BRIEFCASE
QUARTERLY REAL ESTATE DISPUTES UPDATE

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Season's Greetings and best wishes for 2024

BRYAN CAVE LEIGHTON PAISNER BLP

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> There can be no rule that there must always be a delay before a break clause can be exercised. That would be a fetter which is not found in the statute... there are cases where an immediately exercisable break clause may be appropriate – so it cannot be said that the very notion of such a clause is inconsistent with the underlying policy of the Act.
>
> [2023] EWHC 2495 (CH) [82]

CASE 1

B&M RETAIL LTD V HSBC BANK PENSION TRUST (UK) LTD

High Court weighs up landlord's redevelopment plans with tenant's security of tenure in business lease renewal

AUTHOR: AKHIL MARKANDAY

WHAT WAS IT ABOUT?

- B&M sought to renew its lease of retail premises in Willesden under the Landlord and Tenant Act 1954 (**"1954 Act"**).
- The landlord, HSBC, missed the opportunity to oppose the renewal under the 1954 Act. Having committed to grant a lease of the same premises to new tenant Aldi (that required an extensive redevelopment), it was imperative that HSBC secured an early redevelopment break in B&M's renewal lease.
- B&M issued a claim for the grant of a new ten year tenancy. In response, HSBC proposed an 18-month term with a landlord's redevelopment break clause operable immediately on six months' notice.
- The County Court was satisfied that there was a "real possibility" of HSBC's redevelopment going ahead, and the prejudice to HSBC's development plans and the potential financial losses if the agreement with Aldi was lost weighed in favour of granting a redevelopment break clause operable immediately.
- B&M appealed on the ground that the immediately operable break clause in the renewal lease is inconsistent with the purpose of the 1954 Act, which is to confer a reasonable degree of security of tenure on tenants.

WHAT DID THE COURT SAY?

- The High Court upheld the County Court decision. The Judge had applied the correct legal test and had balanced the interests of B&M and HSBC, comprehensively weighing all the factors both against and in favour of an immediately exercisable break.

WHY IS IT IMPORTANT?

- The court has a wide discretion when carrying out the requisite balancing exercise in 1954 Act lease renewals. While the tenant's interest in security of tenure may justify some delay in the landlord's ability to redevelop resulting in a later break date in the renewal lease, in cases where the landlord's redevelopment plans are well-developed and a delay may jeopardise the landlord's plans altogether, there is no rule in the 1954 Act that prevents a court from granting an immediately exercisable break in the renewal lease.
- This case was unusual. HSBC missed B&M's notice seeking a new lease under the 1954 Act, so failed to serve a counter-notice indicating its intention to oppose B&M's renewal on redevelopment grounds The notice provisions under the 1954 Act are strict and unforgiving, and in this case a missed statutory deadline led to years of expensive litigation concerning the terms of the renewal lease.
- The Law Commission is currently working on a project to reform the 1954 Act. This case highlights that its notice provisions are fraught with technical traps for the unwary - an issue that will hopefully fall in scope of the Law Commission's proposed reform of the 1954 Act.

CASE 2

THE RIDGEWAY (OXSHOTT) MANAGEMENT LIMITED V (1) TERENCE DESMOND MCGUINNESS AND (2) EMMA MCGUINNESS

Injunction awarded to preserve "one plot, one house" estate policy

AUTHOR: EDWARD GARDNER

WHAT WAS IT ABOUT?

- Mr and Mrs McGuiness owned one of 47 plots on The Ridgeway estate in Oxshott, Surrey. Like other owners at The Ridgeway, they had signed a deed of easement granting them the right to use the private roads within the estate "*for the sole purpose of access to and egress from the Property in connection with its use as a single private dwelling house*".
- When Mr McGuinness's elderly father became unwell, Mr and Mrs McGuiness obtained planning permission to demolish their existing home and build two new houses on the same plot, one as their family home and the other to provide a home for Mr McGuiness's father. The Ridgeway's estate management company (RMOL) brought proceedings for an injunction to prevent the proposed construction works on the basis that they would breach the easement to use the road for more than the permitted single dwelling.
- The limitation on the use of the private roads was contained within an easement so the procedure under section 84 of the Law of Property Act 1925, that enables covenantees to seek a modification or discharge of a restrictive covenant, was not available to the McGuinnesses. Instead, they argued that an injunction would be oppressive under the circumstances. There had been numerous substantial renovation and extension projects on the estate that had caused similar disruption and obstruction, and an award of damages in this case would be more appropriate.

WHAT DID THE COURT SAY?

- Using the private road in excess of use in connection with a single private dwelling would constitute a trespass. Where there is a trespass, the starting point is that there should be an injunction, but there may be cases where it would be oppressive to award an injunction and damages would be more appropriate.
- The court held that RMOL was entitled to an injunction. If an injunction was refused, the system of easements on the estate would be undermined; others could just "buy off" the easements and this would encourage "in fill"/overdevelopment of single plots on the estate. The McGuinnesses knowingly entered into the deed of easement and were aware of the opposition to infilling on the estate. Their single house could be extended and the court found a stubborn reluctance on their part to consider alternatives. Damages would not adequately compensate RMOL for what would be a clear contravention of its "one plot, one house" policy with potentially significant knock-on consequences for further breaches across the wider estate. Consequently an injunction was not oppressive.

WHY IS IT IMPORTANT?

- Mr and Mrs McGuiness had not tried to "steal a march" by implementing their planning permission and proceeding with the development without addressing the issue of the easement concerning the use of the private estate roads. Nonetheless, the courts still awarded an injunction.
- This judgment will serve as a caution to developers that an injunction remains a real risk if the proposed development would interfere with property rights. Developers need a comprehensive understanding of the rights and restrictions that may constrain development in order to adopt an appropriate mitigation strategy or modify plans accordingly.

> "Damages would not adequately compensate RMOL for what would be a clear contravention of the "one plot, one house" policy it has so strenuously attempted to impose and enforce."
>
> [2023] EW MISC 9 (CC) [138]

> In my judgment, the compartmentalised approach should no longer be followed, and to do the trial judge justice, in this case he considered the grounds of opposition both singly and cumulatively. That was an entirely correct approach.
>
> [2023] EWCA CIV 1178 [62]

CASE 3

HARMOHINDER SINGH GILL V LEES NEWS LTD

Court of Appeal considers parameters of "bad tenant" grounds in opposed lease renewal case

AUTHOR: LAUREN KING

WHAT WAS IT ABOUT?

- Lees News Ltd operates a supermarket from premises in Kensington, which it occupies under two Landlord and Tenant Act 1954 (**"1954 Act"**) leases.
- When it served notices seeking to renew its leases, its landlord Mr Gill served counter-notices stating that he would oppose the renewal on several grounds under section 30(1) of the 1954 Act: (a) the state of disrepair of the premises, (b) the tenant's persistent delay in paying rent, (c) other substantial breaches of tenant's obligations and tenant conduct issues, and (f) his intention to redevelop the premises.
- In County Court lease renewal proceedings ground (f) failed, however the court found that when Mr Gill served counternotices opposing renewal, the premises were in substantial disrepair as a result of the tenant's breach of its repairing covenant; the tenant had persistently delayed paying rent during its tenancies; there were other breaches of the lease; and the tenant's litigation conduct had been poor.
- The Judge nevertheless exercised his discretion in the tenant's favour and held that the tenant ought to be granted new leases of the premises. He took into account the fact that the tenant had remedied the substantial disrepair by the date of the hearing; the delay in payment of rent was minor and would unlikely recur, and the other breaches of covenant were minor. The landlord appealed.

WHAT DID THE COURT SAY?

- When a landlord relies on "tenant fault" grounds to oppose a 1954 Act lease renewal, there is a two-stage process: (1) the landlord must first prove the bad tenant conduct, then (2) the court must exercise a value judgment to decide if, due to that conduct, the tenant ought not to be granted a new tenancy.
- For the purpose of (1), the court must not focus on tenant conduct at a single snapshot in time but should instead consider the tenant's overall performance throughout the lease. There may be a particular emphasis on tenant conduct between the service of notices and the hearing.
- For the purpose of (2), the court should consider the grounds of opposition both individually and cumulatively. It should consider tenant conduct and all relevant circumstances in the round and reach an overall conclusion, rather than compartmentalise each particular ground of opposition and consider conduct and circumstances relevant only to that ground.
- Adopting the above approach, the Court of Appeal upheld the County Court decision and ordered a renewal of the tenant's leases.

WHY IS IT IMPORTANT?

The Court of Appeal has confirmed that:

- tenant conduct throughout the lease term is relevant for the purpose of establishing "bad tenant" grounds of opposition, and does not turn on the status quo at any particular date.
- the court should not take a "compartmentalised" approach when considering tenant behaviour under section 30. All breaches, grounds of opposition, conduct and circumstances should be considered collectively when the court is exercising its value judgment.

CASE 4

WOLVERHAMPTON CITY COUNCIL (AND OTHERS) V LONDON GYPSIES AND TRAVELLERS (AND OTHERS)

Supreme Court backs newcomer injunctions

AUTHOR: REBECCA CAMPBELL

WHAT WAS IT ABOUT?

- Several local authorities obtained injunctions against 'persons unknown' which were designed to prevent Gypsies and Travellers from camping on local authority land without permission. At the time the injunctions were granted, these 'unknown persons' or 'newcomers' had not yet actually camped on the local authority land, nor had they threatened to commit any other unlawful activity.
- When the local authorities sought to extend the injunctions, the High Court expressed concern and concluded that it did not have the power to grant newcomer injunctions, except on a short-term, interim basis and it made a series of orders discharging the newcomer injunctions obtained by the local authorities.
- The local authorities successfully appealed to the Court of Appeal, which held that the Court did have the power to grant newcomer injunctions. Before the Supreme Court, the case centred around the issue of unauthorised encampments of travellers. Given the potentially wide ranging nature of newcomer injunctions, the Court agreed to hear interventions from Friends of the Earth and Liberty, who made representations on the issue of protecting the right to protest.

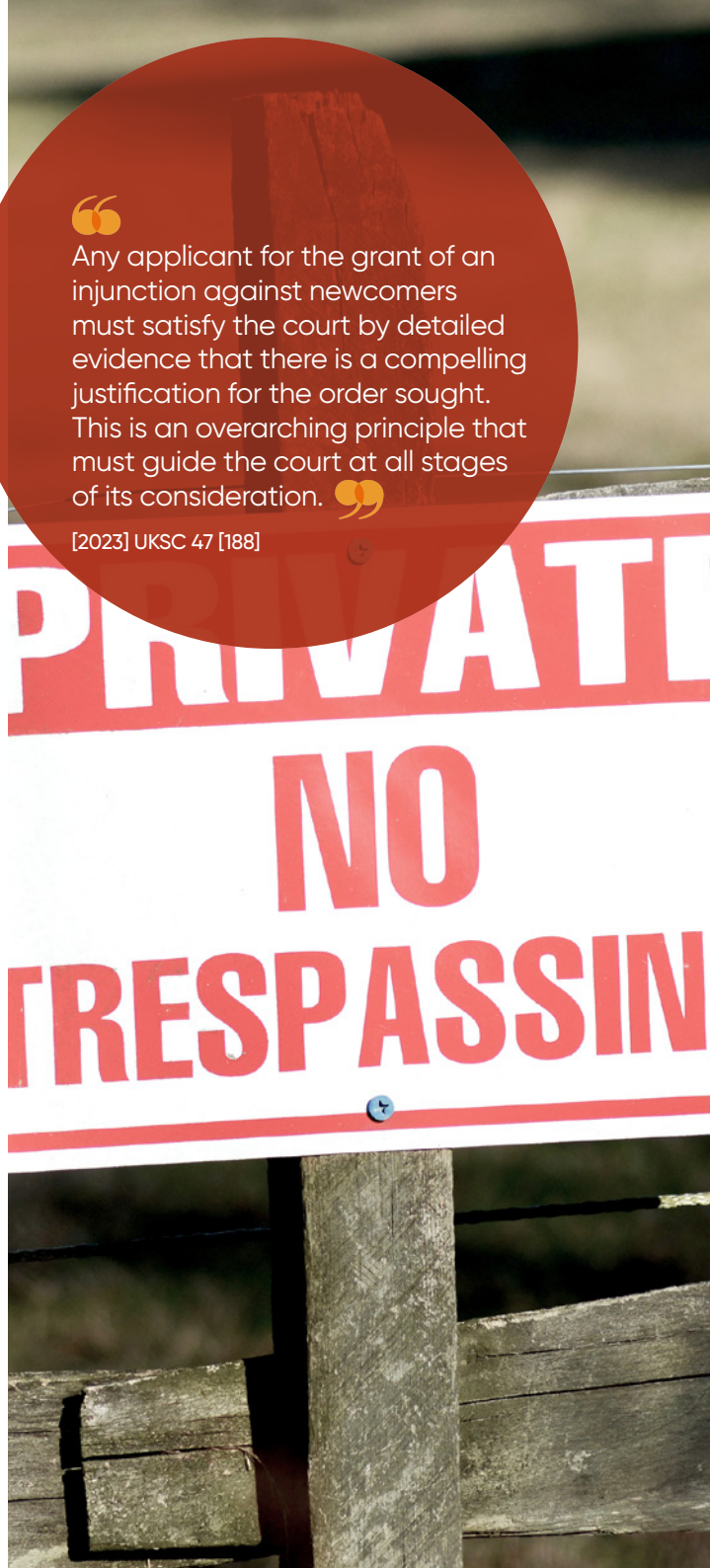
WHAT DID THE COURT SAY?

- The Supreme Court unanimously held that that the Court does have power to grant newcomer injunctions. However, it should only exercise this power against unknown persons in circumstances where there is a compelling need to protect civil rights or to enforce planning or public law that is not adequately met by any other available remedies.
- Balancing the wide ranging nature of this new type of injunction, the Court also directed that procedural safeguards must be incorporated to protect newcomers' rights. This includes an obligation on the landowner to take all reasonable steps to draw the application and any order made to the attention of those likely to be affected by it; and to provide the most generous provision for newcomers to have the ability to apply to have the injunction varied or set aside. The injunctions must also not apply for a disproportionately long time period or to a disproportionately wide geographical area.

WHY IS IT IMPORTANT?

- The decision is an important clarification of Court's wide ranging discretion when deciding applications for injunctions against persons unknown.
- The decision will be welcomed not just by local authorities dealing with unauthorised encampments, but by private landowners looking to proactively protect land and property, in a climate where groups such as Just Stop Oil and Extinction Rebellion are increasing their high profile protest actions and thinking of creative new ways to cause maximum disruption. However, the evidential bar to obtaining a newcomer injunction remains high and applicants must be prepared to demonstrate a compelling justification to satisfy the court that the remedy is appropriate.

> "Any applicant for the grant of an injunction against newcomers must satisfy the court by detailed evidence that there is a compelling justification for the order sought. This is an overarching principle that must guide the court at all stages of its consideration."
>
> [2023] UKSC 47 [188]



> The proposed use is reasonable and the fact that it does not require planning permission is an indication that it is a minor alteration to the use of the premises and one that would not normally give rise to concerns, even in a situation where properties are conjoined.
>
> [2023] UKUT 251 (LC) [82]

CASE 5

PETER MARTIN KAY V JOANNE SARAH CUNNINGHAM (1) BARRY NIX (2)

Upper Tribunal modifies restrictive covenant to allow Florence Nightingale's childhood home to be used as a B&B

AUTHOR: ROBERT HODGSON

WHAT WAS IT ABOUT?

- In 2011 Mr Kay purchased Lea Hurst, a Grade II listed building and the former home of Florence Nightingale, for £1.7m.
- In 2019 Mr Kay decided to let out five of the 15 bedrooms at Lea Hurst on a bed and breakfast (**B&B**) basis. This was in breach of a restrictive covenant imposed by an earlier transfer of the property not to use Lea Hurst other than as "a single private residence".
- Two neighbours of Lea Hurst, who had the benefit of the covenant, commenced proceedings against Mr Kay seeking an injunction to prevent Mr Kay letting out the rooms. Mr Kay then applied to the Upper Tribunal to seek modification of the covenant to allow the use of five of the rooms as a B&B. The neighbours objected.

WHAT DID THE COURT SAY?

- Section 84(1) of the Law of Property Act 1925 sets out grounds upon which the Upper Tribunal may modify or discharge restrictive covenants affecting land:
  - (a) The covenant should be deemed obsolete; or
  - (aa) The covenant impedes some reasonable use of the land and does not confer practical benefits of substantial value or advantage on those entitled to enforce it; and any loss can be compensated in money; or
  - (b) All parties with the benefit of the covenant consent to its discharge or modification; or
  - (c) The discharge or modification will cause no injury.
- The Tribunal found that that there was no credible evidence to show that the modification of the covenant would have any effect on the interests of the neighbours. It was satisfied that grounds (aa) and (c) had been made out, and exercised its discretion to modify the covenant, with the caveat that Mr Kay's fee-paying guests should use a separate driveway to minimise disturbance to neighbours.

WHY IS IT IMPORTANT?

- In reaching its decision the Tribunal took into account the fact that the use of five rooms for B&B purposes was "permitted development" and the change of use did not require planning permission, supporting a finding that Mr Kay's proposed B&B use was "reasonable" for the purpose of ground (aa). This was also not a case where there was a risk of the floodgates opening (i.e. a risk of further development). The Tribunal may have reached a different conclusion if planning permission was required and there was a risk of future development.
- The Tribunal noted that Mr Kay had spent £1m restoring Lea Hurst to preserve a heritage asset and his motivation to make his home available to the paying public was "*in part at least, altruistic rather than wholly pecuniary*". This may have led the Tribunal to overlook Mr Kay's cynical breach of the covenant that caused his neighbours to seek an injunction in the first place. This sort of behaviour is less likely to be tolerated where the desire to modify/discharge a covenant is purely commercially or financially motivated.

GETTING IN TOUCH

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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