Hardwicke Building

Property Team

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The members of the Hardwicke Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

Telephone: 020 7242 2523
Web http://www.hardwicke.co.uk/property
Team Email: property@hardwicke.co.uk
Civil Clerks: Kevin Mitchell, Danny O'Brien, Paul Martenstyn, Daniel Kemp, Oliver Edwards & Richard Evans

Stephen Lennard	1976	Alexander Bastin	1995
Robert Leonard	1976	Edward Rowntree	1996
Wendy Parker	1978	David Pliener	1996
Karl King	1985	Fiona Scolding	1996
Michelle Stevens-Hoare	1986	Brendan Mullee	1996
Steven Woolf	1989	Nicola Muir	1998
Sara Benbow	1990	Alison Meacher	1998
Daniel Gatty	1990	Alastair Redpath-Stevens	1998
Rupert Higgins	1991	Andrew Lane	1999
Arthur Moore	1992	Sarah McCann	2001
Kerry Bretherton	1992	Dean Underwood	2002
Alexander Goold	1994	Michael Wheater	2003
Andrew Skelly	1994	Alice Marshment	2003

Property Team Newsletter

Did you see…….. ? Recent cases you may have missed

Repairing Covenant

Latimer & another v. Carney & others [2006] EWCA Civ 1417
A landlord- brought action for dilapidations against R, former tenant- report from surveyor on condition of premises at termination of lease- inter alia, roof repairs needed- estimate of cost of works given in report- A carried out repairs to roof, and re-let- other improvements carried out to accommodate incoming tenant's needs- A sought damages from R for the alleged breaches of the repair covenant- J rejected claim- A had failed to prove actual costs of repairs and no evidence on diminution of value of the reversion in accordance with Tenant Act 1927 s.18(1)- appeal:
Held: Appeal allowed. S.18 required the Court to determine the amount of damage to the value of the reversion resultant on the breach of the repairing covenants. This involved determining the difference in market price of the property in and out of repair. However, the Court need to do no more than find that the difference was at least as great as the amount claimed in respect of repairs. Expert evidence as to the diminution in value of the reversion was not necessary. The amount of diminution could be inferred from the evidence as to the estimated cost of the repairs. The fact that A had done more work than was necessary for repair did not mean that there had been no damage to the value of the reversion or that A had not suffered any loss as a result of R's breaches of covenant. A failure to repair the decorative state of the premises is a breach of the covenant to repair for the purpose of s.18(1) even if that failure also constituted a breach of a covenant for periodic decoration in the same lease.

Rent arrears

Thomas v. Ken Thomas Ltd [2006] PLSCS 206
A tenant and R landlord- lease required payment of rent and VAT- A in financial difficulties, fell into arrears of rent- R appointed a third party to advise on its position- third party proposed that A enter into a Company Voluntary Arrangement – R informed by third party of proposed CVA- R also notified that A intended that rent arrears owed for November should go into the CVA as an unsecured amount and that VAT that had not been paid in respect of a number of months' rent should also go into the CVA as an unsecured amount- A further informed that it intended that December's rent would be paid in two equal payment- A responded that it would treat the equal payments as November's rent- payments made- third party contacted R and proposed to pay January's rent in instalment- A responded that it would treat those payments as December's rent- A brought claim for forfeiture on grounds of non-payment of rent and non-payment of VAT on the rent- A contended that R had waived right to forfeit by accepting rent due after right to forfeit arose- J held no waiver, R entitled to forfeit and relief on terms that A pay all the rent and VAT- appeal:
HELD: Appeal allowed. R had waived its right to forfeit the lease by accepting rent falling due after the right to forfeit arose. A had right to apportion payments in respect of its debts to a particular debt. A had apportioned the payments to the December and January rents. If R was not prepared to accept the payments as apportioned by A he could have refused to accept them or returned them within a reasonable time. Once R had accepted the payments he was fixed with the consequences of the appropriation of the debt payments in relation to any action for forfeiture.

Land

Adverse possession

Rehman v. Benfield [2006] EWCA Civ 1392
A owner of property occupied by R- R and husband entered property in 1991- R's husband (without A's knowledge) fraudulently obtained a lease of the property- husband arranged for someone to impersonate A- fake A went to a solicitor (X) who drew up a lease which he and R signed in December 1991- in 1992 X sent a copy of the counterpart lease to A's solicitors (D), on their request- A did nothing until 2004 when he commenced possession proceedings- R alleged adverse possession- question whether R had acknowledged A's title by signing the lease so that time did not start to run until after December 1991- J held that, for the purposes of s.30(1) of the 1980 Act, A could not point to any document signed by which amounted to an acknowledgment R- appeal:
HELD: Appeal allowed.
A was the owner in fee simple of the property, and entitled to be registered as its proprietor. The requirements of s.29 of the 1980 Act were satisfied. R had clearly acknowledged A's title in writing when she signed the lease document in December 1991. The fact that the document she signed was in fact ineffective to create a valid and binding lease was irrelevant. She had clearly acknowledged A's title. There had been communication of the acknowledgement for the purposes of s.30(2) of the 1980 Act when the lease was sent to D. The lease had been in the possession of X with R's authority. She could not object to it being sent to D, who were A's agent.

Case summaries by **Arthur J. Moore**

Sub-tenant successfully challenges freeholder's charges

In a recent case the freeholder of a building let the upper floors, containing 24 flats, to a tenant. The tenant in turn sub-let the individual flats on long leases. The freeholder charged the tenant an annual "maintenance charge" which the tenant then passed on to the sub-lessees. Is this "maintenance charge" in fact a service charge, and can it be challenged by the sub-lessees? These were the questions recently considered by the Court of Appeal in *Oakfern Properties Ltd v. Ruddy* [2006] EWCA Civ 1389.

The freeholder sought to argue that to be a service charge, the tenant would need to be just a "tenant of a dwelling" (*s.18*), rather than the tenant of dwellings and other parts, as the tenant was in this case. In support of this proposition the freeholder relied upon the language of the *1985 Act* itself (and the use of "dwelling" elsewhere, such as *s.3*) and the *Rent Act* language used from the time service charge statutory provisions were introduced by the *Housing Finance Act 1972*. It was accepted that either parties' submissions would produce anomalies, but the freeholder gave the example that if Mr Ruddy (a sub-lessee) was correct and the maintenance charge payable by the tenant was a "service charge" then so would the charges paid by a tenant of a shopping centre which happened to include a janitor's flat.

Mr Ruddy argued that the County Court decision of *Heron Maple House Ltd-v-Central Estates Ltd [2002] 1 EGLR 35* should be applied. The tenant (lessee) was the tenant of each of the 24 flats, and the fact it was also the tenant of the other flats and other parts of the block was irrelevant. As for the *Rent Act* provenance of the service charge statutory provisions, caution should be exercised in applying the same language and meaning to what are two very different systems. With respect to the shopping centre example given by the freeholder, why should there be no protection in such cases against any unreasonable charge? In a case such as this the corollary would be that the tenant would be required to pay the maintenance charge come what may and then, when passing it on to the 24 sub-lessees through their service charge, be subject to the irrecoverability provisions of the service charge regime, leaving a potential shortfall.

The Court of Appeal held (per Jonathan Parker LJ) that the "tenant of a dwelling" should not be read as "tenant of a dwelling and of nothing else", and *section 18(1)* did not suggest otherwise. Further, there was no significant relationship between the service charge provisions and the *Rent Acts*, the former emphasis being "not so much on protecting the tenant in his home as on providing him with a way of challenging unreasonable charges sought to be levied by his landlord". *Section 18(1)* should be given its ordinary meaning and this allows for the charge imposed by the freeholder in this instance on the head-lessee being a "service charge" for the purposes of the *Landlord & Tenant Act 1985*. Moreover, the Act did not provide that only the payor of a service charge could challenge it. There was no restriction on who might challenge the service charge and Mr Ruddy (who had no direct relationship with the payee) could do so. Permission to appeal was refused. Hardwicke Building's **Andrew Lane** appeared for Mr Ruddy.