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NEWS UPDATE FOR PROPERTY LAW PROFESSIONALS

Warning for landlords over using photos for inventories

Private property landlords and agents are leaving themselves open to costly disputes over wear and tear by using digital evidence to replace written descriptions in inventories, at check in and check out, the Association of Independent Inventory Clerks (AIIC) has warned.

Inventory reports should contain a full description of a property and its contents, with detail on every bit of damage and its exact location at the start of a tenancy, the AIIC said. This can be supported with photographs but these need to be of a high quality, so any damage can be seen clearly.

"We want landlords and agents to be better informed in the event of a dispute, that means providing quality evidence to substantiate their claims for withholding the deposit," said AIIC chair, Pat Barber.

"The law clearly states that the deposit remains the tenant's money and that they are entitled to get it back at the end of their stay, provided they have met the terms of the tenancy agreement, so the onus lies with the agent or landlord to provide proof."

Photographs submitted in inventories are often little larger than thumbnails and hence make it difficult to see detail, she said.

"To back up a damage issue, along with a detailed description, any photographs need to be of a reasonable size, so that the damage can be actually seen clearly. A glossy inventory that relies heavily on photographs will be of little use in a dispute," she added.

Concerns raised over FSA mortgage proposals

Concerns have been raised about the new rules on mortgages being proposed by the UK's financial watchdog.

In its response to the Financial Service Authority's (FSA) Mortgage Market Review, the Building Societies Association has warned that the new rules will be too intrusive.

Particularly concerning, it said, are the intended move to a fully advised mortgage market and consumer reaction to the extra information that lenders will have to collect to assess affordability.

"The policy decisions of this government are focused on putting consumers back in control of their own finances. The proposal from the FSA to move to a fully advised mortgage market flies in the face of this, taking consumer control in the opposite direction," said Paul Broadhead, head of mortgage policy at the BSA.

In its response, the Council of Mortgage Lenders (CML) identified areas where clarification is needed including a one size fits all approach to advice; supervisory uncertainty; and help for existing trapped borrowers.

It said the requirement to give advice whenever there is spoken or interactive dialogue would drag into an advice process many borrowers who do not want or need it.

On supervisory uncertainty, the CML said that, while the responsible lending rules appear to allow flexibility to lenders, supervisors may be more prescriptive. It urges the FSA to ensure its monitoring, supervision and enforcement are in line with its policy intentions, reducing the risk of lenders adopting an over cautious approach due to supervisory uncertainty.

It said existing borrowers could find future borrowing problematic under the new rules and the transitional arrangements, as currently drafted, are complex and may not be widely used.

The CML suggested that, instead, lenders should be able to lend with discretion on an exceptional basis to borrowers who would otherwise be trapped.

New planning framework launched

The government has launched a new National Planning Policy Framework which it hopes will support growth and help to create homes and promote investment.

The new framework – which reduces over 1,300 pages spread between 44 separate documents into a document of 50 pages – aims to make planning guidance simpler and more accessible. It gives guidance to local councils in drawing up local plans and on making decisions on planning applications.

It retains key elements of the draft framework published in July 2011, including: enshrining the local plan – produced by local people – as the keystone of the planning system; establishing a powerful presumption in favour of sustainable development that underpins all local plans and decisions; guaranteeing robust protections for our natural and historic environment, including the green belt, national parks, areas of outstanding natural beauty and sites of special scientific interest; and encouraging the use of brownfield land in a way determined locally.

It also strengthens the requirement for new development to be of good design; supports local councils that wish to create a new generation of garden cities; allows communities to specify where renewable energy should, and should not, be located; and allows councils to provide the parking facilities in town centres that will help them compete with out-of-town shopping centres and supermarkets.

Contents

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Possession claims

Will recent appeal court decisions give lower courts the confidence to more robustly dismiss defences on human rights or public law grounds in possession claims? ***Rebecca Cattermole*** *reports*

TANFIELD CHAMBERS

Since the December 2011 *Property Law Newsletter* article, "Possession woes: assured shorthold tenancies", two decisions have come from the appellate courts reinforcing the exceptionality of successful defences on human rights or public law grounds. It is hoped by many landlords that these more recent decisions will give judges at first instance the confidence to dismiss such defences at an early stage of proceedings and in many cases without a hearing. It may also have the effect of lessening the likelihood of challenges against private sector landlords.

Westminster City Council v Holmes

The first case is *Westminster City Council v Holmes* [2011] EWHC 2857. This was a claim for possession of a dwelling let under a non-secure tenancy by the local authority under the homelessness provisions contained in Pt VII of the Housing Act 1996. The authority had determined to seek possession following an assault by the defendant tenant on two of its housing officers. The claim was defended on the grounds that it would not be proportionate for an order to be made and the decision to seek possession amounted to disability discrimination. The local authority applied for possession on a summary basis or for the defence to be struck out. At first instance, the recorder granted the claim for possession and struck out the defence. The defendant appealed.

Dismissing the appeal, Mr Justice Eady said the question for the court in a homelessness case was whether the making of an order for possession would indeed be legitimate and proportionate. To make a judgment on proportionality the court needs to consider what the legitimate aims are, within the contemplation of art 8(2), upon which the local authority may seek to rely and what types of factual issues will be relevant. It is plain that weight will be given to the fact that making the order would: (a) serve to vindicate the authority's ownership rights; and (b) enable the authority to comply with its public duties in relation to the allocation and management of housing stock.

Of course, this only follows *Hounslow LBC v Powell* [2011] UKSC 8, [2011] 2 AC 186 and does not, in law, take matters much further. The decision does, however, demonstrate that the courts are unwilling to entertain defences which only consist of bare denials or lack cogent evidence where public law defences are raised.

It also showed the interplay between the Supreme Court decisions in *Manchester City Council v Pinnock* [2010] UKSC 45 and *Hounslow LBC v Powell*; *Leeds CC v Hall*; *Birmingham CC v Frisby* [2011] UKSC 8 and the procedure laid down in CPR Pt 55 which governs possession claims in general. The intention behind CPR Pt 55 is that such claims will normally be determined without the need for a trial; ie, on a summary basis, where the judge is only expected to read the written evidence submitted (see CPR Pt 55.8). Consequently, it is not contemplated that the ordinary procedure for obtaining summary judgment should apply in such cases (see CPR 24.3(2)).

Thus, on the facts in *Holmes*, the recorder's determination of the claim for possession, on a summary basis, was in accordance with the public policy requirements under CPR Pt 55, namely that there should be a summary determination wherever possible. If he had not chosen that course, but rather ordered a full trial with oral evidence, this would have given rise to what Lord Hope in *Powell*, [at 41], called "the risk of prolonged and expensive litigation, which would divert funds from the uses to which they should be put to promote social housing in the area". No positive case had been pleaded by the defendant in circumstances where the burden lay on him to show that he had substantial grounds to establish the need for a hearing to find the facts. There was no cogent evidence to demonstrate a breach of the local authority's statutory duty under the Disability Discrimination Act 1995.

Corby Borough Council v Scott; West Kent Housing Association Limited v Haycraft

The second decision concerns the conjoined appeals in *Corby Borough Council v Scott*; *West Kent Housing Association Limited v Haycraft* [2012] EWCA Civ 276 which were heard before the Master of the Rolls, Richards LJ and Davies LJ at the end of February.

Both appeals concerned claims for possession of residential property against tenants who had no domestic law defence but where art 8 had been invoked.

Scott concerned a property let under an introductory tenancy by the local authority. The tenant had fallen into arrears and the authority served a notice of proceedings for possession and subsequently issued its claim. It was accepted that the only defence open to the tenant was on art 8 grounds if she could establish highly exceptional circumstances. The matter was listed for trial which lasted a day. The judge was persuaded that there were exceptional circumstances here: the day before the trial the tenant's relatives had paid off the arrears; and the tenant had been the victim of "a murderous assault".

On appeal, the Master of the Rolls – with whom the other judges agreed – expressed the view that this was a case which should not have proceeded to trial because the tenant's defence was hopeless as a matter of law. The violent attack was irrelevant to the issue of art 8 proportionality as it did not result in mental or physical injury which would render the tenant's eviction harmful. Indeed, it had nothing to do with the claim for possession or the respect to which Scott was entitled under art 8 for her home. As for the arrears, the fact that they were cleared prior to the hearing was of little significance; it was fanciful to suggest that a residential

occupier should be able to pray in aid of the fact she has paid the landlord money which was owed as a factor enabling her to cross the high threshold when invoking art 8.

The Master of the Rolls considered the facts in *Haycraft* to have more merit although even in that case he held the high threshold was not crossed. The housing association had granted an assured shorthold tenancy as a form of probationary tenancy. Following complaints of nuisance, the landlord served a s 21 notice following a complaint of nuisance and upheld the decision to seek possession on review. A possession order was made by the district judge. On appeal, the circuit judge rejected the defendant's argument that there had been no complaints for some period of time, the defendant had been made homeless and he denied the allegations of nuisance, justified a full hearing for possession, let alone allowing the appeal.

It may be recalled that in the earlier article, reference was made to the permission decision in *West Kent Housing Association Limited v Haycraft* [2011] EWCA Civ 992. Permission to appeal was given – albeit with some reluctance – on the basis that judge did not consider the tenant's conduct since the nuisance incident, his vulnerability and allied personal circumstances, and that he would be likely to be intentionally homeless as result of the finding on disputed allegations. The point raised by Arden LJ as to whether it might be arguable whether a registered social landlord is to be treated as in a different position from a housing authority under a housing duty does not seem to have been pursued at the appeal hearing.

The Master of the Rolls rejected the argument that either the health of the defendant or that the risk he would be treated as intentionally homeless and would not be entitled to housing in his own right were relevant. First, there was no evidence that his health problems would be exacerbated by his eviction. Secondly, the fact he may be treated as intentionally homeless was not a significant factor so far as art 8 proportionality was concerned. Article 8 is primarily concerned with respect for his particular home as opposed to a general right to be provided with a home.

It had been hoped that further guidance as to the procedure to be followed in handling such defences would be provided to county court judges. The Master of the Rolls in the end declined to do so, stating there was a limited amount that could be said in so far as the substantive issues are concerned; the prospects of the argument succeeding are dependent on the facts of the particular case. Accordingly, any one decision can be only of very limited assistance in terms of giving any sort of general guidance.

He did, however, make two important points:

First, a judge should be rigorous in ensuring that only relevant matters are taken into account on the proportionality issue and should not let understandable sympathy for a particular tenant have the effect of lowering the threshold for art 8 defences to cross. The case in *Haycraft* serves to emphasise the significance of the height of that threshold, that is, how exceptional the facts relied on by any residential occupier must be, before an art 8 case can have a real prospect of success.

Secondly, it was desirable for a judge to consider at an early stage (normally on the basis of the tenant's pleaded case) whether there is an arguable case on art 8 proportionality. If it is a case which cannot succeed, then it should not be allowed to take up further court time and expense to the parties or delay the landlord's right to possession.

These cases show that the art 8 defences so prominent in recent years may soon subside as judges become more confidently robust in dismissing them at an early stage. It may be, as suggested by the Master of the Rolls, that the Civil Procedure Rules Committee may consider a particular procedure to be put in place or designated civil judges will consider what procedures are appropriate for the courts under their responsibility.

Rebecca Cattermole
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Lease terms: an update

The government is pointing to "green shoots of recovery", but the commercial property market remains subdued: so how has the sector responded to the prolonged downturn? ***Brian Kilcoyne*** *and* ***James Corbett*** *investigate*

Shorter leases and other signs of flexibility

Many practitioners will recognise the trend towards shorter lease terms. Ten- and even five-year terms are becoming the norm, and break rights are now (if not standard) much more common than they used to be – with a break at five years typical and occasionally breaks at four and eight years being seen.

There has been no wholesale change from rent being paid quarterly in advance, which remains the norm. However, monthly payments have been agreed quite commonly by landlords faced with tenants with cash flow issues, especially in the retail sector and secondary property markets. In this recession, landlords have been keen to keep tenants in occupation to maintain occupancy levels and defray rates and other bills.

Guarantors

The decisions in *Good Harvest LLP v Centaur Services Limited* [2010] EWHC 330 and *K/S Victoria Street v House of Fraser (Stores Management) Limited and others*[2011] EWCA Civ 904 continue to creep into drafting discussions and during applications for assignment where a guarantor is involved. Landlords are now exceptionally sensitive to the issue of enforceability of guarantors, and often uneasy about the consequences of losing a direct guarantor on assignment, in favour of the solution implied by *K/S Victoria Street*, being an authorised guarantee agreement (AGA) backed up by a sub-guarantee (known as a GAGA).

In the light of these cases, tenants' solicitors are heavily amending standard alienation provisions and giving careful thought to the structure of a guarantee arrangement: this is particularly true where parent company guarantees are being offered. In many instances, large group company occupiers should try

to resist offering the ultimate parent as guarantor (in view of the enforceability problem raised by *K/S Victoria Street*), and should consider offering a guarantor lower down the financial pecking order, which might make a future intra-group assignment much less contentious.

Break clauses

As ever, break clause disputes continue to occupy the courts' time, and remain the subject of hot dispute between lawyers acting for landlord and tenant.

The traditional break clause which is dependent on unqualified compliance with the tenant covenants is becoming more of a rarity. Certainly tenants' lawyers typically resist this type of wording out of hand. Landlords' lawyers still try to get qualified compliance obligations as well as other conditions such as payment of rent up to the break date or giving vacant possession. However, the problems thrown up by these seemingly innocuous conditions are now well known.

For example, in *Quirko Investments Limited v Aspray Transport Limited* [2011] EWHC 3060 (Ch), the landlord successfully argued that a clause stating that a break notice shall only be effective if at the time of the expiry of the notice "there are no arrears of rent reserved or any other sums due". In that case, arrears of insurance rent by the tenant were sufficient to invalidate the break.

That strict approach was dramatically echoed in *Avocet Industrial Estates LLP v Merol and another* [2011] EWHC 3422 (Ch), where the High Court held that a tenant's failure to pay default interest of about £130 (even though interest had not been demanded) meant that it failed to comply with the strict conditions of the break notice, and the break was held to be ineffective.

As a result, well-advised tenants resist even these conditions, preferring to offer a break premium which at least gives certainty. If the landlord is insistent, tenants should revise the wording to ensure that arrears must be clear (eg, have been demanded within a minimum time before the break), that rent can be apportioned and that no reinstatement type work is required to get the break.

Faced with a difficult letting market, landlords are keen to keep a tenant on the hook. The flipside of this coin is that landlords are also keen to "re-gear" leases to remove breaks and this is now a standard feature of investment property portfolio management. Institutional landlords (who are especially sensitive to reversionary values and certainty of long-term income) will offer substantial rent holidays or premiums to achieve this.

Out of hours service charges

Landlords have long included a provision for charging an additional amount if they are obliged to provide "services" outside normal working hours – but in the past, many tenants assumed (rightly) that this would rarely be enforced. We have noticed that landlords are now more likely to enforce this provision, which can come as a surprise to a tenant, who might expect access at all times and at no extra cost.

"Green" leases

The idea of a "green lease" has been around for some time, but the issue has only recently become active.

Local authorities now have to make a presumption in favour of sustainable development, and so routinely impose "green" requirements on developers as a condition of the grant of planning permission. Planning conditions can take a number of forms, but they typically impose requirements to demonstrate that the fabric and fittings of a building comply with a minimum set of environmental credentials, and obligations to ensure that any commercial leases contain suitable "sustainable" provisions.

Some landlords have struggled with these requirements, particularly where their target tenant market consists of smaller-end commercial operations, which might not have the resources or expertise to comply with complicated sustainability obligations. Unsurprisingly, this can damage the marketability of commercial premises, and we are noticing that some landlords will take steps to "hand hold" tenants through the process.

Another principal reason for the sudden rush of interest in green leases concerns the impending arrival of the first payment date under the Carbon Reduction Commitment Scheme – due in June 2012. The scheme controversially imposes a tradable tariff based on energy consumption (no longer intended to be revenue-neutral), so there is now a clear financial incentive to improve energy efficiency in commercial properties. Tenants and landlords often try to bat away the obligation to meet the costs of the scheme: but on the whole, landlords do appear to be passing the cost onto tenants, although tenants with particularly strong covenant strength are occasionally able to resist.

Avoiding disputes

Sophisticated landlords and tenants are avoiding costly and lengthy disputes by engaging with each other closely at the heads of terms stage. This tends to make lease negotiation a much smoother process, and should save clients money in terms of legal spend. Solicitors advising either party can win brownie points by offering early involvement at the HoTs stage, and should at least offer comments on the HoTs before they are signed off.

Dilapidations

Recessions have typically always been good for the dilapidations industry and this recession is no different. This is an area where considerable friction can arise between former landlords and tenants.

The temptation is for landlords to exaggerate claims (eg, requiring improvements going beyond repairs or claiming for work which they have no intention of doing). The temptation is for tenants to do no work and then haggle ill-advisedly about whether the landlord has suffered any loss. These sorts of arguments can be particularly heated where the premises are older and tired and need a substantial overhaul to be put back on the market. These arguments were aired in the infamous case of *PGF II SA versus Royal & Sun Alliance Insurance Plc* (2010) EWHC 1459.

The number of claims actually getting to court is small because most settle. But the industry is well aware of the tensions and in recent years has sought to minimise this by requiring greater openness and transparency in the negotiation. This has led to the formal adoption of the Dilapidations Pre-action Protocol under the Civil Procedure Rules and it will be interesting to see how effective this will be.

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No conversion

Normal maintenance and administration of a property, containing ten flats, did not convert ownership of it into a letting business. It was an investment property. Incorporation relief was not available on the transfer of the property to a company

Capital Gains Tax (CGT) is a tax charged on the total gain or profit made when selling or disposing of a chargeable asset. Freehold and leasehold property are included in the assets liable to CGT. Business assets attract relief from CGT. Investment assets do not. CGT reliefs can be applied if an asset has been used for business purposes.

Incorporation relief

Under s 162 of the Taxation of Chargeable Gains Act 1992, if a business is incorporated by transferring business assets in exchange for shares, some or all of the gain can be deferred until the shares are disposed of. An individual or partnership who transfers a business to a company can qualify for this relief. This is given automatically, provided the business:

- together with all of its assets (except cash) is transferred; and
- is transferred as a going concern; and
- is transferred in exchange wholly or partly for shares in the company.

In *Ramsay v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 176 (TC), the Ramsays owned a large house, divided into flats and let to tenants which they had transferred to a company. They spent approximately 20 hours per week maintaining the flats and dealing with administration. They argued that the letting and administration constituted more than passive receipt of rents from an investment property and that the transfer to the company was the transfer of a letting business qualifying for incorporation relief.

No letting business

The First-tier Tribunal (Tax) disagreed. Where an individual asserts that a business arises, there is a presumption that it is not a business, unless proof of sufficient activity is established. The onus of proof rests on the person claiming the relief. The activities had to be over and above those which might be required or expected as incidental to the ordinary maintenance, repair and development of an investment property Here, the activities were normal and incidental to the owning of an investment property. They were not of a unique nature and were those which arise by necessity when one owns a property let out in flats.

It was informative to note that the Ramsays had returned the income from the property as relating to the letting of property (Sch A) as opposed to income from a trade or business (Sch D).

Size of property

The scale of the building did not convert the ownership of a property into a business. The house was a single investment property, albeit comprised of ten flats. The scale of activities was commensurate with the size of the property and the number of occupied apartments.

Refurbishment/redevelopment

Likewise, the refurbishment and redevelopment of the property did not mean that this was a letting business. The works had mainly been carried out by the company. In any event, while they were commenced by the Ramsays, this was to maintain or enhance an existing investment property in order to enhance the available returns by increased rents and have fewer vacancies than previously.

Joanna Bhatia

Stalling by developer

Exploring other development and funding options was not a legitimate reason for putting off works to complete an apartment block with due diligence in accordance with contracts with various buyers

Repudiation of a contract occurs where one party to it communicates to the other (through words or conduct) that he no longer intends to be bound by it, usually by committing a major breach of a significant obligation in the contract (*Thorpe v Fasey* [1949] 2 All ER 393). The innocent party can then decide whether to:

- seek to enforce performance of the contract and remedy of the breach;or
- accept repudiation and treat the contract as at an end.

To be repudiatory, the breach must go to the root of the contract. It must:

- deprive the innocent party of substantially the whole benefit that it was intended, as expressed in the contract, that he should obtain; or
- render him incapable of performing his own obligations.

The test is whether, looking at all the circumstances objectively, the contract breaker has shown a clear intention to abandon and refuse to perform the contract. In *Baht v Masshouse Developments* [2012] All ER (D) 168 (Mar), the High Court held that Masshouse had been in repudiatory breach of contracts with various buyers for the off-plan sale of long leases in apartments, to be built by Masshouse, in an apartment block.

Progress with the development of the block stopped in October 2008, when the main contractor went into administration. By mid-January 2010 Masshouse had arranged for another contractor to start enabling works towards the construction of the block.

Breach of contract

The contracts obliged Masshouse to complete each apartment with all due diligence. Masshouse was not liable for any delay caused by circumstances beyond its control, including the default of any contractor.

The court found that after June 2009 there was no serious obstacle to the

starting of the enabling works, and the placing of the main contract, which could not have been surmounted by using due diligence. Instead of moving forward in this way, Masshouse continued to explore the option of an alternative hotel development and also to look into design changes necessary if government funding was to be obtained. This was not a legitimate reason for putting off the works to complete the block in accordance with the contracts. In the second half of 2009 it was in breach of contract as it was doing nothing to complete the block with all due diligence.

Repudiatory breach?

Prolonged as it was, the failure of several months to complete the block would not of itself be calculated to deprive the buyers of the substance of what they had contracted for (ie, for their apartments to be built out and sold to them). However, Masshouse's failure was not to be viewed simply as mere delay. Its failure to progress the development, following a period of several months after the contractor's administration, signalled an intention on its part not to be bound by the contracts. It was biding its time while deciding what to do and, materially, whether or not it would ever build out the development.

The buyers had been entitled to treat the contracts at an end by reason of Masshouse's repudiation of them and to recover their deposits with interest (in accordance with the standard conditions incorporated in the contracts).

Contract affirmed?

The buyers sent their letters terminating the contracts after:

- letters sent by Masshouse' lawyers to them with a view to getting them to walk away from the contracts (walk-away letters); and
- the enabling works had started.

This did not mean that they were treated as affirming the contracts and so were precluded from any right to rescind. The walk-away letters were silent as to how Masshouse intended to carry forward the contracts and were better viewed as a threat than as indicating any commitment by it. Even if the buyers had been told that enabling works were now under way (of which there was no evidence), those works viewed by a passer-by would not necessarily have been for completion of the apartment block, but could have been for any development of the site.

Joanna Bhatia

Compromise agreement

Time was of the essence for payment of sums in a compromise agreement regarding a tenant's break

In *Intergraph (UK) v Wolfson Microelectronics* [2012] All ER (D) 179 (Mar), the High Court held that the tenant, Wolfson, had failed to validly exercise a break clause to determine its lease. One of the conditions of the break was that Wolfson had to give vacant possession of premises demised to it in a later lease of adjacent premises, unless either:

- it was no longer the tenant of the other lease; or
- it was still the tenant of the other lease, but had carried out works to create an independent means of access and reinstate partitioning (separation works).

Wolfson served a break notice, but forgot to serve notice to break the lease of the adjacent premises. It could not comply with the vacant possession requirement. After failing to agree terms for a surrender of both leases, the only option for it was to carry out the separation works.

The parties subsequently entered into an agreement where the landlord, Intergraph, agreed to accept the effectiveness of the break notice and Wolfson agreed to pay, among other amounts, a sum in lieu of the separation works. Due to an administrative oversight, not all of the monies were paid by the break date (28 February 2011).

Intergraph argued that time was of the essence for the payment under the agreement, as it had been in relation to the original break conditions. Wolfson contended that under the agreement the parties agreed that the lease would terminate in any event and that time was not of the essence for the payment of the sum before the break date.

The court agreed with Intergraph. The break was ineffective.

The outcome turned on the interpretation of the agreement which pointed to the conclusion that the original break conditions remained on foot and it was not an agreement that the lease would terminate in any event.

References to original break

The agreement contained an offer by Intergraph to take back possession early if Wolfson wished to give it up. If it did, Intergraph confirmed that Wolfson had complied with the vacant possession condition. References to giving up possession early and compliance with the vacant possession condition could only be read as references to the original break clause. The fact that the agreement referred back to satisfaction of the original condition clearly suggested that the parties still recognised the need for Wolfson to comply with the vacant possession condition for there to be an effective break of the lease. If the offer was accepted, Wolfson was assured that the vacant possession condition was satisfied. It did not mean the parties were agreeing to termination of the lease in any event.

No date for payment specified

The agreement provided for payment of outstanding sums under both leases. The sums were already required to be paid as a condition to the original break. The agreement stated an amount of principal and interest "assuming payment on 22 February 2011" (ie, earlier than the break date), but did not actually specify a date for payment. The reasonable observer would understand that the parties were simply qualifying and agreeing the amount to be paid to satisfy the existing break condition. This made commercial sense. There was no reason for Intergraph to give up the benefit of a condition requiring payment by the break date (as to which time was of the essence) for an entirely open-ended obligation on the part of Wolfson to pay the amounts at a time entirely of its choosing (subject only to payment of interest in the meantime).

The agreement also referred to payment of sums for the carrying out of works "required by the conditions to the break clause". This suggested that the parties understood that they were still operating within the framework of the original break conditions, but were

agreeing that Wolfson could pay a sum in lieu of the works. The reasonable observer would understand that in the same way as time was of the essence for carrying out the works required by the break, it was also of essence in relation to the obligation to make the payment in lieu. Again, this made commercial sense. There was no reason for it to give up the condition for the works to be done by the break date (as to which time was of the essence) for a substitute monetary obligation which could be satisfied by Wolfson at any time.

No provision for interest on late payment

The agreement contained no provision for the payment of interest on any late payment. The inference was that this was because the parties intended that the consequence of a failure to make the agreed payment was simply that the break notice would not be effective.

Acknowledgment that lease may continue

The opening words of the first section of the agreement confirmed that Intergraph "…will accept the effectiveness of the break notice on the following conditions…" That had an element of futurity about it. It did not suggest that the agreement itself amounted to an unqualified acceptance of the effectiveness of the break notice.

The agreement provided that the lease of the adjacent premises remained in force despite "any" termination of the earlier lease. The word "any" signified that it was not certain that the lease would terminate. The fact that the agreement required Wolfson to pay a sum for dilapidations (which were only payable on termination of the lease) did not mean that the parties had agreed that the lease would terminate in any event.

This case could be distinguished from *Legal & General Assurance Society v Expeditors International* [2007] All ER (D) 166 (Jan) (where an agreement was held to mean that a lease would come to an end in any event) where payment was made well in advance of the break date of an amount expressly referable to rent after the break date which it could not have been intended should be payable twice (ie, if the lease was continuing).

Joanna Bhatia

Case digests

Newhaven Port and Properties Ltd v East Sussex County Council
[2012] All ER (D) 183 (Mar); [2012] EWHC 647 (Admin)
21 March 2012

Commons – Registration – Town or village green – Defendant local authority deciding to register area of beach as village green – Claimant port authority objecting to decision – Whether registration of beach compatible with it being operational port land – Commons Act 2006, s 15.

These proceedings concerned an area of beach known as West Beach. In 2006, the defendant local authority decided to register West Beach as a town or village green under the Commons Act 2006. The authority had decided to register the beach after receiving an application from Newhaven Town Council. That application had been supported by significant evidence that West Beach had been used by local inhabitants as of right for lawful sports and pastimes for a least 20 years expiring in April 2006. It was on that date when the defendant, which owned and operated Newhaven Port, had fenced off public access to West Beach. The land was part of the operational land of the port, and was subject to the by-law making powers of the claimant as port authority. The claimant was concerned about the safety of the steps down from the harbour wall to the beach, and ferry wash over the application area. The registration of the area as a village green could, it feared, carry with it an obligation to permit access to the beach and thus to make the route safe; and it could carry a public liability to ensure the safety of those exercising rights, with consequent effects on the operation of the port. Further, as port authority, it had plans for the future development of the port which were likely to require works extending into the application area. The registration of the area as a village green could prevent it exercising those powers, were that to interfere with the exercise of the recreational rights. The claimant challenged the decision to register West Beach as a village green.

The claimant contended that the registration of the land as a village green would not be compatible with it being operational port land. There would be a conflict inherent between registration as a village green, and the consequential power to make by-laws under the Commons Act 1899, and the power to make by-laws under the Harbours Docks and Piers Clauses Act 1847, among other statutory powers. Consideration was given to *British Transport Commission v Westmoreland County Council* [1958] 2 All ER 353 (*BTC*) in which it was held that a private right of way over land held for a special statutory purpose under a private Act of Parliament could be presumed to have become dedicated as a public right of way, as a result of public use; the special status of the land did not of itself prevent dedication, so long as dedication in that way was not incompatible with the statutory purpose.

The claim would be allowed.

It was established in *BTC* that the test was whether, on an examination of the specific facts, there was at least a likelihood, or it was reasonably foreseeable, that such a grant would conflict with the statutory objects for which the land was held so that the two interests would be in conflict. The grant or implied permission could not be effective if there were any reasonably foreseeable circumstances in which it would hinder or conflict with the statutory functions for which the land was held. It was only where that was not reasonably foreseeable that no conflict existed in law.

In this case, since registration was not compatible with the statutory purpose for which the land was held by the claimant, it could not registered. In the circumstances, whether expressed as a question of statutory capacity or powers, or the unlawful fettering of its powers, the claimant could not permit the use of the land as of right for recreational purposes because it was reasonably foreseeable that that would conflict with its statutory functions. It had no power to give an actual or implied consent to that use, and could not be taken to have done so. No rights had lawfully been acquired or no use of the land carried out without a necessarily implied permission.

The authority's decision would be quashed.

Legislation update

Residential Property Tribunal Procedures and Fees (Wales) Regulations 2012	**Enactment citation** SI 2012/531 **Commencement date** 21 March 2012 **Legislation affected** SI 2006/1641, SI 2006/1642 revoked **Enabling power** Housing Act 2004 s 250(2)(a), Sch 13	Regulate the procedure to be followed for applications and appeals (jointly referred to as applications) made to a residential property tribunal under the Housing Act 2004, Pt 9 of the Housing Act 1985, which relates to demolition orders, and the Mobile Homes Act 1983. Pt 3 makes provision for the payment of fees in respect of certain appeals and applications to tribunals.
Energy Act 2011 (Commencement No 1 and Saving) Order 2012	**Enactment citation** SI 2012/873 **Commencement date** 21 March 2012 **Enabling power** Energy Act 2011, ss 121(1), (5)	Commences provisions in Ch 1, Pt 1 of the Energy Act 2011 relating to the Green Deal plan; Pt 2 relating to the acquisition of rights to upstream petroleum infrastructure and downstream gas processing facilities and powers of compulsory acquisition of carbon dioxide pipelines; and Pt 5 amending or repealing energy conservation measures relating to the Home Energy Conservation Act 1995 in Scotland and in energy conservation authorities in Wales.
Royal Parks and Other Open Spaces (Amendment) (No 2) Regulations 2012	**Enactment citation** SI 2012/957 **Commencement date** 28 March 2012 **Legislation affected** SI 1997/1639 amended **Enabling power** Parks Regulation (Amendment) Act 1926, s 2(1), (1A)	Amend the Royal Parks and Other Open Spaces Regulations 1997, SI 1997/1639. Introduce a prohibition against camping and using amplified noise equipment without permission in parks in the vicinity of Parliament Square. Provide that no person may fail to comply with a police direction to cease, or not to start, a prohibited activity in these parks. Apply in Canning Green, Victoria Tower Gardens, the garden around the Jewel Tower, and the lawn around the statute of George V. Introduce powers of seizure, retention, disposal and forfeiture under the Royal Parks (Trading) Act 2000 over objects used in offences that relate to the prohibited activities.
Infrastructure Planning (Waste Water Transfer and Storage) Order 2012	**Enactment citation** SI 2012/draft **Legislation affected** Planning Act 2008 amended **Enabling power** Planning Act 2008, ss 14(3), (4), 232(3)(b)	Amends the Planning Act 2008 to extend the categories of infrastructure projects which are nationally significant and so benefit from the same streamlined planning application process reserved for other Nationally Significant Infrastructure Projects. Also makes a supplementary provision in relation to ongoing infrastructure projects where if anything done by a promoter prior to this order is compliant, it will be treated as though completed after the order is in force.
Housing Support Grant (Scotland) Order 2012	**Enactment citation** SSI 2012/113 **Commencement date** 1 April 2012 **Enabling power** Housing (Scotland) Act 1987, ss 191, 192	Fixes the aggregate amount of the housing support grants payable under the Housing (Scotland) Act 1987 for 2012/13 from 1 April 2012 at £760,950 and sets out the method to determine the aggregate amount payable to the Shetland Islands Council.