SLAUGHTER AND MAY/

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NEWS

The safety dance

Further extension of tenant protection

The government has once again extended the protection afforded to commercial tenants affected by the Covid-19 pandemic. Although aimed primarily at those businesses forced to close during lockdown in the hospitality, retail and leisure sectors, the extension continues to apply to all tenants of commercial premises. The protection from forfeiture and the exercise of the commercial rent arrears recovery procedure (CRAR) will now apply until 30 June 2021, shortly after the June quarter day. This means that landlords will not be able to forfeit for non-payment rent and they will not be able to exercise CRAR until there are at least 457 days' rent outstanding. The extended period of protection can be seen as a key part of the government's support package to help businesses to survive lockdown and to become part of the post-pandemic economic recovery. The extension means that institutional investors will have to wait longer for rent to be paid. Concerns remain that some tenants are seeing the protection as an excuse for a rent holiday.

The government has again made it clear that it expects those businesses that can pay all or any of their rent to do so. Landlords and tenants should continue to work together to agree a shared recovery plan to support businesses struggling as a result of the pandemic. The government's code of practice for the commercial property sector sets out suggested principles for reaching such an agreement. A template has been added to the code that encourages ongoing discussion between landlords and tenants. It provides for the tenant to share information about the effect of lockdown on its business together with its proposals for dealing with arrears and ongoing tenant liabilities.

The government is aware of the significance of commercial leases as part of the economy and has launched a call for evidence on the effect of the pandemic on commercial rents and how to withdraw the current protection package without damaging business. Commercial rents and the landlord and tenant relationship will be key influencers as the government monitors the position and considers appropriate steps to support businesses and promote economic growth. A reminder that the government is also proposing a review of the security of tenure regime provided by the Landlord and Tenant Act 1954 and the role, if any, that this continues to have in the commercial letting market.

Summer holiday

The government's road to recovery

The Chancellor's budget seeks to support a post Covid-19 economic recovery. An extension of the SDLT holiday for residential property will help the housing market and cushion a sharp landing. The threshold for the nil rate band will remain at £500,000 until 30 June 2021 and will be reduced to £250,000 from 1 July 2021 to 30 September 2021. Thereafter, it will revert to the pre-pandemic level of £125,000. The Welsh Revenue Authority has extended the LTT holiday until 30 June 2021. Further measures relevant to the property industry include a mortgage guarantee for homebuyers with a small deposit, a three-month extension of the business rates holiday for eligible properties in the retail, hospitality and leisure sectors and further relief for the remainder of the business

rates year. The government has promised to publish its final report on its fundamental review of the business rates system in the Autumn. The Budget also contained measures to boost business including a temporary "super deduction" of up to 130% for companies investing in plant and machinery and grants to help businesses recover as lockdown eases.

Sign your name

Land Registry and the execution of deeds

A reminder that the Land Registry no longer requires applications for registration to be based on a "wet ink" original deed. First, it agreed to accept deeds executed in accordance with the *Mercury* guidance and then it agreed to accept electronic signatures. It is important to comply with the Land Registry's requirements in relation to the use of electronic signatures and the solicitor applying for registration must certify that those requirements have been satisfied. For example, the one-time password (OTP) must be sent to the signatory and any witness by text message. Although sending the OTPs by email does not affect the validity of the deed, the application for registration may be rejected.

The times they are a-changin'

SDLT and Residential Property

With effect from 1 April 2021, a 2% SDLT surcharge applies to non-UK resident buyers of residential property. The 2% surcharge is in addition to the normal SDLT rates, and also the existing 3% surcharge for acquisitions of additional dwellings and the 15% rate for acquisitions by corporate vehicles. Two tests apply for determining whether an individual is UK resident and a further test applies to companies

Know your rights

Residential leasehold reform

The government has proposed a number of reforms to residential leasehold legislation. Under the proposals, residential tenants would be able to extend their leases by 990 years without any ground rent and new leases of retirement accommodation will also be free of ground rent. Escalating ground rent structures have proved to be controversial with large numbers of residential tenants unable to afford to extend their leases. Although the focus has been on ground rents, the reforms should also make it more straightforward to exercise the right of collective enfranchisement and for individual tenants to extend their leases, including the calculation of the premium payable to the landlord. The government will also be looking at service charges and administration fees charged by landlords and managing agents. The government will also once again seek to stimulate interest in commonhold. Commonhold title was introduced in 2002 as an alternative to leasehold title and allows outright ownership of both residential flats and commercial units. However, take up by the property industry has been virtually non-existent.

CASES ROUND UP

The hanging garden

Restrictive covenant also provided a benefit to house

Re Copleston's Application: [2021] UKUT 18 (LC)

The applicants had been granted planning permission to build a new home in their garden. Their neighbours objected to the proposed development. The neighbours' garden, but not their house, had the benefit of a 1960's restrictive covenant that prevented the proposed development. The applicants applied to modify or discharge the restrictive covenant under Section 84 of the Law of Property Act 1925. They argued that the character of the neighbourhood had changed and the restriction on building had become obsolete. They also argued that the reasonable use of their land was impeded.

The application was refused. Although there had been development subsequent to the covenant, that did not render the covenant obsolete. The covenant continued to protect the amenity value of the benefitted land. Although the proposed development was a reasonable use of the applicant's land, the covenant continued to secure a practical benefit of substantial value or advantage. It was accepted that the practical benefit to the neighbours' garden by itself was not substantial. However, the court was able to consider the effect of the proposed development on the neighbours' property as a whole, including the house. The neighbours had acquired their property as a single site, including the garden with the benefit of the restrictive covenant. The court was able to construe widely the practical benefits conferred by the restrictive covenant.

Say what you say

Tenant could challenge landlord's service charge certificate

Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd: [2020] EWCA (Civ) 1521

The landlord had applied for summary judgment against the tenant in respect of unpaid service charges. The service charge schedule provided that the landlord's certificate as to the total cost and the amount payable by the tenant would be conclusive, except in the case of manifest or mathematical error. Any dispute as to the proportion payable by the tenant was to be determined by an expert. The total amount in the certificate for the service charge year 2017/18 was larger than normal and the tenant challenged it. The landlord argued that its certificate was conclusive and issued proceedings for payment. At first instance, the judge decided that although the certificate was conclusive as to the amount of the total service charge cost, whether those costs should have been incurred remained open to challenge.

The Court of Appeal allowed the landlord's appeal. The landlord's certificate was conclusive as to the "amount of the total cost and the sum payable by the Tenant". Those two elements could not be separated. Although the wording could work in the landlord's favour, the lease had been negotiated and the tenant had agreed to those terms.

D.i.v.o.r.c.e.

Break right and implied conditions

Wigan Borough Council v Scullindale Global Ltd and others: [2021- EWHC 779 (Ch)

In May 2016, the Council granted a long lease of a stately home to the defendant for use as a wedding venue. The Council had already obtained planning permission for the conversion works. The tenant was required to commence the works within six months of the grant of the lease and to complete the works, in accordance with the planning permission, before 23 May 2018. The lease contained a right for the landlord to terminate the lease if the tenant failed to meet those milestones. The right was expressed to be exercisable at any time and the Council was required to pay compensation to the tenant if the lease was terminated. On 16 September 2019, the Council served notice purporting to terminate the lease on 22 November 2019. Although the development had not been completed by 23 May 2018, the tenant argued that the works had been completed when the landlord sought to exercise the break right. The tenant remained in occupation after the break date and argued that the landlord's break notice had not been served within a reasonable time. The landlord claimed that the tenant was a trespasser and sought damages for trespass or mesne profits.

The court followed a strict interpretation of the break right and held that the Council's break notice had been effective. The words "at any time" were not to be construed as requiring the notice to be served within a reasonable time. In addition, the court could not imply such a term in the break right. It was open to the tenant to serve notice on the Council once the milestones had passed thereby making time of the essence for the exercise of the Council's break right. However, the Court was able to imply a limitation that the break notice could only be served while the tenant was still in breach. The court decided that an officious bystander would not have understood that the parties intended that the right to break could remain exercisable throughout the term notwithstanding that the tenant was no longer in default. The court found that as at the date the notice was served the tenant had not completed the development works in accordance with the planning permission and the lease had been validly terminated.

Sitting on the dock of a bay

Working quayside was town or village green

TW Logistics Limited v Essex County Council and another: [2021] UKSC 4

The owner of the quayside used it for commercial purposes relating to the operation of a port. The land had also been used by local residents for recreational use for more than 20 years. The landowner applied for the quayside to be removed from the register of town or village greens on the grounds that the recreational use by the public was not sufficient and that registration made its continuing use for business purposes a criminal offence.

The Supreme Court confirmed that the quayside had been properly registered under the Commons Registration Act 1965. The landowner was aware of its use by the public but had failed to take steps to

prevent it. The Supreme Court also confirmed that continuing to use the quayside for business purposes would not constitute an offence. The public's use for recreational purposes was qualified by the pre-existing commercial activities and the two uses remained compatible.

The whole of the moon

Meaning of planning permission in option

Fishbourne Developments Ltd v Stephens: [2020] EWCA Civ 1704

The Court of Appeal has considered the meaning of "planning permission" in the context of an option agreement. The developer had been granted an option to acquire a parcel of farm land if it obtained planning permission permitting development of the property. The developer argued that the option could be exercised if it obtained a planning permission for the whole or part only of the property. The judge at first instance agreed with the landowner that the planning permission had to relate to the whole or substantially the whole of the property. It also had to relate to the erection of new buildings and a change of use.

The Court of Appeal has confirmed the judge's interpretation of the meaning of "planning permission" in the context of the option. If the developer could rely on an inconsequential planning permission to acquire the land at a discount that would defeat the intention of the parties. The option was granted on the basis that the developer would take steps to enhance the value of the land.

Alone again or

Sale and leaseback did not trigger VAT self-supply

Balhousie Holdings Ltd v HMRC: [2021] UKSC 11

The Supreme Court has considered whether a sale and leaseback transaction of a care home amounted to a self-supply for VAT purposes. The taxpayer had formed a VAT group with a number of subsidiaries. As part of a financing arrangement, the care home was transferred intra group and then sold to a third party that immediately leased it back. HMRC argued that the group company had disposed of its entire interest in the care home and that the benefit of zero-rating had been lost. The Supreme Court decided that the sale and leaseback were two simultaneous transactions and there was no point when the relevant group member did not have a major interest in the care home. Accordingly, it had not disposed of its entire interest and the self-supply charge did not apply.

Gimme shelter

Property guardianship business rates scheme was not effective

Southwark v Ludgate House Ltd and another: [2020] EWCA Civ 1637

The Court of Appeal has overturned a ruling that a property occupied by live in guardians was subject to council tax and not business rates. The court decided that the occupation of a former office building by live in guardians did not prevent the owner of the building from being liable for business rates. The building was due to be demolished to make way for a new development. Pending demolition, the owner entered an arrangement with a company to provide property guardian services. The company in turn granted licences to a number of individual guardians to occupy individual rooms. The Upper Tribunal decided that the guardians were in rateable occupation of their respective rooms.

The Council appealed successfully to the Court of Appeal. The owner remained in rateable occupation of the entire building, including the rooms occupied by individual guardians. The owner had reserved a significant amount of control and the occupation of the guardians was analogous to that of lodgers or a caretaker. The decision means that business rates mitigation schemes based on property guardian arrangements may not be effective.

Word up

Oral agreement can give rise to proprietary estoppel

Howe and another v Gossop and another: [2012] EWHC 637 (Ch)

The claimants had previously transferred part of their land to the defendants. In the transfer, the defendants were granted a right of way over an access road and agreed to resurface the road in return for £7,000. Following completion of the works, the claimants offered to transfer two additional parcels of land instead of paying the £7,000. The parties

agreed to the proposal and the defendants started work on the additional land. The claimants denied that the oral agreement was legally binding and issued a claim for possession and damages for trespass.

The High Court decided that the requirements for establishing a proprietary estoppel had been satisfied. Even where an agreement did not satisfy the formal requirements of Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, a proprietary estoppel could still arise and the facts did not need to be exceptional for these purposes. The defendants had relied on the claimants' offer to transfer the additional land. They had accepted that offer and acted to their detriment in reliance upon it. It would be unconscionable for the claimants to go back on their assurance to transfer the land. The court ruled that the claimants had granted the defendants a licence to go over the additional land while the defendants remained the owners of the adjacent land. The proprietary estoppel was established to defeat the possession claim and not to defeat the requirements of Section 2 for the creation of a contract.

Lost weekend

Weekend home owned as beneficial joint tenants

Rowland v Blades: [2021] EWHC 426 (Ch)

The parties were an unmarried couple who owned their own homes and were not co-habiting. They decided to buy a home together for weekend use. One of the parties funded the entire purchase. The couple then split up and the issue was whether they held the property as joint beneficial tenants.

The High Court decided that the parties had a common intention to share the property beneficially. The parties had both signed their solicitor's "joint ownership form" indicating that they intended to hold the property as joint tenants. The court approached the case as a domestic case and the starting point was that equity should follow the law. Notwithstanding the fact that one party had paid for the property, the parties had indicated that they were to hold it jointly.

The court also considered the parties' arrangements for the use of the property. A suggestion that the claimant could not use the home with his new partner was found to be unreasonable.

OUR RECENT TRANSACTIONS

We advised Bourne Leisure on the acquisition of a majority stake by Blackstone. Bourne Leisure operates under the Butlin's, Haven and Warner Leisure brands from three holiday resorts, 38 holiday parks and 14 leisure hotels.

We are advising Jones Lang LaSalle on its new London headquarters at 1 Broadgate.

We continue to assist Ocado with the expansion of its distribution network including a new customer fulfilment centre at Symmetry Park, Bicester.

We acted for Legal & General on the sale of an Asda superstore at Chatham Waters, Kent

AND FINALLY

Baabers

A feral sheep rescued from a forest in Australia has enjoyed a long overdue haircut. The sheep, named Baarack, was shorn of his 35kg fleece.

Bangered to rights

German police have solved a burglary after DNA recovered from a sausage half eaten by the thief matched that recovered from a suspect by French police.

Paid in full

A garage worker in Georgia received his final wages by way of 90,000 coins, worth the equivalent of £666, dumped outside his home.

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