SLAUGHTER AND MAY/

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REAL ESTATE NEWSLETTER

NEWS

Know your rights

Government introduces Renters' Rights Bill

The government has introduced the Renters' Rights Bill, which is based largely on the previous government's Renters (Reform) Bill, and is expected to come into force in Spring 2025. New monthly-periodic assured tenancies will replace fixed-term assured and assured shorthold tenancies. The new style tenancy will continue until the tenant serves two-months' notice or the landlord can establish a ground for possession. The tenant's two-month notice can be served at any time. All existing tenancies will be converted to assured tenancies, unless a section 21 notice has already been validly served. The Bill provides for the much anticipated abolition of section 21 "no fault" evictions. The landlord will now need to demonstrate one of the revised mandatory or discretionary grounds for possession. Under the new rules, landlords will not normally be able to terminate a tenancy in the first 12 months and will need to give four-months' notice if they wish to redevelop, sell or move into the property. This means that the notice period for no-fault grounds of possession will increase from two to four months. If the landlord proves a no-fault ground, the property cannot be re-let or advertised for re-letting within a 12-month period. A mandatory ground for possession will arise if three months' arrears of rent have accrued, subject to giving 4-weeks' notice. A discretionary ground arises in respect of persistent arrears falling below the three-month threshold or in respect of wants of repair. There are specific rights to terminate at any time for antisocial or criminal behaviour, and greater flexibility to determine student lettings linked to the academic year.

Rent increases are limited to the market rent and can only occur once every twelve months. A rent increase is instigated by the landlord serving two months' notice on the tenant. The tenant has the right to challenge the proposed increase and the First-tier Tribunal will determine whether the proposed figure exceeds the market rent. The new rent will be the lower of the landlord's proposed rent and the market rent as determined by the Tribunal. To prevent bidding wars, landlords cannot accept more than the asking rent. The Bill introduces a new Ombudsman scheme to help deal with landlord and tenant disputes. Landlords will also need to register on a new private-rented sector database providing information for prospective tenants. The Decent Homes Standard will now apply to the private-rented sector, in addition to social housing. Other provisions include preventing landlords from unreasonably withholding consent to a tenant having a pet at the premises. The landlord can require the tenant to take out insurance to cover the associated risks. There are also non-discrimination provisions to protect tenants seeking to rent who are on benefits or with children. Breaches by landlords may result in criminal prosecution and the payment of a fine. Landlords may also be required to repay rent pursuant to a rent repayment order where an offence has been committed.

CASES ROUND UP

I like to move it

Council able to forfeit lease of zoo premises

The Tropical Zoo v Hounslow London Borough Council: [2024] EWHC 1240 (Ch)

This case involved a covenant by the tenant to "remedy any breach of a Tenant Covenant notified by the Landlord to the Tenant as soon as possible and in any event within two months after service of the Notice". This clause effectively gave the landlord two bites at the cherry when it came to forfeiture of the lease following a breach of covenant. First, following the actual breach and, secondly, following the service of the notice if the tenant had not remedied the breach in two months. The Tenant held a long lease of premises

granted by the Council to allow the relocation of zoo premises. The lease was granted in 2012 and required the tenant to build a new zoo building and education centre within two years. The building work did not take place. The landlord had reserved a right to forfeit for a material breach of covenant. In 2022, the Council served a notice that referred to the failure to build the zoo and required the breach to be remedied within two months. The tenant, not surprisingly, failed to comply and the Council served a section 146 notice and took steps to forfeit the lease. The Council instructed its agents not to accept rent, but two payments were received and not immediately returned.

The High Court confirmed that the Council was entitled to forfeit on the basis of a breach of the two-month notice covenant. The covenant had given the landlord a further opportunity to forfeit, following the original failure to build the zoo within two years of the date of the lease. It then considered whether the right to forfeit had been waived. The Council's agents merely had the role of collecting rent and did not have authority to manage the property on behalf of the Council. The agents only had a treasury function as opposed to a wider asset management role. Simply receiving rent did not amount to a waiver by the landlord because the agents did not have any wider authority to make such a decision on behalf of the Council. The Council had not waived the right to forfeit and was entitled to re-enter the premises. The tenant had failed to demonstrate to the Court that the breach would be remedied and, accordingly, relief from forfeiture was not granted.

A hard rain's a-gonna fall

Nuisance claim available for water discharge

The Manchester Ship Canal Company v United Utilities Ltd: [2024] UKSC 22

The Supreme Court has overturned the Court of Appeal's judgment and held that where foul water was discharged into watercourses, a common law claim for nuisance could arise. The Supreme Court ruled that a claim against the relevant water company under the Water Industry Act 1991 was not the only available claim where watercourses were polluted by foul water, even where there was no negligence or deliberate wrongdoing by the utilities company. The Manchester Ship Canal Company had commenced proceedings against United Utilities for nuisance and sought an injunction or damages in respect of unauthorised discharges into the canal. The Court of Appeal had decided that it was not possible to bring a claim in private nuisance where the effective remedy was the provision of a better sewage system. This was a regulatory matter and the only available remedies were those under the statutory regime.

The Supreme Court has ruled that a claim could be brought in private nuisance and that remedies were not confined to those afforded by the statutory regime. The Supreme Court found that a statute could only deprive a person of the peaceful enjoyment of its property if that was clearly Parliament's intention from the language used. The 1991 Act did not authorise the water company to discharge foul water into the canal and the discharges could have been avoided if United Utilities had invested in improving infrastructure and treatment processes. The Supreme Court acknowledged that granting an injunction requiring a sewerage undertaker to invest in new infrastructure to prevent unlawful interferences with property rights could disrupt the relevant statutory regime. However, damages could be awarded in respect of both past interference and also future or repeated interference with those rights. The decision is significant in that it opens the doors to private claims against water companies in respect of unlawful discharges into waterways.

We gotta get out of this place

Redevelopment break in renewal lease

B&M Retail Ltd v HSBC Bank Pension Trust (UK) Ltd: [2023] EWHC 2495 (Ch)

This case considered whether a landlord was entitled to have an immediate redevelopment break right in a lease renewal under the Landlord and Tenant Act 1954. The tenant held a lease of retail premises in Willesden. The landlord, HSBC, failed to oppose the grant of a new lease due to an administrative error. The tenant had requested a new tenancy by serving a section 26 notice which the landlord had failed to oppose by serving a counternotice within the required two-month period. It was, therefore, not able to oppose the grant of a new tenancy. However, the landlord did propose that an immediate landlord redevelopment break clause should be included in the new lease. At first instance, the judge decided that there was a real possibility of the landlord wishing to redevelop and ordered the inclusion of an immediate redevelopment break right. The exercise of which would, of course, be subject to the landlord satisfying the redevelopment ground of opposition under ground (f). The landlord had entered into a conditional agreement for lease of the premises with Aldi. Evidence was produced indicating that there was a real possibility of the landlord being able to obtain planning permission for a new Aldi store and carry out the proposed redevelopment. The tenant argued that the

inclusion of an immediate and continuing break right defeated the object of the Act by failing to confer protection on the tenant's business.

The appeal failed on the basis that the judge had applied the correct legal test and had considered the relevant factors in connection with the inclusion of a break clause. There was a real possibility of the proposed redevelopment taking place and a redevelopment break clause should be included. The inclusion of such a break right gave the tenant very little certainty as to the term of its new lease. Provided, the landlord could satisfy ground (f), it would be able to terminate the lease if it wished to redevelop. The tenant would be entitled to compensation but would lose its premises. The tenant has been granted permission to appeal.

Getting better

State of repair and lease renewal

Gill v Lees News Ltd: [2023] EWCA Civ 1178

The Court of Appeal has considered ground (a) under the Landlord and Tenant Act 1954. Under ground (a), the court considers whether the tenant "ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said [repair and maintenance] obligations". The tenant operated a newsagent and convenience store under two leases. The tenant sought to renew the leases under the Act, but the landlord opposed the grant under grounds (a), (b), (c) and (f). Ground (b) relates to the persistent delay in paying the rent, ground (c) to other substantial breaches and ground (f) is the redevelopment ground. Although the premises were in substantial disrepair at the date of the landlord's section 25 notice, the tenant had remedied the defects by the date of the hearing. At first instance, the Judge rejected the landlord's grounds of opposition on the basis that the wants of repair had been remedied and the other alleged breaches were minor in nature. The landlord appealed in relation to the date on which a ground relating to tenant default or misbehaviour had to be made out and in relation to the court's consideration of whether the tenant "ought not to be granted a new tenancy".

The Court of Appeal ruled that ground (a) does not confine the court to considering the state of repair as at the date of the hearing. The court can consider disrepair at the date of the section 25 notice as well as earlier in the term. This means that a landlord can oppose the grant of a new lease based on the state of repair of the premises even if the wants of repair are subsequently remedied. However, the remediation will be a factor in determining whether the tenant "ought not" to be granted a new tenancy. The Court of Appeal also confirmed that ground (a) only relates to disrepair of the holding and the disrepair of other parts of the building falls within ground (c). The decision offers guidance as to determining whether a tenant "ought not" to be granted a new tenancy. The court should look at the relevant grounds, both individually and cumulatively, and can consider the consequences for the tenant of not being granted a new tenancy.

I'm not the man you think I am

Collateral warranties are not construction contracts

Abbey Healthcare (Mill Hill) Limited v Augusta 2008 LLP: [2024] UKSC 23

The Supreme Court has allowed the contractor's appeal and ruled that a collateral warranty was not a construction contact for the purposes of the Housing Grants, Construction and Regeneration Act 1996. The Act provides the parties to a construction contact with a right to adjudication. A building contract had been entered into for the design and build of a new care home, which was then let to Abbey on a 21-year lease. The contractor gave a collateral warranty to Abbey. Defects in the construction, including fire safety issues, became apparent following completion. The contractor failed to remedy the defects and both the landlord and Abbey brought adjudication claims against it. The contractor challenged the adjudicator's jurisdiction in respect of Abbey's claim on the basis that the collateral warranty was not a construction contract. The adjudicator rejected this challenge and awarded damages to Abbey as well as the landlord. Abbey sought to enforce the award, and this resulted in court proceedings. The Court of Appeal had confirmed the adjudicator's award on the basis that the collateral warranty was a construction contract and Abbey had been entitled to refer the dispute to adjudication.

The Supreme Court overturned the Court of Appeal's decision. An agreement was only a construction contract if it gave rise to separate obligations for the carrying out of construction work. The collateral warranty simply contained confirmation that the contractor had diligently performed and would continue to perform its obligations under the original building contract. The Supreme Court decided that this did not constitute a separate obligation for the carrying out of construction works. The obligation was only a derivative obligation in respect of the obligation for carrying out construction works in the underlying construction contract. Accordingly, the collateral warranty was not a construction

contract for the purposes of the Act and the adjudicator did not have jurisdiction to consider Abbey's claim. This ruling means that most collateral warranties will not be construction contracts for the purposes of the Act and will not give rise to a right to adjudication.

Someone to watch over me

Building Safety Fund and contribution orders

R (on the application of Redrow Plc and others) v Secretary of State for Levelling Up, Housing and Communities: [2024] EWCA Civ 651

The appellant housebuilders were developers of high-rise residential buildings. Following the Grenfell tragedy, the developers had signed a pledge to the Building Safety Fund to ensure that tenants were not required to pay for the cost of remediating unsafe cladding. In this case, tenants buying long leases of the flats had taken out insurance policies to cover the risk. The developments were found to have unsafe cladding and remedial works were required to be carried out. Several of the tenants had successfully claimed under their insurance policies. Notwithstanding the insurance proceeds, the Secretary of State decided to require the developers to contribute to the Building Safety Fund in respect of the cost of the remedial works. The developers sought to challenge this decision by way of judicial review. The developers argued that the Secretary of State had acted unlawfully and had failed to identify the reasons for the decision. The application for permission to bring judicial review proceedings was dismissed at first instance and the developers appealed.

The Court of Appeal considered whether the Secretary of State had followed the government's guidelines when making the decision to require contributions to the Fund from the developers. The fact that the tenants had claimed successfully under their insurance policies did not detract from the fact that the developers had made an unqualified pledge to contribute to the Fund. Accordingly, the Secretary of State had acted lawfully in requiring contributions in respect of the costs of remediation.

Connected

Landlord's repairing obligations and replacement fixtures

Triplark Limited v Whale and others: [2024] EWHC 1440 (Ch)

This case considers a landlord's plans to replace the communal heating and hot water system in a residential block in Highgate. There had been a history of issues between the tenants and the landlord, including the appointment of a manager under the Landlord and Tenant Act 1987 and a ruling that costs relating to the partial instalment of new systems were not recoverable through the service charge. At the end of the manager's appointment, the landlord sought a ruling regarding the extent of its and the tenants' obligations in relation to the heating and hot water systems. The landlord believed that it was entitled to replace the original systems with new systems which were not identical but provided the same services. In addition, it sought a declaration that it could disconnect the services and reconnect them to the replacement systems and that it would not be in breach of its obligations if it provided services up the exterior of each flat, which the tenant could connect to. The leases include a tenant covenant to repair the flat including "central heating apparatus … solely applicable to the flat and all fixtures and additions thereto". There is also a landlord covenant to "maintain and renew when required the central heating and hot water apparatus and all ancillary equipment thereto other than that contained in the flat". The landlord argued that it was able to install the new systems and the tenant covenant would then apply to the new heat exchangers as "all fixtures and additions thereto". The tenants argued that the new system would substantially increase their repairing obligations.

The Judge rejected the landlord's contention on the basis that "fixtures and additions" only applied to things added by the tenants and not additions made to the heating system by the landlord. In addition, the landlord's proposed new system involved two heating devices whereas the original system when the leases were granted only involved one. Under the old system, heat and hot water created by the communal systems passed directly to the flats. Under the proposed new system, a heat exchanger was required to pass heat to each flat through a secondary system and each tenant would be responsible for repairing the secondary system. That has an additional burden on the tenants that had not been contemplated when the leases were granted.

School's out

Forfeiture for non-payment of rent

Tanfield and another v Meadowbrook Montessori Limited: [2024] EWHC 1759 (Ch)

This case serves as a reminder of the significance of including the words "whether formally demanded or not" in a forfeiture provision for non-payment of rent. The landlord served a statutory demand on the school tenant in relation to arrears of rent as well as a winding-up petition. The

landlord then took steps to forfeit the lease of the school by peaceable re-entry. The peaceable re-entry took place in term time causing considerable disruption. The school claimed that the forfeiture was unlawful and also sought damages by way of counterclaim. The lease did not include the words "whether formally demanded or not" in the forfeiture for non-payment of rent provision. The school argued that a formal demand for rent had not been made.

The common law rules in relation to a formal demand for rent applied and the landlord had not complied with these. The court ruled that the forfeiture was unlawful and the school was entitled to damages. The court found that the school had an arguable claim for damages in respect of the lost school fees when the school was closed as a result of the forfeiture, as well as exemplary damages.

Somebody's watching me

Court rules on drones and unknown trespassers

Anglo International Upholland Ltd v Wainwright and persons unknown: [2023] 5 WLUK 613

This case considered whether a drone flying over another person's property amounted to a trespass. The claimant owned St. Joseph's College in Upholland. The property was a disused listed building, previous uses of which had included a seminary and a boarding school. The owner was concerned about safety at the site and was spending around £260,000 a year on security. The property was of interest to urban explorers who accessed the building by climbing the perimeter fence and also filmed their activities using drones. The pictures taken and recordings made were distributed on social media and encouraged others to access the site. The property owner applied for an interim injunction to prevent trespassers from entering the property and to stop the flying of drones over it. The named defendant was identified as one of the urban explorers and had a presence on social media. The identity of the other intruders was not known.

The judge considered section 76 of the Civil Aviation Act 1982 and decided that a drone should be considered in the same way as an aircraft. As such, there was no trespass if the drone flew over property at a height that was reasonable in all the circumstances. The act of flying was not in itself a trespass but the taking of photos and filming meant that the height at which the drones were flying was not reasonable. The court ordered an injunction preventing trespass on the site and the flying of drones over it for a two-year period. The court also considered the law in relation to the grant of injunctions against unknown persons, including the Supreme Court ruling in *Wolverhampton v London Gypsies and Travellers*, as well as appropriate methods of service on unidentified defendants. In the case of persons unknown, the onus was on the applicant to persuade the court that alternative methods of service were appropriate and reasonable. In this case, the applicant requested the named defendant to notify his followers on his social media page. The judge also allowed the documents to be served by posting QR codes on notices around the perimeter of the site, this avoided the need to make large amounts of documentation available at the site.

Back together again

Costs of terminal dilapidations were recoverable

Peachside Limited v Lee and Keung: EWHC 921(TCC)

Section 18(1) of the Landlord and Tenant Act 1927 limits the damages recoverable by a landlord for breach of a tenant repairing covenant. The first limb of S18(1) limits damages to the diminution in value of the landlord's reversion caused by the breach and the second limb provides that damages are not recoverable where works are to be carried out by the landlord at the end of the term which would render any repairs in respect of the tenant's breaches valueless. For example, where the landlord intends to demolish or redevelop the premises. This case related to restaurant premises in Manchester forming part of a former textile warehouse. The tenant vacated the premises in March 2021 leaving them in a state of disrepair and resulting in the landlord serving a section 146 notice and seeking to forfeit. The landlord initially planned to re-let the premises as a restaurant but decided that the best option was to re-let the premises as office premises. The landlord proposed to carry out the necessary works in two phases. The first to remedy the wants of repair for which the tenant was responsible and the second to install a new lift and redevelop the premises as offices. The landlord had carried out the repairs but by the time of the hearing did not have the funds to carry out the second phase. The tenant argued that the works carried out by the landlord were unnecessary and involved improving the premises. It also argued that the cost of the works exceeded the diminution in value of the landlord's reversion and that some of the works were rendered valueless by the landlord's plans to convert the premises into offices.

The court considered whether the works were reasonable and necessary, and also whether the landlord's intentions for the redevelopment of the

premises as offices were genuine. A particular issue was whether the installation of a new passenger lift as opposed to repairing the existing goods lift was reasonable. The court agreed that the premises would command a reasonable rent as offices and that the landlord had acted reasonably in carrying out the initial repairs. Accordingly, the landlord was able to recover the cost of these works as dilapidations.

It's been a long time coming

Consent for tenant's alterations

Messenex Property Investments Ltd v Lanark Square Ltd: [2024] EWHC 89 (Ch)

In this case, the tenant applied for a declaration that its landlord had unreasonably withheld consent to the tenant's proposed alterations. The tenant's lease of a mixed-use building required it to obtain landlord's consent for alterations or additions to the building and the consent was not to be unreasonably withheld or delayed. In 2020, the tenant made two requests for consent to carry out some substantial structural works. The landlord asked for additional information including preliminary drawings prepared by a structural engineer. Correspondence between the parties followed for nearly three years culminating in the preparation of engrossments of the licence for alterations and an agreement in principle in respect of the additional rights over the landlord's adjoining premises required by the tenant to carry out the works. However, formal consent for the works was not granted and the tenant applied for a declaration that consent had been unreasonably withheld. In addition to the tenant's failure to provide the structural engineer's drawings, the landlord contended that the works would involve a trespass on its adjoining land, that the tenant had failed to provide an unconditional undertaking in respect of the landlord's reasonable costs and that there was a lack of clarity in respect of the tenant's proposals.

The court found in favour of the landlord and refused to grant the declaration. The landlord had acted reasonably in requiring sight of the structural engineer's drawings and it had also acted reasonably in insisting on an unconditional undertaking for its costs. The undertaking given by the tenant had been expressed to be conditional on completion of the licence within 14 days, notwithstanding the missing drawings. However, the court found that there had been sufficient clarity as to the tenant's works as engrossments of the licence for alterations had been prepared and an agreement in principle regarding access to the landlord's adjoining land to carry out the works had been reached. The onus was on the tenant to show that the landlord had acted unreasonably. In relation to section 19(2) of the Landlord and Tenant Act 1927, the application for consent did not have to take any particular form. It had to be clear to the landlord that an application for consent to specific works had been made and that a response was required. A ground for refusal may relate to property other than the demised premises, such as the impact on the landlord's adjacent property. Although it may be reasonable to require an unconditional undertaking in relation to costs, it may not be reasonable to require payment of rent arrears and other outstanding sums as a pre-condition to giving consent.

A certain smile

Conditional relief from forfeiture

Biljani v Medical Express (London) Ltd: [2024] EWHC 2246 (KB)

The claimant tenant operated a dental practice from a consulting room on Harley Street owned by the defendant. The landlord also operated a medical practice from the building. The lease provided that the tenant would only use the premises as "a fully registered dental practitioner for legitimate dental or surgical procedures". The claimant was suspended by the General Dental Council and started using the premises to provide cosmetic services, including Botox treatments. The landlord was not happy and served a section 146 notice seeking forfeiture for breach of the user covenants.

The judge found that the treatments provided while the tenant was suspended from practice were in breach of the lease. However, the judge granted relief from forfeiture on the condition that the tenant would not use the premises until her suspension came to an end and the claimant was required to give an undertaking to this effect. The court considered the landlord's desire to preserve the good name of the landlord and its building but was prepared to grant relief on a conditional basis.

I want to break free

Renewal lease and tenant break right

Kwik-Fit Properties Ltd v Resham Ltd: [2024] EWCC 4

This case concerned the terms of a renewal lease under the Landlord and Tenant Act 1954. Kwik-Fit held a lease of premises in Tyne and Wear for a term of 25 years. The initial annual rent was £35,000 subject to review, but no review had ever taken place. The lease expired on 8 April 2021 and the tenant held over under the Act. Negotiations took place for the grant of a new lease. Three issues remained outstanding, and these were referred to the court. The tenant claimed that it

should be entitled to a right to break at the end of each five-year period. It argued that this was in line with its business policy to achieve operational flexibility. The lease required the tenant to contribute to the cost of repairing a shared accessway. The contribution was expressed to be one third of the costs but allowed for the landlord to apply a different percentage if it was fair and reasonable to do so. The tenant argued that this liability should be subject to a cap. The amount of the rent was also disputed.

The court decided that it was not fair and reasonable to include a tenant break clause. There was no real evidence that this was Kwik-Fit's nationwide policy or that it was in line with the car maintenance sector generally. The tenant could not impose a cap on the contribution to the costs of repairing and maintaining the accessway. In particular, the existing provisions were subject to the landlord acting fairly and reasonably, and the percentage could go down as well as up. A rental figure of £39,300 was awarded by the Court. It was satisfied that a rent review had not been implemented as the landlord could not achieve a higher rent on the review dates.

OUR RECENT TRANSACTIONS

We have advised Derwent London on the letting of the retail units at One Oxford Street.

We advised Song Capital on a £331m ground debt transaction secured on a portfolio of 76 Morrisons stores.

We advised London Square on the acquisition of a residential development site at Stratford Cross.

We are advising Crystal Palace on its Selhurst Park redevelopment project, including a new 13,500-seat main stand.

AND FINALLY

Narcos

A Columbian court has ordered the destruction of the country's non-native hippos. Numbers of hippos in the country have increased to 166 and can be traced back to specimens added to the private zoo on Pablo Escobar's ranch. Following the drug Lord's demise, the hippos escaped and established a thriving population in the wild.

Christmas time

Venezuela celebrated Christmas on 1 October this year. Embattled President Nicolas Maduro had brought the holiday forward in an attempt to appease protesting Venezuelans.

Cat fight

Larry the Downing Street cat's position is under threat after Keir Starmer introduced a new kitten, named JoJo, to number 10.

Shark life

Sharks caught off the coast of Brazil have tested positive for cocaine. The drug was found in all the Brazilian sharpnose sharks tested by scientists. Brazilian sharpnose sharks inhabit coastal waters and are believed to have become contaminated after drugs dumped by smugglers found their way into the food chain.

Slow coach

Trains between Ascot and Bagshot were delayed after a tortoise, named Solomon, was spotted on the tracks just outside Ascot Station. Solomon had escaped through a hole in the fence and was returned safely to his owners.

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