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.

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Property Team Newsletter

Rent Review – some timely thoughts

You might think that the scope for litigation over the interpretation of rent review clauses in commercial leases would be restricted by the many cases on the subject which have already been through the courts. But that would be to underestimate the variety that is found in the format of such provisions and the extent to which laymen fail to operate them as the draftsmen intended. A recent case in the Court of Appeal illustrates both where the law has become reasonably predictable and where there is still room for considerable argument. *Lancecrest Ltd v Asiwaju* [2005] 16 EG 146 was concerned with whether a landlord's trigger notice was served too late, and whether a tenant's response to the trigger notice was a valid counter-notice for the purposes of the clause in question.

The rent review clause in the lease in *Lancecrest* provided for reviews every four years if the landlord should serve a notice stating what he proposed the new rent should be. That notice was to be served "no more than 12 months before the review date". It was accepted that this meant during the 12 months ending with the review date. If the tenant did not like the landlord's proposal he could serve a counter-notice within two months after receiving the landlord's notice (in respect of which time was stated to be of the essence) informing the landlord that he did not accept the landlord's proposed new rent. If no counter-notice was served within two months, the rent proposed by the landlord was to be the new rent. The landlord served its trigger notice 54 weeks after the relevant review date. The tenant responded by a letter which did not address the level of rent proposed but asserted that the trigger notice was invalid. The Court of Appeal had no difficulty holding that the landlord's trigger notice was effective even though served late. By a majority it held that the tenant's letter amounted to a valid counter-notice.

The question whether a rent review notice is served too late will depend primarily on whether time was of the essence of the relevant part of the rent review clause. If it was not, and no notice was served making time of the essence, then the fact that a notice was served after the time provided for will not invalidate it. The principle to be applied when considering whether time is of the essence in respect of the operation of a rent review clause was established in *United Scientific Holdings v. Burnley B.C.* [1978] AC 904. Lord Diplock encapsulated the position at p. 930, saying:

> "I would hold that in the absence of any contra-indications in the express words of the lease or in the interrelation of the rent review clause itself and other clauses or in the surrounding circumstances the presumption is that the time-table specified in a rent review clause for completion of the various steps for determining the rent payable in respect of the period following the review date is not of the essence of the contract."

In *Lancecrest* the Court of Appeal found that the landlord was entitled to serve the trigger notice after the relevant review date. There were no contra-indications in the lease or surrounding circumstances to rebut the usual presumption. On the contrary, a significant indicator that time was not intended to be of the essence for service of the landlord's notice was that time was expressly stated to be of the essence in the sub-clause regarding service of the tenant's counter-notice but not in the sub-clause providing for the landlord's trigger notice,

So *Lancecrest* is a reminder that time is presumed not to be of the essence of rent review clauses unless there are strong reasons to conclude that the parties to the lease intended otherwise. Obviously, express words stating that time is of the essence are the most straightforward way of rebutting the presumption. A deeming provision stating what the rent will be if a notice or counter-notice is not served will usually rebut the presumption as well (see *Starmark Enterprises Ltd v CPL Distribution Ltd* [2002] Ch 306), as might an interrelated break clause.

The question whether the tenant's letter denying the validity of the landlord's trigger notice amounted to a counter-notice informing the landlord that the tenant did not accept the landlord's proposed new rent caused the Court more problems. Clarke LJ held that the test was whether the document relied on as the counter-notice was in terms which were sufficiently clear to bring home to the ordinary landlord that the tenant is purporting to exercise his right to serve a counter-notice. He said that it was inappropriate to apply too literal an approach to the construction of a counter-notice of the kind in question. Applying that test, he held that the tenant's letter was a valid counter-notice. A reasonable landlord would have realised that the

tenant was not agreeing to the proposed new rent, even though the letter was phrased in terms of a rejection of the validity of the landlord's trigger notice and did not address the question of the level of rent proposed.

With some hesitation, Neuberger LJ agreed with Clarke LJ's conclusion. Brooke LJ dissented. He did not think that the letter could be read as a notice informing the landlord that the tenant did not accept the new rent proposed. While this is, of course, a decision on the particular rent review clause and the particular notice in question, it amply illustrates the room for manoeuvre that exists, post *Mannai*, when dealing with a notice that does not strictly comply with what is required by a lease.

Daniel Gatty

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

Landlord and tenant

9 Cornwall Crescent v. Kensington & Chelsea RLBC [2005] EWCA Civ 324

Appellant nominee purchaser- collective enfranchisement- Leasehold Reform Housing and Urban Development Act 1993- Appellant's notice to Respondent freeholder proposed purchase price of £210- freeholder's counter-notice proposed £130,000- Appellant claimed Respondent's notice invalid as price proposed was not realistic- Cadogan v. Morris [1999] 1 EGLR 59 relied on- Appellant claimed they entitled to purchase at their proposed price- claim dismissed- purchaser appealed-

Held: Appeal dismissed. The *Cadogan* test did not apply to freeholder's counter-notices under s.21 of the Act. The important difference was that the proposed price in the tenant's notice could become the actual purchase price (section 25), while that in the freeholder's notice could not. Because of this contextual difference, the Court should not construe the words "proposed purchase price" the same way in s.13 and s.21.

Arthur J. Moore

Housing

Newham LBC v. Hawkins [2005] EWCA Civ 451

H was a secure tenant by succession and became a tolerated trespasser after breach of Court Order-H died- Lanldlord Respondents sought possession against the Appellants (the children and grandchildren of H) who remained in occupation- Appellant's claimed H had had new tenancy had arising out of Respondent's conduct- possession granted- occupiers appealed.

Held: Appeal dismissed. The general rule was that no new tenancy would arise where a trespasser was in occupation with the landlord's consent- he was a tolerated trespasser. No offer of new terms of a tenancy, or any demand for a rent increase, had been made. There was no evidence of intention to create a new tenancy.

Arthur J. Moore

Adverse possession

Beulane Properties Ltd. v. Palmer [2005] 14 EG 129, Nicholas Strauss QC, sitting as a deputy High Court Judge

Landowner seeking order restraining defendant from entering on or using land- defendant claimed adverse possession for twelve years up to October 1998- claimant argued that he was being deprived of property without compensation, which was a breach of art.1 of the first Protocol of the European Convention on Human Rights-

Held: On the facts, the defendant had established adverse possession by the end of June 2003, by which time the Human Rights Act 1998 was in force. The legislation therefore fell to be interpreted in the light of s.3 of the HRA. The effect of the legislation was to deprive the claimant of all his rights in relation to the land. This amounted to a deprivation under art. 1 of the first Protocol. The claimant received no compensation for the loss. The expropriation of registered land in the present circumstances was disproportionate to the aims of the statutory provisions. The legislation would be reinterpreted in the light of s.3 of the HRA. The defendant's claim to have acquired title to the land failed, and the claimant's claim succeeded.

Arthur J. Moore

Batsford Estates (1983) Co Ltd v. Taylor & another [2005] EWCA Civ 489

Appellants were the son and daughter of one of the three original tenants of a farm- mid-60's Respondents served notice to quit-oral agreement that tenants would surrender tenancy if two of them could stay for life- further tenancy subsequently granted in error to the two occupiers- further notice to quit in 1985- not acted on- Appellants' father (one of the occupiers) dies in 2000- respondents serve further notice to quit- claim for possession- Appellants claimed adverse possession on basis of father's possession since 1985- Respondents claim occupation was by permission to be implied from the fact that they had not pursued the notice to quit- claim for adverse possession rejected- appeal.

Held: The appeal was dismissed. What was needed was an overt act by the land owner from which the permission could be inferred. It was irrelevant whether the occupant was aware of it or not. In the context of adverse possession, the landowner was not required to communicate the permission by word or conduct. Once a permission was communicated, it became express and was no longer implied.

Arthur J. Moore

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