



PROPERTY GROUP NEWSLETTER



It has been an exciting six months for the Tanfield Property Group. We have been joined by four new practitioners from 33 Bedford Row: Daniel Dovar, Piers Harrison, Michael Walsh and Jonathan Upton and were once again successful at the Enfranchisement and Right to Manage Awards. Ellodie Gibbons, this issue's editor, won Barrister of the Year, whilst Tanfield Chambers received a highly commended. We have, of course, also been winning cases. Rebecca Cattermole was successful in the Court of Appeal in Windsor and District Housing Association Ltd. v. Hewitt: a case concerning a tenancy obtained by deception and Ellodie was successful in the High Court in Calladine-Smith v. Saveorder Ltd: a case concerning the service of notices under the Leasehold Reform, Housing and Urban Development Act 1993. In this issue, Carl Fain writes about summary judgment in opposed '54 Act renewals and Tim Polli discusses rent review provisions in commercial leases.

PHILIP RAINEY QC

ISSUE NO 8: SUMMER 2011

SUMMARY JUDGMENT IN OPPOSED 1954 ACT RENEWALS

Carl Fain considers the possibility of a summary judgment application in cases where a landlord opposes the grant of a new tenancy under the Landlord and Tenant 1954.

When a landlord serves a hostile notice under section 25 of the Landlord and Tenant Act 1954 which relies on either ground (f) (redevelopment) or (g) (own occupation) of section 30(1), he will often want to recover possession of the premises as quickly as possible, either to enable the redevelopment to go ahead or to commence his own occupation. Under section 64 of the Act, the tenancy will not determine until three months after the application for a new tenancy is finally determined. Consequently, and particularly where proving the grounds is a foregone conclusion, landlords will be keen to obtain a swift decision from the court.

Conversely, tenants will often want to delay the inevitable result for as long as possible. They are likely to want to continue to trade, to buy time to find alternative premises or to extract a premium from the landlord, over and above the statutory compensation, for vacating early. The tenants' wish for delay can be assisted by procedure. In an opposed renewal, the practice direction to CPR 56, at paragraph 3.16, provides that, unless it is unreasonable to do so, any grounds of opposition should be tried as a preliminary issue. However, it may be more than 6 months after directions are issued before the court lists the preliminary issue for hearing. The landlord, if successful, will then need to wait a further 21 days (the period for an application for permission to appeal) and 3 months following judgment for the tenancy to end.

Faced with such tactics, landlords may ask can I use a summary judgment application to get a determination from the court more quickly? Of course the success of such an application will depend on the facts of each case, but the authors of **Reynolds and Clark** take the view that such

1954 ACT RENEWALS

RENT REVIEW

CONTINUED OVERLEAF



ELLODIE GIBBONS

Ellodie, who won Barrister of the year at this year's Enfranchisement and Right to Manage awards, was called in 1999 and started life at the Bar as a commercial chancery pupil. After moving to Tanfield, Ellodie began taking on residential landlord and tenant work, principally for large social landlords and local authorities. Ellodie has since developed a specialist property practice, for which she has been recommended in both Chambers UK and the Legal 500. Her principal areas of practice are all aspects of commercial and residential leases (both short and long) including service and administration charge disputes and leasehold enfranchisement, but she also undertakes a certain amount of real property work. Ellodie is a contributor to both the first and second editions of 'Service Charges and Management: Law and Practice' (Sweet & Maxwell) and co-author of 'Leasehold Enfranchisement Explained' (RICS Publishing).

OUR AUTHORS



RENT REVIEW UPDATE

Tim Polli warns of the dangers of not seeking specialist legal advice

As and when commercial rents recover following the property crash, both landlords and tenants will again turn their minds to rent-review under the provisions in their leases. Since it is common for modern commercial leases to provide for arbitration in the absence of agreement, an increase in the number of such arbitrations will no doubt follow. However, landlords and tenants who rely on the apparent informality of arbitration and underestimate its legal rigour should be wary. It is rarely enough to instruct a surveyor without seeking the assistance of a specialist lawyer. As recent case law shows, rent review arbitrations ought to be approached with the same care as any other litigation.

THE IMPACT OF THE ARBITRATION ACT 1996

Firstly, landlords and tenants should be aware of the impact of the Arbitration Act 1996 on the process initiated under an arbitration clause. As the unsuccessful appellant in **Cordoba Holdings v Ballymore Properties Ltd** [2011] EWHC 1636 (Ch) discovered to its cost, the scope for subsequently challenging an arbitrator's award is strictly limited by the Act's terms.

Cordoba was the tenant of premises which it used as a data centre; Ballymore was its landlord. As is common, the rent review provisions of the lease provided that any improvement to the premises carried out by the tenant during the term was to be disregarded when determining the market rent. The arbitrator determined the review on the grounds that any open market tenant would also be able to use the premises as a data centre.

"The reports filed by Cordoba's surveyor had failed formally to adduce evidence to prove it had carried out the works to enhance the power supply, and how much they had cost."

Cordoba contended that was an error of law because the arbitrator had failed to disregard improvement works carried out by Cordoba (outside of the demised premises) to enhance the power supply to the premises so that they could be used as a data centre. It argued that, as

an application is only likely to be appropriate in exceptional circumstances. They suggest it could be utilised where the landlord intends to occupy (ground (g)), which should be easy to establish, but feel it may be more problematic in a ground (f) claim, for example, if planning permission is yet to be granted or there is a dispute as to the extent to which the works are qualifying works.

The tenant in **Sommerfield Stores Limited v Spring (Sutton Coldfield) Limited** [2010] EWGC 2084 (Ch) adopted an interesting, yet ultimately unsuccessful, tactic which sheds light on summary judgment in 1954 Act claims. The landlord opposed the grant of a new tenancy on ground (f). The tenant, believing that the landlord could not yet establish the necessary intention, applied for summary judgment. The tenant argued that the date on which the landlord had to establish that he had the requisite intention was the date of the summary judgment hearing.

HHJ David Cooke sitting as a High Court judge disagreed: he held that the relevant date was the date of the substantive trial. In his judgment, the question for the court on such an application for summary judgment was whether, looking forward to the anticipated date of trial, the landlord can show a real prospect of being able to establish the necessary intention at that time. Both at first instance, and on appeal, it was held that the landlord did have a real prospect of so establishing at trial and thus the application was dismissed.

Conversely, if a landlord can show at the summary judgment stage that he can make out his ground of opposition, the tenant has no real prospect of successfully defending the claim. Consequently, summary judgment can be used to determine the tenancy early. This approach is supported by **Trust Inns Limited v Esqulant & Esqulant (Unreported, September 2009, HHJ Birtles, Mayor's and City of London County Court)**, a case in which the landlord relied on ground (g) and issued a Part 7 claim to terminate the tenancy. The tenant failed to file an acknowledgment of service and the landlord duly applied for and obtained judgment in default. The tenant then applied to set it aside. In response, the landlord filed comprehensive evidence to show that it would clearly make out ground (g) at trial. The application was dismissed on the basis that the tenant had no real prospect of successfully defending the claim, the court being willing to determine the matter in favour of the landlord at a summary stage.

So it seems that where a tenant seeks to delay matters and the court is unlikely to list a trial of a preliminary issue quickly, a landlord with a strong case under grounds (f) or (g) should consider making an application for summary judgment.

CARL FAIN



CARL FAIN

Carl has been a member of chambers since completing his pupillage in October 2003. Prior to that Carl worked as a management consultant for a well known firm, but could not stop himself leaving such a stable and rewarding job to come to the Bar. Carl's practice covers all the main areas of litigious property law, with a particular emphasis on landlord and tenant, not only before the courts, but also the LVT and Land Registry adjudicators. Carl's recent cases include **Idealview Ltd v Bello** [2010] 1 EGLR 39, **The New Northumbria Hotel Limited v Maymask** (148) LLP [2010] EWHC (Ch) 1273 (in which he was led by Philip Rainey QC) and **Barnard v Zarbafi** [2010] EWHC 3256 (Ch). Carl is a contributor to the second edition of 'Service Charges and Management: Law and Practice' (Sweet & Maxwell). In his spare time, when allowed by his wife and his 5 month year old daughter, Carl wastes many a good Saturday in Tottenham watching Spurs beat their arch rivals and then lose to the worst teams in the league.



TIM POLLI

Tim was called to the Bar in 1997 and swiftly developed a specialist chancery and commercial practice, for which he is now recommended in both Chambers UK and Legal 500. Tim has a broad experience including all aspects of real property law (particularly disputes concerning freehold covenants, boundaries and rights of way), the law relating to mortgages and other securities (especially those which are defective for some reason) and both commercial and residential landlord and tenant law (for example 1954 Act lease renewals, service charge disputes and enfranchisement claims). Tim's recent cases of note include **UCB Home Loans Corporation Ltd v Grace** (both the breach of trust summary judgment hearing at LTL 15/12/2010 and the subsequent enforcement action at [2011] EWHC 851 (Ch)). Tim is a contributor to both the first and second editions of 'Service Charges and Management: Law and Practice' (Sweet & Maxwell) and contributes articles to the Butterworths Property Law Newsletter, the Solicitors Journal and the Lawyer. Outside work, Tim enjoys theatre, film and football.

Advice at an early stage in rent review arbitrations.

a matter of law, such works constituted improvements to the premises and ought to have been disregarded, and on this basis sought to appeal the award under section 69 of the Act. It was argued in the alternative that if the Court concluded that the arbitrator had not dealt with the issue at all, the award could be challenged on the ground that the said failure constituted a serious irregularity pursuant to section 68(2)(d) of the Act.

"Two relatively recent cases are illustrative reminders that, on questions of construction of the lease, as with the construction of any other contract, the Court will ask itself what the parties to the lease meant by the words they used."

Both challenges failed, but not on the merits of the substantive point of law: they did not even get that far! The reports filed by Cordoba's surveyor had failed formally to adduce evidence to prove it had carried out the works to enhance the power supply, and how much they had cost. Further, those reports appeared implicitly to accept that the enhanced power supply was to be disregarded. The Court therefore concluded that the arbitrator had made no finding as to the existence of any external works carried out by Cordoba, the issue not having arisen on the factual evidence before him. It followed that the point of law identified by Cordoba had not been in issue before the arbitrator and did not arise out of the award as required by section 69(1) of the Act, nor was it based on any findings of fact as required by section 69(3)(c).

The challenge pursuant to section 68 failed for similar reasons. The arbitrator had not failed to deal with an issue which had been 'put to him' within the meaning of section 68: the issue had not been put to him at all.

Cordoba lost the opportunity to run its point of construction by failing to raise it sufficiently coherently before the arbitrator. There is no way of knowing why the necessary evidence and arguments were not submitted to the arbitrator at the time, but it is clear that, if the construction argument which Cordoba subsequently sought to



advance had occurred to its representatives in the arbitration, it was not properly advanced by them. Like the CPR, the Arbitration Act has strict rules for appeals. These rules must inform those presenting the case before the arbitrator to ensure that recourse to the courts remains an option.

CONSTRUCTION OF THE LEASE

Two relatively recent cases are illustrative reminders that, on questions of construction of the lease, as with the construction of any other contract, the Court will ask itself what the parties to the lease meant by the words they used. They also both feature consideration of the general principle, which is often taken for granted, that the rental value of premises for the purposes of a rent review clause in a lease is the value of the whole of the demised premises including any buildings on the land.

In **Sahota v RR Leisureways (UK) Ltd** [2010] EWHC 3114 (Ch) a local authority had entered into an agreement for a lease, which required the tenant to construct buildings on derelict land. Following the construction of the buildings, the land and buildings erected thereon were demised to the tenant for a 99 year term. The rent was to be subject to review after the first 15 years, and then every 10 years. Lessee's improvements to the demised premises were to be disregarded in the review.

CONTINUED OVERLEAF

On the first review, the local authority had accepted that the buildings erected by the tenant were to be disregarded: the reviewed rent was therefore just a ground rent. However, by the time of the second review the council had sold its reversion and the new freeholder argued that the buildings were not to be disregarded because they were not improvements to the demised premises, but part of the demised premises.

The Court accepted that, in general, the rental value of premises for the purposes of a rent review clause in a lease is the value of the whole of the demised premises including any buildings on the land. However, drawing on the well-known observations of Lord Hoffman in **ICS v West Bromwich Building Society** [1998] 1 WLR 896, and following **Hambros Bank v Superdrug** [1985] 1 EGLR 99, the Court concluded that, in the circumstances in which this lease was agreed, and notwithstanding the words used, the parties to the lease meant the buildings to be disregarded in the rent review.

Airways Aero Associations Limited v Wycombe DC [2010] EWHC 1654 (Ch) concerned a commercial lease of a small civil airport. The lease demised “*all that piece of land containing 205.4 acres ... together with the stores offices hangars and other aerodrome buildings erected on the land ... together also with the bungalow known as Hazelwood Bungalow.*” The rent review provisions provided that the rent was to be that at which “*the Airfield*” might reasonably be expected to be let for the residue of the term, but “*the Airfield*” was not defined in the lease.

The tenant sought to argue that the reviewed rent for the demised premises should be limited to the market rent for such smaller part of the site as could accurately be described as the airfield. The landlord local authority conceded that “*the Airfield*” did not include Hazelwood Bungalow, but contended that it included the entirety of the remainder of the demised premises.

Having considered the authorities, and construing the lease as a whole, the Court concluded that, although the lease was badly drafted, it did not indicate a sufficient intention to depart from the general rule. Terms such as “*Airfield*” and “*aerodrome*” were not intended to refer to different parts of the site. The tenor of the judgment was that, absent the local authority’s concession, Hazelwood Bungalow would not have been disregarded in the rent review either.

LESSONS LEARNT

The lesson to take from these recent cases is that, when considering the implementation of, or a response to, a rent review, the lease and its rent review provisions should be considered carefully without distraction by assumptions that may have been made previously. Particular attention ought to be paid to the user covenants, and the provisions concerning what is to be disregarded, because both can have a very significant effect on the market rent. At all times, one should ask oneself what the original parties to the lease meant by the words used.

The arguments to be deployed, including all technical legal arguments, ought to be identified as early as possible, and the parties’ evidence (whether the submissions by the surveyor instructed or, indeed, separate witness evidence) ought to be prepared with those arguments in mind. In that way, any appeal to an arbitrator’s award might, at least, be considered by the Court on its merits.

Thus, when a landlord or a tenant is faced with a rent review, specialist legal advice ought to be taken as soon as possible, not least because the consequences of success or failure are multiplied by the period between each review. Further, upwards-only review provisions might have the effect of fixing the consequence of any mistake until the open rental market has caught up.

TIM POLLI

TANFIELD CHAMBERS



For further information or to instruct a barrister, please contact **Joanne Meah**, Property Clerk or **Kevin Moore**, Senior Clerk, on T: +44 (0) 20 7421 5300 or E: clerks@tanfieldchambers.co.uk

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