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Property @ction Review

March 2013

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Introduction

Welcome to the 15th Edition of the Quarterly Review from the Squire Sanders' Property@ction Team. In this issue we will look at the following:

(i) "Rage, rage against the dying of the (right to) light"? The Law Commission Consultation 2013

(ii) Retail Therapy: The Royal Institute of Chartered Surveyors' attempt to breathe life back into the British High Street

(iii) Enforceability of verbal agreement

(iv) Canonical confirms the need for contractual certainty in the context of break clauses

(v) Renewing business lease terms – any good reason to change?

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

"Rage, rage against the dying of the (right to) light"? The Law Commission Consultation 2013

With recent rights to light case law causing substantial headaches to developers and a current Law Commission consultation aimed at curtailing the powers of Courts to grant injunctions to enforce rights to light, it is more important than ever for those wishing to develop their property in a built-up environment to be aware of the law in relation to rights to light and how it may change in the near future.

What is a right to light?

The right to light is a right for the owner of a property (the "dominant land") to unobstructed access of light through specified apertures (usually windows) of their premises. The right to light is an easement that can be enforced against the owner of land against which the right is held (the "servient land").

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How does a right to light come about?

There are two main methods of obtaining a right to light:

1. By express grant/reservation

   This occurs where, for example, a landowner decides to sell part of their land but wishes to limit interference that may be caused to his land by the purchaser's developments. The easement will be recorded in the transfer to the purchaser and, in the case of registered land, will appear on the register of title.

2. By prescription

   Where a property has enjoyed 20 years' access of light without any interruptions lasting one or more years, and without the express permission of the owner of the servient land, then it is likely that a right to light by prescription has been acquired.

   A right to light acquired by prescription is much harder to discover as it is unlikely to be registered and notice need not be given to the owner of the servient land in order for it to come into existence.

Why do rights to light matter?

Rights to light most commonly cause problems when the owner of land, burdened by a right to light, begins development work on their property.

Not all interference with light will be classed as an infringement of a right to light. The interference must cause a nuisance. The test for whether a right to light has been infringed is whether there has been:

"*such a deprivation of light as to render the occupation…uncomfortable in accordance with the ordinary ideas of mankind*"[1].

There will be no nuisance if the dominant property:

"*Remains adequately lit for all ordinary purposes for which the property may reasonably be expected to be used*"[2].

If a Court finds that a right to light has been infringed, it can either order the infringing party to pay damages if the interference is "small", or alternatively grant an injunction to either prevent the development going ahead or require the developer to demolish or cut back existing development.

A right to light can, in certain circumstances, cause serious problems to an intended development. The recent case of HKRUK II v Heaney[3], where the owner of a right to light obtained an injunction compelling a developer of servient land to demolish a completed development even though the owner of the right to light had delayed bringing the claim, has highlighted the ability of landowners to prevent developments and/or name their price for consenting to interference with rights to light.

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[1] *Colls v Home & Colonial Stores* [1904] AC 179

[2] *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 1 WLR 922

[3] [2010] EWHC 2245 (Ch)

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Law Commission consultation

On 18 February 2013, the Law Commission launched a consultation into the amendment of the law of rights to light. The consultation period is due to close on 16 May 2013.

The four main proposals made by the Law Commission are:

1. That it should no longer be possible to acquire new rights to light by prescription;
2. That a statutory test should be put in place to determine when the Court will grant an injunction and when only damages will be available;
3. That a notice procedure should be instituted that must be complied with before a claim for relief against interference with rights to light can be made; and
4. That the Lands Chamber of the Upper Tribunal be granted powers to discharge rights to light where they are deemed to be obsolete or of no practical benefit.

The full consultation paper and contact details for comments may be found at http://lawcommission.justice.gov.uk/consultations/rights-to-light.htm.

Retail Therapy: The Royal Institute of Chartered Surveyors' attempt to breathe life back into the British High Street

Introduction

A combination of falling consumer numbers and rising costs for retailers has resulted in a steady decline of the British 'High Street'. Vacancy levels are at an all-time high and expected to rise still further in the coming 12 months. In an attempt to stem the tide, the Royal Institute of Chartered Surveyors (RICS) (in partnership with the British Retail Consortium) has intervened by offering a way to make 'the leasing process shorter and less complicated for small and new businesses'.[4]

This effort to make the High Street more attractive to small businesses comes in the form of a simplified contract providing tenants with 'fixed property costs and a clear picture of their responsibilities as well as helping landlords achieve 'a rental income on a previously unoccupied space'. [5]

The RICS Small Business Retail Lease (SBRL) was released in the summer of last year and comes in response to the Portas Review (published late in 2011) which contained 28 recommendations to reinvigorate the high street, one of which was the promotion of the RICS Leasing Code.

[4] RICS Small Business Retail Lease - An Introduction for Professional Advisors 4 July 2012

[5] Ibid

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Key features of the Leasing Code

Term	Set at a maximum of 5 years. As well as following current market trends, this short term ensures less administration as there is no need to register the lease at the Land Registry and there is no provision for rent review.
Break Rights	Parties are able to negotiate whether break rights are suitable for the tenant, and if so when and on what notice.
Fixed/Inclusive Rent	So as to reduce the opportunity for unforeseen costs there are no distinct provisions for payments of insurance or service charge. Such costs must be included in the headline rent. Rates and utilities are payable by the tenant.
Disposal	The tenant may not sublet; and any assignment of the lease is subject to the landlord's consent which is not to be unreasonably withheld.
Use	The permitted use is limited to a specific business activity, which could hinder any attempt to assign.
Repair	Requirement for an agreed Schedule of Condition ensures the tenant is not obliged to return the property in a condition better than at the commencement of the term. If the property forms part of a larger building, the landlord is obliged to keep the fabric of the building in repair to allow the tenant to continue trading.
Alterations	Without consent the tenant may perform standard internal works. Any erection of signage requires consent. Any further alterations that are required by the tenant should be agreed and documented prior to completing the lease.
Deposit	Basic provisions are included to allow for the tenant to pay a deposit to the landlord at the beginning of the lease. This amount should be agreed at the outset and the landlord would hold the money against any breach of the lease, potentially including failure to pay rent and lack of repair.
Rent Payment Dates	Rent is payable monthly in an attempt to aid cash-flow.
Damage	If the whole or a large part of the property becomes unfit for use or inaccessible, then rent is suspended and either party may end the lease giving notice to the other.

Although it is thought that the majority of leases will preserve the tenant's statutory right to renew the lease at the end of the term, there may be instances where such a right is not suitable (for example if the landlord plans to redevelop the site after expiry of the term). Accordingly, a second version of the lease is available in which the renewal right is excluded.

Will it work?

Many believe that a recessive economy and high vacancy rates should place tenants in a relatively healthy bargaining position and that the SRBL strikes a fair balance between the interests of both landlord and tenant for high street properties.

Since the initiative is less than 12 months old, it is difficult to say with any certainty whether it will be a success, although that will depend to a large extent upon the readiness of commercial landlords to adopt it.

Perhaps only if new and independent retailers press for the use of the SBRL, will the high street once again be the beating heart of British retail.

Both versions of the SBRL, along with guidance notes and recommended heads of terms, are available to download from the RICS website[6]. However, it should be noted that as the SBRL is a legally binding contract between the landlord and tenant, it is important that in spite of its relative simplicity, both parties take independent professional advice.

Latin Quarter – Obiter dicta

Obiter dicta are remarks of a judge, which are not necessary to reaching his decision but are made in passing, as comments, illustrations or thoughts. Since they are not necessary to reaching the decision, they are not binding on subsequent courts, although they can be persuasive and are often referred to in subsequent cases for that reason.

[6] www.rics.org/uk/knowledge/more-services/professional-services/small-business-retail-lease/

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Enforceability of a verbal agreement

A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms that the parties have agreed in one document, or, where contracts are exchanged, in each document, as provided by Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("section 2").

The Court of Appeal considered this in the case of Keay v Morris Homes[7] and the circumstances surrounding an alleged oral agreement and whether section 2 applied.

The facts

Mr and Mrs Keays had entered into an agreement to sell some land in Birmingham to the developer, Morris Homes. The agreement was conditional on Morris Homes obtaining planning permission for the construction of a medical centre on part of the land. It also provided that on completion, Morris Homes was to enter into an agreement to grant a 125 year lease of the medical centre back to the Keays.

Morris Homes had difficulty in negotiating the planning permission with Birmingham City Council and the parties subsequently entered into a supplemental agreement in writing, which varied the original agreement by reducing the price that Morris Homes was to pay for the land.

Following this, the Keays alleged that at the same time as the supplemental agreement was entered into, it was also verbally agreed between them and Morris Homes, that Morris Homes would carry out building works on the Keays' land, in return for the price reduction. However, this was not mentioned in the supplemental agreement.

Completion took place. The land was transferred to Morris Homes and the parties entered into the agreement for lease back.

The litigation

Morris Homes failed to carry out the works and the Keays brought proceedings for damages in excess of £2 million.

The Keays argued that the obligation to carry out the works was a separate, free-standing enforceable agreement, rather than a term of the supplemental agreement and therefore there was no need to satisfy section 2 and it was on the oral agreement that they now based their claim.

As part of their argument the Keays said that once completion had taken place of the original contract then it was open to them that any non land terms (such as their building works) could be enforced outside of the main contract or any supplemental agreement.

At first instance (the decision followed a summary judgment application at which there was no oral evidence), the Court held in favour of the Keays and Morris Homes appealed. There were two

[7] *Keay and another –v- Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900

issues which the Court of Appeal had to consider:

1. Was the oral agreement a term of the supplemental agreement? and, if it was;
2. Had section 2 been satisfied?

The first issue was a question of fact and one which could only be determined at trial following consideration of all the evidence. If the parties had made this oral agreement then they were either seeking to vary the original sale contract and the term should have been recorded (along with the other terms) into the supplemental agreement or they had entered into a new, free-standing agreement.

The second issue assumes that the obligation to carry out the works was a term of the supplemental agreement and then the Court needed to decide whether section 2 (which has to be satisfied) was in fact satisfied.

The Court of Appeal rejected the notion that performance of some terms of a void contract can turn it into a valid contract. The correct approach is that completion of the "land elements" of the contract will not then validate the non-land elements. The omission of the oral agreement from the written supplemental agreement rendered the supplemental agreement void, and so the original sale agreement was left unchanged. At most, the oral obligation was a proposed term of the contract that was not in this event incorporated into any valid contract and was therefore not capable of being enforced independently by the parties.

The matter was re-submitted for trial. The Court of Appeal decision is a useful reminder to parties that land transactions should record all of the terms relating to the sale agreement in accordance with section 2 to avoid such difficulties.

Canonical confirms the need for contractual certainty in the context of break clauses

Case law surrounding the operation of break clauses continues to develop rapidly, with the outlook at present not being too sunny for tenants following a number of recent "landlord friendly" judgments. These judgments have largely resulted from the courts adopting a strict interpretation of the break clauses in question.

The decision in December in the case of Canonical UK Ltd (Canonical) v TST Millbank LLC (TST)[8] has highlighted the weight that the courts will place upon the need for parties to have contractual certainty, particularly when it comes to the question of whether tenants have properly complied with monetary payment pre-conditions.

The facts

On 17 February 2012, Canonical served notice on its landlord, TST, to terminate its underlease on 22 August 2012, pursuant to a break clause that allowed for termination upon service of not less than six months' notice. A number of pre-conditions had to be satisfied for the break to take effect, in

[8] [2012] EWHC 3710 (Ch)

particular:

1. Payment of rents up to and including the break date;
2. No material breach of tenant covenants subsisting at the break date; and
3. An additional payment (a reverse premium) by the break date of either three months' rent (for a break date on or before the 14 August 2012) or one month's rent (for a break date after the 14 August 2012).

The underlease provided for rent to be paid "yearly and proportionately for any part of a year.…….by equal quarterly payments to be made in advance on the usual quarter days".

Canonical paid the whole of the June 2012 quarter's rent in advance on 29 June, following receipt of an invoice from TST's agents on 7 June.

The question for the court

Following the break date TST contested that the underlease had not been broken, as Canonical had apparently failed to comply with one of the pre-conditions, namely the payment of one month's rent by way of reverse premium.

Canonical argued that rent was only due for the period up until the 22 August break date and that as such the balance of the sum that it had paid (being the whole of the June quarter's rent) should be attributed to the reverse premium payment.

The issue to be resolved by the court was whether the payment made by Canonical on 29 June was sufficient to discharge the payment pre-conditions to the break clause.

TST argued that the full quarter's rent was due on the June quarter day and that Canonical was therefore not in credit at the time of the break, so it had failed to pay the one month's reverse premium.

Canonical asserted that the words 'yearly and proportionately for any part of a year' in relation to rent payments should be construed to mean that rent was only due for the period up to the 22 August break date. Thus, the balance of the money paid on 29 June, after deducting the rent due, should be taken as payment of the reverse premium, even though it was not stated at the time that payment was being made on this basis.

The decision

It was held that, on a proper construction of the underlease, the full quarter's rent for the June 2012 quarter was payable, notwithstanding the reference in the underlease to rent being paid "yearly and proportionately for any part of a year". Consequently, Canonical had not satisfied the reverse premium condition and the underlease had not been broken.

The court went on to confirm that allowing less than a full quarter's rent to be paid when it is not definite that a lease will terminate is not conducive to contractual certainty for the parties.

The clear message for tenants is that they will need to be aware that the words 'proportionately for any part of a year', even when read in conjunction with a break clause, cannot be taken to reduce the rent payable just because the lease may end by virtue of a break notice. Mr Justice Vos reminded the parties that ''one must also remember that leases are to be construed strictly, and that business certainty is desirable for all parties''.

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Renewing business lease terms – any good reason to change?

You might think that market traders would be used to getting things their own way, and that is probably true when it comes to selling things like fruit, vegetables or meat, but for the tenants of Smithfield Market in London it proved a very different situation when it came to the renewal of their business tenancies, as the recent case of Edwards & Walkden (Norfolk) Ltd and others v City of London Corporation[9] shows.

In this case the landlord, City of London Corporation, successfully argued that the terms of the renewal leases to be granted to the tenants of the market should depart from the existing lease terms and include separate rent and service charge provisions, rather than all inclusive rents.

Business lease renewals

In the majority of cases the parties to a business lease that is protected by Part II of the Landlord and Tenant Act 1954 (the "Act") will reach agreement on the terms of the renewal lease by negotiation. However, the option is always open for the landlord or tenant to apply to the court for it to determine the terms of the renewal lease.

The starting point for the court in determining the terms of the renewal lease is the terms of the existing lease. Section 35 of the Act makes it clear that the court must "have regard" to the terms of the existing lease. Put simply a tenant is entitled to request a renewal lease on the same or similar terms to the existing lease.

If either party wants the renewal lease to include different terms than those included in the existing lease, then that party must demonstrate to the court that there is "good reason" why the court should depart from the existing lease terms[10].

Inclusive or exclusive rent?

It was not disputed between the parties that the landlord should be were entitled to recover the costs of maintaining and providing services in Smithfield Market.

Leases granted in the 1980s had provided for separate rent and service charge. However, when extensive renovation works were carried out, some way into the terms of the leases, the parties agreed to modify the split rent and service charge to an inclusive rent, to take account of the disruption caused by the renovations.

The works were delayed. The parties entered into agreements for lease providing for the grant of new leases with separate provisions once the works were finished, but for an inclusive rent prior to then. There was a dispute between the parties and the leases were not completed.

The leases which fell to be renewed in the proceedings which went to court reflected the ongoing dispute between the parties. They provided for a temporary inclusive rent and some expressly provided for the issue of whether the rent should be inclusive or exclusive to be the subject of further

[9] [2012] EWHC 2527 (Ch)

[10] *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726

negotiation or referal to the court upon renewal. Two leases simply provided for an inclusive rent.

In O'May the landlord had tried to argue, but ultimately without success, that the renewal lease should include a separate service charge provision on the basis that the rent payable by the tenant was reduced. The landlord relied on evidence of current market practice in support of its case.

The terms of the existing lease in O'May did not include any service charge provisions and therefore it had to convince the court to vary the terms of the existing lease. The House of Lords held that the landlord had failed to satisfy the burden that there was "good reason" to depart from the existing lease terms.

"Good reason"

In Edwards, the court found that the City of London had demonstrated that there was "good reason" to depart from the terms of the existing leases and include a separate service charge provisions in the renewal leases.

The court in coming to this conclusion took into account various factors including:

- evidence of current market practice adduced by the City of London (in contrast to the decision in O'May);
- that the issue of whether or not there should be separate service charge provisions in the renewal lease had been specifically provided for by the parties in the existing lease; and
- that the parties were in agreement that the landlord was entitled to payment of its costs of providing services and maintaining the market.

This case is an important decision that endorses the rationale (if not the outcome) of the case of O'May and shows that the courts are prepared, in appropriate cases, to depart from the terms of the existing lease when determining the terms of renewal business tenancies where a party can demonstrate good reason to do so.

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