Contents

01. Introduction

02. Further information required?

04. When is it unreasonable for a landlord to withhold consent to a tenant’s application to apply for planning permission?

06. No heating no pay?

08. Who pays for property fraud?

12. Licensees and relief from forfeiture

14. Network Rail tied in knots!

16. Implied terms and entire agreement clauses

18. Damages awarded in lieu of specific performance for breach of tenant’s covenants to maintain brand standards

20. “No Oral Modification” Clause


In this edition we update you on recent decisions and legal developments affecting the property industry:

- Was failure to consult fatal to a landlord’s recovery of service charge? A case comment on Reedbase Limited v Fattal and others [2018]

- A discussion of the recent case of Rotrust Nominees Limited v Hautford [2018]: did fear of enfranchisement justify a landlord’s decision to refuse a tenant’s request for consent to make a planning application?

- No heating no pay? An analysis of the Upper Tribunal’s decision in Saunderson v Cambridge Park Residents Association Limited [2018]. Tenants often disconnect themselves from communal supplies but will that mean they are no longer to pay for the supply?

- Beware of the imposter! The Court of Appeal decision on two high profile cases following fraudsters masquerading as the owners of residential property. Do the solicitors bear the innocent parties’ losses?

- Oh Buoy! Case comment on licensees and relief from forfeiture in The Manchester Ship Canal Company Limited v Vauxhall Motors Limited (formerly General Motors Limited) [2018]

- Network Rail tied in knots! Two property owners successfully make a claim against Network Rail who failed to take appropriate steps to prevent the spread of Japanese Knotweed

- J N Hipwell & Son v Szarz [2018]. The Court of Appeal implied a term into a lease notwithstanding the fact the lease contained an entire agreement clause

- In Zinc Colibrie 1 Ltd and others v Adda Hotels and others [2018]. A case comment on the High Court’s decision to order damages in lieu of specific performance of the tenants’ obligations under their leases

- Rock Advertising v MWB Business [2018]. A recent Supreme Court case on whether a ‘No oral modification’ clause was effective
Further information required?

In Reedbase Limited and another v Fattal and others [2018] EWCA Civ 840 the Court of Appeal was asked to decide if a statutory consultation should have been repeated when a landlord changed a specification of works to residential leasehold property.

The Court also considered whether the landlord had failed to make good damage caused by repairs to a roof terrace.

**Statutory background**

The Landlord and Tenant Act 1985 imposes restrictions on landlords of residential property who intend to carry out "qualifying works". At the first stage, the landlord must consult the tenants on the intention to carry out the works. A second consultation is required on the estimates obtained by the landlord.

Failure to consult may result in the landlord being able to recover only £250 for the works from each tenant.

**Facts**

The case involved an apartment block near Regent's Park, London. Repairs were required to an asphalt roof under a terrace adjoining two penthouse flats. During the course of the works, the landlord decided to make some changes so that the new (and more expensive) tiles were fixed by a pedestal system, instead of being bonded on to the asphalt. This was necessary in order to avoid invalidating the guarantee relating to the roof sealant.

The additional cost of the new tiles and fixing system was approximately £31,000, representing 6% of the full costs of the works.

The tenants of the two penthouse flats (but no other tenants) complained that the estimates originally obtained by the landlord did not refer to the pedestal system and that the statutory consultation was therefore defective.

The two tenants also complained that the landlord had failed to satisfy its obligation to make good following the repairs to the roof.

**The Court of Appeal’s decision**

**The consultation issue**

Giving judgment, Lady Justice Arden noted that there was no statutory judgment as to when the second stage consultation should be repeated. She held that the test was whether, in all the circumstances, the two complainant tenants had been given sufficient information by the first set of estimates. It was also necessary to consider the protection to be given to the tenants by the consultation procedure. Would it be materially assisted by obtaining fresh estimates?

In the circumstances of the case, fresh estimates would not assist because:

- The tenants knew about the change in the works and approved it. This was not a case of the landlord trying to ambush the tenants
- The change in cost was relatively small compared with the full cost of the works
- It was unrealistic to assume that contractors who had estimated for the full works but not obtained the contract would be likely to tender or hasten to tender for a small part of it. There was no evidence that a fresh tender would have led to a cost saving
- The possible delay caused by a retendering process might have prejudiced other tenants
- Regardless of the consultation procedure, the tenants could rely on other statutory provisions relating to unreasonable and unreasonably incurred service charge costs

An estoppel argument advanced by the landlord — based on the tenant's prior approval of the additional works — was not considered by the court.

**The landlord’s obligation to make good**

The landlord was required to make good any damage caused to the demised premises when carrying out repairs.

The tenants’ argument that the landlord should have replaced like with like was rejected by the Court. The landlord’s obligation was, so far as possible, to restore the property to its pre-existing condition.

In this case the landlord could not reasonably have been expected to lay the same type of tiles on the sealed roof surface, or to replace the tiles in their pre-existing damaged condition.

The landlord had in fact improved the tenant’s property by installing new and apparently superior tiles. Its actions did not amount to breach of covenant.

**Comment**

This is a helpful decision in that it offers guidance to landlords on when the statutory consultation procedure for "qualifying works" should be repeated. It is also a useful reminder of the purpose of the consultation procedure, as observed by Lord Neuberger in Daejon Investments Limited v Benson and others [2013] UKSC 14. In short, the consultation requirements are a means to an end, not an end in themselves. The objective is the protection of tenants in relation to service charges, so that they are not required to pay for unnecessary services, or services provided to a defective standard, or to pay more than they should for services which are necessary and are provided to an acceptable standard.

Armel Elaudais
Senior Associate
E: armel.elaudais@clydeco.com
T: +44 20 7876 5561
When is it unreasonable for a landlord to withhold consent to a tenant’s application to apply for planning permission?

In Rotrust Nominees Limited v Hautford Limited [2018] EWCA Civ 765 a landlord had unreasonably withheld consent to a tenant’s application for consent to apply for planning permission for increased residential use. The freeholder’s concern that change of use might facilitate a claim for enfranchisement was irrelevant as was the related issue of the effect of enfranchisement on the wider management of the estate.

Facts
Rotrust was the freehold owner of a block of properties on Brewer Street, Soho, of which 51 Brewer Street (the “property”) formed part.
Hautford was the current tenant under a lease granted in 1986 for a term of 100 years from 25 December 1985 (the “lease”).
The tenant’s user covenant in the lease was widely drawn and permitted one or more of retail, office, residential, storage and studio use (the “tenant’s user covenant”).
The lease also included a covenant on the part of the tenant not to apply for any planning permission without the prior written consent of the landlord, such consent not to be unreasonably withheld (the “tenant’s planning covenant”).
The current authorized planning uses of the property were retail for the basement and ground floor, office/office ancillary for the first and second floors and residential for the two top floors.

In April 2015 Hautford applied to Rotrust’s predecessor in title for consent to apply to the planning authority for change of use of the first and second floors to residential. The then freeholder refused, on the grounds that change of use might facilitate a claim for enfranchisement was irrelevant as was the related issue of the effect of enfranchisement on the wider management of the estate.

Hautford applied to the county court for a declaration that the landlord was unreasonably refusing consent to the making of the planning application.
The County Court judge decided that consent had unreasonably been withheld.

The appeal
The Court of Appeal noted that there did not appear to be any reported cases on the reasonableness of a landlord withholding consent in relation to a tenant covenant not to apply for consent for planning permission. There was no doubt, however, that the court should apply the principles relevant in the case of a tenant’s application not to assign or sublet without the landlord’s consent, not to be unreasonably withheld (and that was not disputed by the parties).

Decided authorities might be helpful but were case-specific. Even minor differences in the factual context could be critical.

As in the case of any dispute relating to the true meaning of a contract, the starting point was to ascertain the purpose of the covenant intended by the original parties to the lease.
The question was whether, in the context of the lease as a whole and the relevant factual circumstances in which it was made, the purpose of the tenant’s planning covenant included precluding the residential use of the first and second floors in order to prevent enfranchisement of the property under the 1967 Act.

In the judgment of the Master of the Rolls it did not.
The tenant’s user covenant expressly authorised the use of the property as residential. It was not subject to a proviso that residential use was subject to landlord’s consent.
The landlord had argued that the tenant’s user covenant should be read with and subject to the tenant’s planning covenant. This was “no more and no less than” a re-writing of the covenant so as to make it subject to a proviso that landlord’s consent was required to use for residential parts of the property not then in residential use.
The landlord’s approach was also impractical because it was open to any person to apply for planning permission to change the use of the property.

If Rotrust were correct, Hautford would be prevented from applying for planning permission to use the first and second floors for residential purposes for the remaining 70 years of the term. A third party, however, would be free to make the application and, if successful, Hautford could take advantage of the permission. That would have been the position from day one of the lease.

It made no difference that planning permission would enhance the tenant’s prospects of enfranchisement because of the increase in the residential floor area. Cases relied on by the landlord where the landlord had reasonably refused consent for fear of enfranchisement involved leases granted before the 1967 Act existed. Hautford’s lease, by contrast, had been granted against the legislative background of the 1967 Act and the user covenant expressly permitted residential use.

Even if the landlord’s concern about the effect of enfranchisement on the proper management of the wider estate was relevant, the landlord could rely on section 10(4) of the 1967 Act, which provided for restrictive covenants to be included in the transfer of the freehold.

The landlord’s appeal was dismissed.

Comment
The Court of Appeal’s decision is good news for tenants, confirming that that there is no general principle that a landlord is entitled to withhold consent to assign, alter or change the planning use for fear of enfranchisement.
The Upper Tribunal (Land Chamber) was asked to decide if a leaseholder was liable to pay heating-related charges to his landlord after his property was disconnected from an estate heating system.

The case of Saunderson v Cambridge Park Court Residents Association Limited Re: Cambridge Park Court [2018] UKUT 182 (LC) was heard by the Upper Tribunal ("UT") on an appeal from the First-Tier Tribunal ("FTT") which had decided against the leaseholder.

Both tribunals considered the basis on which communal heating and hot water services were provided to and paid for by leaseholders.

The UT also considered whether the heating supplied to the property in question was of a reasonable standard.

**Facts**

The leaseholder’s flat was one of 36 in a 1930s purpose-built block. A communal heating and hot water system had been installed many years ago but there were no relevant provisions contained in the service charge clause in his lease, or in the leases of the other tenants. The leaseholders had nevertheless indemnified the landlord for the heating and hot water costs which the latter had included in service charge demands.

From around 2008 the heating service in the leaseholder’s flat had been unsatisfactory. By their own admission, the managing agents were unable to cure the problem despite having made numerous efforts to do so and there appeared to be no prospect that the situation would change. As a result, in March 2014, the leaseholder’s flat was disconnected from the communal heating and hot water system, with the permission of the landlord. Subsequently the leaseholder installed his own gas boiler.

The leaseholder accepted that he should contribute a small percentage of the heating costs in order to reflect the benefit he received from the heating to the common parts. The landlord, however, served service charge demands relating to the full cost of the heating and hot water provision.

**The UT’s Decision**

The UT determined that the leaseholder was not liable for heating charges for the three service charge years in question.

**Comment**

It is not uncommon for service charge provisions to be operated somewhat differently from the basis specified in a lease, or for services to be provided and paid for which are not allowed for in the lease at all.

This case illustrates that, in some circumstances, a binding arrangement may be created between landlord and tenant as a result of their conduct over a period of years, where there are holes in the lease.

The counsel of perfection is to ensure that the service charge provisions in the lease reflect reality and allow for future-proofing and to ensure that service charges are imposed in accordance with the provisions in the lease.

---

**No heating no pay?**

The FTT found that the cost of oil had been included in the service charge for the flat since the assignment of the lease to the tenant in 1994 and that the landlord had contributed to it, apparently without complaint. It appeared that none of the other leaseholders had objected to the charge.

Taking into account the conduct of the parties, the FTT’s view was that the parties had interpreted the provisions of the lease so as to require the landlord to supply hot water, and for the lessees to reimburse the landlord for that cost. In the alternative, the leaseholder would have been estopped from claiming that the lease had not entitled the landlord to recover the cost of providing the heating and hot water.

The FTT also considered whether the leaseholder remained liable to contribute towards the costs of heating and hot water after his disconnection from the estate system in March 2014. It held that he did remain liable because the service charge percentage specified in his lease had not been varied. There was no mechanism in the lease for the percentage to be varied, or any means by which the shortfall could be recovered from other leaseholders.

**The UT’s Decision**

The UT considered that the FTT had erred because it had failed to consider the potential effect of the landlord’s persistent failure to provide heating to a reasonable standard between 2008 and 2014. It was clear that the leaseholder had been given permission to install his own system because the landlord could not rectify the problem.

There was a convention by estoppel which meant that the leaseholder was liable to pay the costs of the communal heating supplied by the landlord, including fuel costs. However, his liability was conditional upon the heating being supplied to his flat via the communal system.
Who pays for property fraud?

The Court of Appeal has ruled on two important high profile cases involving fraudsters (imposters) selling residential property.

The outcome is a success for the buyers, both of whom will receive substantial compensation for their losses.

The defendant lawyers concerned (or their insurers) will no doubt see it differently because they are left to pick up the tab although also innocent victims of fraud.

The combined appeal decision is reported in P&P Property Limited v Owen White & Catlin LLP and another, Dreamvar (UK) Limited v Mischon de Reya and another [2018] EWCA Civ 1082.

Our reports on the first instance decisions appear in the Summer 2016 and Autumn 2017 editions of our Real Estate Bulletin.

The headline points are:

- If a sale is not genuine the solicitors acting for both vendor and purchaser are likely to be in breach of trust.
- Even if a solicitor acts honestly and reasonably it may not be exonerated from liability for breach under section 61 of the Trustee Act 1925.
- Depending on the circumstances, a vendor’s solicitors may also be warranting to the purchaser (and any lender) that their clients are the true owners of the property, even if in reality they are not because they are fraudulent imposters.
- There is no in principle change to the law on liability in negligence to a third party.

Background

In both cases a person (imposter) masquerading as the owner of the property instructed solicitors to deal with the sale. The fraud did not come to light until after completion.

The buyer in the P&P proceedings sued the vendor’s solicitors (Owen White & Catlin LLP – “Winkworth”) and the vendor’s lawyers (Mary Monson Solicitors Limited – “MMS”), claiming damages in excess of £1 million. MDR, in turn, claimed against MMS.

At first instance, the court held that MDR were in breach of trust but dismissed all claims against MMS leaving MDR to pay substantial compensation to the disappointed purchaser.

The buyer in the P&P proceedings sued the vendor’s solicitors (Owen White & Catlin LLP – “Owen White”) and estate agents (Winkworth) but not, apparently, their own solicitors. All of the claims were dismissed by the High Court, leaving P&P with a potential loss exceeding £1 million.

Not surprisingly, both cases were appealed and they were heard by the Court of Appeal together.

Court of Appeal

The Court of Appeal was asked to consider questions relating to negligence, breach of warranty of authority, breach of undertaking and breach of trust.

Negligence

P&P had claimed for negligence against Owen White. Both courts rejected the claim because there were no special circumstances indicating that the solicitors had assumed direct responsibility to P&P to take reasonable care. It was P&P’s own lawyers who owed them a duty of care.

Similarly, P&P’s claim for negligence against Winkworth was rejected. There was no assumption of a duty of care.

The Court of Appeal also held that MDR were not negligent in relation to the undertakings obtained from MMS. They were not under an obligation to seek a non-standard undertaking from MMS over and above the usual undertakings included in the Law Society’s Code for Completion by Post (the “Code”).

Breach of warranty of authority

P&P’s claim for breach of warranty of authority was rejected at first instance. Owen White’s warranty did not, and should not, include an implied promise that they had the authority of the true owner of the property, as well as the authority of their fraudulent imposter client. If such a requirement were implied, solicitors involved in conveyancing transactions would effectively be guaranteeing that their client was the registered title holder, and would be strictly liable if that were not the case. The claim for breach of warranty against Winkworth was also rejected on similar grounds.

The Court of Appeal disagreed in relation to Owen White. On the facts they did give a warranty that they were authorised to act on behalf of the true owner. It was right that the claim had been dismissed, however, because P&P had not materially relied on the warranty as such. Rather, the buyer’s representative had been induced to allow his client to exchange contracts because he believed that the necessary due diligence had been carried out.

Winkworth had done no more than provide a memorandum of sale to P&P: it pre-dated the contract and said nothing to indicate in terms that they had received the instructions summarised in the memorandum. It was not, therefore, a statement of warranty by Winkworth that they had been given those instructions by the true owner of the property.

Breach of undertaking

P&P alleged that Owen White had breached the undertaking contained in paragraph 7(i) of the Code. This provides that the seller’s solicitor undertakes to have the seller’s authority to receive the purchase money on completion. The High Court disagreed, stating that the reference to the “seller” is to the person agreeing to sell the property, not a reference to the registered title holder, if different.

In Dreamvar similar claims against MMS were also dismissed at first instance.

These decisions were reversed on appeal. Lord Justice Patten considered that this undertaking amounts to an undertaking that a seller’s solicitors have the authority of a person who would be genuinely entitled to complete the sale and not merely the authority of the person (imposter) who happens to be their client.

Breach of trust

At first instance MDR had defended the claim for breach of trust contending, amongst other things, that they were authorised to pay the purchase monies to the seller’s solicitors on receipt of latter’s undertaking to provide title documents. This argument was advanced on the basis that Dreamvar implicitly agreed to MDR dealing with the monies in accordance with ordinary conveyancing practice.

MDR had conceded liability for breach of trust by the time the appeal was heard. They accepted that, as the purchaser’s solicitors, they held the purchase monies on bare trust for their client pending completion. They were only authorised to release the monies on completion of a genuine sale.

Similarly, the Court of Appeal held that the solicitors for both vendors should have retained the purchase monies in their accounts, to await either a genuine completion, or further instructions from the purchasers’ solicitors. They acted in breach of trust when they released the purchase monies to or at the direction of their (imposter) clients.

Relief from liability for breach of trust

A defence to a claim for breach of trust is potentially available under section 61 of the Trustee Act 1925 where a trustee has acted honestly and reasonably and ought fairly to be excused for breach of trust.

The judge at first instance found that MDR had been honest and reasonable but did not exercise his discretion. MDR was far better able to meet or absorb the consequences of the
breach of trust than Dreamvar. It was also not irrelevant that M&amp;R was much better placed to consider and as far as possible achieve greater protection for Dreamvar as against the risk which actually occurred. Dreamvar did not have recourse against M&amp;S and little or no prospect of tracing or making a recovery against the fraudster.

The Court of Appeal agreed that the first instance judge was entitled to take these factors into account. It went on to say, however, that the question of M&amp;S’s liability to Dreamvar was irrelevant. It made no difference to the assessment of the reasonableness of M&amp;R’s conduct and the inequality of its position and that of Dreamvar. It was always open to M&amp;R to seek a contribution from M&amp;S.

Interestingly, Lady Justice Gloster disagreed that M&amp;R should not be relieved under section 61. They had not been dishonest and had obtained the required undertaking from M&amp;S under the Code. They had acted reasonably. She considered that primary responsibility should rest with M&amp;S who were responsible for checking the identity of the seller. Lady Justice Gloster went on to say, amongst other things, that the court’s sympathy should not be with one commercial party rather than another just because one has insurance and the other has not.

Owen White were not held liable for breach of trust at first instance. The court said, however, that had it been asked to consider the section 61 point, it would have found that Owen White did not act reasonably. The solicitors had failed to carry out several fairly basic identity checks on their client. Other factors were that P&amp;P was not insured against the fraud and had incurred a liability to a lender for the purchase price. P&amp;P was also liable to (and had paid) the true owner because of the significant work done to the property.

The Court of Appeal did not seek to interfere with these findings.

Comment
Where does the court’s decision leave us?

Purchasers are offered some protection against fraudsters because the release of completion monies other than in a genuine transaction amounts to breach of trust. It is therefore open to purchasers to seek damages against their own solicitors and/or the vendor’s solicitors.

Despite Lady Justice Gloster’s dissenting view, it also seems likely that the courts will for public policy reasons decline in many cases to give solicitors statutory relief for breach of trust. Having said that, such decisions are fact specific and it cannot be ruled out that relief will be granted in another case.

Conveyancers are faced with the challenge of identifying further methods by which they can minimise the risk of claims.

Should buyer’s solicitors, for example, now ask their counterparts to give an express warranty as to the identity of the seller? Alternatively — and probably without much prospect of success — should they or their client conduct their own identity checks.

The Law Society has published an “interim informative” for solicitors and is assessing whether and how the Code and other Law Society documents might be amended and is also reviewing other elements of practice.
Licensees and relief from forfeiture

The stakes were high in *The Manchester Ship Canal Company Limited v Vauxhall Motors Limited* (formerly General UK Motors Limited) [2018] EWCA Civ 1100 where a landowner stood to gain in excess of £300,000 a year if the court decided that a licensee had no right to relief from forfeiture in respect of a surface water discharge licence.

Although critical of its reasoning, the Court of Appeal agreed with the High Court and concluded that the licensee had a right to relief from forfeiture, effectively reinstating its existing licence for which only a £50 annual fee was payable.

**Facts**

In 1962 the Manchester Ship Canal Company (“MSCC”) granted a licence (the “Licence”) to Vauxhall for the discharge of surface water and trade effluent from its plant at Ellesmere Port into the Manchester Ship Canal.

The Licence was granted in perpetuity in consideration of a payment of £50 per year, with no provision for any increase. It included a right for MSCC to terminate where the annual fee was in arrears subject to giving prior written notice to Vauxhall.

Vauxhall failed to pay the £50 annual fee which was due on 12 October 2013. After giving written notice, MSCC terminated the Licence on 30 March 2014. Vauxhall’s immediate offer to pay the outstanding fee was not accepted. The parties then entered into negotiations for a new licence and, although terms were agreed by mid-2014 on a subject to contract basis, a fresh licence was not completed. In January 2015 Vauxhall put MSCC on notice that they intended to apply to the court for relief from forfeiture and went on to make the application in March 2015.

By the time the appeal was heard in April 2018 the evidence was that the value of the right to discharge water and trade effluent into the canal was in the region of £300,000 to £440,000 per year.

**High Court decision**

His Honour Judge Behrens decided that he had jurisdiction to grant relief against forfeiture and exercised his discretion in favour of such relief. He came to this conclusion assuming (without deciding) that the right of passage of water granted in the Licence is “about as close to a possessory right as it is possible to imagine”.

**The Court of Appeal’s decision**

MSCC’s appeal was based on an argument that the court did not have jurisdiction to grant relief from forfeiture. Even if it did, the application for relief was made too late.

Did the court have jurisdiction to grant relief from forfeiture?

Giving judgment, Lord Justice Lewison held that relief from forfeiture is available only where possessory or proprietary rights are granted. He disagreed with the approach adopted by the judge in that:

- He had focused on the question whether the right of passage of water was possessory when he should have considered whether the Licence, considered as a whole, granted possessory rights
- By apparently extending the boundaries of the jurisdiction to rights which were “close to possessory”, he was diverging from a substantial body of precedent

It was therefore necessary for the Court of Appeal to decide if the Licence granted Vauxhall proprietary or possessory rights.

It was accepted by both parties that the Licence did not create proprietary rights.

Lord Justice Lewison went on to identify the two elements of the concept of possession as factual possession (a sufficient degree of physical custody and control) and intention to possess (intention to exercise custody and control on one’s own behalf and for one’s own benefit).

He also stated that possessory rights need not be rights in land in order to support a right to relief from forfeiture and can include, for example, rights in infrastructure, or the airspace enclosed by infrastructure.

In this case, the terms of the Licence were such that possessory rights were granted. The Licence gave Vauxhall sole responsibility for the construction, maintenance and repair of the infrastructure. MSCC did not reserve any rights to use the infrastructure or to carry out works to it, unless Vauxhall were in default of its own obligations.

Taking those rights into account, the physical characteristics of the property and the intention that only Vauxhall would be entitled to use and maintain it, there was a sufficient degree of physical custody and control of the infrastructure (but not of the soil on which it was placed) having regard to the nature of the property and the manner in which property of that character is normally enjoyed.

It was also clear that Vauxhall intended to exercise its rights and fulfil its responsibilities on its own behalf and for its own benefit.

The conclusion that Vauxhall had possessory rights was not enough on its own to support a decision to grant relief from forfeiture. It was in addition necessary that MSCC’s right to forfeit was intended to secure the payment of money or the performance of other obligations. This was clearly the case because the rights granted in the Licence were subject to the annual fee being paid and performance of the covenants contained in it. The termination right exercised by MSCC was available only if Vauxhall were in default.

**Should the court have granted relief from forfeiture?**

The Court of Appeal could not interfere with the Judge’s decision unless he was wrong in principle and he had not made such an error.

There was no time limit by which Vauxhall was required to make an application for relief. Delay was a factor which could be taken into account but only where the delay had caused prejudice, which was not the case. Vauxhall did not issue proceedings promptly but MSCC could have made its own application to the court at any time after service of the termination notice and/or chosen to peaceably re-enter.

The Judge was also entitled to take into account the windfall which would benefit MSCC if relief from forfeiture was refused.

**Comment**

The case is a useful reminder that the right to relief from forfeiture is not necessarily limited to tenants.

Where commercially possible, it is advisable to include flexible “no-fault” termination provisions in licences, so that the licensee may end the contract without fear that the right to forfeit may be available to the licensor.

If — as is likely — it is also necessary to include provisions in a licence permitting termination for breach, the licensor should bear in mind that the licensee may have a right to relief, depending on the subject matter of the contract and all the circumstances.

---

Keith Conway
Partner
E: keith.conway@clydeco.com
T: +44 20 7876 4298
Network Rail tied in knots!

In a previous edition of the Bulletin (August 2017), we discussed the County Court case of Williams & Waistell v Network Rail Infrastructure Ltd in which two adjoining property owners succeeded in a private nuisance claim against Network Rail who had failed to take appropriate steps to prevent the spread of Japanese knotweed roots and shoots from its land onto the Claimants’ land.

The Court of Appeal has recently handed down judgment on Network Rail’s appeal and it has upheld the decision at first instance, albeit for different reasons to those given by the Recorder (Network Rail Infrastructure Limited v Williams & Waistell [2018] Civ 1514).

Background

Japanese knotweed, described by the Environment Agency as “indisputably the UK’s most aggressive, destructive and invasive plant”, has long been a scourge on landowners. The plant is extremely fast growing and according to the RICS paper on “Japanese Knotweed and Residential Property”, once established, its “eradication requires steely determination”. Japanese knotweed poses a particularly significant risk to properties within seven metres of the plant and it can affect drains, paving, walls and outbuildings. For this reason, the presence of knotweed can affect the valuation of a property and it is likely to influence a lender’s decision when offering a mortgage on the affected property.

First instance decision

Network Rail owned the land directly behind the Claimants’ properties, comprising an access path leading to an embankment which dropped down to the train line. Japanese knotweed had been present on the embankment for at least 50 years. The Claimants issued private nuisance claims against Network Rail on the basis that:

1. Network Rail was liable for the encroachment of the Japanese knotweed onto the Claimants’ land even though the Claimants were unable to prove that it had actually caused any physical damage to their land (the “Encroachment Claim”); and

2. the presence of Japanese knotweed on Network Rail’s land in close proximity to the boundary of the Claimants’ properties constituted a significant interference with the Claimants’ quiet enjoyment or amenity value of their properties as it affected their ability to sell their properties at the true market value (the “Quiet Enjoyment/Loss of Amenity Claim”).

The Claimants sought damages and an injunction requiring Network Rail to treat and eliminate the knotweed. At first instance, the County Court Recorder rejected the Encroachment Claim because no physical damage had been caused by the encroachment. However, the Recorder held that the Quiet Enjoyment/Loss of Amenity Claim should succeed because the amenity value of a property can, in principle, include the ability to dispose of the property at a proper value.

The Recorder found that Network Rail was aware of the presence of the plant and had constructive knowledge of the risk posed by the plant and its potential damage. Network Rail had failed to carry out its obligation as a reasonable landowner to eliminate and prevent interference with the Claimants’ quiet enjoyment of their properties and this breach of duty had caused both a continuing nuisance and damage. Accordingly, the Claimants were awarded damages.

Court of Appeal decision

Network Rail appealed the first instance decision and the Court of Appeal held that:

1. The Recorder was wrong, in principle, to conclude that the presence of Japanese knotweed on Network Rail’s land within close proximity to the Claimants’ properties was an actionable nuisance simply because it diminished the market value of the Claimants’ properties. “The purpose of the tort of nuisance is not to protect the value of property as an investment or a financial asset”. There must be physical damage to the property.

2. However, the Court of Appeal did not agree with the Recorder’s decision to reject the claim based on the spread of the knotweed’s rhizomes to the Claimants’ land. The Court noted that Japanese knotweed and its rhizomes can be described as a “natural hazard” and their mere presence “imposes an immediate burden on the owner of the land in terms of an increased difficulty in the ability to develop, and in the cost of developing, the land, should the owner wish to do so”. As such, “they are a classic example of an interference with the amenity value of the land.”

As Network Rail had actual knowledge of the presence of knotweed since 2013, it was, or ought to have been, aware of the risks it posed to adjoining properties, and it failed reasonably to prevent the interference with the Claimants’ enjoyment of their properties, an actionable nuisance had arisen. If the Claimants were required to prove damage in order to complete the cause of action, this was constituted by the diminished ability of the Claimants to use and enjoy the amenity of their properties.

Comment

This judgment is significant because it reaffirms the decision that the presence of Japanese knotweed can be an actionable nuisance before it has caused physical damage to neighbouring land because of its effect on the amenity value and quiet enjoyment of such land.

Property owners, managers and insurers should be aware of the potential liability they are exposed to by the presence of Japanese knotweed. Careful management, weed control and eradication programmes will be prudent. When acquiring property, purchasers should be mindful of the presence of the plant and raise any queries with their surveyors and solicitors.

Sarah Buxton
Associate
E: sarah.buxton@clydeco.com
T: +44 20 7876 4789
In the March 2018 case of *J N Hipwell & Son v Szurek* [2018] EWCA Civ 674, the Court of Appeal held that a term should be implied into a lease requiring the landlord to keep the electrical installations for the premises safe and certified despite the fact that the lease contained an entire agreement clause.

**Background**

A tenant of café premises brought a claim against her former landlord for losses she had suffered as a result of her being forced to close her business due to issues she had been experiencing with the electrical wiring in the premises.

The lease was silent upon which party was responsible for the repair and maintenance of the electrical installations and it contained a standard entire agreement clause (as well as a non-reliance clause in respect of any pre-contract representations made by the landlord).

The tenant claimed that, prior to the grant of the lease, the landlord had falsely or negligently represented that the electrical wiring had passed a safety inspection and, as a result, she was entitled to rescind the lease. In the alternative, she alleged that the landlord was in repudiatory breach of an implied term that he would be responsible for the maintenance and/or repair of the electrical installations and that she was entitled to accept the repudiation.

At first instance, the Judge found that, before the tenant signed the lease, the landlord had represented to her that the electrical wiring had been completed and certificated. The tenant claimed that, prior to the grant of the lease, the landlord had falsely or negligently represented that the electrical wiring had passed a safety inspection and, as a result, she was entitled to rescind the lease. In the alternative, the landlord had conceded (correctly, in the Court’s opinion) that an entire agreement provision does not affect or prevent the implication of a term which is to be implied on the grounds of business efficacy.

The Court noted that it is well established law that a term may be implied where it is necessary to give business efficacy to a contract. Applying the principles identified in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 and another, the Court firstly considered whether any express provisions of the lease covered this point. The Court noted that the lease “is an oddly balanced document, imposing on the tenant far more extensive covenants than upon the landlord” and that “the lack of any express obligations in respect of either the exterior of the Premises or the plumbing and electrical supply and installations is an obvious gap inconsistent with the objective intentions of the parties” which were apparent from both the landlord’s evidence and the other terms in the lease.

To ensure that the lease did not lack commercial or practical coherence, the Court of Appeal held that, as a matter of business necessity, a landlord covenant should be implied to the effect that the electrical installations were safely installed and that they would continue to be covered by a safety certificate.

**Comment**

Whilst this case was decided upon its facts, it is a reminder that careful drafting is required to ensure that the terms of a contract accurately reflect the parties’ intentions. It also illustrates that an entire agreement clause will not prevent a term from being implied into a contract if it is necessary to give business efficacy to the contract in question.

Sarah Buxton
Associate
E: sarah.buxton@clydeco.com
T: +44 20 7876 4789
In Zinc Cobham 1 Ltd and others v Adda Hotels and others [2018] EWHC 1025 (Ch), the High Court considered whether specific performance should be ordered requiring a tenant of hotel premises to trade, operate and maintain their hotels in accordance with specific brand standards.

**Background**

The appellants, which were part of the Zinc Hotels Group (“Zinc”), owned ten hotels which were each leased to the Respondents (“Adda”) and operated under the ‘Hilton Hotels’ brand.

Each of the leases contained express covenants which essentially required Adda to maintain active trade in the hotels in accordance with the Hilton Hotels Brand Standards and to keep the hotels in the standard of repair and decoration consistent with their use as first class hotels and as required by the Hilton Hotels Brand Standards.

Following their inspection of the hotels in 2015, Zinc served various schedules upon Adda setting out their alleged breaches of the Hilton Hotels Brand Standards. The schedules identified specific remedial works which were said to be required to each of the hotels.

Adda failed to undertake the remedial works (which would have cost over £100 million) and so Zinc issued a claim for specific performance of Adda's obligations under the leases to trade operate and maintain each of the hotels in a manner consistent with the Hilton Hotels Brand Standards, by remedying the various breaches. In the alternative, they sought damages for breach of covenant.

Upon Adda’s application, the Deputy Master struck out Zinc’s claim insofar as it sought the remedy of specific performance.

The decision

Zinc appealed the Deputy Master’s decision. The High Court Judge concluded that the Deputy Master’s reasoning was correct and dismissed the appeal for the following reasons:

1. The Deputy Master was right to conclude that Zinc had no real prospects of obtaining an order for specific performance at trial and the Particulars of Claim disclosed no reasonable grounds for seeking such relief.
2. Zinc’s claim for specific performance had an “air of unreality and fictionality about it” because:
   a. they had not established that they had any legitimate interest which went beyond monetary compensation and so specific performance should not, in principle, be granted;
   b. the difficulties which Zinc alleged it would have in valuing its loss were “more imagined than real” particularly where Zinc accepted that the performance of the works would make no difference to the rent they would receive from their investment in the hotels. Seeking an order requiring Adda to carry out £100 million worth of works, which cost would far exceed the likely loss Zinc would suffer, would be inequitable;
   c. the necessary valuation exercise was not overly complicated and, even if it were, this would not satisfy the necessary condition of having a legitimate interest extending beyond monetary compensation;
   d. the Court could not grant specific performance of the principal trading obligations — i.e. it could not order Adda to actively trade from the premises — and so, by the same reasoning, it was not able to order specific performance of the ancillary parts of the obligation relating to the mode of trading;
   e. even if an order for specific performance were available, such an order would create difficulties in terms of supervision and the only available enforcement mechanism would be contempt of Court “creating oppression caused by [Adda] having to do things under threat of proceedings for contempt”.
3. In the circumstances, the Judge held that Zinc had no real prospect of successfully persuading a Judge at trial that it would be appropriate to make an order for specific performance and there was no other compelling reason why the issue should not be disposed of at that stage. Damages would be an adequate remedy.

Comment

This case illustrates the potential difficulties landlords may face when seeking an order for specific performance of tenant covenants under a lease. Landlords may wish to consider alternative enforcement options, such as forfeiture or, if the lease contains a Jervis v Harris type clause, whether it would be preferable to undertake the works themselves and subsequently seek to recover the costs from the tenant as a debt.

Sarah Buxton
Associate
E: sarah.buxton@clydeco.com
T: +44 20 7876 4789

Damages awarded in lieu of specific performance for breach of tenant’s covenants to maintain brand standards
“No Oral Modification” Clause
- Rock Advertising Limited v MWB Business Exchange Centres Limited
[2018] UKSC 24

The parties entered into a contract which included a clause that all variations to the contract “must be agreed, set out in writing and signed on behalf of both parties before they take effect”. Such a clause is called a “No Oral Modification” clause. The issue in this case was whether the clause was effective. One of the parties argued that it was not because: (i) a variation of an existing contract is itself a contract; (ii) precisely because the common law imposes no requirements of form on the making of contracts, the parties may agree informally to dispense with an existing clause which imposes requirements of form; and (iii) they must be taken to have intended to do this by the mere act of agreeing a variation informally when the principal agreement required writing”. Those arguments have been accepted in other countries, such as Australia, Canada and Germany and also found favour in the Court of Appeal in this case.

The Supreme Court (by a 4:1 majority) has allowed the appeal from that decision. Lord Sumption, giving the leading judgment said that “In my opinion the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation”. He commented that the reasons provided for disregarding No Oral Modification clauses “are entirely conceptual” and "there is no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation.”

The same principle also applied to entire agreement clauses: "Both are intended to achieve contractual certainty about the terms agreed, in the case of entire agreement clauses by nullifying prior collateral agreements relating to the same subject-matter."

This Supreme Court decision provides certainty to contracting parties as it clarifies the law in relation to No Oral Modification clauses. A failure to comply with the requirements of such a clause when varying a contract will not necessarily invalidate the change, but if the required contractual variation procedure has not been followed, it will be difficult to prove the amendment effective. As Lord Sumption stated, it gives businesses more control over who has the authority to agree such amendments.

Commercial arrangements do require flexibility and this does not sit well with the judgment. However if parties wish to amend an agreement, the judgment highlights the value of checking and following the procedures set out in the contract to vary its terms.

The decision, while establishing that No Oral Modification clauses are effective, also recognises that the clauses carry the risk that a party may act in good faith on the contract as varied orally where the other party tries to avoid the agreed change. The Supreme Court acknowledged that the principle of estoppel may apply in such circumstances and it is possible that in a future case estoppel may be used by parties to argue that an oral amendment is still valid despite a No Oral Modification clause.

Clyde & Co Real estate specialists offers the combined benefits of experience, market knowledge and a 'best in class' service. Our practice spans the full spectrum of transactional and contentious real estate work and associated disciplines, including:
- Development
- Finance
- Investment
- Litigation
- Occupier and landlord services
- Planning

In addition, our real estate team work closely with our construction, corporate, employment and tax practices, giving our clients the benefit of a stable team able to assist on all aspects of a project.

Contact us: realestate@clydeco.com
Visit us: www.clydeco.com

Isaac Taylor
Associate
E: isaac.taylor@clydeco.com
T: +44 20 7876 4878

They always go the extra mile for the client and are extremely personable.
Chambers UK, Real Estate

They are excellent and very commercial. They always try to come up with the most cost-effective solution.
Chambers UK, Real Estate

They show outstanding 'communication and team-building' skills. Keith Conway is recommended for his 'commercial realism and common sense'
Chambers UK, Real Estate
50+
Offices*

3,800
Total staff

415
Partners

1,800
Lawyers

*Includes associated offices.

Clyde & Co LLP is a limited liability partnership registered in England and Wales. Authorised and regulated by the Solicitors Regulation Authority.

© Clyde & Co LLP 2018

www.clydeco.com