



Property Litigation Case Review 2009

December 2009

In case you have missed the last 12 months' most significant property cases, or want a reminder, listed below is our monthly review of the more important cases.

December 2008

Consent to assignment The landlord refused consent to an assignment of the lease as the assignee was a newly incorporated company and therefore did not have the requisite covenant strength. The existing tenant stated that it would continue to be liable for rent and dilapidations under the terms of the lease, and on that basis the landlord was only entitled to refuse consent if its reversion would be damaged or diminished by the assignment. It was held that where the clause in the contract provided that the landlord would not unreasonably withhold its consent provided that the prospective assignee would be a reasonable and responsible tenant, the landlord was entitled to arrive at a decision which did not relate only to the damage which might be caused to the reversion. If his decision was one which a reasonable landlord could have arrived at, no further justification for his decision was required. There was no basic rule of law that said that, if the reversion was not damaged or diminished, it would always be unreasonable to withhold consent. *Royal Bank of Scotland PLC v Victoria Street (Number Three) Limited [2008] EWHC 3052 (Ch)*

Easements A developer purchased a building with an express right of way over such part of an adjoining property "as is necessary for the purpose of carrying out any maintenance, repair, rebuilding or renewal" to the building. The developer obtained planning permission to demolish the single storey building and increase the floor area of the building some seven fold. The adjoining owner objected to the continuing use of the right of way because the new building did not fall within the phrase "rebuilding or renewal". The Court of Appeal held that the scope of the right was conditioned by its underlying object. It must have been contemplated by the draftsman that there could be a change to the character of the area and the types of buildings that might be built on the land, and the clause should not be construed absolutely literally. *Risegold Limited v Escala Limited [2008] EWCA CIV 1180*

January 2009

Break Clause A lease stated that a tenant's break notice would be valid if either the notice was served formally at the landlord's registered office or if the notice served some other way was acknowledged by the landlord. The tenant's formal notices were misdirected (and so never received by the landlord) and an informal notice faxed through to the landlord was not acknowledged by the landlord until long after the break date. The Court of Appeal held the notice invalid. Certainty must be achieved in the operation of a notice, and certainty would not be achieved if the notice, incorrectly and invalidly served, could subsequently be brought back to life. *Orchard (Developments) Holdings v Reuters [2009] EWCA Civ 6*

Virtual Assignment A "virtual assignment" is an arrangement under which all the economic benefits and burdens of a lease are transferred to a third party, but without any actual assignment of the leasehold interest. They have been used by tenants of commercial property to achieve some of the important practical benefits of an assignment of a lease without needing to obtain consent from the landlord, on the basis that they do not breach the restrictions normally contained in anti-alienation covenants. In this case, the Court held, however, that a virtual assignment, which passed the "economic benefits and burdens" of a lease, will breach the covenant "not to share possession" of the property. The structure did not constitute an underletting, nor was it an assignment for the purposes of the anti-alienation provision, since no deed of assignment had been executed. Nor did the virtual assignment constitute a declaration of trust. Furthermore, there was no parting with or sharing of occupation by the assignor, because the property was at all times occupied by a subtenant. *Clarence House Limited v National Westminster Bank Plc [2009] 3 ALL ER 175*

February 2009

Guarantors on Assignment The Court of the Appeal held that the terms of a guarantee required by the landlord as a condition of a Licence to Assign were unreasonable and an attempt to better the landlord's position under the lease. It interpreted those terms to mean that the guarantor of the assignee would be released only on a subsequent assignment with the landlord's consent and if in addition to the landlord's consent reasonable alternative security were offered. Possibly the landlord merely intended to stipulate that it could withhold consent to a subsequent assignment if no reasonable alternative security were offered, but that was not how the document read. The landlord was acting unreasonably in seeking to impose those terms on the guarantor. *Landlord Protect Limited v St Anselm Development Company Limited [2009] EWCA CIV 99*

continued

Burgess Salmon LLP, Narrow Quay House, Narrow Quay, Bristol BS1 4AH
Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
Chancery Exchange, 10 Furnal Street, London EC4A 1AB
Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7685 1266
www.burgess-salmon.com



Burgess Salmon LLP is a Limited Liability Partnership registered in England and Wales (LLP number OC307212) and is regulated by the Solicitors Regulation Authority. A list of members, all of whom are solicitors, may be inspected at our registered office: Narrow Quay House, Narrow Quay, Bristol BS1 4AH.

- Rights of Light** A landowner, who had agreed with a neighbour not to take action to enforce rights to light which he had acquired by prescription over more than 20 years, had not (by that non-enforcement agreement) ever released those rights to light entirely. The agreement related only to the development anticipated at that time, and a subsequent development, with a scheme which differed to the original scheme, could not take advantage of the original agreement. In that situation the landowner's rights to light could still be enforced to prevent the new development. *Salvage Wharf Limited v G & S Brough Limited* [2009] EWCA Civ 21
- Landlords right to enter** The Court held that a typical lease clause permitting the landlord to enter premises to make "surveys" did not entitle the landlord to carry out an environmental survey requiring intrusive investigations such as drilling boreholes and taking samples. The lease wording would have to be far more explicit to permit works involving business disruption over many days even if the landlord was obliged to make good any damage to the premises. *Heronlea Mill Hill Limited v Kwik Fit Properties Limited* [2009] EWHC295(QB)

March 2009

- Disclaimer** The Court of Appeal affirmed that disclaimer does not extinguish liability under a lease. To ensure that liability is discharged, there must be express mention of this in the document. An AGA will only be discharged on disclaimer if the document itself expressly says so. *Shaw v Doleman* [2009] EWCA Civ 283
- Rent Review** A lease had provisions for an open market rent review on broadly normal terms, yet an uplift of 25% was to be applied once the primary figure had been determined. The tenant argued that this was an onerous provision and its existence should be considered when determining the open market rent using the presumption of reality used to construe rent review clauses. The court disagreed with this concluding that the absence of the uplift in the hypothetical lease terms meant it should not be taken into account when assessing market rent. *Nissim v. Ablethird Ltd* [2009] ALL ER (D) 243 (MAR)
- Proprietary Estoppel** The House of Lords, reversing the decision of the Court of Appeal, confirmed that Peter Thorne, a farmer who had worked for 29 years on a farm owned by his father's cousin, was able to enforce a promise that he would inherit the farm even though the cousin died without a will and nothing was written down. What was different about this case was that there was no clear representation made by David to Peter that he would inherit. It was found that there were enough indirect actions and comments to mean that the cousin had made a sufficiently clear promise and it was reasonable for that to have been relied on. *Thorne v Major, House of Lords* [2009] 3 ALL ER 945

April 2009

- Surrender** This Court of Appeal decision confirms that by accepting the keys to the property 15 months before the end of the term, and allowing a member of the family to live in it, the landlord's actions completed a surrender by operation of law. The landlord had claimed that the family member was simply occupying as a caretaker of the property but the Court was not persuaded since the landlord had also redecorated the property, re-hung curtains and replaced furniture which the tenant had asked to be removed upon taking occupation under the lease. *Art World Financial Corporation v Safaran and Others* [2009] ALL ER(D)(Unreported)
- Easement** The building of a gateway by Mr Heslop partially blocked a right of way exercised by Mr Bishton and others. The obstruction meant that those who exercised the right had to deviate onto another piece of land owned by Mr Heslop. Mr Bishton argued that the structure was a "substantial interference" with his right of way. Mr Heslop argued that the alternative route was equally as convenient and that the interference was not therefore actionable. The Court disagreed with Mr Heslop stating that providing an alternative route to an express right of way does not prevent any obstruction of the original from being actionable, nor will it extinguish the right of way over the original route. *Heslop v. Bishton & others* [2009] EWHC 607 ChD

May 2009

- Derogation from grant** A Transfer reserved an access right to retained land used as a water bottling plant. It was contemplated by both parties to the original Transfer that lorries would use the right of way for that business purpose. New owners of the servient land planted shrubs and built fences on the visibility splay which meant that the planning permission for the bottling plant was not renewed, as the sight lines at the junction to the access were said to be insufficient for lorries. Although the access way had not been blocked, the court held that the actions of the servient owner were such as to amount to derogation from grant. *Carter & Another v. Cole & Other* [2009] EWCA Civ 410

June 2009

Mineral Rights The Court of Appeal upheld the High Court decision that running a pipeline under someone's land without any right to do so constituted a trespass- albeit a technical one because it did not interfere with the landowners use or enjoyment of the land. Taking into account the value of not having to pursue a statutory claim, the damages were assessed at £1,000. The High Court had awarded c.£750,000. In its judgment the Court of Appeal confirmed that any valuable minerals beneath land, however far down, belong to the surface landowner in the absence of any other title holder. *Star Energy UK Onshore Ltd & another v. Bocardo SA* [2009] EWCA Civ 579

July 2009

Break Notices A case illustrating that break notices must comply absolutely with the terms of the break clause and be given on behalf of the correct tenant. A lease was granted to two tenants, a trading company and a dormant company. Both were named as tenant because the lease contained an absolute prohibition on assignment to group companies. The tenant's solicitors served a break notice but did not refer to themselves as acting for the dormant tenant company and the notice was held to be ineffective. It was not obvious to the landlord receiving the notice what was intended. The landlord would not have known if there had been an unlawful assignment to the trading company alone or whether the solicitors were acting for both companies. *Prudential Assurance Co Limited v Exel UK Limited* [2009] EWHC 1350

Restrictive Covenants The college applied for a declaration that it was no longer bound by a restrictive covenant. Approximately 70 years earlier the land that it owned had been subject to a restrictive covenant. The Purchaser in that conveyance had covenanted with the Vendor and his successors in title for the benefit of the estate "or the parts or parts thereof for the time being remaining unsold" not to do works on the land. The college argued that the conveyance limited the benefit of the covenant to the land that belonged to the Vendor at the date of the conveyance and any land they subsequently sold off was excluded. The High Court agreed. The conveyance included express reference to the Vendor and his successors in title and looked to the future. Moreover the benefit of the covenants was annexed only to the part or parts of the estate "for the time being remaining unsold". At the time that the conveyance was entered into the estate was being gradually sold off for development purposes. It was therefore natural for the Vendor to seek to retain the exclusive power to give or withhold consent to a modification or relaxation of the covenants which he imposed without the need to obtain the consent of every subsequent Purchaser. *Norwich City College of Further and Higher Education v McQuillin* [2009] EWHC 1496

August 2009

Equal beneficial interests The issue for the Court was whether equal beneficial interests held by joint tenants could change over time. In this case a couple bought a property as joint tenants, sharing the bills and mortgage payments. When the relationship ended, Mr Kernott moved out and purchased his own house in his sole name. He then severed the joint tenancy of the other property and sought to realise his share following *Stack v Dowden*, where property is held in joint names and there is no express declaration of trust to the contrary, the presumption is that the beneficial interest is held equally by the parties. The intention of the parties may change over time. The court will quantify the shares by reference to "the whole course of dealing" between the parties. In this case the parties changed intention could be inferred from their conduct when the relationship broke down. *Jones v Kernott* [2009] EWHC 1713 (Ch)

September 2009

Ground (f) Redevelopment The landlord served a s.25 Notice objecting to lease renewal on ground (f) – intention to redevelop. The Notice was sent with a covering letter explaining the landlord's plans. The landlord later decided not to redevelop due to changed market conditions, but in the meantime the tenant had found other premises at a higher rent and vacated. When the tenant realised no redevelopment works had started it claimed compensation for misrepresentation under s.37A(2) of the 1954 Act. The Court of Appeal held that the covering letter outlining the landlord's plans constituted a continuing representation, so failure to disclose a change in those plans amounted to misrepresentation. *Inclusive Technology v Williamson* [2009] EWCA Civ 718

Solicitors negligence The Claimant purchased property conditional on planning permission being granted. Planning permission was granted, and the purchase went through, but the permission was quashed at judicial review pursued by the neighbours. The development did not proceed and the Claimant sold the property at a loss. The Claimant claimed that the Defendant should have advised them to enter a "call in" clause which would have protected them in such a situation. The Court held that though the Solicitors had been negligent in not advising on the possibility of judicial review, they were not satisfied on causation. The court considered that

continued

it was unlikely that the vendor would have agreed a "call in" clause, and that if this was the case did not consider that the Claimant would have withdrawn from the purchase on that basis given the buoyant market at the time. *Stoll & Atkins v Wacks Caller (21/09/09) [2009] EWHC 2299 (Ch)*

October 2009

Tenant Insolvency

Where a company is in administration, the statutory moratorium means that no creditor can bring any legal process against the company without the consent of the Administrator or the Court. This would include a tenant's application for a new business letting under the Landlord and Tenant Act 1954. However, the Court granted permission to the tenant to pursue his application having weighed up the loss to the tenant against the loss to any creditors. *Somerfield Stores Limited v Spring (Sutton Coldfield) Limited [2009] ALL ER (D) 68 (OCT)*

November 2009

Breach of nuisance/annoyance covenant

Mr Davies began work on a three storey extension to his property which was stopped when Mr Dennis and others argued that the extension breached a covenant not to cause nuisance or annoyance to those in the estate or neighbourhood, (which Mr Davies had entered into with the original management company), as it blocked their view of the nearby Thames. Mr Davies countered that the covenant would only apply to activities on the property and not to the building of any extension. The Court of Appeal agreed with the court at first instance's findings, stating that the extension was capable of being a nuisance both whilst being built and when built, due to its continuing obscuration of the river view. *Davies v Dennis and others [2009] EWCA Civ 1081*

We hope that this is a useful reference guide to some of the key reported decisions of the last year. If you would like more information on any of the cases, or have similar issues to those raised and wish to discuss them, please contact one of our Property Litigation Team (below).

Property Litigation Team

Burges Salmon has a growing reputation and focus in Commercial Property Litigation matched by an increasingly impressive client profile.

The Team boasts considerable experience and expertise in all forms of dispute resolution including mediations, arbitrations as well as contested litigation, and advises on all aspects of freehold and leasehold property disputes. Particular areas of expertise include:

Commercial Property

Advising on aspects of commercial landlord and tenant relationships including repair and dilapidations, rent review and service charge disputes, breaches of covenants, lease renewals and possession actions.

Banking and Insolvency

Advising banks and other lending institutions, Law of Property Act receivers, landlords, tenants and other landowners involved in secured lending recoveries, insolvencies and voluntary arrangements.

Professional Negligence

Acting on behalf of banks and lending institutions, corporations, professionals and private individuals in claims against professional advisers.

Other Property Disputes

A wealth of experience exists in dealing with the entire spectrum of property related disputes including claims of adverse possession, the enforcement, modification or lifting of restrictive covenants, rights of way and other easements, and rectification of leases and other deeds.



Richard Bedford
Partner

0117 902 2749
richard.bedford@burges-salmon.com



Roger Cotter
Associate

0117 902 2709
roger.cotter@burges-salmon.com



Nichola Padget
Associate

0117 902 7233
nichola.padget@burges-salmon.com



Esther Woolford
Associate

0117 307 6926
esther.woolford@burges-salmon.com



James Sutherland
Associate

0117 307 6902
james.sutherland@burges-salmon.com



Jennifer Pendergast
Associate

0117 939 2229
jennifer.pendergast@burges-salmon.com



Harriet Critchley
Solicitor

0117 902 7267
harriet.critchley@burges-salmon.com



Sam Taylor
Solicitor

0117 307 6965
samuel.taylor@burges-salmon.com