some criticism however, on a number of counts. It is said that:-

- there is no need for a Protocol due to the paucity of dilapidations litigation and there is rarely a problem with exchange of information with those that do litigate; and
- the Protocol is too complicated and incurs excessive costs for a small claim.

From my perspective:-

- surveyors welcome improved guidance from legal sources on the full implications of CPR and the Protocol provides this; and
- the Protocol is detailed because it deals with a complicated area of law and is in accordance with other Protocols. It can be argued that the detail of the Protocol defines best practice thus improving the way dilapidations are approached and dealt with. However, it is recognised that all steps may not be relevant for small claims and where this occurs both parties should review in respect of the sums involved and agree the aspects to be utilised.

Despite these issues, for my part the Dilapidations Protocol has been successful in providing a sensible timetable and procedure for dealing with dilapidations claims. The structure for providing early exchange of information/evidence has encouraged parties to resolve claims without recourse to the courts. Although the Protocol timetable necessitates professional fees to be incurred upfront for the provision of the schedule and claim, this should be seen as necessary to facilitate a negotiated settlement and avoid the high cost of court proceedings.



Our guest contributor this issue is:

David Martin, Director, Building, GVA

David joined the GVA Birmingham Building team as Director in September 2006 with a remit to utilise his project monitoring and management skills gained on previous projects and expand the team's client base. He has led a number of national and European based instructions for a range of public and private sector clients, delivering due diligence, professional and project services on a variety of property types, providing innovative solutions and best practice to all projects. For more information please visit www.gva.co.uk .

New Lands Tribunal Rules – a step in the right direction?

On 29 November 2010, to little fanfare, the Tribunal Procedures (Upper Tribunal) (Lands Chamber) Rules 2010 came into force, supplemented in the usual way by a practice direction containing much of the practical detail of how the new rules operate.

The Rules will apply to all types of cases heard in the Lands Tribunal including compulsory purchase compensation, rating, applications for removal or modification of restrictive covenants and some service charge disputes. They can be most accurately described as evolutionary rather then revolutionary but do contain some important changes which parties should be aware of when commencing (or continuing) actions before the Lands Tribunal.

In essence, the Tribunal can choose, on the grounds of fairness, whether it wishes to apply some of the old rules to cases which commenced after 29 November 2010, but in our experience so far (and as the default position) the Tribunal is applying the Rules to all claims going forward.

Moving closer to the CPR

Several of the changes made in the Rules align the procedures of the Lands Tribunal more closely with those found in the civil courts, the Civil Procedure Rules (CPR).

The Rules introduce a "CPR-like" overriding objective which includes duties to deal with cases proportionately, avoid unnecessary formality and seek flexibility in the proceedings. This overriding objective, married with broader case management powers of the Tribunal, gives the Tribunal a great amount of flexibility to set the agenda for any given matter including variation of time limits under the Rules and holding hearings. One of the key aims of this objective, as with that under the CPR, is to save costs for the parties.

This does not alter the existing separate Tribunal procedures in place, but does require a party to now specify the procedure they consider most appropriate.

Statements of Case

The Rules amend the procedure for starting and responding to a claim (or 'reference') by requiring parties to serve statements of case setting out the particulars of their claim and how the claimed sum is arrived at. This is another way in which the Rules have become more closely aligned with the CPR and is a welcome change, particularly for defendant authorities facing large numbers of claims (such as claims under Part 1 Land Compensation Act) in relation to a scheme of works, as it will make the task of identifying claims without merit much easier at an early stage.

However, there is now the converse burden on an authority, if opposing a claim, to provide a detailed response setting out their points of contention and whether they would like the matter to be determined at a hearing or not. This will inevitably lead to an increase in front loading of costs for defendant authorities who are subjected to a large volume of claims.

Strike out

There is also a new discretionary procedure by which the Tribunal can strike out claims on the basis of procedural failure, lack of reasonable prospects of success or lack of co-operation with the Tribunal. In our experience (particularly with litigants in person), although the Tribunal would, under the old rules threaten to strike out proceedings, it seemed reluctant to do so in all but the most extreme circumstances.

The introduction of this new procedure gives defendant authorities a clear basis on which the Tribunal has the discretion to strike out a claim and provides a more formal basis for a strike out application.

Experts

The provisions in relation to experts have also been slightly modified. The primary duty of an expert to assist the Tribunal (and not their instructing party) remains but is now enshrined within the Rules. In addition, all expert evidence must be in the form of a written report unless the Tribunal directs otherwise, either proactively or by an application of the parties. It is also clear from the Rules that the parties are expected to consider, where appropriate, appointing a single joint expert, with the aim being to save costs. However, this is only ever likely to be appropriate in straightforward or low value cases.

Costs

One area of the Rules which did not receive much attention was costs. The Tribunal has indicated that further amendments will be made to the costs provisions in the Rules once an ongoing review of costs in Tribunal proceedings and the Jackson Report on legal costs generally have reached their conclusions and the recoverability of success fees and insurance premiums in Tribunal proceedings has become clearer.

Conclusion

The full impact of the Rules is yet to be felt. We do not expect the changes to precipitate a seismic shift in the running of cases in the Tribunal but have already seen the Tribunal taking a more active role in the management of proceedings and using its broader case management powers.

Tenancy Deposit Sanctions – Good news for landlords

The Court of Appeal has recently handed down a welcome judgment for landlords of residential tenants concerning the protection of tenancy deposits.

The decision in *Tiensia v Vision Enterprises*[6] has clarified the timeframe for a landlord to comply with the requirements for registering a tenancy deposit and has reduced the risk of a landlord facing financial penalties for non-compliance.

Tenancy Deposit Schemes

Sections 212 to 215 of the Housing Act 2004 ("the Act") introduced a new scheme for protecting residential tenancy deposits. Since 6 April 2007 any tenancy deposit paid in relation to an Assured Shorthold Tenancy ("AST") must be protected by registration with one of three authorised tenancy deposit protection schemes.

6 Vision Enterprises Ltd (t/a Universal Estates) v Tiensia; Honeysuckle Properties v Fletcher and others [2010] EWCA Civ 224

The Act imposes strict obligations on those receiving tenant's deposits. In particular, the recipient must take the following steps

- Protect the deposit with an authorised tenancy deposit scheme within 14 days of receipt of the deposit and comply with any other "initial requirements" of that particular scheme; and
- Give to the tenant prescribed information about the protection of the deposit with an authorised scheme within 14 days of receipt of the deposit.

Sanctions for non-compliance

If the recipient fails to comply with these requirements then the tenant can apply to the court for an order requiring the deposit to be paid into an authorised scheme or for repayment of the deposit within 14 days.

In addition, the Act provides that that in those circumstances the court must order the recipient to pay to the tenant a sum equal to three times the amount of the deposit.

The failure to protect a tenancy deposit restricts a landlord's ability to regain possession of the property from the tenant. A landlord can normally apply for an order for possession of an AST at any time after 6 months on giving 2 months written notice, provided the fixed term of the tenancy has come to an end (the "notice only" ground). However, a landlord is prevented from relying on this ground if he does not properly protect the tenancy deposit.

The Cases

In *Tiensia* the Court of Appeal were required to consider two separate appeals which dealt with the same issue.

In both cases, the landlord had issued court proceedings to recover possession of the property and rent arrears from the tenants. In response the tenants in each case filed a defence and counterclaim arguing that the landlords had failed to protect the tenancy deposit in accordance with Act and seeking a claim for compensation.

In both cases, the landlord had failed to protect the deposit within 14 days of receipt from the tenant. However, following receipt of the counterclaims, the landlords in each case proceeded to properly protect the deposits before the hearing dates.

The Issue

The main issue in the Court of Appeal was whether the landlord's failure to properly register the deposit within *14 days of receipt* automatically triggered the tenant's right to compensation under the Act.

The Decision

By a majority of 2:1 the Court of Appeal held that the landlords had not breached the Act by failing to properly protect the deposits *within 14 days of receipt* and the tenants were not automatically entitled to receive compensation. Instead, the penalty of compensation should only be imposed if a landlord has failed to properly protect a tenancy deposit by *the date of the hearing* of the tenancy deposit proceedings.

The Impact

The decision in this case is undoubtedly positive for landlords as it minimises the risk of having to pay a penalty for failure to properly protect tenancy deposits.

It remains the case, however, that a landlord will not be able to rely on the notice only ground to recover possession until he has properly protected the tenancy deposit. For many landlords this will be sufficient incentive to comply with the legislation.

It has been argued that the decision has rendered the tenancy deposit legislation impotent by minimising the threat of sanctions on landlords. However, as the Court of Appeal recognised, the purpose of the tenancy deposit legislation is not to punish landlords but to ensure that tenancy deposits are properly protected. In this respect the Act retains its rigour whilst providing welcome relief for landlords.

FURTHER INFORMATION

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