BRIEFCASE
QUARTERLY REAL ESTATE DISPUTES UPDATE

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BRYAN CAVE LEIGHTON PAISNER BLP

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> ...one can naturally describe the oil still being on the claimants' land as a continuing nuisance. But that is wholly misleading when one is trying to clarify the meaning of a continuing nuisance in the legal sense.
>
> Jalla and another v Shell International Trading and Shipping Company and another [2023] UKSC 16 [24]

CASE 1

JALLA AND ANOTHER V SHELL INTERNATIONAL TRADING AND SHIPPING CO LTD AND ANOTHER

Supreme Court rules on what constitutes a continuing nuisance

AUTHOR: VICTORIA BLANCHARD

WHAT WAS IT ABOUT?

- In December 2011, at least 40,000 barrels of oil were leaked off the coast of Nigeria and reached the Atlantic shoreline. Just under six years after the spill, the claimants (two Nigerian citizens) brought a claim in nuisance for undue interference with the use and enjoyment of their land caused by the spill. In April 2018, the claimants attempted to amend their claim form, including changing one of the parties being sued to Shell International Trading and Shipping Co Ltd ("STASCO").
- The date of accrual of a cause of action is the date from which the limitation period starts to run (in this case December 2011). Under English law, the limitation period is six years. The defendants argued that the claimant's amendments were being sought after the expiry of the limitation period which meant that they could not bring a claim against STASCO (the only English domiciled defendant, without which the English court would lack jurisdiction).
- So the question was whether the nuisance caused by the oil spill was limited to the date of the original oil spill or whether the continuing existence of oil on the claimants' land could constitute a "continuing" nuisance so as to effectively restart the limitation period each day, allowing them to amend their claim more than six years after the spill.

WHAT DID THE COURT SAY?

- A continuing nuisance requires a cause of action that is 'continually accruing'. Where an interference with the use and enjoyment of land is caused by a one-off event, such as a flood, the cause of action crystallises and the period of limitation begins to run once the land is affected.
- A cause of action cannot be said to continually accrue purely because the land is still subject to the effects (however severe) of the original interference; it must continue on a regular basis. For example, repeated noise, smells, smoke, vibrations or the overlooking that was at issue in Fearn v Tate.
- There was no continuing nuisance in this case because there was no repeated activity or an ongoing state of affairs for which the defendants were responsible that was causing continuing undue interference with the use and enjoyment of the claimants' land. The spill was a one-off event, and the cause of action accrued and was complete once the claimants' land had been affected by the oil in December 2011.

WHY IS IT IMPORTANT?

- Provides useful clarification and a reminder of the importance of issuing proceedings within the correct limitation period against the correct defendant.
- There is still scope for a continuing nuisance to arise in the context of repeated pollution events, and this case potentially paves the way for further collective actions to be brought in the English courts against parent companies domiciled in England or Wales even though the relevant events occurred in another jurisdiction.

CASE 2

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

Landlord's redevelopment break trumps the tenant's position

AUTHOR: JESSICA HOPEWELL

WHAT WAS IT ABOUT?

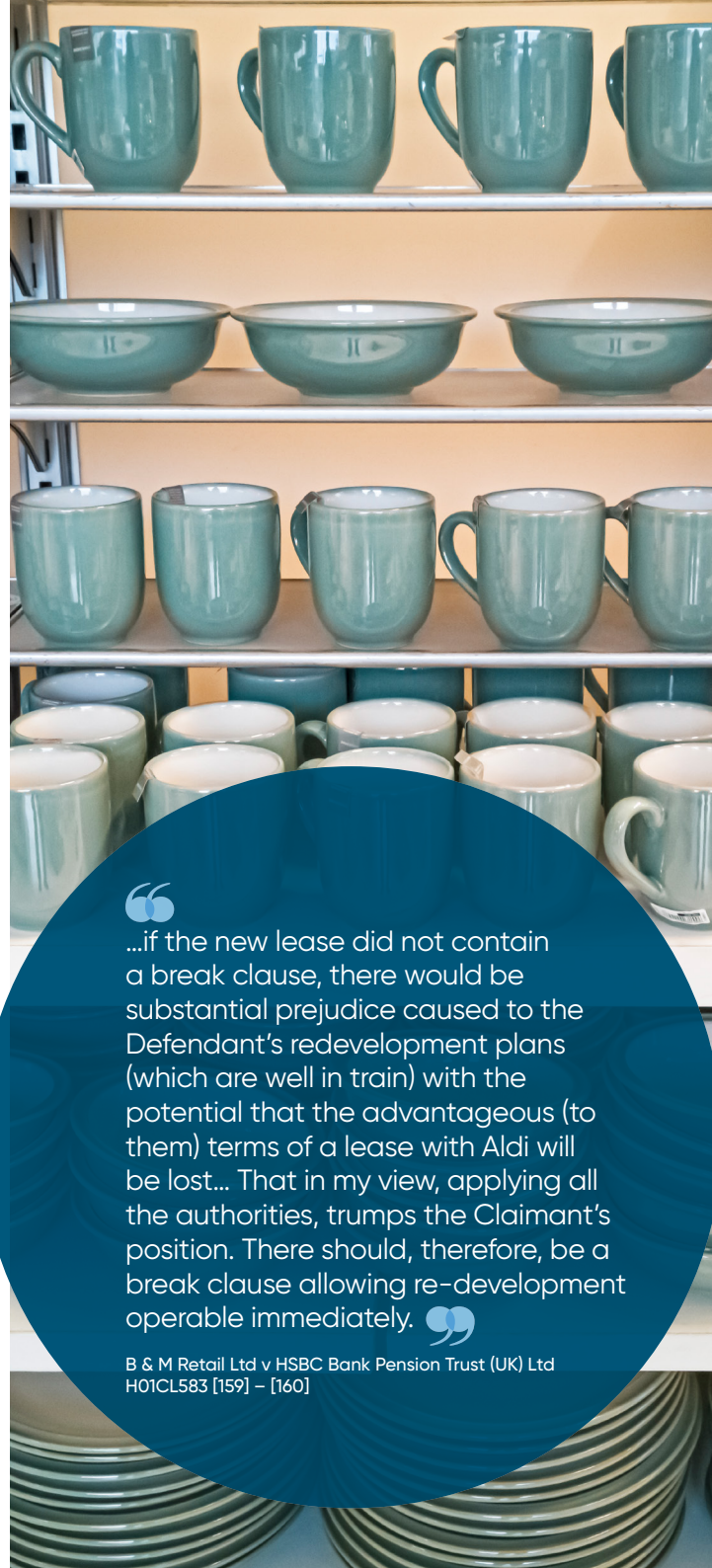
- B&M served notice on its landlord (HSBC) seeking to renew its tenancy of large retail premises in Willesden. HSBC had already entered into a conditional agreement for a 20-year lease with new tenant Aldi, whereby Aldi would carry out defined redevelopment works to the premises, which were in need of updating. HSBC had not appreciated that B&M had served notice seeking to renew its new lease, and so missed its opportunity to serve a counter-notice opposing renewal on the ground of redevelopment. It was therefore obliged to grant a new lease to B&M under the Landlord and Tenant Act 1954.
- The court was asked to decide whether the new lease should include a landlord's redevelopment break clause (and how soon this could be exercised) and the term length of the new lease.

WHAT DID THE COURT SAY?

- As to the inclusion of a redevelopment break clause, the central issue was whether there was a real prospect of planning permission for Aldi's works to the premises being granted, which would justify the inclusion of the redevelopment break clause in B&M's new lease. The court preferred HSBC's evidence on this issue and held that there was no reason to prevent the proposed redevelopment of the premises, and so it was appropriate to include a landlord's redevelopment break in the renewal lease.
- As to when the break clause could be exercised under B&M's new lease, the court said that a long lease without breaks would cause substantial prejudice to HSBC's redevelopment plans and the advantageous deal with Aldi could be lost if HSBC could not secure vacant possession of the premises by February 2025. That trumped B&M's position, and the court allowed a redevelopment break to be operable immediately under the new lease, upon HSBC giving six months' notice.

WHY IS IT IMPORTANT?

- This case is a good outcome for landlords, as it appears the court will not obstruct a landlord's redevelopment plans unless there is no real prospect of successfully implementing those plans. For landlords who miss the chance to oppose renewal or whose redevelopment plans are not sufficiently well advanced to oppose renewal, a redevelopment break is a good alternative.
- It is a reminder of the importance of dealing with formal notices promptly. Had the tenant's notice come to the landlord's attention in time, it could have opposed renewal and potentially avoided the need to grant a new tenancy to the existing tenant.



> "...if the new lease did not contain a break clause, there would be substantial prejudice caused to the Defendant's redevelopment plans (which are well in train) with the potential that the advantageous (to them) terms of a lease with Aldi will be lost... That in my view, applying all the authorities, trumps the Claimant's position. There should, therefore, be a break clause allowing re-development operable immediately."
>
> B & M Retail Ltd v HSBC Bank Pension Trust (UK) Ltd H01CL583 [159] – [160]

> It is perfectly true that the HoT were not headed "subject to contract" which would have put it beyond doubt that the parties did not intend to be contractually bound by any part of the HoT.
>
> Pretoria Energy v Blankney Estates [2023] EWCA Civ 482 [20]

CASE 3

PRETORIA ENERGY COMPANY (CHITTERING) LIMITED V BLANKNEY ESTATES LIMITED

"Subject to contract" heading not essential for heads of terms

AUTHOR: CARLY CURTIS

WHAT WAS IT ABOUT?

- The Court of Appeal considered whether heads of terms ("HoT") for a lease of farmland in Lincolnshire created a contractually binding agreement for lease.
- The HoT were not labelled "subject to contract", but instead were subject to planning consent being obtained.

WHY IS IT IMPORTANT?

- This case highlights the importance of parties being clear as to the legal effect of their HoT. Although not essential, it remains prudent to label HoT "subject to contract" to put it beyond doubt that the parties do not intend to be contractually bound.

WHAT DID THE COURT SAY?

- Parties often use the phrase "subject to contract" to show that they do not intend to be contractually bound, but the use of this phrase is not essential.
- Instead, the court must consider whether the communications between the parties lead objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.
- The HoT stipulated that a formal agreement should be drawn up and there were a number of important lease terms that had not been dealt with in the HoT, including the lease commencement date. The existence of a binding lock-out agreement which prevented the parties from negotiating with third parties for a limited period was also viewed as being incompatible with a binding agreement for a 25 year lease.
- Accordingly, the court found that the HoT did not create a contractually binding agreement for lease.

CASE 4

ERYL ROSSER V PACIFICO LIMITED

"Caveat Emptor" type argument does not save seller from misrepresentation claim

AUTHOR: MEGAN DAVIES

WHAT WAS IT ABOUT?

- This was a claim for misrepresentation relating to the purchase of a flat in Cardiff. Soon after Mrs Rosser had purchased a newly converted two-bedroom flat from Pacifico Limited in 2016, she discovered that the Velux window in the second bedroom did not have planning permission and had to be removed, leaving the room without any source of natural light or ventilation – rendering it unfit for lawful use as a bedroom. She brought a claim against the seller for misrepresentation.
- Mrs Rosser had relied on the seller's description of the room in question as a second bedroom (including in the lease plan) and the seller's confirmation in the Law Society Information Form that there were no planning issues.

WHAT DID THE COURT SAY?

- The Court found Pacifico liable for misrepresentation and ordered it to pay damages.
- It was no defence for Pacifico to say that Mrs Rosser could have checked the planning permission and found out that there was an issue herself.
- Pacifico was unable to demonstrate that its sole director, who had signed the Law Society Information Form, had reasonable grounds for believing the representations that the room could lawfully be used as a bedroom and that the works had all the necessary consents. The director gave the confirmations without raising enquiries with Pacifico's agents and contractors who carried out the development, or comparing what had been built to the planning permission.

WHY IS IT IMPORTANT?

- This case demonstrates the importance of a seller checking the facts carefully before providing pre-contract confirmations to a buyer. Where the subject matter of any of the pre-contract information and confirmations is not within the seller's actual knowledge, this includes raising any relevant enquiries with related third parties.
- Taking reasonable steps to verify the accuracy before providing information to the buyer will demonstrate that the seller had reasonable grounds for believing it was true and should assist the seller in its defence if a representation turns out to be false.

> "Where there has been a misrepresentation it is well established that it is no defence to the person who has made the misrepresentation to say "Oh well, the party who was misled could have checked and found out the facts for himself..."
>
> Eryl Rosser v Pacifico Ltd [2023] EWHC 1018 (Ch) [61]

5 RECENT LEGAL NEWS

RENTERS (REFORM) BILL: NEW RENTERS REGIME FOR RESIDENTIAL PROPERTY SECTOR

AUTHOR: JESS PARRY

- The Renters (Reform) Bill is not in force yet. It will be debated in Parliament and is likely to be amended before it becomes law.
- Key changes proposed include:
  - Renters to move to 'rolling' periodic tenancies, generally continuing from month to month.
  - Landlords will not be able to grant fixed term tenancies (e.g. 1 year).
  - Landlords will only be able to evict on specific grounds e.g. rent arrears, anti-social behaviour, intention to sell, or where the landlord or a close family member wants to move in.
  - The Section 21 'no fault' (or more accurately, 'no reason') eviction procedure, which allows landlords to evict without specifying a ground, will be abolished.
  - New process for annual rent increases, up to market rent, which tenants can challenge.
  - Landlords will not be able to unreasonably refuse a tenant's request to keep a pet.
  - Further changes to be introduced under separate regulations, including a tenant complaints scheme and a landlord property portal (both expected to be compulsory and funded by landlords).
  - Significant fines for landlords who breach the new rules (up to £30,000 for significant or repeat breaches).
- Residential landlords will be subject to more obligations, burdens and risks. This could drive some out of the private rented sector, and market rents may increase to offset risks for those that remain.
- A key aspect to the success of these reforms will be the ability for 'good' landlords to evict troublesome tenants quickly and cost-effectively. The Bill does not address how this can be achieved.
- Abolishing fixed-term tenancies will cause significant issues for the student housing sector, where tenancies usually align with the academic year. The explanatory notes to the Bill say that certain Purpose Built Student Accommodation ('PBSA') will be exempt. However, PBSA is not defined and no such exemption is currently included in the Bill.
- Read our BCLP Insight for more detail and commentary on the Bill.

> "The Bill will abolish section 21 'no fault' evictions and move to a simpler tenancy structure where all assured tenancies are periodic – aiming to provide more security for tenants and empower them to challenge poor practice and unfair rent increases without fear of eviction."
>
> Explanatory Notes, Renters (Reform) Bill

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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