BRIEFCASE
QUARTERLY REAL ESTATE CASE UPDATE

Special Supreme Court Edition
March 2023

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KEY CASES

BARTON V MORRIS: SUPREME COURT REFUSES TO AWARD COMMISSION FOR £6M RESIDENTIAL PROPERTY SALE

An oral contract provided for a £1.2m introduction fee, payable upon a property being sold for at least £6.5m. It did not provide for what was to happen if the property was sold for less than that amount. The Supreme Court had to decide if the seller nevertheless had an obligation to pay reasonable remuneration to the introducer for their services.

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AVIVA V WILLIAMS: CONTRACTUAL FREEDOM FOR LANDLORDS TO DETERMINE SERVICE CHARGES IS PRESERVED... TO A POINT

The Supreme Court had to decide the extent to which a term in a residential lease which allowed the landlord to revise the tenant's percentage share of the service charges was invalidated by the anti-avoidance provisions of the Landlord and Tenant Act 1985

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FEARN V TATE GALLERY: NOTHING OVERLOOKED! NO CHANGE TO THE LAW OF PRIVATE NUISANCE IN TATE VIEWING PLATFORM CASE

The Supreme Court considered whether the owners of luxury flats situated next to the Tate Modern were entitled to a remedy in the tort of private nuisance by reason of the Tate Modern's use of the top floor of its Blavatnik Building as a viewing platform that overlooked the flats.

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SARA & HOSSEIN ASSET HOLDINGS V BLACKS: PAY NOW, ARGUE LATER!

The Supreme Court had to consider whether there was any scope for a tenant to dispute liability for service charges in spite of its lease providing that the landlord's annual service charge certificate was "conclusive".

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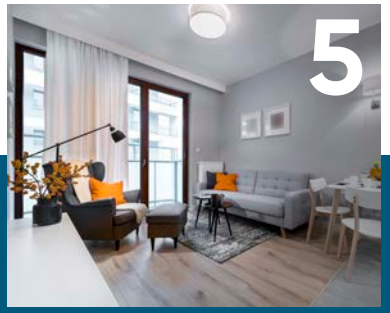

RAKUSEN V JEPSEN: SUPREME COURT DECIDES THAT A RENT REPAYMENT ORDER CANNOT BE MADE AGAINST A SUPERIOR LANDLORD

The Supreme Court unanimously decided that a rent repayment order (RRO) for a landlord's failure to obtain a licence to operate a "house in multiple occupation" (HMO) can only be made against the immediate landlord of a tenancy. In this case the tenants' claim for an RRO against their superior landlord under a "rent to rent" scheme was struck out.

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> I am therefore satisfied that it is not possible to imply a term into this agreement to the effect that Mr Barton will be paid a reasonable fee if the sale was for less than £6.5m. It is not possible to say that there is any particular fee to which the parties would clearly have agreed, or which is so obvious that it goes without saying and it is not necessary to imply such a term to give the agreement business efficacy or coherence.

CASE 1

BARTON V MORRIS:
Supreme Court refuses to award commission for £6m residential property sale

AUTHOR: AKHIL MARKANDAY

WHAT WAS IT ABOUT?

- Mr Barton had made two failed attempts to purchase a property in Northolt, costing him almost £1.2m in forfeited deposits. Determined to recoup his losses, he verbally agreed with the seller that he would receive £1.2m if he introduced a purchaser of the Northolt property who paid at least £6.5m for the property.
- Mr Barton introduced a purchaser who was prepared to pay £6m, and the sale went through on that basis. The contract was silent on what would happen in these circumstances; it only provided for what would happen if the property sold for £6.5m or more. The seller argued that there was no obligation to pay anything to Barton. Mr Barton disagreed, and brought a claim for the reasonable value of his services (on the basis of an implied term and/or unjust enrichment).
- The first instance judge held that Mr Barton was not entitled to any payment. The Court of Appeal allowed Mr Barton's appeal and held that he was entitled to a reasonable fee (£435,000) for his services. The seller appealed to the Supreme Court.

WHAT DID THE COURT SAY?

- The majority of the Supreme Court found for the seller, so although Mr Barton had introduced a purchaser for the property, he received nothing for his services. Ultimately the case turned on the majority's view that by agreeing to be paid an unusually large fee for a sale at £6.5m or above, Mr Barton had also agreed to receive nothing if the sale was for less.
- It is worth noting that two out of five Supreme Court Justices disagreed. Both considered that a term allowing commission for a sub £6.5m sale had not been ousted by the express terms of the contract, and should be implied by law into the oral contract between the parties. One of the Justices would also have allowed the unjust enrichment claim.

WHY IS IT IMPORTANT?

- The decision was not clear cut by any means, and serves as a salutary reminder that all eventualities should be dealt with explicitly in a contract to avoid an argument over whether a "missing" term should be implied into the contract, or whether there might be a claim based in unjust enrichment.

CASE 2

AVIVA V WILLIAMS

Contractual freedom for landlords to determine service charges is preserved... to a point.

AUTHOR: PERRY SWANSON

WHAT WAS IT ABOUT?

- This case concerned a mixed use commercial and residential block. The leases required the residential tenants to pay, by way of service charge, a contribution to three types of maintenance costs (insurance, building services and estate services) as either a stated fixed percentage or *"such part as the **Landlord** may otherwise reasonably determine"* (the "Reapportionment Provisions"). The landlord had, for many years, been demanding service charges in different proportions to the fixed percentages specified in the residential leases, relying on the Reapportionment Provisions.
- Section 27A of the 1985 Act gives the First-tier Tribunal jurisdiction to determine disputes concerning residential service charges (liability, quantum etc.). There is an anti-avoidance provision (section 27A(6)) that renders void any agreement that effectively ousts this FtT jurisdiction. The leaseholders claimed that the Reapportionment Provisions were rendered void by section 27A(6), leaving the landlord with only the fixed percentages in the lease. In the alternative, the leaseholders argued that the reapportionment imposed by the landlords was unreasonable. Essentially, this appeal raised the question of just how far section 27A goes in restraining what would otherwise be the parties' freedom of contract.

WHY IS IT IMPORTANT?

- This decision clarifies that a landlord's discretionary decision making power to depart from fixed lease percentages remains intact and will be subject only to a review by the FtT if so required. The decision should reduce the risk of service charge shortfalls, whilst leaving leaseholders with an avenue to ask the FtT to determine whether a reapportionment is in fact reasonable.

WHAT DID THE COURT SAY?

- Each of the lower courts responded in a different way. The FtT decided that the landlords' contractual power to reapportion remained intact; the Upper Tribunal departed from the FtT's decision holding that all of the wording in the Reapportionment Provisions was void, leaving only the fixed percentages specified in the lease, unless the parties agreed otherwise. The Court of Appeal took a different approach. It held that the Reapportionment Provisions should remain, but ought to be amended to replace reference to "the Landlord" with the FtT, as it is the FtT alone that has jurisdiction to determine the proportions to be paid if there is a departure from the fixed lease percentages, leaving the tenants to apply for an FtT determination in every case of a departure from the fixed percentages.
- The Supreme Court approved the FtT's decision, finding that the Reapportionment Provisions would only be void to the extent that they purported to oust the FtT's jurisdiction, for example if they provided for any landlord's decision departing from the fixed lease percentages to be final and binding, which the lease provisions did not do. The FtT's jurisdiction therefore remained intact.
- *Oliver v Sheffield City Council*, which all the lower courts relied upon, was wrongly decided as this would result in every discretionary decision affecting a leaseholder's service charge being referred to the FtT, which would produce the most bizarre and unintended results, completely overwhelming the FtT by opening "a veritable Pandora's box of disputes".

> "In my judgment it was not the purpose or effect of section 27A(6) to deprive that form of managerial decision making by landlords of its ordinary contractual effect, save only to the extent that the contractual provision seeks to make the decision of the landlord or other specified person final and binding, so as to oust the ordinary jurisdiction of the FtT to review its contractual and statutory legitimacy."

> . . . as well as being contrary to principle, the notion that visual intrusion cannot constitute a nuisance is not supported by precedent and indeed that such direct authority as there is positively supports the opposite conclusion

CASE 3

FEARN V TATE GALLERY

Nothing overlooked! No change to the law of private nuisance in Tate viewing platform case.

AUTHOR: REBECCA CAMPBELL

WHAT WAS IT ABOUT?

- Neo Bankside is a luxury residential development, comprising a number of apartments that have floor to ceiling windows. It is situated approximately 35 metres away from the Tate Modern's 10th floor viewing platform, which attracts around 600,000 visitors a year, who can see into the luxury apartments (that were built before the viewing platform was installed).
- Four apartment owners complained that the use of the viewing platform was a nuisance and invasion of privacy. The Tate's visitors were peering inside their apartments, watching their every move, and this invasion of privacy meant that they could not enjoy their properties. They sought an injunction requiring the Tate to close part of the platform on the grounds of nuisance and a breach of their human rights to 'private and family life'. Their claim was dismissed, and the Court of Appeal agreed. The apartment owners appealed to the Supreme Court.
- Nuisance claims historically relate to noise emanating from or physical activity on land that prevents the enjoyment of neighbouring property. The law of nuisance does not prevent the overlooking of windows by neighbouring buildings nor does it create a right to privacy, so did this case create new law?

WHY IS IT IMPORTANT?

- The position remains that overlooking from one building to another in an urban built-up environment like London will not ordinarily constitute a nuisance. Where one big residential tower is built next to another and one resident can see into a neighbour's flat, this "overlooking" will not be a nuisance. What remains to be seen is where the line will be drawn between common or ordinary and "abnormal" use of buildings and amenity spaces that could give rise to a nuisance claim.

WHAT DID THE COURT SAY?

- All five Justices of the Supreme Court decided that visual intrusion of the kind proved in this case (consisting of near constant observation, made worse by the use of cameras and social media, and occasionally binoculars), was capable of amounting to a private nuisance. A slim majority (3:2) held that, since the operation of the viewing gallery could not be said to constitute a **normal use** of the Tate's land (in contrast to the use by the leaseholders of their glass-walled flats some 35 metres away), the Tate had committed a nuisance.
- So the 'ordinary and common use' test was central to the judgment. Inviting members of the public to admire the view from a viewing platform is not a common and ordinary use of the Tate's land, even in the context of operating an art museum in a built-up area of south London.
- No new law or extension of the existing law of nuisance was necessary. The common law had already developed "tried and tested" principles, one simply had to apply the correct test in nuisance to arrive at a finding that the Tate was liable in nuisance in this case. It is no answer to a claim for nuisance to say that the defendant (Tate) is using its land reasonably or in a way that is beneficial to the public.
- The two dissenting Justices agreed that the visual intrusion complained of could constitute a nuisance, but disagreed on the test to apply when considering whether something constitutes a nuisance. Unlike the majority (which ruled that it came down to whether the Tate's use was ordinary and common within the locality), the two dissenting Justices favoured a wider, objective reasonableness test, and on this basis did not agree that the Tate was liable in nuisance.

CASE 4

SARA & HOSSEIN ASSET HOLDINGS V BLACKS

Pay now, argue later!

AUTHOR: ROGER COHEN

WHAT WAS IT ABOUT?

- Blacks was the tenant of retail premises in a multi let building, for which it paid rent and a service charge. Under its lease, once the landlord had ascertained the total cost of the service charge and the proportion payable by Blacks for the service charge year, it would furnish a certificate to Blacks setting out this amount, and this certificate was "conclusive" in the absence of "manifest or mathematical error or fraud".
- Blacks accepted that this certification was conclusive as to the landlord's expenditure on services and expenses, but not as to its liability to pay the service charges. The correct categorisation of the services and expenses to derive the sum payable by Blacks could be contentious. Blacks adopted an **"argue now, pay later"** approach.
- The landlord argued that the certificate was conclusive as to *both* the sums incurred by the landlord and Blacks' liability to pay, subject only to the defences of manifest or mathematical error or fraud. Allowing Blacks to challenge payment of the service charge would undermine the commercial purpose of enabling the landlord to recover the costs and expenses it had incurred without significant delay or dispute – so, **"pay now, you cannot argue".**

WHAT DID THE COURT SAY?

- The majority of the Supreme Court (4:1) held that neither party's interpretation of the relevant clause was satisfactory and adopted an alternative interpretation. Whilst the landlord's certificate is conclusive as to what is required to be paid by the tenant, payment by Blacks of the certified sum in accordance with the certificate did not preclude Blacks from disputing liability in the courts; **"pay now argue later"**.
- This interpretation was consistent with the language of the lease; the landlord would be assured of payment without undue delay, but the tenant could still raise and pursue any arguable defence at a later stage.
- Lord Briggs was the dissenting judge. He considered that the language of the clause was clear and "pay now argue later" was an imaginative creation which the parties could have agreed (but did not), and could not be derived by interpreting the ordinary meaning of the words in the lease.

WHY IS IT IMPORTANT?

- Of the objections to a service charge demand permitted by the lease, fraud is hard to prove and mathematical or manifest errors do not protect against many of the wrongs which lead the landlord to demand and the tenant to pay too much; for example, works which fall outside the scope of the services to be rendered according to the service charge regime. So the third way revealed by the reasoning of the majority provides important protection for the tenant in a world where no statutory protection is available. On this occasion "creative imagination" is not faint praise with which to be damned but a tribute to judges working in tandem with commercial realities.

> "Such an interpretation provides real benefit to the landlord not only in terms of cashflow but also because, from the landlord's perspective, there is a world of difference between the tenant being able to hold up payment whenever charges are disputed and the tenant being required to pay first and then to have to take the initiative to initiate and establish a claim."

> We accept that the interpretation we take renders RROs less effective than they perhaps could be if they were to be made available against superior landlords. But in our view that development would undermine the clear definition of an RRO, as set out in section 40(2) of the 2016 Act, and would therefore require new legislation.

CASE 5 RAKUSEN V JEPSEN

Supreme Court decides that a rent repayment order cannot be made against a superior landlord

AUTHOR: ROBERT HODGSON

WHAT WAS IT ABOUT?

- Mr Rakusen held the long-lease of a flat in Finchley Road (the **Property**). In 2016 Mr Rakusen granted a tenancy of the Property to Kensington Property Investment Group Ltd (**KPIG**). Under this "rent to rent" scheme, KPIG entered into licence agreements with three tenants (the **Tenants**). It was agreed by all parties that as the Tenants were not from the same household and were sharing living facilities, the Property was operating as an unlicensed HMO.
- Tenants who live in an unlicensed HMO may apply to the First-Tier Tribunal (**FtT**) for a rent repayment order (**RRO**) against their landlord under section 41 of the Housing and Planning Act 2016 (the **Act**) and claim up to 12 months' rent paid under the licence or tenancy agreement.
- The Tenants applied to the FtT for RROs totalling £26,140 against Mr Rakusen, the superior landlord of the Property, who argued that an RRO could only be made against the Tenants' immediate landlord (KPIG) and not the superior landlord.

WHAT DID THE COURT SAY?

- The Supreme Court found that an RRO can only be made against the immediate landlord of the tenancy that generates the relevant rent, in this case, KPIG.
- The Supreme Court Justices based their decision on a natural interpretation of section 40(2) of the Act which states: 'A rent repayment order is an order requiring the landlord under a tenancy of housing in England to repay an amount of rent paid by a tenant.'
- The Court construed the phrase "repay an amount of rent paid by a tenant" as meaning rent paid to the 'landlord under a tenancy'. The natural meaning of 'landlord under a tenancy' is the immediate landlord of the tenancy which generates the rent of which repayment is sought, who in this case was KPIG, not Mr Rakusen. There was also support for this interpretation of the legislation in the Housing Act 2004 (the predecessor to the Act) under which an RRO could only be made against the immediate landlord, and there was no indication in the pre-legislative materials that the Act sought to change the 2004 position.

WHY IS IT IMPORTANT?

- "The Supreme Court construed the meaning of "landlord" under section 40(2) of the Act more narrowly for the purpose of establishing liability for an RRO. There was concern raised by Intervener, Safer Renting, that confining RROs to the immediate landlord provides an easy way for rogue landlords to escape an RRO – all they need to do is set up a rent-to-rent scheme ensuring that they are considered to be the superior landlord.
- There are, however, still serious sanctions for a superior landlord who lets a property in breach of the Act. It is a criminal offence to operate an unlicensed HMO (where licence is required) and if convicted, the fines for non-compliance are unlimited. Local authorities also maintain a range of further enforcement options such as enforcing a civil penalty of up to £30,000 per offence. Landlords in breach (including superior landlords) can also face banning orders and entry into the data base of rogue landlords.
- It is therefore still very important to ensure that landlords who are responsible for HMOs have the correct licence in place.

GETTING IN TOUCH

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