

THE USE OF MEDIATION IN PROPERTY CASES

Mediation is becoming ever more popular as an effective way of resolving property litigation without the need to proceed to trial. The final agreed mediated order is almost invariably a Tomlin Order which means that the scope for agreeing relatively detailed Orders is limitless. I recall a particularly detailed Tomlin Order running into 4 pages where a lease was granted under the Leasehold Reform and Urban Development Act 1993. In practice though many of the mediated cases deal with disrepair and/or arrears of rent or service charges and can be dealt with in large part by the agreed award of a sum of money.

The process is informal. The parties each summarise their case in turn before the Mediator in open session. They then move to their own rooms and the Mediator shuttles back and forth endeavouring to facilitate an agreement. It is a confidential, voluntary and without prejudice process although the courts occasionally award costs against individuals who unreasonably refuse mediation. It gives the power back to the parties themselves and the Mediator is not allowed to attempt to impose an agreement. Neither is the Mediator allowed to give legal advice. Whilst some Mediators are not trained Barristers or Solicitors, the parties are frequently reassured if they have a Mediator who understands their specialist area.

Are there any cases which are by their nature unsuitable for Mediation? One example would be where there is a preliminary point of law which it is felt needs resolving before mediation can go ahead. That example is more naturally considered as "suitable for mediation but not yet". The difficulty in practice might be in persuading a

court to wait in such circumstances. Moreover if the parties continue nevertheless to a mediation they can often compensate by making extra allowance for an additional risk factor-particularly if both parties are likely to be equally affected. I recall one boundary dispute which initially appeared not susceptible to mediation because a preliminary ruling might be required. Once I started to mediate it became clear that the dispute was less about where the property boundaries were but more about cutting down some unsightly trees. An agreement was achieved.

Are there any Mediations which are doomed to fail from the start? The mediations where the wrong people attend e.g. a Barrister on behalf of his Client who has been given a telephone number to ring in the event of the first offer of £100 being unacceptable. The mediations which start with one of the parties saying "I want every last penny I'm owed and it's a matter of principle".

When they work and they do more often than not a mediation agreement can save the parties huge sums of money on legal fees. Because there is no winner and no loser there is no loss of dignity on one side or another. That's not to say that Mediation is always easy... somebody once said "It is an exercise in shared pain". But if there is no pain, no gain!

David Daly

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Property Group Newsletter

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Welcome to the Tanfield Chambers Property Group Newsletter. Our aim is to be informative about recent developments in legislation and/or case law concerning property issues, comment upon areas of interest or ongoing debate and sometimes present amusing anecdotes to those who work in both the contentious and non-contentious varied and wide ranging areas of property law. If we achieve some of those aims we will be pleased; if we achieve all of them we hope that you will look forward to these Newsletters making a regular appearance.

Geraint Jones QC.

TENANCY DEPOSITS – THE NEW LAW

What's the problem?

Anyone involved in the residential lettings market will be familiar with tenancy deposits. Typically a tenant is required to pay a month's deposit against failure to pay rent or comply with other obligations of the tenancy. In central London this may mean the tenant coughing up hundreds if not thousands of pounds in deposit moneys which he or she doesn't see again until the tenancy is over.

Official data suggests that disputes about these deposits are quite common. A government survey of 600 private rented sector landlords in 2001 showed that 82 per cent regularly made deductions from their tenancy deposits. The Survey of English Housing recently indicated that 32 per cent of tenants who paid a deposit had their deposit returned only in part or not at all. Forty-five per cent of these tenants believed that the deposit had been withheld unjustly.

Perhaps surprisingly, these disputes don't seem to have worried litigators a great deal in the past. *Woodfall* devotes seven sentences of its five volumes to the subject of tenancy deposits. All that may well change with the implementation of Chapter 4 of the Housing Act 2004.

The objects of the legislation are to remove the risk that rogue landlords and agents might misappropriate a deposit and to provide a quick and

cheap means of resolving disputes.

The basic regime

The legislation applies only to assured shorthold tenancies: see s.213(1) and 212(8). The parties cannot contract out of the provisions which apply to performance deposits of any description. Chapter 4 applies to any deposit received (rather than a tenancy entered into) after the provisions came into force on 6 April 2007: s.213(1). One obvious avoidance has been prohibited - landlords cannot side-step the legislation by seeking a deposit in non-monetary form: s.213(7).

The new restrictions are effectively threefold:

- A deposit must be paid in accordance with a government authorised scheme
- The landlord must comply with the "initial requirements" of the relevant scheme
- The landlord must notify the tenant of his or her rights under the relevant scheme

The schemes

The legislation envisages two types of scheme. The first is a general 'custodian scheme' where the deposit is paid to an independent scheme administrator who holds it in a special account. The interest on the deposit pays for the scheme administration and there are no other costs involved. The second is an 'insurance scheme' where

the landlord keeps the deposit but pays a premium to the administrator. Both types of scheme must offer alternative dispute resolution. Once the dispute is resolved, the deposit cannot be paid out without an agreement, adjudication or court order.

Late last year, the government announced contracts with three scheme administrators. The largest is The Dispute Service, a not-for-profit insurance scheme which provides its own dispute resolution service. Since the scheme is backed by the main managing agent bodies (ARLA, the NAEA and the RICS) and it has been running a successful trial scheme since 2004, it is likely to be the most popular. Another 'insurance scheme' is to be run by Tenancy Deposit Solutions Ltd for the National Landlords Association. There is also a custodian scheme run by Computer Investor Services Ltd. Both of the latter will rely on the Chartered Institute of Arbitrators to provide their alternative dispute resolution.

The requirement to notify

The requirement to notify under s.213(5) applies once the deposit is received – rather than once the deposit is required or the tenancy is granted. The landlord then has 14 days to give information in prescribed form (or in a form substantially to the same effect) to:

- the tenant
- any person who has paid the deposit on the tenant's behalf

At the date of writing, the government has not issued subsidiary legislation setting out the prescribed information – but this is expected soon.

Enforcement

One of the most significant points in Chapter 4 – and something that is likely to make these provisions compulsory bedtime reading for litigious tenants and their advisers – is the quite severe consequences where a landlord is in breach. If a landlord receives a deposit and has not complied with the initial requirements of a scheme or it fails to give notice within the 14 day period, the tenant can apply to the county court for certain orders. The court has no discretion and, if it finds the landlord in breach, it must order:

- return of the deposit to the tenant (or, in the case of a ‘custodial scheme’ payment of the deposit to the scheme administrator): s.214(3) and in any event;
- Payment to the tenant of a sum equal to three times the value of the deposit: s.214(4).

The court has no power to extend time limits. Landlords may well consider the latter penalty severe. A landlord who gives notice to its tenant outside the 14 day time limit (or who forgets to serve a notice on the tenant’s father who wrote out the deposit cheque), will have to pay back the deposit plus perhaps three month’s rent or more.

The other sanction for non-compliance is that under section 215 no section 21 notice may be served determining an assured shorthold tenancy while

a deposit is held otherwise than in accordance with one of the schemes.

Tenants who seek to resist a possession order may therefore wait until possession proceedings are issued to point out a failure to comply with Chapter 4. It may also be that ‘defective’ deposits will emerge as a significant basis for tenants resisting possession claims in the county court and counterclaiming the enhanced deposit penalty under sections 214(4).

You have been warned!

Mark Loveday

LEASEHOLD ENFRANCHISEMENT: A LANDLORD’S CLAIM TO AN OPTIONAL LEASEBACK MUST BE MADE IN HIS COUNTER NOTICE *CAWTHORNE V HAMDAN* [2007] EWCA CIV 6

Facts

The Respondents were qualifying tenants of a block of flats owned by the Appellant landlord. The tenants sought to exercise their right to collective enfranchisement pursuant to Part I, Chapter 1 of the Leasehold Reform, Housing and Urban Development Act 1993 (“the 1993 Act”). One flat (“the Flat”) was not held by a qualifying tenant. The landlord served a counter notice which did not claim any leasebacks, despite provision in the form used for him to do so. The parties were unable to agree the terms of acquisition and ended up before the Leasehold Valuation Tribunal who determined the price payable. The landlord appealed to the Lands Tribunal on grounds relating to the valuation of the Flat. On the eve of the appeal, the landlord served a notice claiming a leaseback of the Flat pursuant to section 36 and Schedule 9 Part III of the 1993 Act. If the leaseback notice was valid, the landlord would be entitled to a 999 year lease of the Flat at a peppercorn rent in accordance with Schedule 9 Part IV. The Lands Tribunal determined that the leaseback notice was not valid. The landlord appealed to the Court of Appeal.

Law

Paragraph 5 of Schedule 9 Part III entitles a landlord of any flat which is not let to a qualifying tenant immediately before the appropriate time (defined as the time when the freehold is acquired by the nominee purchaser) to the grant of a 999 year lease at a peppercorn by the nominee purchaser. Paragraph 5(2) provides that the nominee purchaser shall, if the freeholder by notice requires him to do so, grant such a lease. In *West Hampstead Management Co Ltd v Pearl Property Ltd* [2002] EWCA Civ 1372, 3 EGLR 55 Arden LJ noted that Schedule 9 appears to allow for a notice to require a leaseback even after the contract stage and at any time prior to completion.

However, section 21(3)(a)(ii) provides that a landlord’s counter notice must specify “any additional leaseback proposals”, defined by s.21(7) as a reference to proposals in accordance with section 36 and Schedule 9.

Decision

The judgment of the Court of Appeal acknowledged that the statutory provisions did not sit well together and held that the leaseback notice was served too late and was therefore invalid. Lloyd LJ held that if the landlord

wants a leaseback of a flat in respect of which, at the time of the counter notice, there is not a qualifying tenant, he must say so in his counter notice. If he does, he will be entitled to a leaseback so long as there is still no qualifying tenant immediately before acquisition by the nominee purchaser. The reference to “the appropriate time” in Schedule 9 Part III does not extend the opportunity for the landlord to serve a leaseback notice if he has not made proposals to that effect in his counter notice. Rather it imposes a condition subsequent on the entitlement of the reversioner to a leaseback if he has said he wants one in the counter notice, such that he cannot have it if immediately before the acquisition by the nominee purchaser the relevant flat does not have a qualifying tenant.

The court rejected the landlord’s argument that the tenants were protected by the ability to refer the case back to the LVT under s.24(4)(b)(i) by reason of a change of circumstances. This would cause substantial delay, and in a rising market, would enable a freeholder to obtain a higher price by serving a late leaseback notice. In a case of more than one flat not held by a qualifying tenant this would enable a sequence of leaseback notices by the landlord. It should be noted that this was a case which preceded the

amendments made to the valuation date by s.126 of the Commonhold and Leasehold Reform Act 2002. The court also considered Pearl and noted that the point had not needed to be determined in that case: the court could therefore approach it from an unfettered point of view.

The question of when compensation can be awarded for distress and inconvenience.

Preparation for a recent mediation caused me to look again at *Farley –v- Skinner* [2001] 3 WLR 899, a well-known decision of the House of Lords concerning the entitlement to recover compensation for non-pecuniary losses in a property context.

In *Farley*, the purchaser of a country estate asked a surveyor specifically to consider whether the estate would be affected by aircraft noise. The surveyor stated that it would not be. He was wrong. The purchaser complained that the noise “interfered with his enjoyment of a quiet reflective breakfast, a morning stroll in his garden, or pre-dinner drinks” – we all know the kind of thing. The House of Lords, who recognise an appalling level of hardship when they see one, upheld an award of £10,000.

Farley serves as a reminder that

Conclusion

The failure to claim a leaseback in a counter notice is fatal, except in the unlikely situation of a flat which ceases to be occupied by a qualifying tenant between service of the landlord’s counter notice and completion of the

HOME DISCOMFORTS

damages for inconvenience may be recovered not only in the more familiar situation where the provision of pleasure, relaxation etc. is “the very object of the contract”, but also in situations where the breach causes physical inconvenience and discomfort. A modest award for such inconvenience or discomfort, or for “mental suffering” directly related to it, is correct in principle. “Physical”, in the view at least of Lord Scott of Foscote, may simply be equated with “sensory”.

Where such discomfort results from negligence on the part of a surveyor or conveyancing solicitors, this alternative basis for such an award is important, because it has been held that retainers with professionals of this kind, even in a residential context, will not usually be contracts whose “very object” is the provision of peace of mind – see *Watts –v- Morrow* [1991] 1 WLR 1421 (surveyors); *Smyth –v- Huey* [1993] NI 236 (solicitors). (An exception might arise where, as in *Farley*, a specific

purchase. The court has firmly closed the door which had been left ajar by Pearl.

Christopher Heather

request is made to consider some particular aspect of domestic comfort.)

Examples of awards under this head are rare but see:

- *Bailey –v- Bullock* [1950] 2 AER 1167 (£300 for couple forced to live with parents for 1 year sharing bedroom with their 6-year-old child),
- *Buckley –v- Lane Herdmen* [1977] CLY 3143 (£1500 to couple forced to live in inadequate housing for 2 years);
- *Wapshott –v- Davis Donovan* [1996] PNLR 361 (£3000 to couple for 3 years living in flat too small for young family).

My client family were living in a tiny Hampstead maisonette because their solicitor had omitted to tell them the full extent of the consents needed for alterations. Ambitions to persuade the Lords to top their generosity in *Farley* were thwarted – the case settled.

Andrew Butler

BUILDING BOUNDARIES RIGHTS OF ACCESS UNDER THE PARTY WALL ETC. ACT 1996

It is generally accepted amongst building professionals that in order to build a wall or structure properly and safely on the edge of your land you need to have some limited access to the adjoining neighbour’s land. This sort of construction work will usually require service of a notice under s.1(5) of the 1996.

For years party wall surveyors have debated the question of whether service of such a notice conferred rights of access under section 8 - which confers rights of access “for the purpose of executing any work in pursuance of this Act”. There is no authoritative judicial

decision on the question - perhaps a result of the fact that the overwhelming majority of surveyors have, historically, assumed that such works did amount to work in pursuance of the Act, and accordingly fell within s.8.

In *Sleep & Davis v. Wise* (Unreported, Barnet County Court, 6th October 2006) HHJ Pearl held that the building owner had no such right of access under s.8:- because s.1(5) works, whilst regulated by the 1996 Act, were not works executed in pursuance of the Act, but pursuant to common law rights. She rejected the building owner’s argument that s.10(10) gave

the surveyors discretion to settle the question of access.

The decision is, of course, not binding on other courts, but may be persuasive. If correctly decided, the implications may be far reaching - adjoining owners who have had access foisted upon them by an (ultra vires) award under the 1996 Act may in fact be entitled to claim damages for trespass (subject to limitation and other arguments). In the current climate of damages based upon the restitutionary measure, these damages might be very significant.

Mark Walsh