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NEWSLETTER
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IN THIS ISSUE:

Competition law - user clause struck down

Any clause in any contract (including a lease) is void if it is anti-competitive

In Martin Retail Group Ltd v Crawley Borough Council, during the course of 1954 Act proceedings for the renewal of a lease, the tenant successfully persuaded the County Court to declare that the landlord's proposed user clause was anti-competitive.

The renewal lease was of a shop in a parade on a housing estate. All of the shops in the parade were let by the council on terms that restricted their use to a particular retail business.

The use of the shop in question was restricted to a newsagent, tobacconist and post office counter. The council wanted to re-impose this restriction in the renewal lease. But the tenant also wanted to sell "convenience goods" (i.e. groceries and other household products). This would compete with a supermarket in the same parade. The council, as landlord, refused.

The tenant argued that the proposed restriction, was anti-competitive.

The council claimed that their restrictions encouraged a greater range of available goods and services, which benefitted local people.

The council also argued that businesses would be less likely to take a lease in the parade if their trade was not protected.

The judge sided with the tenant. The council's policy of trying to achieve a suitable tenant mix in the parade was not in itself anti-competitive. But the particular restriction that the council was seeking to impose on the tenant would unlawfully eliminate competition in convenience goods in the parade.

This is the first case of this kind and is an important one for landlords seeking to control tenant mix in their schemes.

When is a right of way abandoned?

It has long been the law that you cannot lose the benefit of an easement simply by failing to exercise it for a long period. In other words, non-use for however long a period is not enough by itself to amount to abandonment of a right of way.

This has recently been confirmed by the Court of Appeal in Dwyer v Westminster City Council in which the council successfully sought to reinstate a right of way over a passageway that had been disused and blocked off since the 1960s.

To constitute abandonment any non-use must also be accompanied by an intention on the part of the beneficiary of the easement never to re-assert the right or to attempt to transmit it to anyone (Tehidy Minerals v Norman (1971)).

Note that the Law Commission has proposed that the law of abandonment be changed. It has proposed that if an easement has not been used for a continuous period of 20 years there should be a rebuttable presumption that it has been abandoned.

Insolvency update

Rent as an administration or liquidation expense

Can the landlord of a tenant that has gone into administration or liquidation claim preferential treatment, ahead of ordinary unsecured creditors, for the payment of rent?

In Goldacre (Offices) Ltd v Nortel Networks UK Ltd (in administration) it was held that, in the case of premises kept running by the administrators, all rent falling due after the date of the administration was payable ahead of ordinary unsecured creditors as "an expense of the administration".

However in Leisure (Norwich) II Ltd v Luminar Lava Ignite Ltd (in administration) the court ruled that rent cannot be claimed as an administration expense for a given quarter when administrators are appointed after the payment day for that quarter. This was a blow to landlords. It led to tenants, such as Game, taking maximum advantage by appointing administrators the day after a rent quarter day. However, in the recent case of Pillar Denton v Jervis (a test case brought by a representative selection of Game's disgruntled landlords), the Court of Appeal has ruled that administrators and liquidators must pay rent pro rata for the period during which they keep the premises running, regardless of when the relevant payment day fell due.

Who is liable for business rates after a lease is disclaimed?

In the recent case of Schroder Exempt Property Unit Trust v Birmingham City Council, the High Court has confirmed that it is the landlord who is liable to pay business rates for an empty property following disclaimer of the lease by the tenant's liquidator.

Under the Local Government Finance Act 1988, the person "entitled to possession of the property" is liable for rates.

The court held that, following disclaimer, the landlord had an immediate right to possession even though it had not actually taken possession of the property.

The landlord is therefore liable for business rates if the tenant vacates following disclaimer (and following the expiry of any empty-rates exemption period). To the extent that the property remains occupied during the liquidation, rates will be payable as an expense of the liquidation.

The landlord may be able to obtain reimbursement of any rates payments from any guarantor, or authorised guarantor, of the tenant.

Planning update

The Government continues with its agenda to reform the planning system

In June the Government announced the response to a consultation it held in March on proposed measures to improve the performance of local planning authorities. The Government proposes to increase the threshold for the designation of local planning authorities as poorly performing, based on the speed of deciding applications for major developments. So far, only one local planning authority, Blaby District Council, has been designated as poorly performing. This means that planning applications can be made directly to the Secretary of State, bypassing the authority. However we expect further authorities to be put into special measures with the introduction of the higher threshold.

As part of the March consultation the Government also provided details of a planning reform it first announced in last year's Autumn Statement to scale back the imposition of Section 106 affordable housing contributions on small-scale development. The Government proposes to restrict the use of affordable housing contributions where sites contain 10 or fewer units with a maximum combined gross floor space of 1,000 square metres. The Government's response to this aspect of the consultation is awaited and the final details of the reform remain to be published.

We expect a busy year ahead with planning reform remaining at the top of the Government's agenda.

Tenant break rights – continuing cases and issues for tenants...

Conditions not complied with:

Conditional break clauses can be very difficult for tenants to operate.

In a recent Scottish case Arlington Business Parks GP Ltd v Scottish & Newcastle Ltd the tenant occupied offices on a business park under two separate leases.

The leases were not due to expire until 2023, but included break clauses entitling the tenant to bring them to an end on 7 May 2013. The break clauses required the tenant to give 12 months' notice and stipulated that the tenant should not be in breach of any of its obligations "at the date of service of such notice and/or the termination date".

The tenant served break notices for each lease on 3 May 2012. But the landlord continued to demand rent and claimed that the leases remained in force because the tenant was in breach of its repairing obligations when the break notices were served.

The tenant admitted that it had not fully performed its repairing obligations on the date of the service of the notices. However, it had subsequently spent over £1.3 million on the premises to ensure that they were in proper repair on the termination date.

The Court accepted the landlord's argument. Both leases therefore remained in full force and effect and the tenant was liable for rent for the remainder of the term.

No refund of sums paid post break date:

The Marks and Spencer plc v BNP Paribas case centres on whether the landlord should refund rent paid after the break date?

M&S entered into four leases of office premises in a building in Paddington known as The Point.

M&S subsequently exercised a mid-quarter break clause in all four leases. It then argued for repayments of rent, service charges and car park licence fees totalling £1.1 million.

In the High Court the judge was sympathetic to M&S's plight. Although he acknowledged a long-standing common law principle of lease interpretation he implied a term into the leases that the tenant should be entitled to a refund.

He said that such a term would be "eminently reasonable" and "necessary to give business efficacy to the lease".

The Court of Appeal has now overturned the High Court decision and confirmed that an implied term could not reasonably be implied in this case.

Strict form of words:

In the recent case of Siemens Hearing Instruments v Friends Life a break clause in a lease said that any notice exercising the break "must be expressed to be given under section 24(2) of the Landlord and Tenant Act 1954". At the time the lease was granted these (now obsolete) words were intended to stop the tenant from both breaking the lease and claiming a new lease (at a more favourable rent) under the 1954 Act.

The tenant's solicitors served a break notice that failed to include the (by then pointless) words. The High Court decided last year that this did not matter. The notice was still valid to break the lease. This has now been reversed by the Court of Appeal.

The Court of Appeal said the omission was fatal to the notice, even though everyone agreed the magic words were pointless. It was a classic case of "if the notice had to be on blue paper, it would be no good serving on pink paper, however clear that the tenant wanted to terminate the lease."

The rent is £325,000 per annum and the lease will now run for until 2023.

Is air space demised or not? Developers note:

A recent case, H Waites Ltd v Hambledon Court Ltd, concerned a development built in the early 1960s comprising twelve flats and two blocks of garages. Each flat lease was for a term of 999 years and included a garage within the demise.

The landlord granted a lease of the airspace above the garage blocks to a developer to facilitate the construction of additional flats. However, the developer met with strong opposition from the existing flat tenants, who laid claim to the garage roofs and airspace above.

Each tenant's lease demised the internal areas of the flat to the tenant (excluding the roof, foundations and external and main structural parts of the building) together with a garage, which was described only by reference to a plan. Was the garage roof included in each demise, or did the exclusions of the structure and exterior apply to the garages, as well as the flats?

The judge decided that the fact that the parties had expressly excluded the main structure when defining the flat, but had not done so when defining the garage, indicated that they had intended to treat them differently (even though each tenant was, as a result, responsible for repairing the part of the roof immediately above his own garage).

Moreover, the grant of a 999-year lease is much closer to a freehold than a lease and such a grant of a garage is therefore likely to include the airspace above and subsoil below.

The judge also considered it unlikely that landlords in the early 1960s would have foreseen the benefit of retaining airspace.

Finally the judge pointed to the cases of Davies v Yadegar (1989) and Haines v Florensa (1989), in which it was held that a lease of the top part of a building which included the roof also included the airspace above the roof.

Consequently the airspace lease granted to the developer by the landlord took effect subject to the leases of the existing tenants. It would therefore be impossible for the developer to construct new flats without trespassing into the tenants' airspace.

Are "online" sales included in Turnover Rent?

One of the common points of contention in turnover rent leases is whether purchases made online by a customer should be part of the gross turnover of a store. The issue can be broken down into three categories:

1. Pure Online Purchases: Online purchases which are paid for online and delivered to the customer should not form part of the store's gross turnover unless that purchase is allocated to that store by the retailer business.

2. Online Purchases at the store: Online purchases made using computers within the store (i.e. computers supplied by the store rather than the customers' personal mobile devices) should count towards the store's turnover because the purchase is being made in the store. This should apply regardless of whether they are paid for and/or collected in the store. The tenant's systems should be set up to capture this data.

3. Click & Collect: If the order is placed online but paid for and collected at the store then the purchase should be part of the turnover. However, if a customer makes a purchase online, pays for it online and collects it from the store then the tenant is likely to argue that it should not be part of the turnover. It will argue that collection from the store is simply a saving to the customer of delivery charges so that the purchase would have been made online regardless of whether the store was there and the store acts simply as a "post box" from which the items are collected.

From the landlord's point of view that purchase should form part of the store's turnover because the store's physical presence may have had some bearing on the customer's decision to purchase online and some of the transaction is being carried out in the store.

Ultimately the bargaining position of the two parties will determine what is agreed but this is a developing and controversial area – as well as tricky drafting territory!