
DLA PIPER
REAL NEWS
SPRING 2015

REAL NEWS – SPRING 2015

A NOTE FROM THE EDITOR AND A LOOK AHEAD

Welcome to Real News! I'm pleased to introduce to you DLA Piper's quarterly guide to key developments in English and Welsh real estate law. In this quarter's edition:

- Mark Beardwood looks at service charge apportionments in mixed use schemes; (Pg. 03)
- Ben Barrison considers the Law Commission's proposed reforms to rights to light law; (Pg. 04)
- Mary Bolton examines a recent Court of Appeal decision which sets out matters to consider when tenants seek relief from forfeiture; (Pg. 07)
- Katie Dunn examines a recent case that deals with easements by prescription; and (Pg. 08)
- Michelle Eyre provides a landlord's guide to further changes concerning tenancy deposit schemes. (Pg. 09)

LOOK AHEAD

- **The Supreme Court is to decide upon reimbursement of rent**

In May 2014, the Court of Appeal ruled that Marks and Spencer Plc, who having exercised a break clause, was not entitled to recover rent paid in advance relating to a period after the break date. The lesson being that a tenant can only recover such rent where the lease contains an express provision to that effect. On 11 November 2014, Marks and Spencer was given permission to appeal to The Supreme Court. A date for that hearing is awaited.

- **Proposal to raise the threshold for serving statutory demands on private individuals**

Currently a creditor who is owed at least £750 by a private individual has, at its disposal on recovery of such debt, the ability to serve a statutory demand with a view to obtaining a bankruptcy order against that individual. The Government has published legislation in which it proposes to raise significantly the threshold debt to £5,000 with effect from 1 October 2015. Other debtor friendly adjustments are also proposed. We'll report on this in more detail at a later date.

I welcome any feedback with regard to formatting and content and so if you do have any suggestions or requests then please do get in touch.

Rachael Jones, Editor
Senior Associate, Liverpool
T +44 151 237 4764
rachael.jones@dlapiper.com

SERVICE CHARGE
APPORTIONMENTS IN MIXED USE SCHEMES

A recent case has highlighted a service charge issue for investors buying a commercial building with a residential element; for example, retail or offices with apartments above on the upper floors. Typically a fund's investment in such a scheme will be based on the income from the commercial space, with the value from the apartments having been stripped out during development by the sale of long leases at a premium.

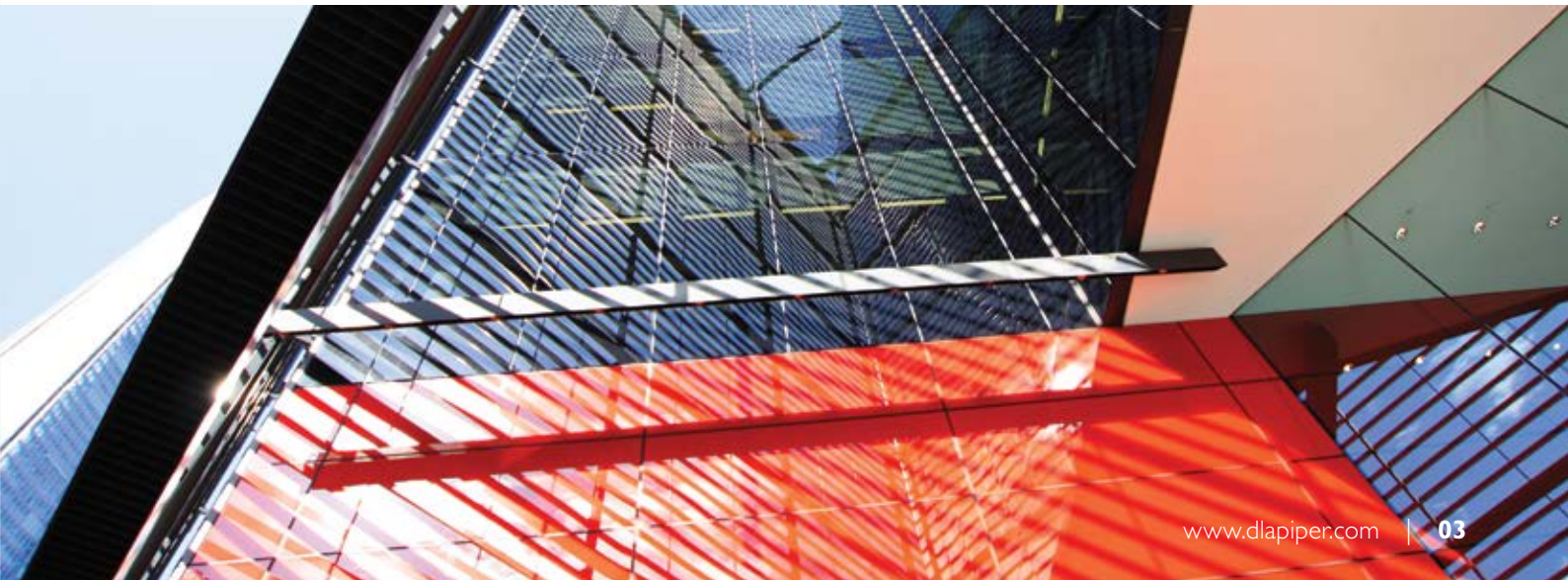
The legal structure for such an investment will often provide for the freehold acquired by the investor to be subject to one long lease of all of the apartments to a management company, with the apartment owners holding sub-leases. The management company would provide any services needed only by the residential tenants, thus distancing the freeholder from any involvement with them. As freeholder, the investor would still be responsible for the repair and maintenance of the structure and building common parts, but the service charge for this would be invoiced to the management company, which would invoice the residential tenants their proportion.

Sometimes the head lease to the management company will provide for a fixed proportion of the building service charge to be allocated to the residential space. Often, however, the head lease will provide for a variable proportion to be allocated, usually by the head landlord's surveyor, to allow for flexibility over the terms of the long residential leases.

The case of ***Windermere Marina Village Ltd v Wild and others*** [2014] looked at that type of clause in a straightforward lease of a dwelling, with the landlord providing services and charging a variable, rather than fixed, proportion as it determined in its discretion. The court ruled that such a provision was void as being contrary to the Landlord and Tenant Act 1985 and that the tenants could apply to the First Tier Tribunal to set the appropriate proportion.

Funds usually do not want to get involved in situations where they have a direct relationship with residential tenants, because of the many complications that the protections they have bring to an investment. However, the case of ***Gater and others v Wellington Real Estate Limited and LCP Commercial Limited*** [2014] has applied the Windermere principle to the type of structure designed to distance the investor from the residential tenants, where there is an intermediate lease to another party. The court held that a similar provision for allocation of a fair proportion of building services in the head lease was void and capable of being challenged by the residential sub-tenants who could apply to the First Tier Tribunal for that fair proportion to be fixed, ousting the landlord's surveyors discretion. On new schemes, such leases should definitely provide for a fixed proportion to be allocated to the residential elements, but this highlights a new issue in acquiring standing investments with residential parts.

Mark Beardwood
Partner, Liverpool
T +44 (0)151 237 4711
mark.beardwood@dlapiper.com



RIGHTS TO LIGHT
A NEW DAWN APPROACHING?

INTRODUCTION

Rights to light issues can have a significant impact on any development scheme in England and Wales. Neighbours can obtain court orders, known as injunctions, to prevent interferences with their rights to light and/or be awarded significant damages to compensate them for the loss of their rights. In some cases, these claims can destroy the viability of a development scheme or require it to be altered significantly.

Over the past 200 years, various statutes and cases have sought to clarify how and when rights to light can arise or be extinguished and/or what should be the appropriate remedy for interference with the rights-injunction or damages? If damages, how should they be calculated? Despite these efforts, the issue of rights to light remains an uncertain and usually highly contentious area of risk for most development schemes.

In an effort to address the problems, England's Law Commission undertook a detailed review of the law on rights to light. The Law Commission's final report was published in December 2014 and proposed significant changes to rights to light law, which are expected to be adopted by Parliament. This article considers the current problems posed by rights to light claims and the solutions proposed by the Law Commission.

What is an easement? A right benefiting a piece of land that is enjoyed over another piece of land owned by someone else.	***What is a right to light?*** An easement to enjoy the natural light that passes over someone else's land, and then enters a building through apertures/openings such as windows (with or without glass), skylights and glass roofs.
How much light? Sufficient natural light to allow the room or space behind the relevant aperture/opening to be used for its ordinary purpose. The amount of light can depend on type of property and room.	***What is not covered by a right to light?*** ■ A right to a view ■ A right to sunlight ■ A right not to be overlooked ■ A right to privacy However, many of the above are public law considerations for the grant of planning permission.

How can rights to light arise?	
Immediately:	***Enjoyment over time:***
■ Express grant	■ Prescription Act 1832—20 years enjoyment "as of right"
■ Implied grant	■ Common law prescription
■ Statute	■ Doctrine of lost modern grant

UNCERTAINTY, IMBALANCE AND MORE UNCERTAINTY

Developers must tread very carefully as to how and when they deal with the potential impact of rights to light claims on their scheme. The injunctions that can be awarded can result in the developer having to cut back their proposed scheme and/or stop work altogether. Thus the financial implications can be huge.

A neighbour who may be entitled to an injunction is under no constraints as to when it must issue proceedings for an injunction except that the courts will generally not assist a party who seeks an injunction after the event, if it can be shown that they had the opportunity to act sooner. Notwithstanding this general principle, there are examples in case law where a party has waited until a building has been erected and has then obtained an injunction requiring it to be cut back. These were extreme cases that show quite how much trouble an injunction can cause at any stage in a development project.

Given the nature of the threat posed by an injunction, neighbours can often extract favourable settlement payments from developers who may be prepared to pay to settle a claim rather than run the risks associated with court proceedings. With claims of this nature, the risks arising from court proceedings include the usual factors such as time and expense but also an additional layer of risk arising from the courts' discretion as to whether or not to award the claimant damages or an injunction. The case law provides some guidance for judges as to how this discretion should be exercised. Furthermore, recent Supreme Court discussion of the point suggests a flexible, proportionate approach that regards injunction as a last rather than first resort is to be favoured. However, the judge in each case retains a high degree of autonomy as to how to exercise discretion in that particular case. Therefore, until judgment is delivered, a developer may still face the risk that the court will order that its scheme be stopped.

Notwithstanding the problems for developers, neighbours seeking such injunctions should not do so lightly. Litigation relating to these injunctions can be very expensive and time consuming. Where a party seeks an interim injunction requiring the development to stop while the case is determined, the party requesting the injunction will have to give the court an undertaking to pay for any losses suffered by the developer, if the court goes on to decide that an injunction is not the appropriate remedy. In the context of a development, the losses could be significant, so the neighbour may be required to provide security for its undertaking either by way of payment of a sum into court or a charge over its assets. Accordingly, the threat of an injunction should always be considered in the context of whether the process can be funded.

CURRENT OPTIONS FOR DEVELOPERS

Developers often deploy one or more of the following tactics as part of their rights to light strategy:

- Negotiations to achieve early settlement and the release of future claims;
- Light obstruction notices;
- Rights to light insurance; and/or
- Developer-led litigation to determine the existence of the rights to light and the appropriate remedy.

A negotiated solution will provide certainty for the developer at an early stage. It may in some cases involve paying more than the claim is "worth" but it does eliminate the risk.

Light obstruction notices are statutory notices that can be served to prevent a neighbour claiming rights to light based on 20 years' continuous enjoyment as of right. If these remain unchallenged for 12 months, the neighbour's claim based on 20 years' enjoyment is eliminated. As well as eliminating claims, these notices can be a useful way to "flush out" potential claimants. However, they can have unintended consequences as they may alert parties to their potential rights.

In the past few years, rights to light insurance has become more and more popular. As with all insurance, it does not prevent the problem arising but provides comfort in the event that it does. Since negotiations and light obstruction notices can take time that is sometimes not available to a developer, many parties now regard rights to light insurance as a viable alternative to negotiated solutions and light obstruction notices.

Developer-led litigation can be appropriate in circumstances where the neighbour's claim lacks merit but the party is still seeking to extract damages using the threat of injunction. It is an option that should be deployed very carefully.

THE LAW COMMISSION'S PROPOSALS

There are two significant changes to the law being proposed by the Law Commission:

- *A statutory test of proportionality for the courts to use when deciding whether injunction or damages is the appropriate remedy.* The recommendation is that a court must not grant an injunction to restrain the infringement of a right to light if doing so would be a disproportionate means of enforcing the dominant owner's right to light taking into account all of the circumstances, including:
  - the claimant's property (for example, whether it is residential or commercial);
  - the loss of amenity attributable to the infringement including the extent to which artificial light is used at the property;

- whether damages would be adequate compensation;
- the claimant's conduct;
- whether the claimant delayed unreasonably in claiming an injunction;
- the defendant's conduct;
- the impact of an injunction on the defendant; and
- whether the scheme is in the public interest.

- *A Notice of Proposed Obstruction (NPO) procedure by which a developer can put its neighbours on notice as to the proposed development*. Following service of the notice, the neighbour must issue injunction proceedings within eight months otherwise it will only be entitled to claim damages for any interference with its rights to light.

Since the proportionality test is very similar to the approach commended by the Supreme Court in *Coventry v Lawrence*, it seems highly likely that the courts may be inclined to adopt a similar test in upcoming cases even if the adoption of the test is presented as part of the courts' general consideration as to how to exercise their remedial discretion. This may mean the courts are less likely to award injunctions in the future but developers should remain vigilant as there are a number of criteria for the courts to apply and the existence of artificial light and planning consent are unlikely to tip the balance in favour of damages in every case.

Once adopted, the proposed changes should enable developers to manage rights to light risks with greater certainty. Some industry commentators have suggested that the NPO procedure should be regarded as a last resort in the event that negotiations fail as it can appear to be aggressive. However, it seems to this author that, if and when available, the NPO may in fact be a sensible step for developers to take at an early stage so they can establish which neighbours are in fact going to seek injunctions and which will settle for financial compensation.

CONCLUSION

While we await the introduction of the recommendations, parties must continue to deal with rights to light matters under the current regime and take care to engage a proper and effective rights to light strategy. Different schemes require different strategies. The key is to be vigilant, aware and flexible.

Ben Barrison
Legal Director, London
T + 44 (0) 207 796 6184
ben.barrison@dlapiper.com

RELIEF FROM FORFEITURE – APPEAL COURT GUIDANCE

APPEAL COURT SETS OUT MATTERS FOR LANDLORDS TO CONSIDER WHEN TENANTS SEEK RELIEF FROM FORFEITURE

Practice point: This case is a helpful reminder of the factors to be considered by a court when exercising its discretion to grant relief from forfeiture. The court will take into account all the circumstances, including whether the tenant has deliberately failed to remedy the breach and whether it would be disproportionate and unjust for the tenant to be deprived of their property.

Relief from forfeiture is a discretionary remedy that is available to a tenant or any third party with an interest in the lease after a landlord has exercised its right to forfeit the lease. The objective of the court when granting relief is to put the landlord and the tenant back into the position they would have been if there had been no forfeiture. The court has a wide discretion whether to grant relief from forfeiture but will generally grant relief if the tenant remedies the breach, or pays compensation in respect of breaches which cannot be remedied, and the court is convinced the tenant will perform its obligations under the lease in the future.

Magnic Ltd v Ul-Hassan and another [2015]

Mr Ul-Hassan and Mrs Malik operated a takeaway restaurant from the premises without planning consent and, therefore, in breach of a lease covenant not to contravene the Town and Country Planning Act 1990. Their landlord, Magnic, served a section 146 notice on Ul-Hassan and Malik, following which possession proceedings were issued and served thereby forfeiting the lease. The possession proceedings were compromised under a consent order, with relief from forfeiture being granted to Ul-Hassan and Malik on agreed terms.

Ul-Hassan and Malik failed to comply with the terms of the consent order. Magnic obtained a possession order on 14 January 2011 with the proviso that, if Ul-Hassan and Malik ceased trading by 11 February 2011 (**"Deadline"**), relief from forfeiture would be granted. That possession order was stayed on 8 February 2011 pending an appeal. Ul-Hassan and Malik continued to operate the takeaway business until 31 May 2011 when the stay was lifted following dismissal of their appeal.

Magnic sought a declaration that the lease had been forfeited and that it was entitled to possession. Ul-Hassan and Malik applied for relief from forfeiture, arguing that the stay was sufficient to extend the Deadline. A district judge dismissed the relief application, declining to grant a retrospective extension of time in respect of the Deadline and declaring that the lease had become forfeit. Ul-Hassan and Malik appealed to the County Court, which also dismissed their appeal. They subsequently appealed to the Court of Appeal.

The Court of Appeal allowed the appeal. The focus of the appeal had to be on the way in which the district judge had exercised his discretion in refusing to extend the Deadline in order to obtain relief from forfeiture. It was common ground that the court had the power to exercise that discretion retrospectively. The Court of Appeal ruled as follows:

- Ul-Hassan and Malik's conduct was not deliberate. They had genuinely believed that the stay had extended the Deadline, pending the appeal. That belief was based on legal advice and was not unreasonable.
- Magnic would have enjoyed a substantial windfall if the lease were forfeited. It would have been able to demand a full market rent from a new tenant, whilst Ul-Hassan and Malik would have been deprived of a valuable asset.
- The lower court had failed to take into account the circumstances in which trading continued after the Deadline. Ul-Hassan and Malik's failure to comply with the conditions for relief from forfeiture was based on reasonable, if mistaken grounds, rather than a flagrant decision to carry on trading regardless of the consequences. Furthermore, they had significantly changed their position by ceasing to trade as soon as their appeal was dismissed, demonstrating that they would have ceased trading on the Deadline had the stay not been obtained.
- It would be disproportionate and unjust to deprive Ul-Hassan and Malik of their property in all the circumstances.

The appeal court concluded that in exercising its discretion, a court should be mindful that the purpose of reserving a right of re-entry is to provide the landlord with some security for the performance of the tenant's covenants. The risk of forfeiture is not intended to operate as an additional penalty for breach. It is an ultimate sanction designed to protect the landlord's reversion from continuing breaches of covenant and to secure performance of the lease covenants. There may be breaches which are so serious as to justify the refusal of relief, such as an unlawful sub-letting. However, in most cases relief will be granted on the breach being remedied and on terms as to costs.

Mary Bolton
Associate, Sheffield
T +44 114 283 3038
mary.bolton@dlapiper.com

EASEMENTS BY PRESCRIPTION
A TAKEAWAY FOR LANDOWNERS

An easement over land can be acquired by prescription in circumstances where a trespasser has made use of the land *"as of right"* for 20 years. The use will be *"as of right"* if it is exercised without force, without secrecy and without the permission of the landowner. Easements can have a significant impact on the use, enjoyment and value of land. Understandably, landowners are often keen to avoid such rights being acquired. The recent case of *Bennett* v *Winterburn* [2015] offers them some comfort.

THE FACTS

The case concerned the car park of a conservative club (**"Club"**) and the neighbouring fish and chip shop (**"Chip Shop"**) in Keighley, Yorkshire. The Chip Shop's suppliers and customers walked across and parked their vehicles in the Club's car park. Two issues were considered:

ISSUE 1: DID THE USE *"ACCOMMODATE THE DOMINANT LAND* (HERE THE CHIP SHOP)"?

The Club argued that the use could not be said to accommodate the Chip Shop in circumstances where it was the customers and suppliers of the Chip Shop, rather than the owners, that used the car park. The Club would be unable to take any legal action against the owners of the Chip Shop personally. The Judge found that it was sufficient, for the purposes of establishing an easement, that the Chip Shop benefitted from the arrangement. The Chip Shop had of course secured custom and supplies for its business as a result. A close connection between the use and the normal enjoyment of the Chip Shop was sufficient.

ISSUE 2: WAS THE USE "AS OF RIGHT"?

The Club had failed to take any action to prevent a right of way, on foot, from being established. However, the Judge considered the signage at the car park and various altercations between the Club's steward and the Chip Shop's customers.

The signage saved the Club from a right to park being established. It read: ***"Private car park. For the use of club patrons only. By order of the committee".***

The Club's signs were visible, unambiguous and appropriate and, on the facts, the Club had therefore done enough to show that the parking was contentious and not ***"as of right"***. It did not matter that the signs were addressed to the world at large and were not erected in response to the use of the customers and suppliers of the Chip Shop. The fact that the signs were largely ignored and the Club could have taken other steps to interrupt the user was neither here nor there.

THE LANDOWNER'S TAKEAWAY

The decision is good news for landowners, who may be concerned about the level of monitoring and action required in order to prevent a right of way being established. A sign offers a simple solution. However, the Judge accepted that a sign, in certain circumstances, could be found to have become redundant. Landowners should keep a watchful eye over their land and seek advice when an unlawful use is identified.

Permission to appeal has been granted and is due to be heard later this year.

Katie Dunn
Senior Associate, London
T +44 20 7796 6451
katie.dunn@dlapiper.com

TENANCY DEPOSIT SCHEMES **A LANDLORD'S GUIDE TO FURTHER CHANGES**

Since 6 April 2007, under the Housing Act 2004 ("**Act**") landlords are required to "protect" deposits paid by tenants on the creation of new residential assured shorthold tenancies ("**AST**") in England and Wales. "Protecting" a deposit means either insuring it or paying into a custodial scheme **and** serving the prescribed information on the tenant within the statutory timeframe.

Since then, there have been two Court of Appeal decisions resulting from the ambiguities and inconsistencies in the 2007 Act and regulations made under it. More recently, there have been yet more legislative changes.

Recent developments include:

- The Localism Act 2011 extended the period from 14 days to 30 days within which a landlord should protect its tenant's deposit and provide the tenant with the specified details of the protection scheme. It also reversed the rule which allowed landlords to remedy a failure to protect tenants' deposits by taking the necessary protective steps late.
- In *Superstrike Ltd v Marino Rodrigues* [2013] the Court of Appeal confirmed that if a landlord wanted to determine a statutory tenancy arising **on or after 6 April 2007** (otherwise than by forfeiture) it must either have duly protected any deposit paid or first returned the deposit to its tenant.
- In *Charalambous and Karali v Ng* [2014] the Court of Appeal extended the *Superstrike* principle to tenancies arising **before 6 April 2007.**

As part of the Deregulation Act 2015, which came into effect on 26 March 2015, Parliament has amended the existing legislation to clarify the law as follows:

- A landlord who has taken a deposit for a fixed term tenancy before 6 April 2007 which then became a periodic tenancy after 6 April 2007, will be required to protect the deposit and serve the prescribed information on its tenant within 90 days of the Deregulation Act 2015 amendments coming into force.
- If a deposit was taken after 6 April 2007 and protected and the prescribed information served, then on the renewal of the tenancy, it will be assumed that the prescribed information was properly served – although some tenancy deposit schemes may require their members to re-protect a tenancy deposit on the renewal of a tenancy.
- In a situation where both the deposit was taken and the tenancy became periodic before the 2007 Act took effect on 6 April 2007, although there is no financial penalty for not protecting a tenant's deposit in this instance, a section 21 notice served to gain possession of a property would be invalid unless the deposit has first been protected and the prescribed information provided to the tenant or alternatively the deposit has been returned to the tenant.

Bearing in mind that penalties for failing to properly protect a tenant's deposit includes the inability to serve a notice to end the periodic tenancy, as well as financial penalties, landlords are well advised to ensure that tenants' deposits are properly managed within the realms of the legislation.

Michelle Eyre
Legal Assistant, Sheffield
T +44 114 283 3584
michelle.eyre@dlapiper.com

If you have finished with this document, please pass it on to other interested parties or recycle it, thank you.

www.dlapiper.com