

# Review

## Property @ction



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

- (i) What amounts to a surrender by operation of law;
- (ii) Does it do what it says on the tin? - full repairing and insuring leases;
- (iii) Double trouble;
- (iv) Compulsory purchase orders;
- (v) Adverse possession;

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

## What amounts to a surrender by operation of law?

Where a landlord and tenant bring a lease to an end, they usually do so by completing a deed of surrender.

However, sometimes, it may be implied that a surrender has occurred. The term commonly used for an implied surrender is a surrender "by operation of law".

In a recent case, *QFS Scaffolding v Sable*<sup>1</sup>, the court considered some of the relevant principles for a surrender by operation of law to take place.

### Facts

The landlord (Mr and Mrs Sable) granted a lease to a tenant company which eventually entered into administration. Prior to the administration, a new company (QFS) was formed with a view to taking over the tenant's business.

The Sables negotiated terms for a new lease with QFS who, in fact, went into occupation. However, the negotiations faltered and no new lease was entered into. Instead, QFS asked the administrator of the tenant to assign the lease to it and, as a result of this request, a deed of assignment was executed.

Mr and Mrs Sable claimed possession against QFS. They claimed that a tenancy at will had been granted to QFS during the negotiations for the new lease and this had been with the consent of the tenant. Further, Mr and Mrs Sable claimed to have terminated that tenancy at will, as a result of which they were now entitled to possession. The court initially found in favour of Mr and Mrs Sable and granted an order for possession. QFS challenged that finding in the Court of Appeal.

The appeal court found that, if the lease had been surrendered, the conduct of Mr and Mrs Sable and QFS would have justified the indication of the grant of a tenancy at will (or perhaps, a licence) during the negotiations. Importantly though, the appeal court was not prepared to accept that there had been a surrender of the lease. It was therefore not appropriate to imply the existence of a tenancy at will or licence from Mr and Mrs Sable to QFS. On the basis that the lease had not been surrendered or otherwise determined, the tenant (in administration) was still entitled to possession.

There needed to be unequivocal conduct on behalf of the tenant which would justify the conclusion that the lease had been impliedly surrendered. Here, the tenant had simply stood by while negotiations progressed between the Sables and QFS. On the basis that the lease had not been surrendered, it could not be implied that a tenancy at will between the Sables and QFS had arisen. The tenant had therefore not assented to the granting of a tenancy at will and the lease was now vested in QFS as a result of the deed of assignment.



The general principles relating to surrenders by operation of law can be summarised as follows:-

- No distinction between surrender by operation of law and implied surrender;
- The landlord or tenant has been party to some act, the validity of which he is afterwards estopped from disputing, and which would not be valid if the tenancy continued to exist;
- The subjective intentions of the parties are not relevant;
- There is no estoppel by mere verbal agreement; in addition there must be some act inconsistent with the continuance of the tenancy;
- A surrender is treated as having taken place immediately before the act to which the landlord or tenant is a party;
- The conduct of the parties must unequivocally amount to an acceptance that the tenancy has ended, i.e. either relinquishment of possession and its acceptance by the landlord; or other conduct consistent only with the cesser of the tenancy;
- It must be inequitable for either landlord or tenant to dispute that the tenancy has ended;
- An agreement by either landlord or tenant that the tenancy shall be put an end to, acted upon by the tenant quitting the premises and the landlord taking possession, amounts to a surrender by operation of law; the giving and taking of possession must be unequivocal;
- Where a tenant requests a landlord to let property to a third party, and the landlord does so, the lease is surrendered at the time of the new letting; the surrender does not take place before the time of the new letting; it is essential that the new letting is effected with the consent of the original tenant; if the original tenant does not consent or know of the new tenancy, there is no surrender; but the original tenant's consent may be inferred from conduct or from long acquiescence in the new arrangements;
- A surrender by operation of law may take place where the landlord, with the original tenant's consent, accepts the new tenant as his direct tenant; the consent of the landlord and the original tenant is needed.

## Does it do what it says on the tin?

Whilst acquiring a building occupied under a full repairing and insuring (FRI) lease may hold many attractions to a prospective purchaser, would-be landlords should be aware that this does not necessarily mean that their tenant will be responsible for all required remedial work. Many factors come into play, so getting appropriate pre-acquisition advice from a building surveyor experienced in dilapidations and service charge matters is vital.

Purchasing the freehold interest in leased commercial property is, of course, a risky business. Seeking good tenant covenant strength, full market rent and a reasonable number of years unexpired on leases are all important factors in the decision-making process. Landlords take comfort from the knowledge that tenants with FRI leases or with comprehensive service charge provisions will be responsible for repairing and maintaining their property investment. So, what then should be the concern if a landlord can always turn to his tenant on an FRI lease to deal with any defects that may exist or become apparent at the premises?

If only it was that clear cut! We review below, some of the situations that have ended up in court, where the property owner has retained a liability that he thought had otherwise been transferred.

### What is the subject matter of the repairing covenant?

In a true FRI lease this is rarely an issue, but what seemingly should be a straightforward exercise in determining whether a landlord or tenant is responsible for any particular part of the building, is, not always the case.

Differences of interpretation certainly do arise. By way of example, in the service charge dispute heard in *Patrick v Marley Estates Management*<sup>1</sup> the Court of Appeal decided that partially demolished cloisters fell within the definition of the "building" and as such were within the landlord's service charge liability. Responsibility for window repairs was also an issue, and it was held that on the proper construction of the lease windows did form part of the "exterior" but not of the "main structure".

It is important, therefore to understand the way that buildings are constructed and of course apply that to the particular lease in question.

<sup>1</sup> [2007] EWCA Civ 117

## **Has there been any deterioration?**

Turning to the defect itself, of fundamental importance is understanding whether the subject matter of the covenant has, in fact, deteriorated.

If its condition is no worse than when first constructed the tenant cannot be responsible for any work to directly rectify it. The 1987 case of *Post Office v Aquarius Properties Ltd*<sup>2</sup> is often cited as a good example of this. The property's basement had flooded due to a defective floor joint that had existed since the building's construction. Crucially, however, because there was no subsequent deterioration to the floor joint, the judge found that there was no disrepair and therefore the landlord had to accept that the liability for remedial work could not be passed onto his tenant.



This case raises the thorny issue of inherent defects. This can be fertile ground for disagreement and it is not uncommon for tenants to argue that they are not responsible for disrepair where the building was constructed with an underlying problem.

## **What is the required standard of repair?**

Once it has been established that the tenant is potentially in breach of its covenant to repair, does this then mean that the obligation can be enforced? Unfortunately for property owners the answer is not always. What needs to be established is whether or not the nature of the damage brings the condition of the building below the standard contemplated by the repairing covenant. In assessing whether that has happened due consideration is to be given to the age, character and location of the premises. In addition, what level of repair would be deemed 'reasonable' by a reasonably minded tenant?

What if part of the building is nearing the end of its notional life expectancy? Well, this itself does not automatically trigger liability; disrepair must nevertheless still feature. This was well demonstrated in the 2001 case of *Fluor Daniel Properties Ltd v Shortlands Investments Ltd*<sup>3</sup> in which tenants successfully argued that air conditioning plant did not need replacing as it was not actually in disrepair, even though the system was nearing the end of its notional life.

## **At lease commencement did the landlord and tenant reasonably envisage the required repair?**

A further consideration is whether the required repair goes beyond what the parties could have reasonably contemplated at the time of entering their lease.

In looking at the intentions of the parties at lease commencement, courts will always apply the test of fact and degree and assess whether work involves giving something back, which is different from that which existed previously.

Interestingly, length of lease term is often flagged by tenants in service charge recoverability disputes, particularly where significant works are planned by a landlord towards the tail end of the term. If properties are bought in such situations, purchasers can perhaps take some comfort from knowing that a tenant's objection to significant expenditure within the last year or so of its lease is unlikely to succeed on that basis alone, and indeed overall lease term is probably of more significance than how long remains. Of course, the need to demonstrate disrepair still remains an absolute requirement.



**Jamie S O'Brien**  
Partner  
Malcolm Hollis LLP

Jamie O'Brien BSc (Hons) MRICS is a Partner at Malcolm Hollis and is head of their Manchester office. Jamie has over 10 years experience undertaking all core building surveying services, but with a particular focus on dilapidations, contract administration and development monitoring. Jamie is also responsible for the management and development of Malcolm Hollis' tenant alterations service.



# Double Trouble

The question of compensation for disturbance on termination of a business tenancy has become more important in recent times as tenants look to maximise their return for loss of goodwill on a property they have occupied for some time. As market conditions improve and landlords look to redevelop their existing portfolio, this question is likely to become even more important as tenants reluctant to relocate look to achieve the maximum possible compensation for loss of their tenancy.

## Background

Under s. 37 Landlord and Tenant Act 1954 (the "Act"), tenants who are denied the grant of a new lease on the following grounds can claim compensation from the landlord for disturbance:-

- 1 Where the tenant is a subtenant of part and the landlord can achieve a higher rent by re-letting the whole; or
- 2 Where the landlord intends to demolish or reconstruct the premises; or
- 3 Where the landlord intends to occupy the premises for his own business.

## Double Compensation

One of the aims of the compensation is to compensate for the goodwill that has been built up by trading from particular premises once the lease of that premises terminates, through no fault of the tenant.

Under the Act, if a tenant has been in occupation of the premises during the whole of the fourteen years immediately preceding the termination of the current tenancy, the tenant can claim compensation from the landlord at twice the rateable value of the property. If the tenant has been in occupation for less than fourteen years, then the compensation is an amount equivalent to the rateable value of the property.

## "Extending" Occupation

However, if the tenant has not been in occupation for fourteen years prior to the termination of the tenancy, there are several ways of "extending" the period of occupation for the purposes of s. 37 of the Act to ensure that the fourteen year threshold is reached and double compensation is payable.

- If another group company of the tenant was in occupation prior to or following the tenant this may well count as occupation by the tenant for the purposes of calculating compensation.
- Case law suggests that a break in the period of occupation which is only for a short time and in the ordinary course of business, for example fitting out, will not break the chain of occupation for the purpose of assessing compensation.
- If the tenant previously owned the freehold of the property and subsequently entered into a sale and leaseback arrangement with the landlord then it may be that the period during which the tenant owned the freehold of the property can count towards the fourteen years.
- If the landlord does not serve a notice to determine the continuing tenancy, then the tenant may decide not to request a new tenancy. Until such time as one or other party serves a notice, the tenant will hold over on the terms of the expired lease and any period of holding over will also count as occupation for the purposes of the Act and may get the period of occupation up to the magic fourteen years.

## Conclusion

Compensation for disturbance for a tenant who is not granted a new tenancy may in some cases prove scant consolation for the goodwill accumulated over the period of occupation. However, a tenant may be able to achieve a better financial result by being alive to the possibilities of how the period can potentially be "extended" to increase its compensation entitlement.

# Compulsory Purchase Orders: Compensation Case Review

The law of compulsory purchase is often perceived as a complex and difficult area of law. Over the last year or so there have been a number of decisions coming from the Upper Tribunal (Lands Chamber) (the "Tribunal") and these decisions, together with those from appeal Courts, continue to shape and develop this area of law. In this review, we look at some of the more significant decisions on disturbance compensation.



## ***Taff v Highways Agency [2009] UKUT 128 (LC)***

Mr Taff was the tenant of business premises used as a scrap yard. The Highways Agency compulsorily acquired around half of his land. Whilst Mr Taff had planning permission for his use of the land he did not (rather crucially) have a valuable waste management licence. Mr Taff claimed extinguishment for the waste management business that operated from the acquired land.

Rule 4 of Section 5 to the Land Compensation Act 1961 (the "**LCA 1961**") disregards any value of land which results from an unlawful use. As Mr Taff did not have a waste management licence, the Highways Agency argued Mr Taff's use could not be taken into account when assessing compensation. After considering the point as a preliminary issue, the Tribunal decided that:

- the use of the land, to the extent it was covered by certificates of lawful use and the planning permission, should be taken into account when assessing compensation, but
- given the lack of a waste management licence, any claim for disturbance based upon that part of the business which could be restrained was irrecoverable.

## ***Pattle v Secretary of State for Transport [2009] UKUT 141(LC)***

Mr Pattle sought rent he allegedly lost as a result of the Channel Tunnel Rail Link Scheme. The Tribunal therefore needed to determine whether such losses (assuming they were caused by the scheme) were recoverable. After hearing submissions, the Tribunal decided (based on this assumption) that a claim for lost rent before the valuation date did not fall within compensation for the value of land under Rule 2. It was therefore recoverable.

The Tribunal also decided that where loss is caused by general blight, as opposed to the scheme, it cannot be recovered. This leaves an interesting issues of causation live before the Tribunal. It is often difficult to decide what has caused loss: an area's general blight or the scheme.

## ***Solartrack plc v London Development Agency [2009] UKUT 242 (LC)***

This was a complex matter where Hammonds acted for the London Development Agency. In March 2003, the London Development Agency agreed to buy freehold premises for £445,000 and entered into a sale contract with Solartrack. The London Development Agency made a compulsory purchase order in October 2003 and executed a General Vesting Declaration in December 2005. The freehold was excluded from the CPO and the GVD.

After hearing evidence from the parties, the Tribunal decided that at a preliminary hearing that:

- there had been no transfer of any interest in the underlease from an associated company to Solartrack. Indeed, the letters purporting to support this were "created ... in an attempt to deceive the acquiring authority" and the "continued reliance upon them in the proceedings ... [was] a flagrant attempt ... to mislead the Tribunal";
- the Tribunal could not determine compensation for the freehold interest in land. It had not been compulsorily acquired so the Tribunal had no jurisdiction;
- the Tribunal could determine compensation for disturbance as the effect of the contract of sale was to give Solartrack a claim for disturbance compensation for it and any loss suffered by its associated companies (relying upon the principle in *DHN Food Distributors v Tower Hamlets London Borough Council*<sup>1</sup>)

These decisions are useful reminders for practitioners of the principles applied by the Tribunal. The aim of compensation for a CPO is to provide a claimant with fair compensation: no less and no more. Evidence is the lesson to be learnt from these decisions: it is needed to support a loss, it must be tested by practitioners before it is put before the Tribunal and evidence of loss resulting from an unlawful practice will be irrecoverable.



## Latin Quarter

### **Qui sentit commodum, sentire debet et onus**

Literally this means that he who enjoys the benefit ought also to bear the burden, he who enjoys the advantage of a right should also take the accompanying disadvantage. In other words, a privilege is subject to its conditions.

This is most commonly encountered in the case of covenants relating to land. The general rule is that the burden of a positive covenant does not run with the land. Whilst a covenant requiring the expenditure of money or the doing of some positive act is binding upon the person who originally enters into the covenant, it is not binding upon successors in title.

The rule that he who enjoys the benefit, ought also to bear the burden is the exception to this. A typical case would be one where parties granted rights to use a road owned by a third party had agreed to make payments towards its upkeep. The obligation to make payments is a positive obligation, but will be binding on successors in title in the event that they wish to use the road.

## Adverse Possession: The Basics

Adverse possession is a process by which someone who is not the legal owner of land can become entitled to the land through a period of possession. Historically, adverse possession caused problems for land owners as they could lose significant portions of their landholdings by failing to spot and remove squatters within twelve years of their taking up residence. Today the rules relating to registered land give some legal owners a little more protection, but there is still plenty of scope for owners to lose land through adverse possession.

### **What kind of possession is needed?**

#### 1. Factual possession

The squatter must show that for the relevant period they have been “dealing with the land as an occupying owner might have been expected to deal with it”.

Because each case is decided on its own facts it is impossible to say with certainty that a particular activity constitutes factual possession. Physically separating off the land (i.e. by erecting a fence around previously open land), is usually (although not always) enough to prove possession. Other activities that could constitute factual possession include:

- exercising grazing rights;
- cultivating or levelling off the land;
- parking cars on the land; and
- charging rent for use of the land.

There is no requirement that the squatters be constantly present on the land, and it is not necessary that their occupation be obvious to the legal owner at all times.

#### 2. An intention to possess

The squatter must demonstrate that they intended to possess the land and to exclude others from the land. There does not need to be an intention to dispossess the legal owner; it has been held that the necessary intent has been demonstrated even where the squatter believed that they were the legal owner's tenants.

#### 3. Lack of consent by the legal owner

In order to claim adverse possession the squatter must have occupied the land without the consent of the legal owner, whether explicit or implied.

## **How long must the land be held?**

Since 2002 there have been two systems under which adverse possession can be registered.

The "old" system is governed by the Limitation Act 1980, and applies to all unregistered land, plus any applications relating to registered land that has been adversely possessed for at least twelve years as at 13 October 2003.

Under this system, once the land has been held for twelve years the squatter has the right to apply to the Land Registry for legal title to the land. The legal owner then has thirty days to raise an objection on the grounds that the squatter has not fulfilled one or more of the criteria for adverse possession listed above. Unless a successful objection is raised, the squatter will obtain legal title to the land.



Under the "new" system, for registered land that had not been held for twelve years as at 13 October 2003, the squatter can apply for title by adverse possession after ten years in occupation. The legal owner is given 65 days to object and request that the application be dealt with under Schedule 6 of the Land Registration Act 2002.

The registered owner's counter-notice requires the squatter to show that either:

- It would be unconscionable for the registered owner to dispossess the squatter AND the squatter ought to be entitled to be registered; or
- The land in question is adjacent to land owned by the squatter, the boundary between the two has never been exactly determined, the squatter has for the past ten years reasonably believed that the land belongs to him, AND the registered owner's land was registered more than a year before the application was made; or
- For some other reason, the squatter is entitled to be registered as the legal owner.

Unless the squatter can show that one of these grounds applies, his application will be rejected. The legal owner then has two years to take steps to remove the squatter or formalise his interest through agreement. If at the end of the two year period the squatter is still in possession and possession proceedings have not been issued against him, he will be entitled to be registered as the legal owner.

## **How can you avoid applications for adverse possession?**

In most cases, adverse possession is an entirely avoidable problem. Simple precautions, such as undertaking regular reviews of landholdings (including physical inspections at different times of day), keeping records of tenancies and licences up to date and ensuring that any agreements relating to land are properly documented, should enable landowners to avoid losing their land to squatters.

However, if an adverse possession application is received, the key is to take appropriate legal advice, object and/or issue the relevant counter-notices promptly, and where appropriate take steps to remedy the situation as soon as the squatter's first application is rejected.

---

## **FURTHER INFORMATION**

For further information please contact:

### **Patrick Walker**

Director for Advocacy  
T: +44 (0)113 284 7566  
E: patrick.walker@hammonds.com

### **Nick Armitage**

Partner  
T: +44 (0)113 284 7025  
E: nick.armitage@hammonds.com

### **Sally Lodge**

Partner  
T: +44 (0)113 284 7102  
E: sally.lodge@hammonds.com

### **Helen Hoath**

Senior Associate  
T: +44 (0)161 830 5068  
E: helen.hoath@hammonds.com

### **William Lawrence**

Partner  
T: +44 (0)20 7655 1551  
E: william.lawrence@hammonds.com

### **Caroline Wort**

Senior Associate  
T: +44 (0)121 222 3405  
E: caroline.wort@hammonds.com

# Hammonds

## Birmingham

Hammonds LLP  
Rutland House  
148 Edmund Street  
Birmingham B3 2JR  
Telephone +44 (0)121 222 3000  
Fax +44 (0)121 222 3001

## Leeds

Hammonds LLP  
2 Park Lane  
Leeds LS3 1ES  
Telephone +44 (0)113 284 7000  
Fax +44 (0)113 284 7001

## London

Hammonds LLP  
7 Devonshire Square  
London EC2M 4YH  
Telephone +44 (0)20 7655 1000  
Fax +44 (0)20 7655 1001

## Manchester

Hammonds LLP  
Trinity Court  
16 John Dalton Street  
Manchester M60 8HS  
Telephone +44 (0)161 830 5000  
Fax +44 (0)161 830 5001

## Berlin

Hammonds LLP  
Unter den Linden 14  
10117 Berlin Germany  
Telephone +49 30 7261 68 000  
Fax +49 30 7261 68 001

## Brussels

Hammonds LLP  
Avenue Louise 250  
Box 65  
1050 Brussels Belgium  
Telephone +32 2 627 7676  
Fax +32 2 627 7686

## Madrid

Hammonds LLP  
Plaza Marques de Salamanca 3-4  
28006 Madrid Spain  
Telephone +34 91 426 4840  
Fax +34 91 435 9815

## Paris\*

Hammonds Hausmann  
4 Avenue Velasquez  
75008 Paris France  
Telephone +33 1 53 83 74 00  
Fax +33 1 53 83 74 01

## Beijing<sup>+</sup>

Hammonds Beijing  
Representative Office Hong Kong  
Suite 1419 - 20  
South Tower Beijing Kerry Centre  
1 Guang Hua Road  
Chao Yang District  
Beijing 100020 China  
Telephone +86 108529 6330  
Fax +86 10 85296116

## Hong Kong•

Hammonds  
Suites 3201-05, 3217-20  
32nd Floor Jardine House  
1 Connaught Place  
Central Hong Kong  
Telephone +852 2523 1819  
Fax +852 2868 0069

\* Affiliated undertakings of Hammonds LLP    + Representative Office