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Commercial Property Disputes 2009 Review

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Foreword

Welcome to the 2009 case law round up from the Commercial Property Disputes Team. In this review we have described a selection of the year's most interesting and topical property cases. In their usual way, the cases reflect the market, including disputes concerning insolvency, breached sale contracts, the validity of break notices, notices to complete and dilapidations. That said, it is our perception (reinforced by discussions with Counsels' chambers and Court staff) that the market has seen a lower turnover of cases that fight to trial. This is probably reflective of the fact that organisations are more likely to save their money and reduce their risk exposure by settling disputes where they can. Recession or not, this is consistent with the Trowers' team approach, where we pride ourselves on our ability, in most cases, to deliver our clients' commercial solutions without the cost and risk of leaving matters to a Judge to decide.

Notable cases that have made their way to the law reports this year, however, include the Court of Appeal decision in *Clarence House*, in which the Court held that covenants not to part with or share possession or to create trusts over the leasehold interest, were not breached by a "virtual assignment" in which the economic benefits deriving from a lease, but not the legal title itself, were sold to a third party. This leaves the door open for corporate

occupiers to restructure their leasehold interests without actually divesting themselves of legal title. The House of Lords also reiterated the proper approach to the interpretation of contracts in *Chartbrook v Persimmon*, a case concerning a poorly drafted overage provision. The Court showed itself willing to distort the actual wording in the contract if that was necessary to make it conform with commercial common sense: sloppy draftsmen should not however sigh with relief as this case had to get to the House of Lords for that decision to be reached!

In our introduction last year, we said that whilst we did not know how things in the wider property world would turn out, we expected to be busy. That prediction has certainly turned out to be true. And as well as being busy, the team has continued to grow, with the addition of solicitor Emma Barnfield in February and partner Paul Marco in August 2009. Emma was previously at Shoosmiths and Paul was national head of property litigation at Halliwells. Thanks to our clients' kind words, our success has also been reflected in the legal directories, where we had positive write ups in both the Legal 500 and Chambers. Our mission for 2010 is to build upon and consolidate this base – so watch this space. In the meantime, we hope you enjoy this review.



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"Do I have to...?"

It is not surprising that the depressed property market has resulted in purchasers trying to wriggle out of their contractual obligations whilst sellers seek specific performance of contracts entered into during more promising times.

The weapon of choice in this battle is often a notice to complete. The Standard Commercial Property Conditions provide, "At any time on or after the date of completion, a party who is ready, willing and able to complete may give the other a notice to complete". Service of the notice triggers a 10 working-day period during which the contract is to be completed; time is of the essence. If either party fails to complete, the other is entitled to rescind the contract and retain or demand repayment of the deposit accordingly.



Reassuringly, in *Jeans v Taylor* the Court held that in order to be valid, a notice to complete had to be sufficiently clear and unambiguous to a reasonable recipient.

Provided a party is in a position to complete, a notice to complete can be used tactically. If completion does not result, the non-defaulting party will be entitled to rescind the contract on expiry of the notice period. Timing of service of a notice to complete must, however, be carefully considered. In *North Eastern Properties Limited v Coleman & Quinn Conveyancing* the sale contract provided for completion 10 days after the purchaser was notified construction works were complete. After 6 months of construction delays, the purchaser attempted, tactically, to serve notice to complete as it was unlikely the seller would be able to complete within the notice period. The seller denied the validity of the purchaser's notice and claimed specific performance of the sale contract, whilst the purchaser claimed the contract had been rescinded. The Court held that the purchaser's notice to complete was invalid as the date of completion had not arisen when notice was served.

Where there is a web of commercial contracts, the use of rescission should be carefully considered. *Mount Anvil Group Limited v Volans Management Limited* concerned three inter-related contracts for a mixed residential/commercial development and the purchase of a management company by two connected purchasers. Whilst the parties agreed two of the contracts had been rescinded and terminated respectively, the purchaser of the remaining contract had entered a notice on the seller's title at the Land Registry to protect its interest in that contract. The Court considered the status of the remaining contract and determined that the three agreements should be seen, commercially, as part of an overall transaction; the remaining contract could not function alone and was therefore also at an end.

The end is nigh (or is it?)

This year has seen the usual wrangles over disputed break notices and surrenders.

In *Orchard (Developments) Holdings Limited v Reuters Limited* the lease contained a break option at the end of the 5th and 10th years, requiring 6 months notice in writing, which in the case of a landlord company was required to be served at their registered office. Reuters intended to give notice to expire on the fifth year of the term on 30 January 2006. On 29 July 2005, Reuters sent 6 month's written notice by process server, but the notice was posted in the wrong letter box and was therefore ineffective. The notice was also faxed to Orchard's office after hours on 29 July, and on (Saturday) 30 July 2005. Faxed notices were only valid under the lease if acknowledged by the landlord. Orchard acknowledged receipt of the notice, but only some 18 months later (a year after the break date in the notice). The Court held that the faxed notice had to have been acknowledged before the break date and therefore the break was ineffective and the lease continued.

Prudential Assurance Company Limited V Exel UK Limited concerned a lease held by two companies. In the heading to the break notice the two tenant companies were referred to, but in the body of the notice it referred only to one tenant giving the notice. The Court decided it did not help the tenant that a) the landlord knew that the break was intended to be operated, or b) that the two companies were part of the same group. The break notice failed as it was not clear notice was being given on behalf of both tenant companies.

On the other other hand, in *Baker Tilly Management Limited v Computer Associates UK Limited* the High Court upheld as valid a



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notice served under the tenant's previous name. As the tenant had not changed as a legal entity there could be little doubt about the meaning and effect of the notice.

In *Artworld Financial Corporation v Safaryan*, the claimant landlord, Mr and Mrs Takanaki (acting through a BVI registered company), had let a high-value ambassadorial residence to the defendant tenants, the Safaryans. Following a series of complaints, the Safaryans moved out of the property fifteen months before the end of the term and returned the keys to the landlord. The landlord claimed for rent due for the remainder of the term, in defence to which the Safaryans contended that the landlord had accepted a surrender of the lease as the landlord had accepted back the keys to the property, redecorated it and, crucially, Mr Takanaki had moved into the property. The Court of Appeal held that the landlord's actions amounted to an unequivocal act, inconsistent with the continuation of the lease. Accordingly, the landlord had accepted the surrender of the lease and its claim was rejected.

Insolvency round up

Whilst tough economic times have seen a sharp increase in tenant insolvency, landlords seeking to protect their rental income stream will be interested by two recent cases where it was held that landlords were entitled to recover the sums owed to them under the lease.

In the matter of *The Cotswold Co Limited* the tenant, the Cotswold Company, entered into a company voluntary arrangement. There was no prospect of the tenant continuing to trade

and, in order to re-let the property and thereby mitigate its losses the landlord entered into a deed of surrender with the tenant. In the meantime, the Cotswold Company's share capital was sold to a third party, providing the supervisor of the CVA with funds for distribution to the tenant's unsecured creditors. The landlord's claim for future rent and payment in lieu of the tenant's unfulfilled leasehold obligations was rejected by the supervisor of the CVA on the basis that the tenant's leasehold obligations were extinguished at the point at which the deed of surrender was completed. However, the Court held that although the tenant's obligations under the lease were not explicitly dealt with in the proposals for the CVA, the same objective



was achieved later through the deed of surrender which expressly reserved the landlord's right to claim within the CVA. Careful drafting of the deed in this instance therefore preserved the landlord's right to claim for future rent and other obligations.

In *Gabriella Shaw v Hazel Doleman*, Shaw had assigned her lease of a retail unit to a third party and entered into an authorised guarantee agreement with the landlord. When the assignee went into liquidation the landlord sought to recover the arrears of rent from Shaw under the AGA which stated that she was liable as guarantor "for the period during which the assignee is bound by the tenant covenants in the lease". The Court of Appeal held that Shaw was liable to settle the arrears as, following the well known House of Lords decision in *Hindcastle*, disclaimer terminated the lease and the liabilities of the assignee company but did not affect the liabilities of any other person. For the purposes of the guarantee, the lease was therefore deemed to continue and the guarantor's liability was not affected by the disclaimer. So in short, the guarantee did what it was supposed to do!

Given the fluidity of insolvency situations, landlords should of course act swiftly where sums are outstanding. In *Nationwide Building Society v Wright*, Nationwide had obtained a final charging order over Wright's share in a property, to secure a judgment obtained in respect of a credit card debt. Prior to this and unbeknownst to Nationwide, a bankruptcy petition had been presented and Wright was made bankrupt a fortnight after the final charging order was made. The trustee in bankruptcy's decision to have the charging order set aside was initially upheld. However, the Court of Appeal decided that, by virtue of s.346(1) of the Insolvency Act 1986, in the absence of special circumstances, the interests of a judgment creditor who obtained a final charging order before the

commencement of the debtor's bankruptcy should prevail over the interests of unsecured creditors. (A stark contrast to corporate insolvency, where there is no such saving provision for persons who acquire property of the company in good faith and with no knowledge of a winding up petition as the winding up petition rather than the winding up order itself marks the start of the insolvency). This case could apply equally to landlords who obtain money judgments against their tenants and seek to enforce these by obtaining a charging order over any other property and assets of the tenant.

Comfort for tenants faced with insolvent landlords (an increasingly common phenomenon) came in the form of *Somerfield Stores Limited v Spring (Sutton Coldfield) Limited*. Somerfield had commenced lease renewal proceedings which were opposed by the landlord on the basis that it intended to redevelop the property. However, the landlord subsequently went into administration and, given the moratorium preventing proceedings against companies in administration, Somerfield was forced to apply to the Court for permission to continue its lease renewal proceedings. Luckily for Somerfield, the Court held that Somerfield's right to a new tenancy was equivalent to a proprietary right and as the scheme of administration was not designed to favour the rights of secured creditors over the interests of a third party with such a proprietary right, the Court gave Somerfield permission to continue its action. These cases are fact specific: for example, it may well have been a different story if the administrators had believed they could sell the property as a development opportunity and wanted time to find a party to take over the ground "f" opposition to the new tenancy.

Without wishing to be overly negative, we expect to see more of these sorts of cases in 2010...

Clogs on development

Not everyone has tightened their purse strings and downed tools in 2009. A number of companies and individuals have sought to pursue developments, with varying degrees of success. As the following cases demonstrate, liquidity is only half the battle with third party rights often delaying matters or, in the worst case, impeding development altogether. Easements and restrictive covenants as ever proved fertile battle ground in 2009.

Although in 2008 the Law Commission conducted an extensive consultation into the replacement of restrictive covenants with a new form of "Land Obligation" no changes have yet been implemented and the old laws remain.

In *Re Abertawe Bro Morgannwg NHS University Trust's application* the Lands Tribunal was faced with an application to discharge a covenant pursuant to section 84 of the Law of Property Act 1925, on the ground that it had become obsolete. This was a 1938 covenant that prevented the use of land for anything other than a maternity clinic. When the covenant had been given there had been no maternity facilities and a high infant mortality rate in the area. After the covenant was given, a maternity clinic had been established on the land and operated until 2005 when, due to the existence of other similar services in the locality and a consequent lack of demand for the maternity clinic, it had been closed down. The beneficiary of the restrictive covenant wanted to use its objection to force the land to be used for dental services, but the Tribunal held that this was a classic case of obsolescence, meaning the covenant should be entirely discharged.

In *Norwich City College of Further and Higher Education v McQuillin* the College wanted to pursue a £173m redevelopment scheme, but local objectors claimed the benefit of a restrictive covenant dating back to 1936. The College sought, and obtained, a declaration that no-one was entitled to the benefit of the covenant in question. This was on the basis that the covenant was expressed to be for the benefit of the owners of such parts of the vendor's estate as from time to time remain unsold. The Court held that the covenant had only been enforceable by the vendor for so long as it retained parts of its estate, all of which had long since been sold. This was a common-sense decision, but not necessarily an obvious one and a less commercially minded tribunal could easily have gone the other way.

In *Salvage Wharf Limited v G & S Brough Limited* a developer secured a nearby owner's agreement not to take any action to enforce its rights to light if affected by a proposed development. The development was subsequently completed, but turned out to be much more extensive than originally proposed. The developer argued that the owner had given up its rights to light by virtue of the agreement. The Court disagreed. The agreement did not release the owner's rights to light: it merely allowed an interference with those rights to the extent of the originally proposed works. The new development was more extensive and therefore the agreement did not assist the developer. The lesson to be learnt? Where development proposals change, such agreements should be reviewed to ensure that the terms are extensive enough to cover the change and, if not, further agreement should be sought.

The Court in *Carter v Cole* granted an injunction requiring a landowner, Mr and Mrs Cole, to remove a fence and shrubs from their land. These items interfered with a visibility splay required for the proper exercise of a



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private right of way by the adjoining owner, Mr and Mrs Carter. The right had been reserved by the Carters when they sold part of their land to the Coles and the Court placed emphasis upon the fact that the need for a visibility splay was a condition contained in a planning permission known to the parties at the time of the sale and referred to in the transfer deed. The Coles were required to remove the obstructions to the visibility splay and to pay damages to the Carters.

In *Propertypoint v Kirri*, the Court held that Mrs Kirri had acquired a right to turn her car on Propertypoint's land so that she was able to reverse it into a garage on her own land. The right was acquired by prescription (at least 20 years' use) despite the fact that the original access route on to the land had been blocked off by hoardings before she had attained 20

years' use and an alternative access route had been used after that time. The Judge concluded that it was the continuous exercise and usage of the right to turn her car that was important and that did not change because the car entered the land from a different direction part-way during the 20 year period.

In *Heslop v Bishton*, the Court confirmed that Mr Bishton's express right of way could not be obstructed or unilaterally altered by Mr Heslop, the landowner, even if a suitable alternative right of way was provided. However, although the existence of an equally convenient new route may mean that a Court will not grant an injunction to enforce the original route, it does not preclude the right to compensation or the right to a declaration that the original route subsists.

Landlord and tenant lucky dip

2009 has seen the usual rag bag of landlord and tenant disputes, from cases concerning the Landlord and Tenant Act 1954 to dilapidations. Here are a few of the more interesting cases.

In *Patel v Keles*, the Court of Appeal considered the right of a landlord to object to renewal of a business lease where the landlord intends to occupy the premises in order to carry on his own business (section 30(1)(g) of the Landlord and Tenant Act 1954). The tenants, Mr and Mrs Patel, ran a newsagent's business from the premises. When their lease expired in 2007, the landlords, Mr and Mrs Keles, opposed the granting of a new lease on the basis that Mr Keles intended to use the premises himself to carry on a newsagent's business.

The principal issue which arose was whether or not Mr Keles had sufficient intention to run a business at the premises. During the course of proceedings he offered an undertaking "not to use the premises for two years for any purpose other than as a newsagents' business carried on by Mr and Mrs Keles". The Court of Appeal held that this was not sufficient, since Mr Keles' intention "ought to be a substantial and genuine intention of running a business for the foreseeable future at the premises". Arden LJ stated that "the occupation must be more than short term" and agreed with the County Court judge that Mr Keles lacked the requisite intention to occupy.

What if there are several separate freeholds that are all subject to one lease? In *EDF Energy Networks v BOH Limited and others*, EDF had one 1954 Act protected lease of 3 different plots of land. The freeholds of those



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plots passed into the hands of separate reversioners, one of whom served a section 25 notice on EDF. EDF served a counter notice and then agreed terms to purchase the freehold from the landlord. The owners of the other plots subsequently argued that EDF had no rights over those other plots as the lease had been brought to an end by the original section 25 notice, which EDF had accepted, and that by purchasing the freehold of the first plot, the lease had merged in the freehold and had been extinguished. Among other things, the Court held that as the section 25 notice had only related to the first plot of land it was invalid to determine the lease – such a notice has to relate to the whole of the premises in the tenancy. Where there are several reversioners with separate titles (a split reversion) there would therefore need to be co-operation to allow the lease to be determined.

When is an assignment not an assignment? When it is a virtual assignment (of course). A virtual assignment allows all the benefits of a sale and leaseback without the drawbacks of creating actual leasehold interests (and hence the need to involve one's landlord). This works by assigning all the economic benefits of the lease to a third party, whilst the tenant remains in occupation. In *Clarence House v National Westminster Bank* the landlord argued that such an arrangement was in breach of the tenant covenant not to share or part with possession of the premises or that alternatively it amounted to an unlawful trust of the tenant's interest. The High Court held in the landlord's favour, deciding that the arrangement amounted to a parting with or sharing of possession. The Court of Appeal held that there was no parting with or sharing possession. On the question of whether a virtual assignment amounted to a trust, the Court said that whilst "Virtual Assignments are strange new beasts in the forest" when "one gets close and has a good sniff the

overwhelming smell is of contract, not trust." So the beast lives to see another day.

Tenants successfully determining their lease interests (see page 5) should however note that due to the lack of demand in the lettings marketplace, maximising returns at the end of the lease term has seldom been more important to investment landlords. That said, landlords should beware of inflating dilapidations claims. In the case of *Business Environment Bow Lane Limited v Deanwater Estates Limited*, the dilapidations claim was stated to be £416,000 but ultimately the parties settled the claim at £1,070, with costs to be decided by the Court. The Court of Appeal agreed that the landlord should not have to pay the costs of a preliminary issue (where the tenant unsuccessfully claimed at the outset that a refurbishment contract had nullified the claim entirely). However, as it was otherwise clear that the dilapidations claim had been grossly exaggerated, the landlord was ordered to pay the remaining costs of the action.

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