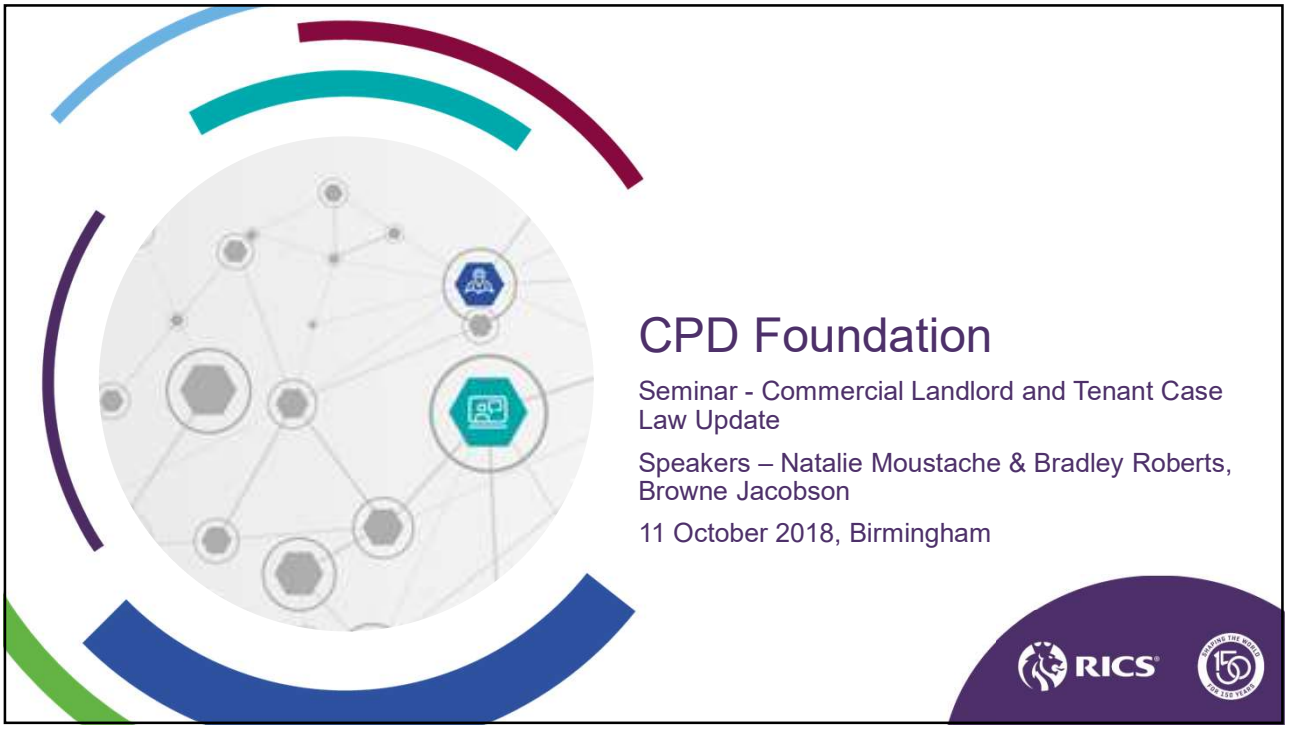


LEASE INTERPRETATION – A BAD BARGAIN?

TRILLIUM (PRIME) PROPERTY GP LTD V ELMFIELD ROAD LTD

FACTS

- Lease – 25 years from 25 March 1985
- Rent review every 5 years
- Agreed reduction in rent of £965k covering period 29 September 2005 until lease expiry on 24 March 2010
- December 2005 – reversionary lease to start on 25 March 2010
- The reversionary lease provided for the Initial Rent (eventually agreed at £1.2m) payable under that reversionary lease to be reviewed *"by multiplying the Initial Rent by the [Retail Prices] Index for the month preceding the relevant Review Date and dividing the result by the Base Figure"*.
- The Base Figure was 193.1 which was the index figure for September 2005 (rather than the figure from the start of the reversionary lease)
- New rent would be over £1.5m

TRILLIUM (PRIME) PROPERTY GP LTD V ELMFIELD ROAD LTD

ISSUES

- Was there an ambiguity in the rent review clause which precluded the court from applying a literal meaning to that clause?
- Even if there was no ambiguity, could the court correct the 'mistake' as a matter of interpretation ?

HELD

- In short - no
- There was no ambiguity in the language or the application of the clause.
- Where parties had gone to the trouble to define a term, it was all the more difficult to avoid giving effect to their chosen definition.

OTHER RELATED CASES

Lewison LJ observed in Trillium:

"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 wording of the contract….".

- **London and Ilford Ltd v Sovereign Property Holdings Ltd** – developer liable to make an overage payment even though it could not implement the development which triggered the payment.
- Does the Lease reflect the Heads of Terms?

BUT…

- **Palo Alto Ltd and others v Alnor Estates Ltd** – court ordered rectification of the lease upon the basis of unilateral mistake (in this case the tenant was aware of the LL's mistaken belief , had not drawn this mistake to his attention and had benefited from the mistake)

IMPLIED TERMS - JN HIPWELL & SON V SZUREK

FACTS:

- Tenant had a 3 year lease of café premises
- One year into the lease, an electrical fault caused a small fire and the tenant was forced to close her business
- No express obligation in relation to the electrical installation/wiring etc.
- Claimed damages against the Landlord for breach of an implied obligation as to the safety of the electrical installation at the premises
- The lease contained an entire agreement clause that the lease:

"constitutes the entire agreement and understanding of the parties relating to the transaction contemplated by the grant of this Lease and supersedes any previous agreement between the parties relating to the transaction".

ISSUE: Should an obligation for the LL to ensure the safety of the electrical installations be implied into the lease?

IMPLIED TERMS - JN HIPWELL & SON V SZUREK

HELD:

- The court implied the term that the Landlord was obliged to ensure the safety of the electrical installations:
  - LL had covenanted to repair the premises and all fixtures and fittings and
  - LL had reserved a right in the lease to enter onto the Premises for the purposes of repairing any service media
- Although there was no express provision in the lease for repair of the exterior, there was a legitimate basis for implying the term in light of the reservation in the lease

NOTE:

- Court can imply a term where necessary to give the contract in question **business efficacy**
- The entire agreement clauses did not prevent the term from being implied
- How does this case sit with the 'bad bargain' cases?

LEASE RENEWAL UPDATES

S FRANCES LIMITED V THE CAVENDISH HOTEL (LONDON) LIMITED

FACTS

- LL opposed renewal under ground (f) of section 30(1) of LTA 1954.
- LL admitted proposed works would not be carried out if T left voluntarily but gave an undertaking to the court to carry out all works if VP was ordered.
- The works would ready the premises for conversion into two retail units but had little practical utility because planning permission would be needed to use the new units and the LL intended to proceed with the works regardless of whether it could obtain that permission.
- In addition, the landlord planned to lower the basement floor for no practical reason and to demolish an internal wall and replace it with a similar one just to show that the works were of a sufficiently 'substantial' part of the premises or were sufficiently 'substantial' works of construction.
- The landlord's predominant purpose in devising its scheme of works was to obtain possession.

S FRANCES LIMITED V THE CAVENDISH HOTEL (LONDON) LIMITED

Issue

- Should a contrived scheme of works which serves no useful or commercial purpose fall within the scope of ground (f)?

Decision

- The 1954 Act contains no anti-avoidance provisions.
- The policy and objectives of the 1954 Act were not to secure the most beneficial and efficient use of land. Ground (f) requires an examination of what the landlord intends to do and whether it intends to do it, not why the landlord may intend to do it.
- Permission to appeal has been granted from Supreme Court (leapfrogged COA).

LEASE RENEWAL PILOT SCHEME

Current process

- Usually get involved on valuation side of matters and preparation of expert report

Pilot scheme in Central London County Court

- One year from 1 January 2018
- Aims – to ensure that all unopposed lease renewal claims proceed to a final determination as smoothly and as quickly as possible and reduce the amount of resources spent on unopposed lease renewals.
- 20 weeks from the issue of proceedings
- New directions timetable – witness statements and expert reports only once hearing been listed
- Consequences:
    - Parties will need to progress quicker;
    - Likely to see more extensions before proceedings are issued.

MISCELLANEOUS UPDATES

JAPANESE KNOTWEED - NETWORK RAIL V WILLIAMS

FACTS

- Claimants were adjoining freehold owners of two semi-detached bungalows which abutted a railway embankment owned by Network Rail
- Japanese Knotweed had spread from Network Rail's land
- Bungalow owners bought a claim in private nuisance
- County Court – Network Rail had actual knowledge of the presence of knotweed on its own land since 2013 and it ought to have been aware of the risks
- Presence of knotweed within 7 metres of the Claimants' land diminished the properties' value. Encroachment not required.

ISSUE

- Was Network Rail liable in nuisance for failing to take reasonable steps to prevent Japanese knotweed from blighting the Claimants' properties?

JAPANESE KNOTWEED - NETWORK RAIL V WILLIAMS

HELD

- Yes - the Court of Appeal disagreed with the County Court judge's decision that National Rail was liable simply because the presence of knotweed on National Rail's land within seven metres of the C's properties diminished the market value of their properties.
- However, it found National Rail liable to the Claimants because knotweed rhizomes had encroached onto their properties.
- Even though no physical damage had been caused to the Claimants' properties, the encroachment itself was sufficient to diminish the utility and amenity of C's properties and that in itself was sufficient for a claim to succeed.
- The mere presence of the rhizomes would increase the cost of developing C's properties (should the owners wish to do so) since the contaminated soil would have to be removed by special (and expensive) procedures.
- Japanese knotweed and its rhizomes were therefore a "natural hazard" which affected C's ability fully to use and enjoy their properties.

REPAIRING OBLIGATIONS: OFFICE DEPOT INTERNATIONAL (UK) LTD V UBS ASSET MANAGEMENT (UK) LTD AND OTHERS

FACTS:

- Tenant sought declaratory relief to determine the performance required by it under a repairing covenant
- Claimant (Tenant) entered into an agreement for lease with the First Defendant (Landlord) where the warehouse was to be constructed. Tenant was then granted a lease when construction was complete.
- First Defendant claimed against the developer for the roof works alleging defective design and construction and the claim was settled (note: Landlord did not use the monies to carry out any repair works) and roof continued to suffer from water ingress.

- Basis of the claim: tenant was concerned that the condition of the roof would engage its repairing covenant and wanted to be able to rely upon the warranties provided by the developer.

REPAIRING OBLIGATIONS: OFFICE DEPOT INTERNATIONAL (UK) LTD V UBS ASSET MANAGEMENT (UK) LTD AND OTHERS

- Tenant sought a declaration as to what works it was obliged to do under the lease, specifically:
  - against the Landlord as to what works were required by the tenant (if any) to put the roof into a lease compliant state
  - against the developer that any work that is required as a result of a design/construction defect would be covered by the collateral warranties.

HELD:

- There was no issue for the Court to properly determine against the Landlord.
- It is up to the tenant to determine what is required to comply with this obligation- LL not obliged to tell them.
- Claimant had not identified a preferred scheme of works --> No positive case, so no actual dispute.
- Obligation was to ensure a state of repair not to carry out specific works.

CRAR AND FORFEITURE - THIRUNAVUKKRASU V (1) BRAR AND (2) BRAR

FACTS

- Tenants occupied under lease with rent to be paid quarterly
- Can forfeit if unpaid for 21 days
- Tenants in arrears
- 1 Feb 2016 - LL sought recovery by means of commercial rent arrears recovery (CRAR) which replaced common law remedy of distress
- 12 Feb 2016 – LL purported to forfeit by re-entry
- T issued proceedings for a declaration that forfeiture was unlawful

HELD

- LL's conduct amounted to clear election to waive forfeiture

POTENTIAL FLOODGATES FOR FRUSTRATION

FACTS

- The European Medicines Agency (which serves as the medicines regulator for the European Union) occupies a property in Canary Wharf pursuant to a lease worth £500m.
- The EMA is set to be relocated to Amsterdam after Brexit.
- Lease still has 21 years left to run.
- EMA is arguing that Brexit undermines the lease's purpose and was unforeseen at the time of the lease, therefore frustrating the agreement and rendering it terminable by law.
- Decision could leave thousands of landlords vulnerable.

INSURANCE- PREZZO LTD V HIGH POINT ESTATES LTD

FACTS

- Tenant had a lease of a restaurant on the ground floor and basement of a building – "the Premises"
- Landlord → Tenant: *"insure the premises in accordance with is obligations".*
- Landlord was lessee in a superior lease and under the terms of the head lease was required to insure the Building
- Tenant was obliged to insure the Premises aside from the insured risks
- A fire caused damage to the restaurant (i.e. the Premises) and to the rest of the Building
- Insurer paid out under the LL's insurance policy and tried to recover form the tenant

ISSUE: could the insurer recover anything from the tenant?

INSURANCE- PREZZO LTD V HIGH POINT ESTATES LTD

HELD

- The Landlord's obligation to obtain insurance **on behalf of itself and the tenant** only extended to the Premises, i.e. to the part occupied by the tenant, **NOT** to the Building.
- Tenant only had the benefit of the Landlord's insurance of the Premises (no claim for insurer)
- HOWEVER, the insurance company could make a claim against the tenant for loss and damage to the Building as the tenant did not have the benefit of the landlord's insurance.

BREAK NOTICE - GOLDMAN SACHS INTERNATIONAL V (1) PROCESSION HOUSE TRUSTEE LTD (2) PROCESSION HOUSE TRUSTEE 2

FACTS

- 25 year lease with a break clause (clause 23) exercisable by the tenant after 20 years
- Clause 23.1: Subject to the tenant being able to yield up the Premises with vacant possession as provided in clause 23.2, this Lease shall be terminable by the Tenant at the expiry of the twentieth year of the Term by the Tenant giving to the Landlord not less than 12 months' and one days previous notice in writing"
- Clause 23.2: "On the expiration of such notice, the Term shall cease and determine (and the Tenant shall yield up the Premises in accordance with clause 11 and with full vacant possession) but such determination shall be without prejudice to the respective rights of either party against the other in respect of any antecedent claim or breach of covenant
- Clause 23.3: The Tenant shall not be entitled to give such notice while it shall be in arrears in payment of the Rent

BREAK NOTICE - GOLDMAN SACHS INTERNATIONAL V (1) PROCESSION HOUSE TRUSTEE LTD (2) PROCESSION HOUSE TRUSTEE 2

Clause 23.2 refers to clause 11. Clause 11 is a clause headed "YIELDING UP" and reads as follows:

"11.1 Unless not required by the Landlord, the Tenant shall, at the end of the Term, remove any alterations or additions made to the Premises (and make good any damage caused by that removal to the reasonable satisfaction of the Landlord) and shall reinstate the Premises to their original layout and to no less a condition than as described in the Works Specification.

11.2 At the end or sooner determination of the Term the Tenant will quietly yield up the Premises to the Landlord in such condition as is set out in the Works Specification.

BREAK NOTICE- GOLDMAN SACHS INTERNATIONAL V (1) PROCESSION HOUSE TRUSTEE LTD (2) PROCESSION HOUSE TRUSTEE 2

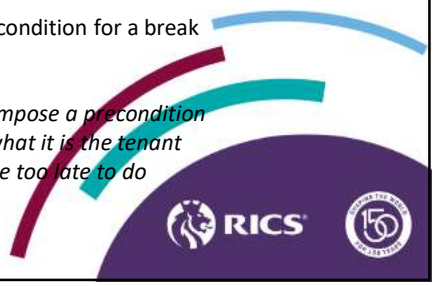
ISSUE: Was compliance with clause 11 a condition of the break?

- Clause 23.1: Subject to the tenant being able to yield up the Premises with vacant possession as provided in clause 23.2, this Lease shall be terminable…
- Clause 23.2: "On the expiration of such notice, the Term shall cease and determine **(and the Tenant shall yield up the Premises in accordance with clause 11 and with full vacant possession)** but such determination shall be without prejudice to the respective rights of either party against the other in respect of any antecedent claim or breach of covenant

BREAK NOTICE - GOLDMAN SACHS INTERNATIONAL V (1) PROCESSION HOUSE TRUSTEE LTD (2) PROCESSION HOUSE TRUSTEE 2

HELD:

- There were two pre-conditions of the break clause: Payment of Rent and Vacant Possession
- Once these two conditions were satisfied, this triggered the reinstatement provisions in clause 11.
- The correct construction of clause 23.2 was that the words in brackets were simply a reminder to the parties, not an additional obligation.
- Clause 11 did not have precise conditions and so it was not a suitable precondition for a break clause
- *"…it does seem to me that it is appropriate that if the landlord wishes to impose a precondition on the tenant, he should make it quite clear in the drafting of the clause what it is the tenant has to do rather than leave it to be argued out at the stage when it may be too late to do anything about it" (para 63)*



OTHER DEVELOPMENTS - AN OVERVIEW

- **Disclosure Pilot Scheme: 1 January 2019 (Business and Property Courts)**

  Reduce the costs/burden of disclosure
  - 2 stages: (1) Initial disclosure and (2) Extended disclosure
  - Parties agree a list of issues for disclosure
  - Watch this space!

- **Company Voluntary Arrangements (CVA) - a changing market?**

  Lower rents – impact on lease renewals/rent reviews
  Shorter leases

- **Leasehold home ownership: buying your freehold/lease extensions**
  https://www.lawcom.gov.uk/project/leasehold-enfranchisement/

  Law Commission Consultation to simplify the procedure and make it more cost effective.
  Options to reduce the price payable by the leaseholder
  Deadline for responses: 20th November

- **Electronic Communications Code** (from 28 December 2017)
  - End the double protection under Code and LTA 1954
  - Change in valuation basis- lower rents

- **MEES – REMINDER**
  - Can't rent out a property below E
  - Not MEES compliant doesn't mean that it's in disrepair
  - Dilapidations

Please complete your evaluation form and return toRICS staff as you leave