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Property @ction Review

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Introduction

Welcome to the 13th Edition of the Quarterly Review from the Squire Sanders' Property@ction Team. In this issue we will look at the following:

(i) Get Orf My Land! - Evicting trespassers from commercial property

(ii) Dilapidations increase; as Tenants take control of the market

(iii) Within, from or to? Calculating time in notice provisions

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

Get Orf My Land! – Evicting trespassers from commercial property

Introduction

The immediate reaction of most landowners upon discovering that trespassers have invaded their property would be to call the police or take direct and forceful action to evict the trespassers themselves. Unfortunately trespassing on commercial property is not of itself a criminal offence, and landowners pursuing "self-help" remedies risk committing one or more offences themselves. At present the only viable option available to landowners in this situation is a civil action for possession of the land.

Depending on the situation, possession proceedings can take months or even years. Fortunately there are specific procedures for eviction of trespassers from non-residential land, which are designed to make the process as streamlined as possible. In most cases the process takes between one and two weeks from the date of the claim form.

Procedure

As soon as a trespass has been identified, the landowner should attend the site and ascertain how many trespassers there are; where on the land they are sited; and how they gained access to the land.

It is advisable to inform the trespassers that Court proceedings are being initiated and ask them to leave. It is also worth notifying the local police force of the trespassers' presence, although their powers to assist are limited.

In most cases the claim will be made in the County Court nearest to the site. It will set out the landowner's right to possession and include a witness statement giving details of the occupation.

For commercial land, the hearing date must usually be at least two days after the date on which the trespassers are served with the notice, although the Court will allocate a hearing as soon after that date as possible. The timescale may be shortened if there is a risk of assault or serious damage to property by the trespassers.

It is important to serve the claim on the trespassers as soon as feasible, ideally on the same day the claim is issued. The procedure for serving the claim is highly prescriptive and must be adhered to; some organisations choose to employ a process server to ensure that the conditions of service are met. It is good practice to obtain a witness statement from whoever serves the claim, in order that any queries regarding service raised at the possession hearing may be answered.

At the possession hearing the trespassers are given an opportunity to defend their occupation of the land. If there appears to the Court to be a genuine dispute it will give directions to prepare for a full hearing. In cases of short-term trespassers on commercial sites, however, there is usually no genuine argument that can be made, and it is common for the trespassers to fail to appear altogether. If there is no genuine dispute and the Court is satisfied that the correct process has been followed it will grant an order for possession.

Once the order has been granted, the landowner can either:

1. Employ the local County Court bailiff to attend the property. The bailiff will attend the site, inform the trespassers of the order and give them at least 24 hours' notice to clear the site. If the trespassers are still at the site after the notice period the bailiff will clear the site. This is by far the cheapest option, but may not be the fastest as the speed of the enforcement is dictated by the bailiff's workload; or
2. Transfer the matter to the High Court and engage a High Court officer to evict the trespassers directly. An order for transfer of the case can be granted without a hearing at the High Court, and in some cases the trespassers can be evicted on the same day that the order is granted. However, the enforcement officers' services are not cheap, especially where there is a large group of trespassers requiring the presence of more than one officer.

As soon as the trespassers have left the landowner should secure the property to prevent re-entry.

The future of eviction?

The recent Legal Aid, Sentencing and Punishment of Offenders Act 2012 has criminalised trespass in residential property. As a result, home-owners will shortly be able simply to phone the police to evict trespassers from their homes. The Act does not apply to commercial premises as yet, although there is a possibility that it will be extended. If that happens, commercial property owners will be able to evict trespassers much more quickly and cheaply. However, at present the existing civil procedure remains the best way legally to evict trespassers from non-residential property.

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Dilapidations increase; as Tenants take control of the market

Dilapidations cases are on the increase. Some would say that in such times of austerity landlords are more aggressive, more eager to identify and pursue liabilities that may generate a cash windfall. Yet there are more subtle and powerful drivers that influence these matters. Landlords rarely ignore such liabilities in any market conditions, whereas how they approach and deal with them is indeed subject to human emotion and is of course dealt with to an extent by the improving attitudes and behaviours of participants when applying the Dilapidations Pre-Action Protocol.

The subject of this article is not such technical matters, but those other drivers that are influencing the increase in the number of dilapidations cases; something that we are very much experiencing at GVA.

We have noted a 178% increase nationally in the number of dilapidations cases between Q1 2008 and Q4 2011. The trend appears to be continuing through 2012 so far and yet we are not experiencing any Landlords who are overly aggressive or determined to hunt down every dilapidations opportunity.

Through our 12 regional offices we can see the same trend and note below four such examples (Q1 2009 to Q4 2011):

Leeds	-	177% increase
Manchester	-	111% increase
Birmingham	-	118% increase
London	-	34% increase

Of course there are negative drivers as would be expected in a poor market following the credit crunch that crashed on to our shores during late 2008. Many organisations have struggled, with premises being closed and portfolios being reduced and rationalised where possible.

We are still seeing the results of such property rationalisation as private and public body strategies that were conceived in 2008/09 are now visibly active, with increased property exits, whether it be by lease expiry or break options at the appropriate time.

That trend begs the question of whether there was a dip around 2008. It appears that the number of cases was steady, as of course the number of leases remained and was not subject to an instant reduction.

It is interesting to note the relative low increase of cases in London. That may be explained by the fact that many organisational outposts in the regions contracted back to London rapidly at the time of the crunch, with many more exits in those areas relative to the London area.

It is logical that as an increase of lease exits has occurred there has been a resultant increase in dilapidations cases. However there are most definitely other drivers at play.

Perhaps the most subtle yet powerful driver is the market itself and the collective behaviour of its participants in creating lease terms and events. We have conducted detailed research into the use of Upward Only Rent Reviews and reviews based on RPI inflation indexation. We found that as both of these bases suit Landlords there has been a clear move by tenants to achieve rent reviews that may involve downward reviews as well. Whilst the latter is not a lease term, it is actually the reduction in lease terms to much shorter durations e.g. 10-15 years down to circa 5 years, which achieves that objective. This singular and collective movement of behaviour has increased the number and frequency of lease expiry and break events, and is the most influential driver to the increase in dilapidations cases.

This trend looks set to continue and it is difficult to see a driver that will reverse the trend. Only perhaps when landlords have a number of begging prospective tenants to choose from will a tenant think to take a longer lease for security of tenure, but such instances seem a long way down the road to recovery. There may be a reduction once portfolios are rationalised, but that is always a work in progress as many Asset Managers will testify to.

There is also the impending proposal by the International Accounting Board to revise the current standard so that operating and finance leases are treated the same. This means that property leases will have to be included in the balance sheet as both an asset and a liability, with the likely rent and dilapidations costs being assessed and identified. There is conjecture that such standards may also impact on whether an organisation can justify a certain occupation when the balance sheet may be inflated by such allowances i.e. adjusting the business case and property use.

It is clear that there are significant changes in the market and of course significant regulatory changes in tandem. The result is more flexibility and ease of movement for tenants, with increased lease events and management of those events.

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Within, from or to? Calculating time in notice provisions

When it comes to giving notice – whether as a landlord or a tenant – the issue of when to send that letter, fax or email can be particularly problematic.

If a period is said to be "30 days beginning with" 1 January, do you count 1 January as day one or not? If "six months' prior notice" is required, does this mean you can only serve notice on the day that falls six months before the event? Thankfully the courts have grappled with these problems, and, generally speaking, common sense has prevailed.

Service "not less than" a specified period before an event

The general rule for these types of clause is that the date of service of the notice is not included, but the date of the event is included. For example, if a notice must be served "not less than" four weeks before it is to take effect and is to take effect on Monday 1 October 2012, the final day on which notice can validly be served is Monday 3 September 2012. As a second example, if notice is to be given "not less than" six months before a date of termination specified within that notice, a notice serviced on 2 April 2012 specifying a termination date of 2 October 2012 would be valid.

Notice to be served on a specified date

"The Tenant may determine the Term on 30 September 2012 by giving the Landlord six months' prior written notice." On the face of it, a clause such as this might suggest that the Tenant can only give notice on 30 March 2012 – the date falling six months before 30 September 2012. In fact, the courts have interpreted this wording as meaning not less than six months' notice must be given.[1] In other words, notice can be served prior to or on 30 March 2012.

However, this does not mean that notice could be given at any time before that deadline. In *Biondi v Kirklington & Piccadilly Estates Ltd*[2], the court held that notice must be served a "reasonable time" before the period begins. On the facts of the case, a notice served one month into the term of a 35-year lease, which purported to exercise an option which was exercisable by notice served six months from the end of the term of the lease, was not valid. In *Multon v Cordell*[3], a notice served three years prior to the end of a 35-year lease was also invalid.

Notice to be served within a specified time period

Finally, we turn to clauses stating that notice must be served "ten days after" or "within one month of" a specified date. The general rule is that the date from which the period runs is excluded and the

[1] Hexstone Holdings Ltd v AHS Westlink Ltd [2010] EWHC 1280.

[2] [1947] 2 All ER 59

[3] [1986] 1EGLR 44

notice may be served right up until the final moments of the last day of the period. So if notice is to be served ten days after 1 October 2012, the final day for service is 11 October 2012, because 1 October itself is ignored for counting purposes.

If the time period is expressed as being a month rather than a number of days, the "corresponding day" rule applies. This means that the date will fall on the same day of the following month, or, if there is no corresponding day, the last day of the month in which the period expires. For example, if notice is to be served within one month from 31 January 2013, it will be due on 28 February 2013 at the latest.

The exception to the general rule above applies to time periods that "commence on" or "begin with" a date. In these cases, the date itself is likely to be included within the computation of the period of time.

Points to remember

Calculating time periods is very important, particularly when dealing with break clauses, in respect of which courts will consider that time is of the essence[4]. While the points above set out the general position, landlords and tenants should always check for any specific service provisions in the lease, which may override or amend these rules. If notice provisions are not clear, it is possible to serve multiple notices on different days without prejudice to the others. But if you are in any doubt as to when to give notice, the best advice is to do it early.

Health and Safety challenges for commercial landlords

Commercial landlords leasing non domestic premises can often be unclear as to the extent of their health and safety duties. It is generally accepted by landlords that where there are multiple tenants in a property, the landlord will retain responsibility for common areas. Landlords are however subject to an overriding duty to ensure that they take reasonable measures to ensure that premises they control are safe and so additional duties for health and safety may fall on landlords in relation to the leased areas of premises if they exert any control over those areas. In some cases, duties falling upon landlords and tenants can overlap, with both parties having co-existing duties in relation to health and safety issues.

In general terms, the greater the extent of control the landlord exercises over the leased premises, the greater the potential liability. The starting point for determining the extent to which the landlord exerts or is able to exert control will be the terms of the lease, but what the landlord does in practice will also be an indicator of control. Responsibilities as defined by the terms of the lease should be aligned with the regulatory framework.

[4] United Scientific v Burnley Corporation [1978] AC 904

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The key areas of health and safety, in relation to which landlords need to understand their duties, are:

Fire Safety

Anyone with control over premises has responsibility in relation to fire safety. This is usually the employer (i.e. the tenant) if the leased premises are used as a workplace. However if landlords retain any responsibility for the safety of the premises in terms of managing fire risk, the landlord can become responsible.

Refrigeration, air conditioning and heating systems

The party responsible for refrigeration systems, air-conditioning systems and heat pumps is the party with the control over this equipment. This means the party with the actual control over the technical functioning of the equipment which includes the party who has free access, the day-to-day running and the power to decide on technical modifications to the equipment. It may be that some of these fall upon the tenant but some may remain with the landlord.

Asbestos

The duty holder in relation to asbestos is the party with the maintenance and repair obligations, which will be defined in the lease. In the event that maintenance responsibilities aren't clearly defined, the legal duty rests with the party which has the greatest degree of control over the premises. The main duty is to be able to identify the presence of asbestos within the premises so that the information can be utilised as part of the risk assessment process preparatory to the commencement of construction work.

Electrical Safety

Responsibility for electrical safety is also often set out in the lease. Tenants are responsible for assessing the risks of their use of electricity and taking steps to control those risks. Landlords usually have a duty of care for wiring systems and electrical equipment and should conduct electrical safety checks before leasing a property.

Gas safety

The primary responsibilities for gas safety in non-domestic commercial premises falls upon occupiers (i.e. tenants), who must ensure that any gas appliance, installation pipework or flue installed in their workplace is maintained in a safe condition. Landlords may also have more general duties under Health and Safety at Work etc Act 1974, such as ensuring that heating equipment in common parts is maintained safely. The lease should be used to determine how these responsibilities are allocated.

Generally

The common theme emerging for most of the areas above is control. The party in control will usually be the party with responsibility. Control however can often be difficult to determine. It is therefore important for landlords to ensure that their leases clearly set out who has the control in relation to each issue and who is responsible for what in terms of health and safety. This is the only way for landlords to ensure they do not become liable for health and safety issues which they thought were the tenant's responsibility.

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Extending powers of sale – Court of Appeal refuses to include missing words

In the Court of Appeal decision of *Cherry Tree Investments Limited v Landmain Limited,*[5] the Court considered the interpretation of a legal charge registered under the Land Registration Act 2002.

A property owner had borrowed money from a lender involving the entering into of a standard form charge document, together with a facility agreement. The facility agreement varied the statutory power of sale under Section 101 of the Law of Property Act 1925, allowing the lender to exercise the power of sale at any time after execution of the facility agreement, even if the borrower was not in default. While this provision was set out in the facility agreement, this clause was not referred to in the standard form charge document which was registered at the Land Registry.

The borrower and lender disagreed as to whether or not a default existed and the lender sold the property to Cherry Tree Investments, who then sought to register their title to the property, at which point the borrower objected.

The question for the Court, on appeal, was whether or not the standard form charge document could be interpreted to include the extended power of sale referred to in the facility agreement.

Lord Justice Lewison in his judgment, highlighted the well-known statement of Lord Hoffmann in *Investors Compensation Scheme v West Bromwich BS*[6] in which he had stated that one is allowed to take account of the background "matrix of fact" that would have been reasonably available to the parties and includes absolutely anything relevant which would have affected the way in which the language of the document would have been understood by a reasonable man. Lord Hoffmann had gone on to state that the "rule" that a word should be given its natural and ordinary meaning, reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. That said, Lord Hoffmann went on to state that if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. In Lewison LJ's words: *"A contract cannot mean one thing when it is made and another thing following Court proceedings. Nor, in my judgment, can it mean one thing to some people (e.g. the parties to it) and another thing to others who might be affected by it".*

Following the decision in *KPMG LLP v Network Rail Infrastructure Limited*[7]*,* Lewison LJ accepted that the Court need not shut its eyes to the terms of the facility letter and so it was deemed to be

[5] [2012] EWCA Civ 736

[6] [1998] 1 WLR 896

[7] [2007] EWCA Civ 363

admissible evidence. Once the Judge had decided that the facility letter was admissible, the next question was what weight could be given to this evidence, once it had been admitted.

Putting the evidence in context, the Land Registration Act 2002 was passed with the intention that, under the system of electronic dealing with land, the register should be a complete and accurate reflection of the state of the title of the land at any given time. In particular, Section 120(2) of the Land Registration Act 2002 dealt with documents kept by the Registrar which were taken to be correct and to contain all the material parts of the original documents. To treat the registered charge as containing a modification of the statutory power of sale contained only in the facility letter fell foul of Section 120(2)(b) of the Act. Further, anyone contemplating dealing with the land may wish to inspect the registered charge and would take it to be correct and containing all material provisions, the intention thereby being that the document itself would be conclusive. While he acknowledged that there are rules which permit the withholding of sensitive commercial information, he found it unlikely that the Registrar would agree to the withholding of information about a power of sale on the ground that it is commercially sensitive, because to do so would prejudice the keeping of the register.

The Judge found that the reasonable reader's background knowledge would include the knowledge that the charge would be registered in a publicly accessible register upon which third parties might be expected to rely and that, while the parties had a choice about what they put into the public domain and what they kept private, the reasonable reader would conclude that matters which the parties chose to keep private should not influence the parts of the bargain that they chose to make public. What had gone wrong was that the parties had failed to include in the charge, a provision extending the statutory power that they agreed it should have contained. This meant, that nothing had, in fact, gone wrong with the language of the charge so far as concerned the power of sale.

The upshot, therefore, was that the Court could not interpret the charge so as to include the words within the facility agreement, whereby the power of sale was extended. Quoting from an earlier case, *"If by oversight parties omit an agreed clause from their contract, interpretation would not provide a remedy."*

Latin Quarter – Ejusdem Generis

Latin for “of the same kind”.

This is a rule of construction which assists the courts in the interpretation of statutes and – by analogy – other documents.

In essence, where a legal document lists classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed.

For example where “cars, trucks, tractors, motor bikes, motor powered vehicles” are mentioned, the word “vehicle” should be interpreted in a limited sense; and should not – for example – be interpreted as including aeroplanes, since the list is of land based transportation.

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