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Introduction

Welcome to the 14th Edition of the Quarterly Review from the Squire Sanders' Property@ction Team. In this issue we will look at the following:

(i) A Licence to bill? The decision in Greene King plc v Quisine Restaurants and others

(ii) Mind the Gap: Lease Re-gearing

(iii) What's in the pipeline for s. 30(1)(g)? The slippery case of *Humber Oil Terminals Trustee Ltd v Associated British Ports*

(iv) Is a right to park an easement and why should we care?

(v) Always read the label: without prejudice and subject to contract

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

A Licence to bill? The decision in *Greene King plc v Quisine Restaurants and others*

In the current economic climate, landlords are increasingly likely to need to call upon guarantors to pay the rent of defaulting tenants under licences to assign. The recent case of Greene King plc v Quisine Restaurants Ltd and Others[1] highlights the issues that can be caused if the landlord fails to comply with its own obligations under the licence.

The Facts

Greene King plc granted a sub-lease of a nightclub in Cardiff to Quisine Restaurants Limited (QR). Mr Nazar Shasha (NS) was the sole director and shareholder of QR. In 2007, QR assigned the lease to Mr Stephen Dite (SD).

As part of the licence to assign, QR guaranteed that:

1. SD would pay the rents and observe the covenants in the underlease; and
2. Should SD default/fail to comply, QR would pay the rents and ensure observation of the covenants, and would indemnify Greene King against its losses and costs of non-payment or non-observation.

NS in turn guaranteed QR's obligations under the licence.

[1] [2012] EWCA Civ 698

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Clause 8 of the licence provided that Greene King would "*use all reasonable endeavours to give written notice to [NS] each and every time the rents…are more than two months in arrear*".

SD defaulted on the rent payments almost immediately following assignment of the lease. Greene King recovered the first six months' arrears from the rent deposit provided by SD, and in December 2008 sent a notice to QR and NS requiring them to pay rent arrears of £78,000 under the licence to assign. At this point the arrears had been outstanding for up to 12 months. Further notices were sent and in June 2010 Greene King began proceedings for recovery of the rent arrears from QR and NS. At no point was notice specifically given under clause 8 of the licence.

NS and QR argued that, because clause 8 had not been complied with, their liability to pay the arrears had not been triggered. Alternatively they argued that notice under clause 8 was a fundamental term of the contract so that, if it had not been given, they were entitled to treat the contract as being void.

At first instance, the Judge held that compliance with clause 8 was not a condition precedent to Greene King being able to recover arrears from NS and QR, nor was it a fundamental term of the contract.

The Court of Appeal agreed. They held that:

- The wording of the licence did not specifically state that compliance with clause 8 was a condition precedent to the liability of QR to pay the rents. Instead clause 8 imposed a separate obligation on Greene King;
- The obligation in clause 8 itself was not entirely clear and did not impose an absolute obligation on Greene King to notify NS of the rent arrears, which gave rise to an inference that it was not a fundamental term of the contract;
- Even had Greene King complied with clause 8, QR and NS would have had limited options to rectify the situation. They had no legal control over SD and no real way of forcing him to pay the rent;
- The benefit that would accrue to NS and QR if their position was correct was disproportionate to the value of the benefits the clause was meant to achieve for NS;
- The benefit of clause 8 was enjoyed by NS alone and not by QR, which was the entity guaranteeing SD's covenants.

Conclusion

This is a good decision for landlords seeking the enforcement of guarantees under licences to assign, because it shows that not every breach of the landlord's obligations will allow the guarantor to avoid its liability.

However, it should be borne in mind that Greene King's failure to comply with the terms of the licence necessitated a (presumably costly) Court case and a delay of two to four years in the recovery of the rents owed. In other cases the landlord's obligation to notify the guarantor of his potential liability has been held to be a condition precedent, breach of which entitled the guarantor to be relieved of its obligations.

It is therefore still important for landlords to review and comply with landlord's obligations in licences to assign, especially if:

- They are framed as absolute obligations rather than "reasonable endeavours" obligations;
- They could be seen as part of the mechanism that gives rise to the guarantor's obligation to pay the rents;
- The landlord could, by complying with its obligations, enable the guarantor to avoid or substantially reduce its liability by enforcing the tenant's covenant.

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Mind the Gap: Lease Re-gearing

The Landlord's Perspective

Recent months have seen a tide of investor sentiment turn against lesser quality and short income assets. Early in 2011 interest was starting to re-emerge for secondary assets. However, investors have turned risk averse again as the UK economy slows.

Buyers are seeking long and secure income streams, which suggest that a shift in buyers' priorities back towards prime is underway. In the retail sector, for example, investor interest has been firmly focussed on the better quality assets across all sub-sectors and due to the limited availability of prime stock, transactional volumes over the first six months of 2012 were down 52% on the same period last year. The yield gap between longer income streams and shorter leases has increased due to yield compression for secure income and yield softening for shorter income and hence the marriage value created from a lease re-gear can be substantial. Pro-active asset management and lease re-gearing is essential to capitalise on the investor shift towards length of income and draw buyer attention. My view, however, is that the real threat of vacant space and tenant default (and with it the liability for void rates/insurance/security/unrecovered service charge etc) has focussed landlords' attention on effective asset management. No longer can landlords 'wait and see'; they must be proactive and work their assets.

From a landlord's perspective, lease re-gearing is an opportunity to protect capital value and reduce the risk of void periods with associated marketing and legal costs. Almost 60% of leases that expired by the end of 2011 were unable to be relet by the end of the second quarter of 2012, the highest level in the last decade (IPD/Strutt and Parker Lease Events Review). The key findings of the report were that 59% of tenants vacated their property at the end of the lease – the highest number since 1998 when the research began. This rose to 75% in the office sector, but was only 42% in the retail sector. In order to consider the level of inducement that should be given to a tenant in exchange for a longer commitment, there are three key areas which need to be considered carefully.

I. The investment value implications of a lease re-gear: The lease re-gear will aim to enhance the capital value of the asset by extending the lease term or removal of the tenant break option. It is important to estimate the yield shift and share of the enhanced value created and to assess the % of the marriage value that should be offered to the tenant in that particular market. As part of his assessment he will quantify the costs of the unit becoming vacant.

II. The local occupational market: A break clause or lease expiry provides obvious opportunities to re-gear and well advised tenants will be fully aware of incentive packages available on competing buildings in excess of 12 months prior to the lease event. The Landlord will need to model the financial implications of any lease re-gear proposal against the incentives available on competing buildings.

III. Dilapidations/IT infrastructure/fit out costs: Prior to considering the level of any lease re-gear proposal whether it be by way of reduced rent/rent free or capital contribution, the well advised Landlord should be aware of the tenant's liability for any accrued dilapidations and works undertaken in the building in order to secure the best possible terms for a lease re-gear.

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The Tenant's Perspective

A lease re-gear offers the tenant the opportunity to revisit lease terms which may have been agreed in a stronger market and often to secure significant rent free periods/reduced rents or capital contribution in exchange for extended lease terms or the removal of break options. There is no better time to do this than during a recession when rental values are on the floor and when a tenant's negotiation strength is at its strongest. A tenant can also look at negotiating away onerous alienation or rent review clauses and the removal of guarantors.

The tenant will need to gauge the strength of its negotiating position by research into the four key areas outlined below:-

I. The value of the tenant's tenancy following a lease re-gear: The tenant will need to accurately assess the yield shift and subsequent enhanced value to the landlord created following a lease re-gear and since the tenant is creating the marriage value it should aim to secure the "lions share" of the marriage value. Having said this, it still 'takes two to tango' and often we see a 50:50 apportionment being agreed to get the deal done. This figure varies from market to market.

II. The local occupational market: In the regional office market there are some significant incentive packages available on Grade A buildings and a lease break/expiry offers the tenant the opportunity to realign its lease commitment to the current market conditions. I would suggest the opportunity is also available for tenants of secondary/tertiary property where the prospect of a building becoming vacant could seriously influence the landlord's thinking. In such circumstances we have seen many tenants take advantage of the position offered by the re-gear to cap their repairing liability by the introduction of a schedule of condition.

III. Dilapidations/IT infrastructure/fit out costs: In some cases, the cost of moving to alternative premises, the disruption to the business plus the making good of accrued dilapidations extinguishes in part the inducement available on competing buildings.

IV. Soft costs: Staff retention, goodwill and relocation costs will need to be considered in detail.

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Richard has 14 years experience in the Central London and Leeds market and is responsible for the professional department in Leeds. His experience is focused on lease re-gears, lease renewals, rent reviews and rating work for major occupiers, pension funds, investors and family run businesses. He is also experienced at dealing with Arbitrations and Independent Expert Referrals, acting as advocate and as expert witness. Richard has recently acted for Callcredit jointly with Squire Sanders (UK) LLP on the lease re-gear of their headquarters in Leeds.

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What's in the pipeline for s. 30(1)(g)? The slippery case of *Humber Oil Terminals Trustee Ltd v Associated British Ports*[2]

Introduction

The Humber Oils case explored the parameters of a landlord's ability to rely on s. 30(1)(g) Landlord and Tenant Act 1954 ("ground (g)"). Ground (g) enables a landlord to oppose the renewal of a lease on the basis that on the termination of the current tenancy the landlord intends to occupy the premises for the purpose, or partly for the purpose, of carrying on its business. The case provides guidance on the operation of the two limbs of the statutory test and demonstrates a landlord-friendly approach to the issue being adopted by the courts.

Facts

The case centred on the renewal of leases of the Immingham Oil Terminal on the Humber Estuary. Humber Oil Terminals Trustee Ltd (HOTT) was the tenant and Associated British Ports (ABP) the landlord.

In 1995 lease renewal negotiations commenced but the parties could not agree terms and ABP subsequently decided that it wanted to take the property back itself and served a "hostile" section 25 notice on HOTT informing it of its intention to rely on ground g.

At first instance HOTT challenged the ability of ABP to rely on the ground due to the significant difficulties ABP would encounter in realising its intention. However this was rejected by the judge[3], who affirmed ABP's right to oppose the grant of a new lease on the ground that it intended to occupy the premises. This decision was reached despite the inherent obstacles ABP would undoubtedly face implementing this intention to occupy, notably the absence of the necessary equipment and infrastructure to run its business, as HOTT asserted that this would all be removed by it when it vacated.

HOTT appealed. The Court of Appeal set out a two stage test that a landlord must satisfy in order to successfully rely on ground (g):

1. Did the Landlord possess a fixed and settled desire to do that which it said it intended to do?; and
2. Did the Landlord, in the view of a reasonable person, have a reasonable prospect of bringing about its desired result? [4]

HOTT argued that ABP had not satisfied the second (objective) limb of the test because it could not on a practical level implement its intention without HOTT's assistance. HOTT had an entitlement to

[2] [2012] EWCA Civ 596

[3] [2011] EWHC 2043

[4] Supra note 1 at para 17

remove its extensive site infrastructure, thus preventing ABP from being able to immediately occupy and ensure oil supplies were not disrupted. HOTT maintained that it would not assist ABP by reaching a deal to leave the infrastructure in place. The removal of that infrastructure would cost £10m and it would take ABP two years at a cost of £60m to re-establish it.

Despite HOTT's protestations that it would not cooperate with ABP, the court remained sceptical of the commercial viability of its argument. The Court considered that in light of the economic circumstances HOTT would be likely to reach a deal with ABP to leave behind the equipment needed by ABP. The Court rejected HOTT's appeal, ruling that the judge at first instance had correctly applied the statutory test in line with the case of Westminster CC v British Waterways Board and that ABP had satisfied both limbs notwithstanding the need to obtain the relevant equipment from its departing tenant.

Case analysis

The Court's approach in this case to assessing whether a landlord can establish ground (g) points to a less stringent assessment of the practicability of a landlord's intention to occupy. The Court of Appeal's judgment provides less certainty for tenants; as it concluded that the landlord intended to occupy despite the fact that there was a commercial negotiation relating to infrastructure that would have to be resolved in the landlord's favour before the landlord could conduct business operations from the property.

From the perspective of tenants, a real risk arises from the fact that the Court of Appeal was willing to uphold a Landlord's refusal to grant a new lease despite the fact that this was based on a commercial likelihood rather than certainty. The long-term outcome of the judgment remains unclear but we may see an upturn in the number of landlords using ground (g) to oppose lease renewals.

Latin Quarter –Expressio unius est exclusio alterius

The literal meaning of this phrase is "the expression of one thing excludes another". It is a principle of construction used to ascertain the meaning of legislation and contractual documents.

The rule is usually applied where a contract lists a number of things – for example, in a list of the risks against which a landlord is obliged to insure in a lease. The fact that a detailed list of insurable risks has been made and agreed by the parties raises an inference that anything not on the list has been excluded from the contract by the agreement of the parties. The practical result of this is that many such clauses conclude with a "sweeper" category, such as "and any such further risks against which the Landlord considers it reasonably prudent to insure".

It is important to remember that the expressio unius rule is only a rule of language, and it can be overridden by evidence that the parties did not intend it to apply; or if it can be shown that the list was meant to serve as an example, rather than a definitive list; or for some other reason such as the supposedly excluded thing not being in existence at the time of the contract (very few leases from the early 20th century would have included an obligation to insure against nuclear attack!)

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Is a right to park an easement and why should we care?

What is an easement?

"Easement" has been a word used in English law since at least 1695. It comes from the old French "aisement", which means "convenience" or "accommodation".

An easement is a right for the benefit of one piece of land over other land, usually adjacent, which is in different ownership. So, for example, the owner of land A may have a private right of way over the adjacent land B, which is owned by someone else, in order to reach the public highway.

An easement is a proprietory, not a personal, right and will therefore bind successors to the owner of land B and enure for the benefit of successors to the owner of land A. So, if the owner of land A sells land A, which enjoys a private right of way over land B, the purchaser of land A will acquire the right of way over land B at the same time as acquiring land A.

The owner of the land subject to the easement is said to retain absolute dominion over his land and all the rights of an owner and can use it as he likes, subject to such limitations as are imposed upon it by the existence of the easement. So, using the right of way example, the owner of land B can do whatever he wishes with land B, so long as he does not prevent the enjoyment by the owner of land A of the right of way.

Is a right to park an easement?

Whilst there would seem to the casual observer to be similarities between someone enjoying a right of way over adjoining land in different ownership and enjoying a right to park on the same piece of land, the courts and commentators have struggled to determine whether a right to park is an easement.

On the one hand one would expect a right enjoyed by the owner of land A to park on land B to pass with ownership of land A; but on the other hand an easement, by definition, should not entitle the party who has the benefit of the easement to exclusive possession of the land over which the easement is enjoyed. A party enjoying a right to park, could presumably leave their car parked on the neighbour's land for several weeks whilst away on holiday, and such action would come pretty close to excluding the owner of the land from possession of it.

Due to the tension involved in a right to park not sitting comfortably within the definition of easement because it effectively excludes the land owner, and yet the need to define the right as an easement so that it may pass to successors in title of the land which benefits, the decided cases – all at first instance – have been decided both ways.

The most recent was *Howard John Kettel and others –v- Bloomfold Ltd*[5] earlier this year, when the court held that where a lease of a flat grants a tenant a right to park in a designated area, an easement will almost certainly be created. The landlord's argument (he wanted to put a new building on the car park and provide alternative parking spaces elsewhere) that the right to park could not be an easement as it excluded him from any practical use of the land, was rejected. However, since that too was a first instance decision, it has not overturned earlier cases which went the other way, and so the law in this area is unclear.

[5] [2012] EWHC 1422 (Ch)

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Always read the label: without prejudice and subject to contract

The labels we put on legal documents can be all important when it comes to whether or not they are enforceable as contracts or admissible in court. But when drafting an agreement or negotiating a lease, landlords and tenants should be wary of relying too heavily on headings such as "subject to contract" and "without prejudice". You may think you are protected, but the court might think differently.

Subject to contract

It is an essential part of contract law that for an agreement to be enforceable, the parties must intend to create binding legal relations; it has long been established that an "agreement to agree" cannot be enforced.

The phrase "subject to contract" is frequently used in commercial negotiations. Whilst the courts will treat the use of the phrase as a strong presumption that the parties do not wish to be bound by their agreement[6], a party should be wary about relying on this label alone.

For example, in *Proforce Recruit Ltd v The Rugby Group Ltd*[7], the High Court decided that although an agreement was stated to be "subject to contract", because the parties had carried out their obligations and exercised the rights that were contemplated under the agreement, there was an implied binding contract.

However, where the "subject to contract" qualification applies to negotiations, it will only cease to apply if the parties expressly or by necessary implication agree that they will be bound[8]. So in a case where solicitors had exchanged a string of emails each headed "subject to contract", it was held that they were merely following each other's lead and did not have in mind what the phrase was intended to cover. The court therefore, by necessary implication, removed the "subject to contract" restriction [9].

When drafting a document as part of negotiations, it is therefore advisable to spell out that "the parties do not intend to be legally bound", rather than rely simply on the phrase "subject to contract".

Without prejudice

The availability of the without prejudice device facilitates settlement of disputes by preventing certain statements made by one party being used against it in court by the other, as evidence of a supposed "admission".

The crucial feature of the rule is that it applies only to evidence of "negotiations genuinely aimed at settlement[10]." For example, an exchange of letters between solicitors attempting to come to a compromise is likely to be covered by the without prejudice rule, whether or not those negotiations are successful.

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[6] Prudential Holborn Limited v Fraser Williams, CA, 14 May 1993, unreported

[7] [2005] EWHC 70

[8] *Cohen v Nessdale Ltd* [1982] 2 All ER 97

[9] *Jirehouse Capital and others v Beller and another* [2009] EWHC 2538 (Ch)

[10] *Rush & Tompkins v Greater London Council and others* [1988] UKHL 7 per Lord Griffiths

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The courts have carved out a number of exceptions to the without prejudice rule and in these cases a document will normally be admissible in court. The exceptions include where the document provides evidence of misrepresentation, fraud, blackmail, perjury or undue influence. However, it is generally speaking a blanket rule that applies in a wide range of circumstances[11].

An important way of making it clear to the other side, and the court, that a document is not intended to be admissible is of course to use the heading "without prejudice" at the top of the page. But labelling a document in this way does not always have the desired effect. There must be "some indication that the author intended the document to be treated as part of a negotiating process"[12] in order for the document to attract such privilege.

Equally, if a document is not marked "without prejudice", the court will consider that to be material as to the question of whether it is in fact without prejudice. Indeed, in a case where no label was used, the burden was put on a litigant to rebut the presumption that correspondence was open rather than without prejudice[13].

Using the headline "without prejudice" is therefore advisable but not conclusive.

Conclusion

In Jirehouse Capital, Mr Justice Peter Smith noted that: "the old observation that solicitors' typewriters had two extra keys marked "subject to contract" and "without prejudice"… is not without a modicum of truth." Case law shows that while those labels are useful, they can sometimes be risky to rely on.

[11] *Unilever plc v Procter & Gamble co* [1999] EWCA Civ 3027

[12] *Schering Corporation v Cipla Ltd* [2004] EWHC 2587 (Ch) per Laddie J

[13] *Cadle & Co v Hearley* [2002] 1 Lloyd's Rep 143

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