Real estate

CLYDE&CO

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Welcome to the spring edition of the Real Estate Bulletin.

In this edition of the Real Estate Bulletin, we update you on recent decisions affecting the property industry:

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- The Assets of Community Value (ACV) scheme, introduced by the Localism Act 2011, provides local community groups, first, with the power to nominate land or buildings that the local community believe to be of value to the local community to be listed, and second, the ability and time to raise money to purchase the asset should it come onto the open market. This article raises important points for landowners who should be aware of the restrictions to which they may be subject to as a result of an asset being nominated or listed as an ACV
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- A tenant's attempt to obtain money back for an over estimated service charge fails

Repair or Improvement? That is the question.

The issue of whether repair works are required or amount to an improvement often arises in relation to dilapidations but the recent case of *Tedworth v Miller [2016]* UKUT 522 shows that this question also arises in relation to the recoverability of the costs of such works through service charge.

Background

Tedworth Square North Limited owned the freehold of a block of flats built in the 1980s. As part of a decoration and repair programme, it decided to replace the old wooden window frames on the building, which were generally in satisfactory condition but in need of decoration, for new metal frames and also agreed to install new double-glazed windows to some of the flats. While the double-glazing was carried out at the tenants' own costs, Tedworth sought to recover the costs relating to the replacement of the window frames from all tenants via the service charge. The leases required the leaseholders to contribute through service charge to costs incurred by the management company in carrying out its obligations, which included a covenant for repair and decoration. One of the tenants, Mrs Miller, challenged Tedworth's right to include these costs in the service charge on the ground that there was insufficient evidence of disrepair to engage the repairing covenant.

First Instance

The First Tier Tribunal rejected Tedworth's argument that, because repairs to some of the frames were necessary which required scaffolding to be erected, this justified carrying out works to all the windows. Instead, the Tribunal concluded that the replacement of the window frames amounted to an improvement rather than repair, meaning that the repairing covenant had not been engaged and that the related costs could not be recovered from the tenants through the service charge. It did, however, allow the costs of some minor repair works and the redecoration of the window frames which had not been replaced to be recovered. Tedworth appealed.

Appeal

The Upper Tribunal held that an obligation to keep a structure in repair only came into operation if there was damage which needed to be made good. Where remedial works were required, a common sense approach should be adopted. So if most of the structure has deteriorated replacement may be justified, even if some parts of the structure are undamaged. However, if only part of the overall structure is damaged, then this should be addressed by localised repair. In this instance, only a small number of windows were in need of repair, not the majority. It was clear in this instance that Tedworth's decision to replace the frames was motivated by a desire to modernise the building.

The Upper Tribunal further held that in apportioning costs, it was necessary to apportion the total cost between recoverable and irrecoverable elements. It would be wrong in principle to carry out that apportionment by considering what the costs would have been if some different sets of works had been undertaken, all of which were recoverable.

Comment

Landlords need to be aware that even when they carry out works that appear to be economically better for the tenants in the long run, by reducing maintenance costs and energy bills in the future, they may nonetheless not be able to recover their costs through the service charge if the parts of the premises in question were not in fact in disrepair.

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The Wrong Side Letter!

Side letters are not an uncommon feature in property transactions. They are often used in an attempt to protect the landlord's investment or rental value whilst granting a personal concession to the tenant. They are usually confidential and supplement, clarify or amend previously agreed terms and can cover a wide variety of matters. The case of *Vivienne Westwood Limited v Conduit Street Developments Limited [2017] EWHC 350 (ch)* concerned a side letter providing for a cap on the rent following the first rent review. At issue was whether the side letter and cap was validly terminated by the landlord. The case has important implications for landlords and tenants who must consider carefully how such side letters are drafted.

Facts

In 2009 Vivienne Westwood Limited ("Westwood") entered into a 15 year lease of a shop in Mayfair. The initial rent was £110,000 per annum with upward only rent reviews at 5 yearly intervals.

By a side letter, the terms of which were agreed at the same time as the lease, Conduit Street Developments Limited ("the Landlord") agreed to accept a reduced rent of £90,000 per annum, with small fixed increases thereafter, but capped at £125,000 per annum at the first rent review (in 2014).

The side letter provided:

"If you breach any of the terms and conditions contained in this agreement or any term of the lease and/or any document supplemental to it … we may terminate this agreement with immediate effect and the rents will be immediately payable in the manner set out in the Lease as if this agreement never existed."

The open market rent review in 2014 was determined at £232,500 per annum thus far exceeding the cap of £125,000 per annum as agreed in the side letter.

Subsequently, the Landlord wrote to Westwood terminating the side letter with immediate effect on the basis that there had been a breach of the lease following Westwood's failure to pay the June 2015 quarter rent on time. Westwood argued that the Landlord's right to terminate the side letter was an unenforceable penalty.

Decision

The Court agreed with Westwood that the termination of the cap in the side letter was a penalty. In coming to this decision the Judge looked closely at the Supreme Court decision in *Cavendish Square Holding BV v Makdessi [2016]* (see Real Estate Bulletin Winter 2016: Penalties revisited).

In this case Lord Neuberger and Lord Sumption, giving the joint lead judgments, confined the penalty rule to a situation where a secondary obligation is engaged upon breach of a primary contractual obligation. A secondary obligation would only be a penalty if it imposed on the party in default a detriment out of all proportion to any legitimate interest of the innocent party in the performance of the primary obligation. When considering the legitimate interest, it was necessary to determine whether the secondary obligation was "exorbitant or unconscionable".

In the current case the Court decided that the side letter and lease entered into at the same time between Westwood and the Landlord should be read as one document and as such Westwood's primary obligation was to pay the lower rents as specified in the side letter. Its secondary obligation was to pay the rent at the level as set out in the lease in the specified circumstances. The Court rejected the Landlord's argument that it had a legitimate interest in seeing the rent revert to the market level following Westwood breaching its obligations under the lease (by late payment of the June 2015 quarter's rent). The consequences were out of all proportion to Westwood's breach and were not part of the bargain between the parties.

As a matter of construction the Court accepted it was necessary to imply a term in respect of Westwood's breach but refused to imply the words *"any material breach"*; instead it implied *"non-trivial breach"*. The Court also noted that the initial and subsequent higher rents of £110,000 per annum and £232,500 per annum were payable with retrospective as well as prospective effect *"as if this agreement had never existed"*. This again demonstrated that termination following a *"non-trivial breach"* of the side letter resulted in extreme and disproportionate consequences and therefore operated as a penalty.

The Court ultimately found for Westwood holding that the Landlord's attempt to terminate the side letter was penal in nature and therefore void and unenforceable.

Comment

Not all termination clauses in side letters and rent concessions will be unenforceable. Each case will heavily depend upon its precise wording. However, landlords and their advisors should carefully consider whether the terms of a side letter will change the tenant's primary obligations and will want to make clear at the outset that it is the lease which creates the primary obligation and that the side letter creates only secondary obligations.

More generally, when drafting, landlords should carefully consider the terms of any side letter to ensure that a clause is not retrospective and unduly onerous and held to be a penalty.

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Borrowers Beware – do not rely on the "extraordinary power" to imply terms!

The Court of Appeal have again confirmed that when considering whether to imply a term into a contract to reflect the parties' intentions it is a "cardinal rule" to ensure that the implied term does not contradict the express terms of the contract. In the recent case of *Irish Bank Resolution Corporation Limited (in Special Liquidation) v Camden Market Holdings Corp and Others [2017]* EWCA Civ 7 the Court of Appeal rejected the borrower's argument that a bank's express right to market a loan was subject to an implied term that the marketing of the loan (as part of a portfolio package including distressed debt) should not harm the borrower's attempts to sell the property. The borrower was concerned that the bank's attempts to sell the debt would negatively impact sales that might be achieved by the borrower.

Facts

In 2005, Camden Market Group ("Camden") entered a Facilities Agreement with Irish Bank Resolution Corporation Limited ("the Bank") to finance the development of parts of Camden Market (the "Properties"). The Bank was aware that Camden intended to develop, market, and sell the Properties. The Facilities Agreement granted the Bank the right to assign any of its rights to any bank with Camden's consent and allowed the Bank to disclose any information about Camden and its loans to any party to whom the Bank was marketing its loans.

Camden was delayed in obtaining planning permissions for the Properties and an extension to the maturity date and 'Exit Strategy' was agreed between the Bank and Camden. The Bank provided a further £10 million loan and Camden obtained a number of planning permissions in January 2013, and subsequently began marketing the Properties.

Subsequently, the Bank entered liquidation in February 2013. Prior to this, Camden's solicitors had reminded the Bank of the requirement to obtain Camden's consent before assigning the loan. Around this time, the Bank began marketing all of its loans in packages as part of a portfolio (as is common in such sales), and Camden's loan was included in such a portfolio. However, this portfolio also included distressed loans, whereas Camden's loan was performing. Camden was concerned that its loan would be viewed as distressed, and indeed claimed that potential purchasers had made comments to that effect.

Camden believed that potential purchasers of the Properties would instead seek to acquire the loan from the Bank, then enforce the security and obtain the Properties for less than their market value.

Camden commenced proceedings against the Bank in October 2013, claiming that the Facilities Agreement included an implied term that the Bank would not do anything to hinder the marketing of the Properties by Camden to achieve the best price.

First Instance Judgment

The High Court held, amongst other things, that the pleaded implied term did not contradict the express terms of the Facilities Agreement and was arguably not inconsistent with it. Further, the Court stated that this case was analogous to the situation where the Court has, for many years, implied a term imposing on a financier an obligation not to hinder the performance of its loan agreement.

The Bank's Appeal

The Bank appealed on the basis that the Judge had erred because the implied term preventing the Bank from marketing the loans was inconsistent with the express terms entitling the Bank to sell the loans with Camden's consent and to provide information about Camden and the loans to prospective purchasers. To imply such a term would breach a "cardinal rule" to the contrary stated by Lord Neuberger in Marks and Spencer plc v BNP Paribas (see Real Estate Bulletin: Winter 2016).

Court of Appeal

The Court of Appeal agreed with the Bank. Whilst the extension gave Camden more time to obtain planning permission that did not mean that it impliedly affected the Bank's rights under the Facilities Agreement. The extension had been incorporated into, but did not alter the Facilities Agreement.

The Court of Appeal agreed with the Bank that the implied term was in substance (though not linguistically) inconsistent with the Facilities Agreement. The claimed implied term prohibited the Bank from marketing the sale of the loans in a manner which hindered the marketing of the Properties in order to achieve the best price in accordance with the Exit Strategy. By contrast, the Bank's express powers contained no requirement "to inform, let alone obtain the consent of, the Camden Market Group" before providing information to potential purchasers of the loans. This express power was held to be "substantively inconsistent" with the claimed implied term. The implied term would "cut across the Bank's entitlement to provide information and would do so in a way which is redolent of uncertainty". The Court of Appeal allowed the Bank's appeal.

Comment

The Courts are increasingly reluctant to exercise the "extraordinary power" of implying terms into lengthy written contracts. This decision demonstrates that the Court's will not imply terms where the implied term would conflict with the express wording of the agreement even where to do so would appeal to commercial common sense. It is important to note that the Court will assess not only whether there is a linguistic conflict between the two terms, but also, as in this case, whether the very substance of the terms is inconsistent.

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Reality prevails!
Newbigen (Valuation Officer) v S J & J Monk [2017]

Does a commercial building which is in the course of redevelopment have to be valued for the purposes of rating as if it were still useable? This was the question five Justices of the Supreme Court faced earlier this month in the case of *Newbigen (Valuation Officer) v S J & J Monk [2017]* EWCA Civ 78. The Court unanimously held that buildings undergoing redevelopment should be assessed at reduced business rates reversing the 2015 Court of Appeal decision. This decision has provided some much needed clarity on the issue of beneficial occupation and will be welcomed by property developers.

Background

The appellants, S J & J Monk ("SJJM"), owned a three storey office building in Sunderland. They were renovating the first floor and had removed all the internal elements of the building, except for the floors, lift and staircases, in order to create three new office suites. SJJM proposed to the respondent, Newbigen ("the VO") that the description of the premises on the ratings list should be altered to "building undergoing reconstruction" and that the rateable value should be reduced to £1. This was because the building was undergoing significant work and was therefore incapable of beneficial occupation. The VO argued that the premises should remain on the ratings list contending that, despite the actual condition of the building, it had to be assumed the building was in repair if those works would be "economic" if carried out.

The Valuation Tribunal dismissed SJJM's appeal holding that the premises was an office suite in disrepair but was to be rated as if it were put in reasonable repair. SJJM appealed to the Upper Tribunal (Land Chamber) which held that the premises had been stripped to such an extent that to replace its major building elements would go well beyond the assumption of repair. The work of removal had rendered the premises incapable of beneficial occupation and as such the rateable value of the premises should be reduced to the nominal amount. The VO appealed to the Court of Appeal which had to consider whether the works were repairs as distinct from improvements or alterations. The Court of Appeal held that the works amounted to economic repairs and ordered that the premises should be valued as if they were in a state of reasonable repair. Hence rates were due in the normal way.

Where non-domestic property is vacant, the rateable value of the property is based on the estimated amount it might reasonably be expected to let from year to year on three assumptions:

- The first assumption is that the tenancy begins on the day by reference to which the valuation is to be made;
- The second assumption is that immediately before the tenancy begins the property is in a state of reasonable repair, but excluding from this assumption any repairs which a reasonable landlord would consider uneconomic;
- The third assumption is that the tenant undertakes to pay the costs of the repairs and insurance.

These "repair assumptions" apply regardless of the actual state of the property. (See The Rating (Valuation) Act 1999).

Supreme Court decision

The Supreme Court overturned the Court of Appeal's decision. In his leading judgment Lord Hodge stated that the matter must be assessed objectively. In carrying out that objective assessment of the physical state of the property on the material day, the valuation officer must have regard to the actual programme of works which is in fact being undertaken on the property. In this case, he noted that the premises were in reality completely incapable of beneficial occupation, because, as an objective fact, they were in the process of redevelopment on the valuation date and no part of them was capable of

beneficial use. Introducing the "repair assumption" at the outset of the hypothetical tenancy did not displace the "reality principle" and the question of whether the premises were capable of beneficial occupation. Accordingly no rates were payable.

Comment

This is an important decision that has restored some much needed common sense. It will be welcomed by developers and investors alike who will be able to act with more certainty going forward. In coming to its decision the Supreme Court upheld the "reality principle" which states that a property should be valued by considering its actual physical state at the valuation date, rather than on the basis of an assumption that the premises are in a state of reasonable repair. As such, a property undergoing redevelopment will not now be subject to an assumption that the property is in repair and subject to business rates. It is anticipated that numerous disputes concerning developers and valuation officers will now be settled. Developers who have perhaps wrongly paid or may be liable to pay rates in this scenario should consider seeking specialist advice as to whether the historic listing is capable of challenge.

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Assets of Community Value – update and recent decisions

The Assets of Community Value (ACV) scheme, introduced by the Localism Act 2011, provides local community groups first with the power to nominate land or buildings that that the local community believe to be of value to the local community to be included on an ACV list and if listed, the time to develop a bid and raise money to purchase the asset – but only when it comes onto the open market.

This is not a straightforward process and as a result, it is important for landowners to be aware of statutory requirements and restrictions to which they may be subject as a result of an asset being nominated or listed as an ACV.

What is an ACV?

Although an ACV is not actually defined by the Localism Act 2011 nor the Assets of Community Value (England) Regulations 2012, land or a building will be of community value if, in the opinion of the local authority:

a) The primary current use of the land or building furthers the social wellbeing or social interests of the local community; and

b) It is realistic to think that the land or building can continue to be used in a way which will further the social wellbeing or social interests of the local community (whether or not in the same way as previously); or

c) There is a time in the recent past where the land or building has been used for the purposes of further social wellbeing or interests of the local community and it is realistic to think that it will be used for the same purpose again within the next five years.

'Social interests' include cultural, recreational and sporting interests, which may relate to areas such as education and training, employment and social enterprise, arts, crafts and culture, and socialisation.

Whilst not an exhaustive list, land and buildings capable of being listed as ACVs include local parks, nature reserves, pubs, shop, libraries and community facilities, car parks, hospitals, school playing field, village halls, bowls clubs, health clubs and gyms – provided they meet the above criteria. That said, it should be noted that there are some exemptions from an ACV listing, however, including residential premises and land connected with that residence, land requiring a site licence and operational land, as defined in the legislation.

Nomination and listing of an ACV

Nominations for the listing of a potential ACV can be made by community interests groups, which include (amongst other things) an unincorporated body with a local connection (i.e. one whose activities are wholly or partly concerned with the local authority's area/neighbouring authority's area). A typical nominating body would be the relevant Parish Council but the qualifying list is wide.

The local authority has eight weeks to decide whether the land/building qualifies as an ACV and ought to be listed on the ACV list. If the land/building is listed, the local authority will notify the owner and the listing will be registered as a local land charge, which will bind successive owners. Land included on the ACV list may be removed after five years, although there is no obligation on the local authority to do so.

An owner can request that the local authority reviews its decision to list an ACV, and can appeal against the listing of an ACV within eight weeks of the date the written notice of the listing was given.

Importantly, the inclusion of land or a building on the ACV list will not restrict what an owner can do with the property whilst it remains in its ownership. An important exception to this rule is that pubs that are listed as an ACV, or nominated to become an ACV, however, cannot use permitted development rights for a change of use or demolition, but must instead apply for planning permission.

Restrictions on the disposal of an ACV

If the owner of an ACV wishes to dispose of it, by either selling the freehold interest or granting a lease for a term of at least 25 years, the owner must notify the local authority of its intention to do so. When this occurs, the local community will be provided with the first opportunity to bid for the ACV within the 'moratorium period'.

The moratorium period will last for either 6 weeks or 6 months, depending on whether a community interest group indicates that it wants to be treated as a potential bidder in relation to the land/building within the first 6 week interim moratorium period. If this occurs, then the full 6 month moratorium period will apply, which provides the community group with time to develop a bid and raise money to purchase the asset. If no such indication is made within the first 6 week period, however, the moratorium period will end.

Although the owner can continue to market the land/building and negotiate its disposal during the moratorium period, it cannot exchange or enter into a binding contract to exchange contracts, except with a community interest group. Whilst this may seem very equitable from the point of view of the local community, this does not provide the community interest group with a first right of refusal and there is no obligation on the owner to dispose of the land/building to it.

Once the moratorium period has ended, the owner can freely dispose of the ACV at any time during the next twelve months. After this protected period has expired, the statutory restrictions on the disposal of the ACVs will reapply, which means the current owner will again have to notify the local authority and repeat the statutory process if they wish to dispose of the ACV. This 12 month period is intended to protect the owner from repeated attempts to block a sale of an ACV, as no further moratoriums are permitted during this time.

The Secretary of State can offer advice and assistance to any community interest group involved in nominating, bidding or acquiring land to be listed as an ACV. This may include financial assistance (i.e. a loan and/or the giving of a guarantee or an indemnity).

Recent appeals against ACV listings

A recent appeal against the listing of a disused gym as an ACV indicates the scope of the ACV scheme, which may include commercial premises that are not a shop or a pub. At the time the listing was made, the gym had recently closed and planning permission was being sought for a care home. When considering whether the building would realistically be used in a way that furthers the social wellbeing or social interests of the community, the Tribunal was of the view that if planning permission was not granted, the owner may consider offering a lease to another gym operator on terms which would make the business viable. If planning permission was granted, however, the site was of sufficient size to encompass both a care home and a smaller gym, which would benefit residents of the care home and the community. Accordingly, the listing of the building was upheld.

Another recent appeal against a listing shows that even green space located within a private residential development can be listed as an ACV. The land in question was public open space known as the 'village green', which was created as a requirement of the planning permission for the housing development. Although the owner of the land argued that the area was 'recently unkempt', the Tribunal held that the land should be listed because the area was used as a recreational space by children of the village and found that it was well maintained.

The ACV listing of a field, which was partially used by a Scout Group as part of their weekly activities, was also the subject of a recent appeal. Although the owner of the land tried to argue that the scout's use of the land was only ancillary and constituted a trespass, the Tribunal found that the predominant and non-ancillary use of the land was for recreational purposes and that the Scout Group was a major user for that purpose. The Tribunal also found that no trespass had occurred. As there was a realistic prospect of the same or a similar charitable use of the land continuing, the listing of the land as an ACV was upheld.

Recent consideration of ACV protections for pubs

The protection afforded to pubs that are listed or nominated as an ACV was recently considered by the House of Lords, where 278 to 188 voted in favour of amendments to the Neighbourhood Planning Bill which remove permitted development rights for all pubs.

Pubs that are listed as an ACV or nominated to become an ACV, are unable to rely on permitted development rights for change of use or demolition. If the pub is not listed or nominated as an ACV, however, the developer must send a written request to the local authority to enquire whether the building has been nominated as an ACV and must wait 56 days to undertake any permitted development.

This is designed to provide an opportunity for the local community to nominate the pub as an ACV, so that permitted development rights would be removed. As the local authority is not required to undertake public consultation during the 56-day period, however, there are concerns that the community may not necessarily know about any proposed for change of use or demolition of pubs.

This change is intended to strengthen planning protections for pubs and encourage further listing of pubs under the ACV scheme. As the Bill is still being considered by the House of Lords, it remains to be seen whether this amendment will ultimately make its way into statute.

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The ongoing question: is it a Lease or a Licence?

Two further cases have come before the Court in which the Court has had to determine whether a licence or tenancy has been created in some unusual circumstances. It is a well-established point in law that in order to determine whether an agreement is a lease or licence, it is necessary to look to the substance, and to the reality of the parties' situation, rather than the form of the agreement.

"Tenancies for Guardians?": *(1) Camelot Property Management Limited and (2) Camelot Guardian Management Limited v Greg Roynon (2017)*

This case involved an ex-care home in Bristol owned by Bristol City Council. The Council instructed Camelot Property Management to put guardians into the building to deter squatting and as a result, Mr Roynon moved into the building in January 2014, choosing two rooms which he wished to occupy. He otherwise had a shared use of the kitchen and living areas with other guardians.

The agreement with Mr Roynon appeared to be and was described as that of a licence but when Notice to Quit was served upon him on 17 May 2016, he refused to vacate and possession proceedings were brought. The matter came before Bristol County Court.

Decision

The Court found that Mr Roynon was not a licensee and did have an Assured Shorthold Tenancy.

The Court had to consider whether the necessary elements of a tenancy had been made out (which were established in Street v Mountford): (a) had there been a grant of exclusive possession (b) for a fixed or periodic term certain (c) and in consideration of a premium or periodical payments. There was no dispute as to the requirements of term and payments and so it fell to be decided whether Mr Roynon had exclusive possession of his two rooms.

The Court considered the following factors:

(a) The agreement did not make express provision for Camelot to access the rooms, however, the Court felt this did not automatically mean that it was a licence;

(b) The agreement restricted Mr Roynon to not having overnight guests, to not having more than two guests at one time and to not leaving guests unsupervised. The Court felt that these restrictions on the use of the rooms (which are common features of tenancies) did not preclude exclusive possession;

(c) Camelot did not have a power within the agreement to move guardians around; in reality, guardians would inform Camelot if they wished to move rooms;

(d) Mr Roynon had the keys to his rooms and no other guardians had keys or would access his rooms without permission; and

(e) Camelot did carry out inspections but these were only visual and so were not inconsistent with a finding of exclusive possession.

The Court held that taking these factors into account, Mr Roynon did have exclusive possession and so had established the elements required for a tenancy (and was therefore a tenant of the two rooms).

"Fairground Attraction: Lease or Licence?": *Holland v Oxford City Council [2016]* EWHC 2545 (Ch)

The St Giles Fair, which dates back to 1625, takes place in Oxford over two days each September. Pitch holders at the fair are required to submit an application with a fee and once accepted, the Council send a letter to the pitch holder attaching the Conditions of Letting (these conditions vary over time).

Mrs Holland (who was a member of the Showmen's Guild, a trade association for the travelling fairground community) had occupied, over several years, pitches 129 and 130 and under Guild rules, was generally entitled to expect the same pitches. Following a re-measurement of the pitches' boundaries, being refused permission to bring a new larger attraction ("Cyclone") on site and complaints she was encroaching a neighbouring pitch, Mrs Holland issued proceedings claiming that she had an annual periodic tenancy of the pitches (for a period each year beginning with the day the attractions were brought on site and ending once the attractions were removed (four days in total)). She also claimed for damages for breach of the covenant for quiet enjoyment.

Decision

The Court found that Mrs Holland was a licensee as opposed to a tenant.

The Court, looking at the substance rather than the form considered various provisions in the Conditions of Letting, such as:

(i) That they were entitled "Conditions of Letting";

(ii) That pitches were subject to road signs, lamps and street furniture;

(iii) That in the event of an emergency, pitch holders had to close down and move their pitches;

(iv) That pitch holders were referred to as "tenants of the fair";

(v) That there was no right of re-entry for the Council; and

(vi) That there was no right of access in favour of the Council.

The Court considered whether Mrs Holland had exclusive possession of the pitches. It considered that the public accessing the pitch was not relevant to the question of exclusive possession. It also found that a high degree of control by the Council did not of itself prevent Mrs Holland having exclusive possession but that the fact that the Council did not include a right of access in the agreement showed that it had not intended to exclude itself from the land. Mrs Holland was not therefore found to have exclusive possession.

The Court found that whilst it was in possible, in theory, for a periodic tenancy to arise, in these circumstances, it had not. Having submitted a new application each year and that being approved, Mrs Holland had entered into a new contract with the Council each year which discharged the previous year's contract. The arrangement was therefore that of a licence.

Accordingly, the Court dismissed Mrs Holland's claim and her claim for damages for breach of the covenant for quiet enjoyment, as this is only an implied term in a tenancy, not a licence.

Summary

Both of these cases reaffirm the position that the Court will look to all the circumstances and to the substance not the form or label of an arrangement. The cases are somewhat conflicting in terms of access provisions: the Camelot case suggests that the lack of an access provision will not of itself suggest that the arrangement is a licence, whereas the Holland case suggests that not including provisions of re-entry or access are more likely to mean that the arrangement is a licence. In any event, it is important that the arrangement does reflect the reality of the situation and that legal advice is obtained on any occupancy agreement, as, particularly in the commercial context, in the event a tenancy is created, there is always a possibility that it will be protected under the Landlord and Tenant Act 1954.

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Service Charge, can you get your money back?

The case of *Charles Knapper and Others v Martin Francis and Rebekah Francis [2017]* UKUT 3 (LC) considered the application of Section 19(2) of the Landlord and Tenant Act 1985 ("the Act"). In respect of service charge clauses on residential leases, and whether it can be relied upon by tenants to be repaid excess service charge.

The appellants in the case were tenants with long leases of chalets at a holiday park. They were required to pay the landlord such sum as the landlord "may reasonably require" on-account of the landlord's projected expenditure for the subsequent year. Notably, the leases were silent as to what would happen if the on-account payment exceeded the actual expenditure by the landlord in the relevant year.

The appellants applied to the First-Tier Tribunal ("FTT") for a determination of the reasonableness of the on-account contribution for the service charge budget requested for 2015, where some of the anticipated expenditure had not actually been incurred in 2015.

The FTT rejected their claim and found that no reduction should be made to reflect the expenditure which was not actually incurred.

The tenants appealed to the Upper Tribunal ("UT"), contending that:

(1) When ascertaining the reasonableness of the on-account payment, the FTT should have taken into account all information known at the time the payment was determined, and not just what was known when payment was demanded, and

(2) Section 19(2) of the Act, which provides for "any necessary adjustment" should be utilised to adjust the tenants' liability as soon as it became apparent that certain expenditure had not in fact been incurred.

The appeal was dismissed on both points:

Issue 1

Firstly, the Judge considered the contractual position of the parties. In this case, the leases required tenants to pay such sums as the landlord "may reasonably require" on-account of the landlord's projected service charge expenditure.

The next stage required the Judge to consider whether the on-account payment demanded in this instance exceeded the statutory limit set out in Section 19(2) of the Act. It was held that the date for ascertaining the reasonableness of the on-account payment requested should be the date at which the tenant's contractual liability to make payment arises. Matters which were not known to a landlord when its budget was made, such as the fact that certain expenditure would in fact not be spent, could not therefore make the on-account payment retrospectively unreasonable.

Issue 2

The UT held, where on-account payments exceeded service charge expenditure actually incurred during the relevant service charge year, Section 19(2) of the Act did not confer jurisdiction on the FTT to direct repayment of the excess amount.

Commentary

Landlords will welcome the clarification that subsequent factors will not retrospectively render on-account demands for service charge unreasonable if unknown at the time. As for tenants, the decision highlights the need for leases to include provisions for a repayment mechanism in the event of an excess in the on-account service charge payment.

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Further advice should be taken before relying on the contents of this Bulletin.

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