

# Real Estate Disputes Case Review 2010

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 2009

### 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 assignment of a lease without needing to obtain the consent from the landlord, on the basis that they do not breach restrictions normally contained in anti-alienation covenants. In this case, the Court of Appeal overturned the previous High Court decision (reported in our 2009 Case Review) and held that a tenant would not be in breach of a covenant "not to part with or share possession of the property" by entering into a virtual assignment. The Court of Appeal also confirmed that the structure of the virtual assignment did not constitute an underletting, an assignment (as no deed of assignment was executed) or a declaration of trust.

NB: In April, the Supreme Court refused to give leave to appeal the Court of Appeal's decision.

*Clarence House Limited v National Westminster Bank Plc [2009] EWCA Civ 1311*

### Damages for Breach of Repairing Covenant

The measure of damages for breach of a covenant to keep, put or leave a property in good repair is capped by Section 18(1) of the Landlord and Tenant Act 1927, which provides that the damages shall not exceed the amount (if any) by which the value of the reversion is diminished by the tenant's breach. At first instance, in carrying out the assessment under Section 18(1), the judge had given a high value to the reversion by taking account of the fact that the Tenant was willing to take a new lease. This would have increased the price which a hypothetical purchaser of the reversion would have paid. There was therefore only a small diminution in value for the purposes of s.18(1) and the Landlord's damages were substantially reduced. The Court of Appeal upheld the Landlord's appeal and ruled that in assessing the value of the reversion, the court should only look at the value of the freehold at the moment it vests in the landlord. No regard should be given to any subsequent dealings, whether actual or hypothetical.

*Van Dal Footwear Ltd v Ryman Ltd [2009] EWCA Civ 1478*

## January 2010

### Tenancies at Will

The landlord granted a tenancy for a fixed term of three months. The tenancy contained a clause that granted the tenant a right to holdover on the expiry of the term, terminable on one week's notice. The tenant remained in occupation and continued to pay rent after the three month term expired, before moving out at a later date. Before he moved out the tenant had let various other individuals into occupation. On discovering these arrangements the landlord served Section 25 Notices on the individuals under the Landlord and Tenant Act 1954. A key issue before the Court of Appeal was whether the contractual term in the lease had the effect of converting a tenancy at will into a contractual periodic tenancy. The Court held that the contractual arrangement to holdover after the expiry of the fixed term was not inconsistent with the creation of a tenancy at will. As a result the tenant and those he had subsequently let into occupation, were no more than tenants at will and did not have the protection of the Landlord and Tenant Act 1954.

*Arben Katana and another v Catalyst Communities Housing Limited [2010] EWCA Civ 370*

## Contracts for Sale of Land

Westvilla Properties sought specific performance of a contract for sale, in which it had sold its freehold interest in a property to Dow Properties. As part of the sale Dow were to grant a 999 year lease of part of the property back to Westvilla at a peppercorn rent. After entering into the contract and paying a deposit, Dow then realised there were deficiencies in the paperwork. First, there were unusual provisions in the lease under which it as, landlord, would be required to make service charge payments to Westvilla. The amount of those payments was not known as no figures had been inserted into the lease. Secondly, a number of plans setting out the extent of the premises demised to Westvilla were missing. Dow attempted to rescind the contract due to uncertainty of terms. The Court declared the contract enforceable and emphasised that it would only hold a contract void for uncertainty as a last resort. The Court adopted a purposive approach to fill in the blanks of the contract based on the knowledge and intention of the parties.

*Westvilla Properties Limited v Dow Properties Limited [2010] EWHC 30 (Ch)*

## Restrictive Covenants

The claimant developer applied for a declaration that it was no longer bound by restrictive covenants affecting land that it had purchased. The covenants were in favour of the original seller of the land (a Building Society that had ceased to exist) and its successors. The Court held that the covenants were only in favour of the Building Society and were not annexed to the land. As the Building Society no longer existed and no longer owned any land in the vicinity that would be benefitted, the covenants were not enforceable.

*Seymour Road (Southampton) Limited v Williams [2010] EWHC 111 (Ch)*

## February 2010

## Guarantors on Assignment

Authorised Guarantee Agreements (AGAs) were brought in by the Landlord and Tenant Covenants Act 1995 ('the Act'). For leases entered into on or after 1 January 1996 the Act abolished the principle of 'privity of contract' so that an original tenant would no longer be liable for the entire term of the lease. However, the Act allowed Landlords to require the outgoing tenant to guarantee the obligations of its immediate assignee by an AGA. The Act was less clear on whether the guarantor of a tenant's liabilities under a lease could also be made to enter into an AGA in order to guarantee the obligations of the tenant's immediate assignee. In a disappointing decision for landlords, the High Court ruled that an AGA entered into by a tenant's guarantor as a pre-condition to a consent to assign was void as it fell foul of broad 'anti-avoidance' provisions contained in Section 25 of the Act. These state that any agreement that excludes, modifies or frustrates the operation of the Act will be void. The Court considered that the Act's operation would be frustrated by a guarantor being required to enter into a guarantee on an assignment. There was no specific statutory provision which allowed this and the Act was meant to ensure that the tenant's guarantor's obligations ended on the tenant assigning the lease. The decision was appealed, but the case was settled before it got to the Court of Appeal.

*Good Harvest Partnership v Centaur Services Limited [2010] EWHC 330 (Ch)*

## Liability of Landlord as Bailor of Goods

The Court gave guidance to landlords as to the appropriate steps to take when they have re-entered premises and found themselves in possession of another persons goods. Under the Torts (Interference with Goods) Act 1977 there is a procedure by which notice can be given to the owner and the goods disposed of if they are not collected, but this is dependant on the landlord knowing who the owners are. In order to ensure he is protected against third party claims when disposing of the goods the Court held that a landlord first had to establish whether the goods had been abandoned by the true owner. To establish abandonment, the landlord needed to show not only an intention by the owner to abandon the goods, but also some physical act by which the owner had relinquished ownership. If this was not possible the disposal of goods would be unlawful unless the landlord could prove that he had undertaken

reasonable enquiries as to the ownership of the goods and was not aware or should not reasonably have been aware of their ownership at the time of disposal.

*Robot Arenas Limited v Waterfield and Others [2010] EWHC 115 (QB)*

### March 2010

#### Dilapidations

A dispute arose over the state of repair at a premises let to a tenant on a 29 year lease. The landlord issued a Section 146 Notice under the Leasehold Property (Repairs) Act 1938. The tenant served a counter-notice, though ultimately the tenant did carry out the works. The landlord then brought proceedings to recover the solicitors' and surveyors costs it has incurred in dealing with the matter from the date of the counter-notice until completion of the repairs. The question for the court was whether these costs could be recovered under the terms of the lease. The key clause allowed the landlord to recover costs incurred in relation to proceedings under Section 146 of the Law of Property Act 1925 or the Leasehold Property (Repairs) Act 1938. The Court of Appeal upheld the first instance decision that the landlords costs fell outside the wording of the clause. There were no proceedings in place under the 1938 Act, the costs had been incurred in relation to persuading the tenant to do the work and the landlord had elected to deal with the problem by negotiation. Even though the work was undertaken by the tenant as an alternative to forfeiture and due in part to the threat of such proceedings, this was not sufficient to bring the costs within the clause.

*Agricullo Ltd v Yorkshire Housing Ltd [2010] EWCA Civ 229*

#### Contracts for Sale of Land

The seller and buyer agreed a 10% reduction on the purchase price on 11 contracts of sale. However it was decided that only 8% of this reduction would be reflected in the contracts for sale, with the remaining 2% being dealt with as a 'finders fee' in a separate side agreement. The buyer then refused to complete the purchase arguing that the contracts of sale fell foul of Section 2 Law of Property (Miscellaneous Provisions) Act 1989. Section 2 provides that all express terms of the sale must be incorporated into one written and signed document. The sellers applied to court for specific performance to enforce the contract. The Court of Appeal upheld the High Court decision in deciding that the seller was entitled to specific performance. The 2% 'finders fee' was not a part of the contracts, which also contained 'entire agreement' clauses. It was an entirely separate transaction and the contracts for the sale of land were not conditional upon it. Section 2 did not serve to prevent the parties from separating the land contracts from other aspects of the transaction. The buyer was seeking to escape the contracts by an escape route which parliament had actually intended to mitigate by the introduction of Section 2.

*North Eastern Properties Limited v Coleman & Quinn Conveyancing [2010] EWCA Civ 277*

### April 2010

#### Insolvency

A creditor who issues a bankruptcy petition should always check to see if notice of the petition has been registered at the Land Registry. Unless notice of a bankruptcy petition is registered, the debtor is free to transfer property to a third party in the period between the issuing of the petition and the making of a bankruptcy order, thus depriving his creditors. If notice is registered then any third party purchaser will take property subject to the rights of a subsequently appointed Trustee-in-Bankruptcy, which includes the right to avoid a sale under Section 284 Insolvency Act 1986. The obligation on the Court Service to notify the Land Registry of a petition does not give rise to a cause of action if they fail to do so, hence the onus is on the creditor to ensure that registration has occurred.

*Poulton v Ministry of Justice [2010] EWCA Civ 392*

**Break Clause**

The Court of Appeal held that a tenant's right to exercise a break clause was limited to the time in which it was the tenant and was therefore lost on an assignment of a lease. Two 99 year leases of industrial units were assigned to Linpac Mouldings Limited. Each licence to assign contained a break clause expressed to be for Linpac's benefit only. Linpac subsequently assigned the lease to another company, Ecomould, who went into administration. The landlord refused to give consent for a re-assignment back to Linpac as it feared that Linpac might be able to exercise the break clauses. Ecomould ignored the landlord's refusal and transferred the leases back to Linpac who then served break notices to determine the leases. At first instance it was held that the landlord's refusal to consent to the re-assignment was reasonable and that the break notices had no effect. Linpac's appeal was rejected. Following the decision in *Maxfactor*, the Court of Appeal considered that it would be extraordinary to allow a former tenant to end a lease when it was no longer the tenant in possession. Nor would the right to break have been revived if a valid re-assignment to Linpac had occurred.

*Linpac Mouldings Limited v Aviva Life and Pensions Limited (formerly known as Norwich Union Life and Pensions) [2010] EWCA Civ 395*

**May 2010****Break Notice**

In a commercial lease the tenant was permitted to serve a break notice provided, on the wording of the lease, it was served not only on the landlord but also on a property management company. The tenant served the break notice on the landlord only and only sent a copy of the notice to the property management company at a later date. The tenant tried to argue that the break was effective on the grounds that the notice had been served timeously on the landlord whilst, as the break clause did not specify a time for service, service on the property management company within a reasonable time was sufficient. The court agreed that a break clause should be construed against the landlord, but in this case the break was not effective as the words in the lease were clear and unambiguous as to who had to be served. Time was of the essence in complying with a break clause and there was no evidence to support an implied term that the property management company only needed to be served within a reasonable time.

*Hotgroup Plc v Royal Bank of Scotland [2010] EWHC 1241 (Ch)*

**June 2010****Break Notice**

Another case which illustrates the importance of ensuring absolute compliance with the terms of a break clause. Prior to serving a break notice the Tenant had notified the landlord that it had changed its name due to a merger with a parent company. In fact, the merger never occurred and the Tenant remained a separate company with its original name. The Landlord was not informed that there had been no change of name. A few months later the Tenant served a break notice in the name and on behalf of the parent company. The Court held that the notice was ineffective and the lease continued for the remainder of the term. The break clause contained a formal requirement for the tenant to give the notice and this requirement had to be complied with. A different company to the tenant had given the notice and there was nothing to suggest that they were acting as agents for the tenant when they did so. It was irrelevant that the notice contained sufficient information to allow a reasonable recipient to deduce the tenant's intention to break the lease.

*Hexstone Holdings Limited v AHC Westlink Limited [2010] EWHC 1280 (Ch)*

## **Company Voluntary Arrangements and third party guarantees**

### **July 2010**

The Court held that a Company Voluntary Arrangement (CVA) entered into by a tenant who had gone into administration should be set aside, on the basis that it was unfairly prejudicial to the interests of a landlord attempting to rely on the benefit of third party guarantees of the tenant's liabilities. The tenant leased two retail units from the landlord. The tenant's liabilities were guaranteed by its Italian parent company. The tenant went into administration and the administrators proposed a CVA in which the landlords received £300,000 and the parent company would be released from its guarantees for the remainder of the leases. In setting aside the CVA the Court made a comparison with liquidation, under which the landlord would not have been deprived of the guarantees. The guarantees were of obvious value to the landlord, and the reason they were taken in the first place was because of the risk of tenant insolvency.

*Mourant & Co Trustees Limited v Sixty UK Limited (in administration) [2010] EWHC 1890 (Ch)*

## **Mineral Rights**

The Supreme Court upheld the Court of Appeal decision (reported in our 2009 Case Review) that, in the absence of any other title holder, the owner of the surface of the land was also the owner of the strata beneath it and any valuable minerals which that might contain. Bocardo, as the paper owner of the title to the land, had a prima facie right to possession of the strata and all that below the surface so as to be deemed in factual possession. By running a pipeline under Bocardo's land, without obtaining a any right to do so, Star Energy had committed a trespass. The Supreme Court also held, with two Lords dissenting, that the Court of Appeal's reasoning in awarding damages of just £1,000 to Bocardo was correct. It was held that Parliament had not intended a landowner, under whose land petroleum was discovered and who did not hold a licence to exploit it, to have a share in the value of that petroleum. Compensation should be measured by the amount that Bocardo would have accepted in consideration for granting Star Energy a right to drill pipelines under their land. As the pipelines would not interfere with Bocardo's use of the land and Bocardo did not hold a petroleum licence by which the pipelines could be exploited, compensation was technically only £82.50 and an award of £1,000 was generous.

*Borcardo SA v Star Energy UK Onshore Limited and another [2010] UKSC 35*

## **Leasehold Enfranchisement**

Under the Leasehold Reform Act 1967 certain tenant's of houses under long leases can serve notice on their landlord to acquire the freehold or extend their leases. Section 2(1) of the Act provides that a 'house' can mean any building 'designed or adapted for living in and reasonably so called'. The Court of Appeal held that an objective assessment was to be made in deciding whether recent adaption works to a property had adapted a property for living in. Changes of furniture and furnishings were to be ignored as these were not works of adaption. The Section was concerned with the physical character of the building and not its actual or intended use. However, where a permitted user covenant under a lease prevented or severely restricted residential use, actual use would become a relevant factor.

*Day v Hoseby Ltd [2010] EWCA Civ 748*

### **August 2010**

## **Landlord and Tenant Act 1954**

The Appellant was the tenant of a supermarket and adjoining land. The tenancies were due to expire. The tenant had served notice on the respondent landlord requesting new tenancies (under Landlord and Tenant Act 1954 s.26). This request was met by a counter notice that the landlord would oppose the grant of new tenancies on the ground that it intended to redevelop the properties upon termination of the leases. The tenant applied to court for the grant of the new tenancies and a trial was set to hear the ground of opposition as a preliminary issue. The tenant's application for summary judgment to dismiss the ground of opposition was dismissed. The issue in the case was the date at which the landlord would need to have established his intention to redevelop. It was held that the date of the hearing at which the necessary intention had to be shown was always set by reference to the date of the substantive trial of the landlord's ground of objection. It was not, as the tenant argued, by reference to the date of the hearing for summary judgment. The tenant's appeal was dismissed.

*Somerfield Stores Ltd v Spring (Sutton Coldfield) Ltd [2010] EWHC 2084*

## September 2010

### Rights of Light

The developer, HKRUK II, purchased the property in December 2007 with planning permission having been previously granted for the redevelopment of a five storey building in Leeds. The developer acknowledged that Mr Heaney would suffer an actionable loss of light to his adjoining property as a result of the re-development, which added a further two floors to the building. Negotiations for settlement broke down and Mr Heaney, threatened injunction proceedings, but never took any action in that regard. The development was completed in July 2009. The developer sought a declaration from the court that Mr Heaney would not be entitled to an injunction for the removal of the two extra floors at the building. The focus of the case was on whether the suitable remedy would be an injunction (to remove the two extra floors) or damages. The developer set out to persuade the court that damages were the appropriate remedy in this case. The court applied the principles set out in *Shelfer v City of London Electric Light Company* which established that the court will only grant damages instead of an injunction if the injury to legal rights is small; the injury is capable of being estimated in money; the injury can be adequately compensated by a small money payment and that it would be oppressive to grant such an injunction. The Court held that given Mr Heaney's investment in his property, and the reduction of light to it, meant that the injury could not be classified as small. The court decided that the loss was capable of being calculated in monetary terms, but that this compensation (damages of £250,000 at the court's assessment), could not be said to be a small amount. Finally the court held that an injunction would not be oppressive, mainly as the developer's infringement had been carried out with a view for profit; not necessity. The Court therefore granted an injunction. The case highlights that it can no longer be taken for granted that it is difficult for a claimant to obtain an injunction in such circumstances, and should encourage developers to ensure rights of light issues are resolved prior to commencing any development.

*HKRUK II (CHC) v Heaney [2010] All ER (D) 101*

## October 2010

### Repudiatory Breach

Mr Heaney had agreed to buy 13 flats from Eminence Property Developments Limited. The market value of the flats dropped significantly as a result of the economic downturn. Mr Heaney failed to take steps towards completion and Eminence served notices providing Mr Heaney with 10 working days to complete. Eminence's solicitors miscalculated and believed Mr Heaney had failed to comply with the notices in time, when in fact he still had one day to comply with them. Eminence therefore served notices rescinding the contracts. Mr Heaney responded that in sending such notices of rescission the vendor was in repudiatory breach of contract, which Mr Heaney accepted and required the return of his deposit. The High Court agreed with Mr Heaney, stating that the notice of rescission indicated a clear refusal by the vendor to perform its future obligation, and therefore constituted a rescission of the contract by Eminence. The Court of Appeal reversed this decision, stating that the legal test for repudiatory breach is only fulfilled where the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. On the facts of this particular case the Court were unable to find an intention by Eminence to abandon and refuse to perform the contract. The Court found that it could be inferred from the facts that Eminence had actually wanted to enforce the contracts in accordance with their term, either by completing or rescinding and exercising remedies conferred on them.

*Eminence Property Developments Limited v Heaney [2010] EWCA Civ 1168*

## November 2010

### Relief from forfeiture

K & J Restaurants ("K&J") held a lease of a building near Tottenham Court Road comprising of a restaurant on the ground floor and basement and residential flats on the first, second and third floors. Pursuant to the terms of the lease, K&J had underlet the upper part of the building on residential tenancies. The lease contained a covenant that the demised premises were not

to be used for illegal or immoral purposes. In November 2007 K&J were informed by the police that one of the flats in the premises was being used as a brothel. The police then served notice on both K&J and the landlord of the premises stating that they were being used as a brothel and requiring immediate action to be taken to remedy the position. The landlord served a section 146 notice under the Law of Property Act 1925 on 28 February 2008. Section 146 states that a right of re-entry or forfeiture for a breach of covenant will not be enforceable unless a notice is served on the lessee specifying the breach that is complained of; if a remedy is capable, requiring the lessee to remedy the breach and requiring the lessee to make compensation in money for the breach. As a result of the Section 146 notice the tenant evicted the subtenant by 6 March 2008. The landlord argued that it was entitled to possession of the building as the lease had been forfeited for breach of covenant. K&J applied for relief from forfeiture. The Court is able to grant relief on any terms that it sees fit, but often the tenant has to pay the landlord's costs in relation to the forfeiture proceedings. At first instance the Court rejected the landlord's claim for forfeiture and possession, asserting that the tenant had not turned a blind eye to the use of the flat as a brothel, and that this breach was in any event remediable. The Court therefore found the February Section 146 Notice to have been invalid. The Court of Appeal upheld the refusal to give the landlord possession, but found that the Section 146 Notice had been valid. The Court of Appeal held that by February 2008, and the Service of the Notice, the tenant had failed for a significant time to take steps to remedy the breach, and had therefore breached the covenant in the lease. However, the Court did grant the tenants relief from forfeiture. The Court was keen to impress that it would only grant relief where the breach involves immoral use in exceptional circumstances, but due to the locality of the premises it was felt that no stigma had attached to the building and as such the breach had been addressed.

*Patel and another v K & J Restaurants Ltd [2010] All ER 278*

## The Real Estate Disputes Team



**Richard Bedford**

Partner

+44 (0)117 902 2749

[richard.bedford@burges-salmon.com](mailto:richard.bedford@burges-salmon.com)



**Roger Cotter**

Associate

+44 (0)117 902 2709

[roger.cotter@burges-salmon.com](mailto:roger.cotter@burges-salmon.com)



**James Sutherland**

Associate

+44 (0)117 307 6902

[james.sutherland@burges-salmon.com](mailto:james.sutherland@burges-salmon.com)



**Samuel Taylor**

Solicitor

+44 (0)117 307 6965

[samuel.taylor@burges-salmon.com](mailto:samuel.taylor@burges-salmon.com)



**Douglas Scott**

Solicitor

+44 (0)117 307 6879

[douglas.scott@burges-salmon.com](mailto:douglas.scott@burges-salmon.com)