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The law stated in this webinar is correct as of 13 January 2015

Case Law Update 2015

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Leasehold Advisory Service
13 January 2015

RESIDENTIAL LEASEHOLD CASE LAW UPDATE 2014

Christopher Last

Elim Court RTM Co Ltd v Avon Freeholds Ltd [2014] UKUT 397

- Facts
  - Lessees given 28, 29 and 30 May 2012 to inspect the articles of association under s78(4) of CLRA 2002
- The claim notice was served with 'RTMF Secretarial, company secretary' signature
- Freeholder served, but not intermediate landlord

Elim Court RTM Co Ltd v Avon Freeholds Ltd [2014] UKUT 397

- Upper Tribunal conclusions
  - It was necessary for articles of association to be made available for inspection on either a Saturday or a Sunday, or both, in order for the NIP to be valid
  - Section 44 of the Companies Act 2006 must be complied with where a company purports to sign a notice
  - All landlords must be served the claim notice

Southwark London Borough Council v Oyeyinka [2014] UKUT 248 (LC)

- Landlord's consultation notices described the works as "window repairs/renewals"
- Tenant could inspect the detailed estimates at its offices
  - Detailed estimates included two alternatives, depending on the extent to which the windows needed to be replaced

Southwark London Borough Council v Oyeyinka [2014] UKUT 248 (LC)

- Lower estimate was given in the consultation
- Window frames were found to be rotten
- Final cost was 75% greater than the original given estimate
- Upper Tribunal held the more extensive works both fell within the description of 'window repairs/renewals' and that the prospect of these works was adequately set out in the alternative estimates made available at their offices

Daejan Properties Ltd v Sean Gerald Griffin Alphonsa Mathew [2014] UKUT 0206 (LC)

- Facts
  - Nine shops and eighteen flats over three storeys
  - Repair of three steel beams supporting a walkway needed
  - Daejan became the freeholder of Crown Terrace in 1973, Mr & Mrs Jain took the lease of Flat 11 in October 1983, Mr Mathew took the lease of Flat 3 in March 2004 and Mr Griffin was granted a lease of Flat 12 in November 2007
  - Emergency works carried out in 2008 that the steel beams supporting part of the walkway had failed and there was a risk of collapse onto the street below. Further works to completely replace steel beams were proposed, with five stages over two years planned
  - Two previous beam replacements had been carried out between 1985 and 1990

Daejan Properties Ltd v Sean Gerald Griffin Alphonsa Mathew [2014] UKUT 0206 (LC)

- It was agreed that the planned works were needed
- Importantly, the landlord accepted it was in breach of its covenant to repair and maintain the beams
- Issues
  - Whether the works would have been cheaper if tendered as a single contract; and
  - If they would have been cheaper if done as planned maintenance instead of reactive work

Daejan Properties Ltd v Sean Gerald Griffin Alphonsa Mathew [2014] UKUT 0206 (LC)

- Findings
  - The works could have been carried out at any time from the date the oldest lessee took assignment of their lease (1983)
  - Those works would have been substantially the same, so the cost of the works would have been substantially the same
  - No savings could have been made if the works had been done at any time in the preceding 30 years
  - No significant savings if done as one project due to urgent need

Daejan Properties Ltd v Sean Gerald Griffin Alphonsa Mathew [2014] UKUT 0206 (LC) Costs

- In *Schilling v Canary Riverside Development PTE Ltd* LRX/26/2005 Judge Rich QC held that: "so far as an unsuccessful tenant is concerned it requires some unusual circumstances to justify an order under section 20C in his favour"
- Five different leases in the building
- Only one allowed the recovery of legal costs through the service charge

Daejan Properties Ltd v Sean Gerald Griffin Alphonsa Mathew [2014] UKUT 0206 (LC) Costs

- The tribunal found that there were unusual circumstances for four reasons
  i. Daejan had breached the repairing covenant
  ii. The lessees had not held their leases for as long as the landlord had held the freehold
  iii. The first of the emergency works was done in October 2008, but the landlord chose not to do any further works until December 2009, over a year later
  iv. The fact that only two of the thirteen leases put before the tribunal contained covenants that would require them to pay towards the costs was taken into consideration
- Section 20C order granted for costs incurred in the LVT, but not the Upper Tribunal costs

Barrett v Robinson [2014] UKUT 322 (LC)

- General rule: costs can be recovered by a landlord taking forfeiture proceedings where those costs were incidental to the proceedings
- The lease contained a covenant to pay costs incurred in contemplation of forfeiture proceedings
- Annual charge of £324 as half of the cost of the buildings insurance was challenged as unreasonable
- The service charge was reduced – a credit of £65 acknowledged on the account. A 50/50 split in the cost of the insurance was found to be reasonable

Barrett v Robinson [2014] UKUT 322 (LC)

- Attempt to recover £6,250 costs under the covenant in the lease that allowed recovery of costs taken in contemplation of proceedings under Section 146 of the Law of Property Act 1925
- At appeal, it was successfully argued there should be no liability to pay the landlord's costs in the first LVT action
- Costs could not have been incurred in contemplation of forfeiture where lessee commences proceedings

Assethold Ltd v Watts [2014] UKUT 0537 (LC)

- £4,188.90 was claimed in surveyor's fees and a further £55,600.52 solicitors' costs
- Clause 3.23 in the lease concerned stated that the landlord could recover
  - "All costs fees charges disbursements and expenses (including without prejudice to the generality of the above those payable to counsel solicitors and surveyors) properly and reasonably incurred by the Landlord in relation to or contemplation of or incidental to [such matters]"
- It was held
  - There are no special rules of construction applying to service charge provisions meaning they were to be construed against a landlord in the case of ambiguity
  - Legal costs incurred in pursuing litigation against a third party related to the fulfillment of an obligation to repair and maintain were, in these circumstances, recoverable under general words regarding the cost of building management

Andrew Parissis v Blair Court (St John's Wood) Management Ltd [2014] UKUT 0503 (LC)

- On each point
- Section 21 of the Limitation Act 1980 does not apply
  - Section 21 relates to money held on trust, and the money was not converted for the landlord's own use
- Section 19 of the Limitation Act 1980 does not apply, as the tenant made the application
- Section 9 of the Limitation Act 1980 does not apply, as County Court action to enforce would be restitutionary and not based on an enactment
- Section 5 of the 1980 Act does not apply, as non-contractual remedies are available in a service charge dispute
- Unconscionable delay in bringing a claim invokes laches, so is not a valid argument
- "Frivolous, vexatious or otherwise an abuse of process" could apply

Proxima GR Properties Ltd v McGhee [2014] UKUT 59 (LC)

- Facts
  - The lease required both that the lessee give the landlord notice of his subletting *and* that consent to sublet was obtained
  - Cost of the notice was £95
  - Cost of consent either a further £95 for 'standard' consent or £330 for a five-year global licence
- Charges for notices of registration are **not** administration charges under Schedule 11 of CLRA 2002

Proxima GR Properties Ltd v McGhee [2014] UKUT 59 (LC)

- A landlord may withhold consent to sublet if subletting is conditional on payment of a reasonable fee and that payment is not made
- Unreasonable conditions release lessees from the obligation to obtain consent
- Not a reasonable condition to require a lessee to pay for a search into the lessee's service charge and ground rent history in order to clear arrears before granting consent to sublet
- A global licence fee of £330 was a payment to release the lessee from the covenant to obtain consent to sublet for a period of five years

Qdime v Bath Building (Swindon) Management Company [2014] UKUT 0261 (LC)

- Leases did not include an express obligation to insure against the risks posed by terrorism
- Leases required Qdime to insure in accordance with the Council of Mortgage Lenders recommendations
- Terrorism insurance cost recovery allowed

ENFRANCHISEMENT AND LEASE EXTENSIONS-CASE LAW 2014

Nicholas Kissen

The Dolphin Square case

- *Westbrook Dolphin Square Limited v Friends Life Limited* [2014] EWHC 2433
- Judgment of the High Court, Chancery Division dated 17 July 2014

The price in the notice

- Genuine opening offer
- Need not be within range of reasonably justifiable valuations
- Lessee does not have to believe it would be accepted
- Reasonable landlord would see it as a real offer

Going beyond the counter-notice

- Freeholder can take a point concerning extent of floor area of building occupied for non-residential purposes even though not raised in the counter-notice

Section 13 notice-areas to claim

- *Cutter and others v Pry Limited* [2014] UKUT 215 (LC)
- Decision of the Upper Tribunal (Lands Chamber) dated 20 May 2014
- Collective enfranchisement

Cutter v Pry

- Nominee purchaser **could not acquire**
- Parking spaces that were allocated but not demised
  - Each lessee had right to park in a specifically marked space allocated by the freeholder
- Gardens for "visual amenity"
  - No access for lessees
  - But lessees had to pay towards their upkeep

Section 1(3)(b) of the 1993 Act

- Qualifying tenants can acquire freehold of other property if a qualifying tenant is, under the terms of the lease, entitled to use the property in common with occupiers of other premises

Car parking spaces

- Did not fall within provisions of Section 1(3)(b)
- Each allocated space not used in common with occupiers of other premises
- Spaces did not form a common pool

Gardens

- Did not fall within provisions of Section 1(3)(b)
- Not property that entitled to use in common with occupiers of other premises under terms of leases
- Express prohibition under lease on entering gardens
- Fact that required to contribute to their maintenance was irrelevant
- Fact that gardens provided visual amenity did not mean they were used within meaning of Section 3(1)(b)

Leasebacks

- *Tibber v Buckley* [2014] UKUT 74(LC)
- *Queensbridge Investment Limited v 61 Queens Gate Freehold Limited* [2014] UKUT 437 (LC)

Tibber v Buckley

- Decision of the Upper Tribunal (Lands Chamber) dated 19 February 2014
- A landlord cannot request the tribunal to extend the areas covered by lease-back claimed in the counter-notice

The Queensbridge case

- Decision of the Upper Tribunal(Lands Chamber) dated 6 October 2014
- Landlord claimed leasebacks of three flats
- LVT decided dispute about leaseback terms in favour of leaseholders
- Appeal lodged by landlord

The Queensbridge case

- Whilst appeal in process landlord granted new 999 year leases of the flats to connected companies
- No obligation to proceed with the leasebacks
- Leases owned by qualifying tenants at the “appropriate time”
- Acquisition of freehold would be subject to the new leases

Enfranchisement and bankruptcy

- *Helman v John Lyon's Charity* [2014] EWCA Civ 17
- Court of Appeal judgment dated 22 January 2014
- Two years ownership qualification for enfranchisement of a house
- Time will run from date of vesting of estate in trustee in bankruptcy
- Receivers of sub-charge could not serve 1967 Act notice in the bankrupt's name to buy freehold

Terms agreed

- *Bolton and others v Godwin-Austen and others* [2014] EWCA Civ 27
- Court of Appeal judgment dated 22 January 2014
- Claim for a new lease by three flatowners
- Section 42 notices proposed deleting term requiring paying share of headlease rent via service charge (RASC)

The Bolton case

- Counter-notice disputed deletion of RASC
- Counter-proposal in counter-notice
  - "The new leases should contain such modifications and amendments as the Landlord is entitled to under and/or as may be necessary to give effect to the requirements of Chapter II of Part I of the Act and without prejudice to the generality of the above such further reasonable modifications to be agreed"

The Bolton case

- Response of leaseholder's solicitors
- " Our client wishes to accept all counter-proposals contained in your client's counter-notice. We look forward to receiving the draft new lease"

The Bolton case

- Draft new lease supplied by landlord's included RASC provision
- Leaseholders' solicitors sent back amended draft deleting RASC
- No response by landlord's solicitor

The Bolton case

- The court decided that this counter-proposal is valid as it contained clear proposals
- Proposing 90-year lease at peppercorn rent on same terms as existing lease without leaseholders' proposed deletion of RASC provision but, if necessary, with such provision in that respect to which they were entitled under and/or as might be necessary to give effect to the requirements of Chapter II of Part I of the Act ,or such reasonable modification as might be agreed

The Bolton case

- Counter-proposal capable of acceptance
- Perfectly workable proposal by the landlord
- Court left to decide to what the landlord was entitled or what the Act required in respect of the RASC provision
- So agreement as to terms of acquisition owing to acceptance of the counter-proposal
- What followed next was procedure for agreeing the form of the lease under the Regulations
- If counter-proposal could not be accepted counter-notice was invalid

Amendment of Section 13 notice

- Regent Wealth Limited v Wiggins [2014] EWCA Civ 1078
- Court of Appeal judgment dated 30 July 2014
- Failure to register Section 13 notice
- Landlord granting leases capable of being claimed under Section 2 of the 1993 Act
- Not possible to amend the notice retrospectively to refer to interests not existing on the “relevant date”

Powers of competent landlord

- Howard de Walden Estates Limited v Accordway Limited and Kateb [2014] UKUT 0486 (LC)
- Decision of the Upper Tribunal (Lands Chamber) dated 28 October 2014

Accordway/Kateb case

- New lease claim
- Freeholder as competent landlord can agree all terms of acquisition even after a notice of separate representation served by intermediate lessee
- Intermediate lessee's remedy is to claim for breach of statutory duty by competent landlord
- Competent landlord can advance defence if acted in good faith and with reasonable care and diligence

Some valuation cases

- Kosta v Carnwath (Trustees of the Phillmore Estate) [2014] UKUT 0319 (LC)
  - Hedonic regression analysis of relativity considered
- Sinclair Gardens Investments (Kensington) Limited [2014] UKUT 79
  - Deferment rate outside PCL
- 82 Portland Place (Freehold) Limited v Howard de Walden Estate Limited [2014] UKUT 0133 (LC)
  - Adoption of Nailrile approach to relativity

Questions?

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Classroom training
15 January 2015 – Manchester
Lease Extension

- The key legislation
- Qualification criteria
- Initial investigations
- Drafting and serving the initial notice
- Post-service procedure including landlord's counter-notice
- Valuing the purchase price
- Terms of the new lease
- Conveyancing procedure
- The missing landlord- a problem with a solution

22 January 2015 – London
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This course outlines the procedure for making an application and reviews the latest case law from tribunal decisions. It is essential training for any practitioner appearing before the tribunal.

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28 January 2015
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In this webinar, you will learn all about the process of buying and selling a residential mobile home. On 26 May 2013 the government introduced a new procedure that must be followed whenever a used residential park home is bought or sold on a park in England.

10 February 2015
Collective Enfranchisement case law non-valuation

Everyone practising in the field of residential leasehold property understands how important it is to be up to date with the latest legal decisions. You and your practice will benefit from this seminar summarising the key Court of Appeal and Upper Tribunal decisions affecting collective enfranchisement.