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Royal Institution of Chartered Surveyors
Commercial Landlord and Tenant – Case Law Update

2nd October 2018

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Northern Ireland Position

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- Commercial tenancies in Northern Ireland governed by the **Business Tenancies (Northern Ireland) Order 1996** ('the Order').
- **Purpose of the Order:** to ensure that any business tenancy with a term exceeding 9 months is protected.
- **Security of Tenure**: the tenant has a right to be granted a new tenancy unless the Landlord has valid grounds for objection under Article 12 of the Order.

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Article 12 grounds for objecting to a new tenancy

Examples:

- **Article 12(1)(a)**: Failure by the tenant to comply with its repair obligations under the current lease;
- **Article 12(1)(b)**: Persistent delays in the paying of rent;
- **Article 12(1)(e)**: The lease was of part of the premises only and it is preventing the landlord from leasing the property as a whole (and thereby from obtaining a higher rent); and
- **Article 12(1)(f)**: The landlord intends to redevelop the premises and cannot do so without obtaining possession

Northern Ireland Position

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- Business Tenancies (Northern Ireland) Order 1996 is tenant-friendly in nature.
- Unlike the position in England and Wales, the parties cannot contract out of the legislation.

HOWEVER:

- Certain criteria apply before tenant protections under the Order will apply.
- The most fundamental criterion is that the tenancy agreement must actually constitute a lease.
- Licensees not protected under the Order.

Case Law

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- **Car Park Services Limited v Bywater Capital (Winetavern) Limited [2018] NICA 22**
  - Car park premises in Belfast;
  - Occupant application for a new tenancy;
  - Owner unwilling to grant; and
  - Owner argued occupant did not have sufficient standing to apply for a new tenancy as they occupied the premises under a licence arrangement only.

Car Park Services Limited – v- Bywater Capital (Winetavern) Limited

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1. Matter first heard by the Lands Tribunal before ending up in the Court of Appeal.
2. Occupant argued that the agreement constituted a lease as it met the criteria prescribed in the House of Lords case, **Street v Mountford [1985] UKHL 4**, namely:
    a. there was exclusive possession;
    b. for a term;
    c. at a rent.
3. Points b and c not at issue. Case hinged on issue of exclusive possession.
4. Literal interpretation of document by Lands Tribunal

Car Park Services Limited - v- Bywater Capital (Winetavern) Limited

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- In analyzing the document, the pivotal clause for the Lands Tribunal was:

''it is hereby further agreed between the parties hereto that this Licence creates no tenancy or lease whatsoever between the parties and that possession of the car parking site is retained by the Licensor subject, however, to the rights contained by this Licence and that such rights are not assignable by the Licensee.''

Car Park Services Limited – v- Bywater Capital (Winetavern) Limited

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- Judgment overturned on appeal.
- Document to be read as a whole and not by reference to individual clauses.
- Risk that occupant's business could be continuously disrupted if the owner was permitted to enter the premises at any time.
- Exclusive possession was clearly the intention.
- Document could only be interpreted as a lease.
- Business Tenancies protections would apply.

Case Law

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- **London College of Business Ltd v. Tareem Ltd [2018] EWHC 437** indicates holistic approach in the interpretation of tenancy documents.
  - Persuasive authority in Northern Ireland.
  - Office complex leased by the College for provision of teaching services. Short form agreements purported to create a series of licenses. Dispute over service charge arose. Tareem claimed that the College was in arrears, removed them and changed the locks.
  - College obtained an injunction requiring Tareem to hand back keys.
  - College sought relief for wrongful exclusion.

London College of Business Ltd – v – Tareem Ltd

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Document appeared to be a licence on the basis that:

1. It referred to itself as a licence;
2. The terms 'landlord,' 'tenant,' and 'rent' were not used;
3. The right to occupy the premises was stated to be personal to the College;
4. It was expressly stated that the licensor remained in occupation and that possession remained with the licensor; and
5. A right of entry at all times was reserved in favour of Tareem Ltd.

London College of Business Ltd – v- Tareem Ltd

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In addition, the agreement stated that:

1. The license fee and service charge were to be paid in return for a *''personal privilege to use the premises''*; and

2. *''this agreement constitutes a personal licence to occupy by the Licensee and shall not be deemed to constitute a tenancy within the meaning of the Landlord and Tenant Act 1954…or otherwise.''*

London College of Business Ltd – v – Tareem Ltd

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Judgment

Wording of document quite clear, nevertheless:

1. It would be unreasonable to expect that the owner could interrupt the occupant's business by reserving a right to enter at any time;
2. There had been no attempt by Tareem to exercise such a right – it had always contacted College in advance; and
3. Court must be alert to the possibility that parties have included provisions for purpose of disguising the true reality of the arrangement.

Lease v Licence - Conclusion

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- Courts will ignore the express words of a legal document in establishing the true intention of the parties;
- Attempts to circumvent the legislation not treated favourably by the courts.
- **Addiscombe Garden Estates Ltd v Crabbe [1958] 1 QB 513:**

''The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee…the rights and obligations of a tenant, and on the grantor…the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence.''

Part 2: Insecurity of Tenure?

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S. Franses Ltd v. The Cavendish Hotel (London) [2017] EWHC 1670 QB

- May impact interpretation of Article 12 of the Business Tenancies (Northern Ireland) Order 1996.
- English High Court held that a landlord is within its rights to object to the granting of a new tenancy to a protected tenant provided that it has a genuine and settled intention to redevelop premises.
- Motive for doing so irrelevant.

S. Franses Ltd – v- The Cavendish Hotel (London)

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Facts:

- Cavendish Hotel London
- Lease of part of ground floor and basement to textile / art dealership. Lease due to expire.
- Tenant applied for new tenancy in accordance with **Section 26** of the **Landlord and Tenant Act 1954**.
- English equivalent to Article 7 of the Business Tenancies (Northern Ireland) Order 1996.
- Landlord objected to the new tenancy on basis that it intended to redevelop the premises.

S. Franses Ltd – v- The Cavendish Hotel (London)

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- At first instance, court held in favour of the Landlord.
- Tenant appealed to the High Court.
- The key issues for consideration were:

1. Was the landlord's intention to develop genuine?;
2. The conditionality of the landlord's intention; and
3. Whether the works could be done with the tenant still in occupation.

S. Franses Ltd – v- The Cavendish Hotel (London)

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- Tenant argued that the Landlord did not have a firm and settled intention to develop the property. It was simply doing so to regain occupation.
- The Court disagreed, holding that intention is sufficient but motive irrelevant.
- Judgment very generous to landlords.
- **Matter not resolved as it is due to be heard by the Supreme Court this month.**

Practical Guidance

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- Before the matter goes to hearing, the landlord should be in a position to show that it has a genuine and settled intention to do the works.
- **Cunliffe v Goodman [1950] 2 KB 237**: the Landlord must have *''moved out of the zone of contemplation and into the valley of decision.''*

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Depending on the type of work involved, the landlord should be able to adduce:

1. Building Survey / Report: the more detailed the better;
2. Architectural Plans;
3. Statutory Consents; and
4. Proof of finance

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From the Tenant's perspective:

1. On receipt of Article 7(6)(b) notice, tenant should apply to the Lands Tribunal without delay to confirm date for hearing; and
2. Tenant should consider all of the circumstances. Are there any factors that show the landlord is not serious about carrying out the works?

Service Charges & Rent Review - Interpretation of Clauses

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- Recent English cases provide guidance regarding the Court's approach when interpreting the clauses where there is a dispute over calculation
- Service Charges - *Arnold v Britton and others [2015] UKSC 36*
- Rent Review – *Trillium (Prime) Property GP Limited v Elmfield Road Limited [2018] EWCA Civ 1556*

Arnold v Britton and others (2015)

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- UK Supreme Court case – tenants' appeal of Court of Appeal decision regarding interpretation of the Service Charge clause
- 99 year leases of holiday chalets at Oxwich Leisure Park, near Swansea
- Example of service charge provision at clause 3(2):

"To pay the Lessor without any deduction in addition to the said rent a proportionate part of the expenses and outgoings incurred by the Lessor in the repair maintenance renewal and the provision of services hereinafter set out the yearly sum of Ninety Pounds and value added tax (if any) for [the first three years OR the first year] of the term hereby granted increasing thereafter by Ten Pounds per Hundred for every subsequent [three year period OR year] or part thereof"

- Landlord argued he could charge £90 for the first year plus an increase of 10% on this each year on a compound basis
- Tenant argued the clause should be interpreted as having a cap

Arnold v Britton and others (2015) contd.

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- Supreme Court dismissed the tenants' appeal by 4:1 majority
- Natural meaning of clause was clear and court would not re-write
- Court must identify the intention of the parties by reference to:

"what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean"

- The fact that by 2072 each tenant would be paying a service charge of £554,000 per annum did not justify departing from the natural meaning of the clause
- The Court will not step in to save a party from a bad bargain, imprudence or bad advice

Trillium (Prime) Property GP Limited v Elmfield Road Limited (2018)

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- Concerned offices in Bromley, England
- Court of Appeal determined the interpretation of an index-linked rent review clause contained in a reversionary lease. High Court had found in favour of the landlord.
- Tenant argued there was ambiguity in the rent review clause regarding what constituted the "Initial Rent" as this formed part of the rent review calculations. Initial Rent was defined in clause 1 as follows:

"The initial rent payable under this Lease from and including the Term Commencement Date to and including 25 March 2015 being rent equivalent to the [greatest] of (a) the rent first reserved under the Initial Lease immediately prior to the expiry thereof subject to such increase calculated in accordance with the provisions of paragraph 3 of the First Schedule hereto [the rent review provisions] (b) £1,200,000 per annum exclusive of VAT and (c) the open market rent as determined in accordance with the provisions for review contained in the Third Schedule hereto."

Trillium (Prime) Property GP Limited v Elmfield Road Limited (2018) contd.

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- The Court of Appeal held that there was no ambiguity in the language of the rent review clause and the definition of "Initial Rent" was clear
- The Court of Appeal relied on the principles of *Arnold v Britton* and confirmed in its decision:

  - if there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the Court has to resolve; and
  - the fact that a contract term was an imprudent one for a party to have agreed or that it has worked out badly or even disastrously is no warrant for departing from the clear language of the contract

Lessons Learnt :

- Ensure clear drafting of service charge and rent review clauses
- Ensure the rent clause indicates rent and service charge payable without deduction or set off
- Ensure parties have taken independent legal advice where possible
- Try and iron out any issues regarding the parties' understanding of the terms when agreeing and entering into the lease

Withholding Landlord Consent to Assign a Lease and reasonableness

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No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2018] EWCA Civ 250

- Landlord consent generally not to be unreasonably withheld
- *No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* concerned a Landlord's appeal to the Court of Appeal against a decision citing refusal of consent as unreasonable
- Tenant held numerous 999 year residential leases in a high value apartment complex, and sought consent to assign 42 of these
- Landlord refused consent for 3 reasons:
  1. The tenant failed to give an undertaking to cover the landlord's legal fees in the sum of £1,250 plus VAT;
  2. The landlord was entitled to have a surveyor inspect the premises as part of the consent process to check if any covenants had been broken and the tenant refused to pay the surveyor's fee of £350 plus VAT; and
  3. The landlord was entitled to a bank reference in order to assess the proposed assignees and the tenant did not provide these.
- The High Court had held that reasons 2 and 3 were reasonable but 1 was not, and unreasonably high fees outweighed the other two reasons

No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2018] EWCA Civ 250 contd.

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- The Court of Appeal held that the High Court applied the wrong approach
- The correct question was whether the decision to refuse consent was reasonable; not whether all the reasons for the decision were reasonable
- If the landlord would have refused consent on the basis of reasons 2 or 3 and either of these in isolation were considered reasonable, then the overall decision to refuse consent was valid
- The Court of Appeal confirmed the landlord's decision to refuse consent was reasonable
- In practical terms, landlords need to ensure that where they are refusing consent based on a number of reasons or conditions, if only one of those is reasonable, it ought to be viewed as reasonable when viewed independently of the other reasons or conditions.

Forfeiture

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- Landlord's option to exercise any right they may have to terminate a lease
- Statutory Provisions – Section 14 of the Conveyancing Act 1881 requires the landlord to serve a notice on the tenant:-

  (i) specifying the breach;
  (ii) requiring the tenant to remedy the breach if it is capable of remedy; and
  (iii) in any case, requiring the tenant to compensate the landlord for the breach if the landlord requires it
- Section 14 of the Conveyancing Act 1881 does not apply to situations where the breach is non-payment of rent
- Contractual Provisions – most commercial leases will contain an express forfeiture clause or proviso for re-entry which should be properly followed.
- Commercial leases will usually provide for right to re-entry if rent not paid for a period (such as 14 or 21 days), where the tenant is insolvent or where the tenant has committed some other breach of the lease.

Shah Din & Sons Limited (in a Company Voluntary Arrangement) v Dargan Properties Management Limited [2012] NI CH34

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- Application by the tenant for relief from forfeiture
- Tenant held portion of landlord's leasehold interest at Dargan Estate, Belfast as assignee. The head landlord was Belfast City Council.
- Tenant was in arrears of rent and service charge from commencement of the tenancy in October 2001
- Landlord issued proceedings against the tenant in 2004 and again in 2011 to recover arrears
- Default judgment was obtained by the landlord in February 2012 and served on the tenant by the landlord's solicitors stating if payment not made "*further action would be taken*"
- By April 2012, the landlord deemed the tenant's default in payment was wilful and re-entered the premises and recovered possession by changing the locks
- Responding to the tenant's application for relief, the Court deemed the landlord had two options (i) enforce the judgment for payment of rent arrears, or (ii) recover the premises by statutory or contractual provisions

Shah Din & Sons Limited (in a Company Voluntary Arrangement) v Dargan Properties Management Limited [2012] NI CH34 contd.

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- Court dismissed tenant's argument that section 14 process was required, satisfied that this did not apply to non-payment of rent
- Court was content that the landlord's taking of possession in accordance with the re-entry provisions was lawful and completed the act of forfeiture
- The landlord had the option to serve a notice requiring the tenant to remedy the breach under the lease terms but the Court understood why the landlord had not taken that approach
- In considering relief against forfeiture, the Court adopted the approach in *Southern Depot & Co Limited -v- British Railways Board 1990 2EGLR* which stated the matters which the Court must take into account when considering granting relief against forfeiture. This includes the conduct of the parties, the willfulness of the breach, as well as the future prospects of the relationship
- The Court concluded it would not grant relief from forfeiture, stating that the conduct of the parties was in total contrast. The landlord had carried out all its obligations and the tenant failed to carry out theirs. The tenant's breaches were also deemed wilful and had extended over may years

Savarese v Fraser Houses (NI) Ltd [2015] NICH 2

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- The landlord, Fraser Houses (NI) Ltd, had commenced High Court proceedings seeking a declaration of forfeiture and judgment for arrears of £30,854.95
- This case concerned the tenant's application for an interlocutory injunction requiring the landlord to surrender possession of the premises
- The tenant (Savarese) was a joint tenant of premises at Ashbury Shopping Centre, Bangor and operated a takeaway pizza establishment. Substantial rent arrears accrued after the other joint tenant (Celentano) returned to Italy in 2010
- The landlord obtained judgment against the tenant and the tenant was ordered to deliver up possession within four months of service of the order and pay arrears of £31,079.74
- There was delay in filing to order to allow the tenant to re-mortgage property he owned to pay the arrears
- In the interim, a winding up order was obtained against the tenant's limited company 'Luigi Savarese Limited' for non-payment of rates. The Insolvency Service attempted to seize the premises and changed the locks to exclude the tenant and stop him from trading. The tenant's solicitor advised the Insolvency Service that Mr Savarese was a party to the lease in his personal capacity and the Insolvency Service returned the property and provided a new set of keys for the locks. When the tenant tried to re-enter, he found the locks had been drilled.

Savarese v Fraser Houses (NI) Ltd [2015] NICH 2 contd.

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- Both parties changed the locks trying to exclude each other and the tenant was refused entry on 30 October by the landlord's security guard. The tenant applied to the Court for an injunction requiring the landlord to surrender possession until the date in the Court order (5 December 2014)
- The landlord argued that although its actions had been unlawful, they were taken because of genuine concern that its interests were being prejudiced
- The tenant's application was granted - the Court held it was clearly unlawful for the landlord to deprive the tenant of possession of the premises before the date stated in the Court order. The Court stated it could not be accepting of parties taking the law into their own hands and disregarding Court orders
- The Court held that the landlord should return possession to the tenant beyond the date of the original Court order to make up for time in which he lost possession to allow property and possessions to be removed – deemed a just and convenient outcome
- The Court's order was subject to the tenant undertaking to:
  - deliver up the premises on 29 December 2014; and
  - pay the landlord £1000 by way of part payment of the arrears by 18 December 2014, representing rent owed for the repossession period

Forfeiture

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- In the English case of *Freifield v West Kensington Court Ltd [2015] EWCA Civ 806* the High Court refused relief from forfeiture on the basis of the tenant's behaviour – the tenant had deliberately sublet a restaurant without seeking landlord consent. The Court of Appeal however decided that although the tenant's attitude was a relevant factor, relief was still possible and subject to good behaviour, the tenant was given 6 months to sell his interest.

Lessons Learnt

- Landlords must ensure the actions taken are lawful and the provisions and terms of the lease must be checked and followed with care, with the relevant steps taken, including service of notices or demands where necessary
- If there is an opportunity to offer the tenant a chance to remedy, consider taking this step, to show the landlord has acted reasonably – this may just include providing an additional short period for payment of arrears
- If possible, landlords or agents should try to agree vacant possession with the tenant or a date for the tenant to return to the property and remove belongings. Case law suggests tenants will be afforded an opportunity to return for these.
- Be wary of deemed surrender of a lease – confirmation of the tenant's intentions should be sought where possible as well as return of keys.

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Questions

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