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PH PERSPECTIVES

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Breach of Quiet Enjoyment

Summary

In *Timothy Taylor Ltd v Mayfair House Corporation & Another* the High Court considered the interrelationship between a landlord's right to build and a tenant's entitlement to quiet enjoyment. The Court held that although the lease gave the landlord the right to build, the landlord had to take all reasonable steps to minimise disturbance to the tenant. In this instance the Court held that the landlord was acting unreasonably and was in breach of its covenant for quiet enjoyment and in derogation from its grant.

Facts

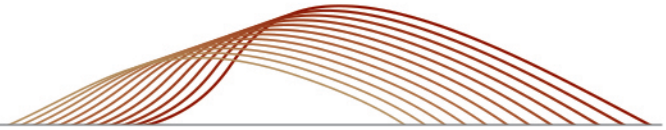
The tenant operated a high class art gallery from the ground and basement floors of a building in Mayfair. The tenant's lease was for a term of 20 years from January 2007, at a rent in excess of £500,000 a year. The lease reserved an express right for the landlord to alter or rebuild the building even if the premises or their use or enjoyment were materially affected. It also gave the landlord the right to erect scaffolding temporarily provided that this did not materially adversely restrict access to, or the use and enjoyment of, the premises. The lease contained a landlord's quiet enjoyment covenant.

In 2013, the landlord started works to rebuild the interior of the building from the first floor upwards to create new flats. The works were noisy to the point that staff suffered absences due to illness caused by the noise, had to wear headphones and on occasions had to close the gallery. The landlord also erected scaffolding which enwrapped the gallery in the whole building with the result that the art gallery was almost invisible.

The tenant claimed that the landlord had not taken all reasonable steps to minimise disturbance and was in breach of its covenant for quiet enjoyment. It sought damages for past breaches of its rights and injunctions in respect of future works.

Decision

The Court held that a reservation of a landlord's right to build should be interpreted as entitling the landlord to carry out the works in question, provided that the landlord takes all reasonable steps to minimise disturbance to the tenant. In considering reasonableness, the Court may take into account:



- What knowledge the tenant had of the intended works at the commencement of the lease;
- Any offer of compensation made by the landlord to the tenant for the disturbance; and
- Whether the works were being carried out for the personal benefit of the landlord or for the benefit of all the tenants in the building.

On the facts the Court held that the landlord was acting unreasonably in the exercise of its right to build and was in breach of its covenant for quiet enjoyment and in derogation from grant. The premises were let as a high class art gallery at a substantial rent and the landlord ought to have had regard to the need to keep the gallery running with as little disturbance as possible to customers and staff. The landlord had refused to offer the tenant any form of discount to the rent. The scaffolding design paid little or no regard to the interests of the tenant and was entirely unreasonable. It impeded access to the premises to a material degree and was not justified under the express right reserved in the lease for the landlord to erect scaffolding.

There was little communication with the tenant in respect of the likely duration of the works and the noise levels likely to be experienced. The landlord made no attempt to limit the hours for noisy work until after the tenant had complained.

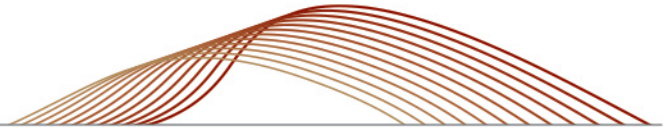
The Court awarded damages for the landlord's breach of its quiet enjoyment covenant and for derogation from grant. Although the tenant had not suffered any loss of profits, it had suffered loss of the use and enjoyment of the premises. The Court assessed damages at 20% of the rent payable under the lease from the date the scaffolding was erected to the date of judgment.

The Court however refused to grant injunctions requiring the landlord to use reasonable endeavours to restrict noise during particular hours and to dismantle the scaffolding and re-erect it using an alternative design. Such injunctions would be impractical and disproportionate and the better course would be for the scaffolding to remain in place and for the Court to award damages in lieu for future breaches. These were assessed at 20% of the rent from the date of judgment to the date of completion of the works, assuming the landlord did not increase the level of disturbance.

Comment

This case serves as a reminder that a right contained in a lease allowing a landlord to build and to erect scaffolding does not give the landlord the ability to completely disregard the tenant's implied or express right to quiet enjoyment. The landlord must take all reasonable steps to minimise disturbance to the tenant or else it runs the risk of claims for damages and, in appropriate cases, an injunction. When contemplating carrying out building works which may impact on tenants, landlords should consider the following steps to minimise the risk of being in breach of the covenant for quiet enjoyment and in derogation from grant:

- Give the tenant as much information as possible about any proposed works before the lease is granted;
- Consult early with tenants and discuss how disturbance can be minimised;
- Design scaffolding in a way that minimises impact on the tenant's use of its premises;
- Meet regularly with the tenant to discuss any concerns and to give details of forthcoming works;



- Ensure that the tenant is kept informed of the works timetable;
- Ensure that any provisos in the lease limiting the landlord's express right to carry out the works are strictly complied with; and
- Consider offering compensation or a rent discount.

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Surrender by Operation of Law – Unequivocal Action Required

Summary

In the recent High Court decision of *Padwick Properties Ltd v Punj Lloyd Ltd*, a guarantor was held liable under the terms of lease and was ordered to pay £4m and obliged to take up a new lease of premises having failed in its attempt to argue that the lease had been surrendered by operation of law.

The Court applied the long established common law principles that a surrender by operation of law will only occur when there is unequivocal conduct by both the landlord and tenant that is inconsistent with the continuation of the lease. The case serves as an important reminder to all parties that a tenant vacating premises or returning the keys to its landlord and the landlord accepting the keys is, of itself, not necessarily sufficient to amount to a surrender by operation of law.

Case Facts

The tenant of a lease found itself in financial difficulties and went into administration (on 7 July 2011). As part of the administration, the keys for the premises were returned to the landlord together with a letter offering the surrender of the lease (on 30 September 2011 following short term occupation being provided by licence to a group company of the tenant). In response to this, the landlord changed the locks at the premises, provided security at the premises and began marketing the premises for relet with vacant possession (but no letting was secured and the premises were taken off the market).

In 2013 (some two years after handing back the keys), the tenant went into liquidation and the lease was disclaimed. The defendant (Punj Lloyd) was the guarantor of the lease and following the disclaimer of the lease, the landlord gave notice to the defendant demanding payment of outstanding rent and requiring the defendant to enter into a new lease in accordance with the terms of the guarantee.

The defendant argued that it was not liable under the guarantee as the lease had been previously surrendered by operation of law.

Decision

The Court rejected this argument on the basis that the landlord's actions were not inconsistent with the continuation of the lease and therefore there had been no surrender by operation of law. The Court therefore gave judgment in favour of the landlord and ordered that the guarantor was liable for £4 million of back rent and made an order for specific performance for the obligation to take a new lease.

The Court considered the behavior of the parties and, in particular, considered whether such conduct would amount to an unequivocal acceptance that the tenancy has ended. The Court

concluded that none of the landlord's actions (taken as a whole) provided this unequivocal acceptance of the termination of the lease and were not wholly inconsistent with the continuation of the tenancy. In particular:

- The acceptance of the keys was not in itself inconsistent with the continuation of the lease. The landlord made it clear that it accepted the keys only for the purposes of maintaining security at the premises.
- Likewise, the changing of the locks and other extra security was undertaken for sensible provision of security at the premises so as to protect the landlord's interest (and had been at the insistence of the landlord's insurers). It is a question of fact as to whether the landlord has gone beyond measures to protect his interests, and the burden of proof lies with the tenant.
- The mere marketing of the premises was not inconsistent with the continuation of the tenancy (and this is established law). However, the position would have been very different if a new lease had been entered into.

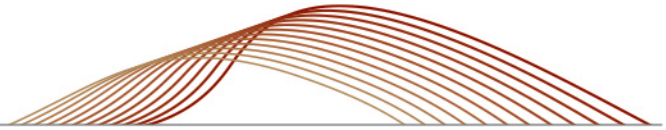
The Court reinforced the principle that surrender by operation of law requires conduct that is unequivocal on both sides which renders it inequitable for either party to dispute that the tenancy is at an end—such an arrangement must be consensual in its nature.

Comment

The decision highlights the need for care to be taken by the parties to a lease when considering a potential surrender by operation of law.

From a landlord's perspective (it would usually be a tenant seeking to be released from its obligations in a lease), the case is a welcome reiteration of the common law principles. A landlord can be faced with a tenant handing back keys and having to juggle between taking action to protect its continuing interests in the property or mitigate potential losses and overstepping this line in being deemed to have accepted the surrender by its action when it did not intend to do so. A landlord needs to carefully analyse its actions if it wishes to defend against any suggestion of surrender by operation of law. The case reiterates that accepting keys, securing premises and undertaking marketing would not necessarily be inconsistent with the continuation of the tenancy but conduct would be considered as a whole. A landlord would still need to be careful in its approach and should ensure that it makes it clear to the tenant at all times that it has not accepted the surrender (and any acceptance of keys is strictly on this basis) and not undertake any action that would be inconsistent with the continuation of the lease (*i.e.*, all actions that the landlord would be permitted to undertake under the terms of the lease). For example, the grant of any rights of third party occupation or works to the premises in excess of repair would be likely to be considered inconsistent with the continuation of the lease. As a landlord, it is also important to ensure that managing agents are also alert to the implications of their actions.

For a tenant, it is clear that it cannot simply hand back keys and consider the lease at an end, even if the landlord accepts these. Tenants (and guarantors) need to be careful in assessing whether the landlord has actually accepted the surrender and whilst this can be construed by way of actions by the landlord, it will need to be established that there is unequivocal conduct on behalf of the landlord amounting to an acceptance that the tenancy has ended. If at all possible it is preferable to formally agree and document the surrender or, failing that, documentary evidence should be obtained of the acceptance. If the landlord is unwilling to provide such a confirmation, it is likely that they will seek to argue that any action they do undertake does not amount to the unequivocal acceptance of a surrender. A tenant or guarantor will then need to identify clear action



by the landlord if they are to avoid ongoing potential liabilities and would be advised to keep an accurate paper trail and attendance notes of any such conduct, correspondence or conversations.

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Forfeiture for Non-Payment of Rent – Relief after Delay

Summary

In the High Court decision of *Pinepoint Limited v Grangeglen Limited* a tenant was granted relief from forfeiture despite a delay of 14 months following the landlord exercising peaceable re-entry for rent arrears. The Court held that the tenant had made its application for relief with the required "reasonable promptitude" despite this considerable delay.

Facts

Pinepoint was the tenant of a long lease of an industrial unit (having paid a premium of £90k in 1981 for a 125 year term) but the lease additionally reserved an annual ground rent of £100 together with obligations to pay insurance premiums and service charge contributions to the landlord, Grangeglen. The lease also provided for standard provisions for re-entry by the landlord on non-payment of rent. Arrears of rent built up and in April 2014 the landlord forfeited the lease by way of peaceable re-entry. No action was taken by the tenant until it issued a claim for relief in June 2015, some 14 months following the original forfeiture.

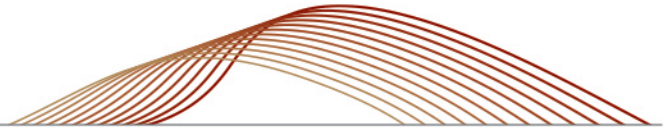
The background to the arrears and the tenant's delay was complicated by the operation of the tenant's business at the premises having been the subject of legal proceedings which led to a freeze on the tenant's assets and the tenant's managing shareholder having claimed he had been suffering from mental illness and depression (and having been imprisoned in March 2016 in relation to the ongoing legal issues).

Decision

The Court held that relief from forfeiture was granted on the basis that the tenant would pay the outstanding arrears. The delay in itself was not considered to be fatal to the application for relief and the judge considered that the Court's discretion to grant relief is a broad one and is not constrained by a fixed time limit.

The Court, in considering the case, reviewed previous case law on forfeiture:

- Following a landlord forfeiting by peaceably re-entering premises (rather than by issuing court proceedings) the Court's power to grant relief is in equity (*i.e.*, outside any legislation) and therefore its discretion is wide;
- Where a landlord has forfeited using court proceedings, S210 of the Common Law Procedure Act 1852 requires that a tenant make any application for relief from forfeiture within six months of the possession order—in cases of peaceable re-entry, the Court is not bound by this timeline and shall only have regard to this limit. Instead, the Court is required to assess whether the tenant has acted with 'reasonable promptitude' in the circumstances;
- It should always be a condition of relief that the landlord be paid in full any outstanding arrears (together with its costs of recovering them) and there would need to be evidence that the tenant will be able to pay; and



- When considering forfeiture for non-payment of rent, save in exceptional circumstances, the Court should not take into account other breaches of covenant.

The Court considered that there were a number of reasons for the delay in seeking relief including that the tenant's manager suffered from depression, together with a lack of understanding forfeiture, financial difficulties caused by the freezing order and a lack of specialist advice. The Court also considered that the tenant was putting itself in a position to pay the arrears. The tenant's own previous illegal activity was not considered an exceptional circumstance justifying refusal of relief.

A key consideration was that the Court considered the Landlord had not suffered any prejudice by the delay as no attempts had been made to re-let or otherwise dispose of the property. The only ascertained loss to the landlord had been the failure to pay the ground rent, service charge and insurance under the lease and there was a significant disproportion between the sum due under the lease and the windfall the landlord would get if relief were refused (*i.e.*, the termination of a valuable long lease).

Relief from forfeiture was therefore granted on the basis that the tenant would pay the arrears within a fixed period.

Comments

A landlord's right of forfeiture as a means of enforcing the tenant's obligation to pay rent is regarded as a cornerstone of the landlord and tenant relationship. However, it is accepted and understood by landlords and those advising landlords that this is subject to the Court's equitable power to grant relief to the tenant and that this is almost certain to be granted if a Court is satisfied that the tenant can and will pay the arrears together with any costs incurred by the landlord.

It had been commonly understood that the application of Section 210 of the Common Law Procedure Act 1852 (which in peaceable re-entry cases acts as a guide rather than a fixed time limit) meant a tenant would have six months (or thereabouts) to make an application to court for relief from forfeiture and landlords have had an expectation that after expiry of this six-month period, it would be safer to re-let the property. However, well-advised landlords are aware that some risk would remain as to any delayed application. Previous cases confirmed that if an application for relief was to be made by a tenant, the tenant must do so with "reasonable promptitude." This case took this concept to an apparent extreme and therefore landlords must exercise caution.

This caution would manifest itself as an exercise of:

- Considering any tenant offer to pay arrears—any subsequent payment would almost certainly bring about relief;
- Assessing the amount of arrears against any windfall that would benefit the landlord in the event of forfeiture (*i.e.*, where there is a valuable lease); and
- If in doubt, to consider forfeiting via court proceedings—this would allow the six-month period to be an absolute certainty.

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Rights of Light – Developers Should Be Wary of Their Conduct

Summary

The recent Court of Appeal decision in *Ottercroft Ltd v Scandia Care Ltd (1) and Dr Mehrdad Rahimian (2)* has highlighted the importance given by courts to a party's conduct when deciding whether to impose an injunction or an award for damages in rights of light claims.

Despite the claimant having only suffered a minor loss, the Court upheld the original judge's decision to issue an injunction on the basis that the defendants had acted in a high handed way and in breach of contractual undertakings.

Facts of the Case

The defendants, Scandia (together with one of its directors Dr Mehrdad Rahimian), had constructed a metal fire escape staircase as part of a mixed use development which had the result of blocking the window of a neighbouring restaurant. The claimant, the owner of the restaurant, had sought an injunction requiring the removal of the staircase on the basis that it interfered with its rights of light.

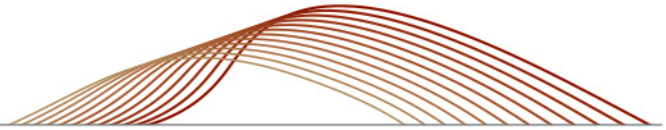
It was not a point at issue as to whether the defendants had interfered with the claimant's rights of light as this was not contested by the defendant. The matter before the Courts was solely whether an injunction or a damages award was the appropriate remedy.

The High Court originally granted an injunction ordering that the defendants remove the staircase. The main reasoning for making this order rested on the defendants' conduct. Of particular note was that the claimant's loss suffered by way of injury to the right of light was only valued at £886 but that the cost of removing and relocating the staircase was assessed in the region of £6,000 and the trial judge accepted that the injury to the claimant was relatively minor and that such injury could be adequately compensated by a monetary award. Notwithstanding this, the trial judge gave weight to the fact that the defendants had acted in an unneighbourly and high handed manner and had proceeded with the construction of the staircase despite knowing that it might interfere with the claimant's rights of light and despite expressly having given undertakings to the claimant not to interfere with such rights.

The defendants appealed the decision, claiming that the trial judge had not exercised his discretion correctly in balancing the conduct of the defendants against the consequences of awarding an injunction.

The Court of Appeal, however, upheld the trial judge's decision and Lord Justice Lewison, handing down the judgment, concluded:

- The defendant's arguments in support of the appeal were, in the most part, irrelevant given the admission that the staircase did infringe the claimant's rights of light;
- It was feasible to move the staircase, albeit at a cost of around £6,000;
- The trial judge was entitled to consider the defendant's conduct and was not wrong to exercise his discretion on the basis of an assessment of such conduct. The defendants had demonstrably acted in a high-handed manner; and
- An injunction was the correct result not only in the interests of justice in the immediate case but also to serve as a warning to others whose conduct is considered to be questionable.



Comment

The question of the appropriate remedy has been a contentious area in rights of light cases for some time now. Prior to 2014, injunctions were ordered in all but the most exceptional cases, with damages only being awarded instead of injunctions where (i) the injury to the claimant is small; (ii) the claimant can be compensated in money; (iii) a small payment would be adequate compensation for the claimant; and (iv) it would be oppressive to the defendant to grant an injunction.

The landmark case of *Coventry v Lawrence*, however, threw a lifeline to developers when the Supreme Court endorsed a more flexible approach to awarding the appropriate remedy. While an injunction would remain the default remedy, the Supreme Court was of the opinion that the test referred to above should not be so rigidly applied and that the full circumstances of each case should be taken into account. This gave Courts a greater level of discretion over whether to award an injunction or damages, and signaled a change of approach that was warmly welcomed by developers.

This latest case, however, serves as a warning to developers that their conduct throughout the entire process is likely to be a major factor in the court's consideration and that even in situations such as this, involving a relatively minor breach, courts will not shy away from issuing injunctions where they feel that the developer has acted in such a high-handed and unneighbourly manner. That said, the decision in the case was not entirely unexpected and on the particular facts of the case, weight was applied to the underhand nature of the developer's conduct in both breaching undertakings previously given and secretly commencing works.

The lesson for developers is therefore one of good faith and good conduct. In the event that an adjoining owner takes legal action for breach of rights of light, a developer should place itself in a position whereby it is able to demonstrate an absence of cynical or high-handed attitude or conduct and preferably conduct acting in good faith.

Rights of light remain a contentious aspect of any development and advice from both a technical and legal perspective is therefore imperative.

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Round Up

New Measurement Regime

With effect from 1 January 2016 all RICS professionals undertaking and commissioning property measurements in relation to office buildings will be required to follow the RICS Property Measurement Professional Statement. The RICS Property Measurement Professional Statement replaces the Code of Measuring Practice in relation to offices and is in line with the new International Property Measurement Standard (IPMS). IPMS is the new global standard that aims to enhance transparency and consistency in the way property is measured across markets.

Professional Statements for other property classes including residential, industrial and retail will be added over time as IPMS is expanded.

The RICS Property Measurement Professional Statement replaces familiar terminology such as "gross external area", "gross internal area" and "net internal area" with new terminology to be known as IPMS1, IPMS2 and IPMS3 and introduces the concept of Internal Dominant Face to establish the inside finished vertical surface to be used for determining an internal perimeter. Floor areas will change and there will be consequent changes to measurement reports.

New Telecommunication Code

The Electronic Communications Code is set out in Schedule 2 to the Telecommunications Act 1984 and is designed to facilitate the installation and maintenance of electronic communications networks. It gives rights to the providers of these networks to install and maintain apparatus in, over and under land and includes a form of security of tenure in favour of providers.

The Code has attracted much criticism over its lifetime due to its complexity and lack of clarity. In February 2013, the Law Commission recommended that the Code should be completely rewritten to reflect the vast changes that have taken place in digital communications since the Code was first established in 1984. Following consultation, the government published its proposals for a revised Code in May 2016.

In the Queen's Speech on 18 May 2016, the Digital Economy Bill was presented as legislation that the government intended to carry over into, or introduce in, the 2016-17 Parliament. The Bill introduces a new Code, which is set out in Schedule 1 to the Bill. The Bill was introduced to the House of Commons and given its first reading on 5 July 2016.

The main proposed changes are as follows:

- The new Code will make major changes to the way land is valued. It proposes changing the basis of valuation to a "no scheme" rule that reflects the underlying value of the land, rather than its value to the network provider. Currently, most operators pay a market rent negotiated between both parties. The changes will restrict the ability of landowners to charge what they like for the rental of their property by telecoms network providers and operators.
- Operators will have new automatic rights to upgrade and share apparatus without prior agreement or payment to land owners where there is minimal adverse visual impact.
- The new Code will also enshrine reassignment of Code rights. This means that as infrastructure assets are sold and acquired by communications providers, under infrastructure sharing arrangements for example, there will be no option for landlords to negotiate new terms for existing contracts.
- The new Code will prohibit the ability to contract out of the Code's provisions.
- Code rights will continue to apply to land when it is bought and sold, without any requirement to register those rights.

The new Code rights will only apply to contracts signed after the law has come into effect and will not apply to existing contracts retrospectively. There will be transitional arrangements as to how and when existing agreements transition to the provisions of the new Code.

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If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings London lawyer:

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