LANDLORD AND TENANT UPDATE - JULY 2016

By Richard Snape
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Established in 1999, Davitt Jones Bould is now one of the largest niche firm of real estate lawyers in the UK.

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DJB is entirely focused on real estate.

Covering commercial property, planning and other related areas we have one of the most experienced teams of solicitors in the country with a total of over 700 years’ PQE. DJB does not use paralegals to undertake legal work.

We act for a diverse range of clients in the real estate sector spanning many industries and our client base includes some of the most significant landowners and occupiers in the country.

Handling any size of property transaction or planning project, the team is comprised of City trained and highly regarded lawyers that operate from the firm’s offices in London, Manchester, Birmingham and Taunton.

The firm enjoys top tier rankings in all of the main directories and is a winner of the Lawyer Awards.

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- North West: Commercial Property
- South West: Real Estate: Commercial Property, Planning, Property Litigation, Local Government

CHAMBERS UK

- London: Real Estate
- South West: Real Estate, Planning, Property Litigation

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LEGAL 500 2015

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CHAMBERS 2016

“Very professional, quick to respond and good at keeping the client informed.”

LEGAL 500 2015

“Clients feel protected to the greatest extent.”

CHAMBERS 2016
RECENT COMMERCIAL LEASE CASE LAW

Service Charges and Ground Rent

Arnold v Britton [2015] UKSC 36 here 99 year leases of holiday chalets required a service charge to be paid based on the work which was done on the premises plus a yearly sum of £90 which rose by 10% compound interest each year. The consequence of this was that by 2072 the liability would be £554,000 per annum. The Supreme Court confirmed that as this was the clear meaning of the provision they would not be prepared to re-write it. This case may remind some people of the Blue Dolphin litigation in the early 1990s whereby some solicitors were held liable for not noticing compound interest in commercial lease rent review clauses.

Norwich City Council v Redford [2015] UK UT 30 here liability for maintenance of lighting was expressed to be apportioned throughout the estate. The Council had contracted out maintenance for the whole of their property portfolio and attempted to bill by reference to all of their premises. As this did not conform with the service charge provisions, the tenants were not liable to pay anything.

Break Clauses

Marks & Spencer v BNP Paribas [2015] UKSC 72 - The Supreme Court has now heard this case. The tenant, Marks & Spencer, had to pay rent quarterly in advance and also insurance charge and a car parking licence in advance. They also had to pay monetary payments owed to the landlord as a condition precedent for exercising their break clause. There was also a premium payable in relation to exercise of the break. The break did not correspond with a quarter day. The tenant paid the rent and other monetary payments in advance and then claimed that it must be implied that they could recover back money relating to the period beyond the break date.

The High Court agreed with this but on appeal the Court of Appeal disagreed. The Supreme Court has now agreed with the Court of Appeal. There is no scope for implication of such a term, especially as the parties had agreed in great detail the terms of the lease and not expressly included anything. Lord Neuberger also confirmed that the case of Ellis v Rowbottom [1900] 2QB 740 was correct in that the Apportionment Act 1870 applied to rent payments in arrears but not in advance.

In Quirkco Investments Ltd v Aspray Transport Ltd [2011] EWHC 3060 (Ch) it was stated that dependent on the terms of the lease any insurance premium which was reserved as rent may have to be paid for the whole year if the payment date fell before the break day. In PCE Investors Ltd v Cancer Research UK, [2012] EWHC 884 (Ch) the Court of Appeal held that a break could not be exercised when the break day fell between rent days and the whole quarter in advance had not been
paid. It is essential in these circumstances that the tenant is only responsible for basic rent, or as a lesser alternative, the lease deals with apportionments after the break date. In **Friends Life v A & A Express Building [2014] EWHC 1463** questions were asked as to how to assess the tenant’s final service charge liability and how their contribution should be ascertained as a condition for exercising the break.

**Other Precedent Conditions**

In **Sirhowy Investments v Henderson [2014] EWHC 3562** planning permission for a second-hand car business was granted subject to conditions that a scheme would be agreed with the local authority in relation to turning facilities to enable car transporters to unload cars without causing obstruction to the highway. Three years after the lease had been granted, the council served notice for a breach of a planning condition. On this happening, the tenant was entitled to serve a break notice if they could show that they had acted reasonably in procuring the scheme. However, the tenants had breached a condition as to exercising the break in that they had to keep the premises in good and substantial repair and as part of a fence had fallen down exercise the break.

**Leasehold Enfranchisement**

**Jewelcraft v Pressland [2015] EWCA Civ 1111**

The Leasehold Reform Act 1967 allows a tenant to enfranchise a house and purchase the freehold. In **Spurgeon v Tandon Trustees [1982] AC 755** and **Day Estate v Hosebay Ltd (2010)** the House of Lords and Supreme Court have held that the legislation applies if accommodation can reasonably be described as a house and this will apply if a material part of premises is designed or adapted for residential purposes at the relevant date. In these cases there was a common staircase to the residential unit. This constituted a house.

In the current case, there had originally been a common staircase but at a later stage this had been blocked and a separate access provided at the back. It was still a house.

**Forfeiture**

**Freifeld v West Kensington Court Ltd [2015] EWCA Civ 806**

The tenant deliberately sublet a restaurant without seeking consent. The landlord forfeited and the tenant sought relief. The High Court refused this due to the tenant’s behaviour. The landlord received a substantial windfall.

The tenant appealed and the Court of Appeal decided that although the tenant’s attitude was a relevant factor, relief was still possible. Subject to good behaviour, the tenant was given 6 months to sell his interest.
Landlord and Tenant Act 1987 and Right of First Refusal

Artists Collective v Khan (2015) PLSCS 313

The provisions apply to mixed business residential premises if the floor area of business use doesn’t exceed 50%.

Here the premises comprised three shops with eight flats above. The landlord transferred his interest to a company which he wholly owned. The consideration was £225k. The tenants served a notice on the company wishing to purchase at the same price. Wishing to undo the wrong, the company transferred back to the original landlord with zero consideration. The tenants were able to acquire the property at no cost.

Dilapidations

Craighead v Homes for Islington Ltd [2010] UKUT 47

Where windows were not replaced like for like, due to intervening changes in Part L of the Building Regulations, it was implied that the landlord could improve the windows to modern standards under the repairing obligation and add the cost to the service charge. This in spite of the fact that the building was listed and potentially exempt from Part L. Contrast this with Mullaney v Maybourne Grange Ltd [1982] where service charges which allowed repairs, but not improvements, to be charged for did not cover replacement of wooden single glazed window frames with UPVC double glazing. The difference between the two cases seems to be due to the intervening statutory provisions. If correct, this may be an extremely useful argument for landlords, e.g. in relation to increased energy performance of buildings.

In relation to this consider R22s which are a type of CFC. These were banned in new air conditioning and refrigeration systems in 2004 but recycled CFCs could be used in existing systems until 1st January 2015. Tenants will no longer be able to repair systems with R22s as a component and will either be faced with terminal dilapidations or the need to replace existing systems. Landlords in relation to communal systems will be able to add the cost of replacement to the service charge. The deal with this and other matters in the future, there should be negotiated caps on service charge.

Consider this in the light of the Energy Act 2011 (see later). By April 2018, with exceptions, a landlord will not be able to let out premises unless it has an energy rating of E or above. This seems to apply to existing and not nearly new leases. Quaere as to whether a tenant who has agreed to apply with statute will have to carry out works to ensure that this is the case and whether a landlord in relation to multi-let premises can add the cost of works to service charge.
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**Repairing Covenants: Interpretation**

Repairing covenants do not require a renewal or rebuilding of the property and the standard of repair depends on the age, character and location of the premises: see **Proudfoot v Hart [1890] 25QB45Z**. This standard is that at the commencement of the lease and not its termination: see **Anstreuther – Gough – Calthorpe v McOscar [1924] IKB716**

The issue of ‘supercession’ was to the fore in the recent case of **Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd [2013] EWHC 463 (TCC)**. The case involved two 35 year leases commencing in 1973 and 1974.

It was not disputed that the tenant did not comply with its repairing obligations under the leases. At trial the landlord produced a costed schedule of dilapidations, and the total damages sought were £2.172 million (including 30 weeks loss of rent). The tenant, by contrast, asserted that the remedial works attributable to want of repair amount to around £700,000. However, the tenant contended that it was not obliged to pay more than £240,000 being the diminution in the landlord’s reversionary interest under s.18(1) of the Landlord and Tenant Act 1927. The tenant’s argument was that even if it had left the premises in a good state of repair that would have been by reference to 1973/4 standards; the building would not have been lettable without the substantial upgrade and improvement works which the landlord would have had to carry out.

The starting point is to consider whether, if the tenant had handed back the premises in accordance with its repairing obligations under the lease, the landlord would have been able to relet or sell the building without significant discount.

If not, then it is necessary to look at what the landlord would have to do to be able to relet the premises at a fair market price; in other words, what ‘extra’ work must the landlord do to make the premises lettable in today’s market? In looking at that ‘extra’ work, the court must have in mind two points: Firstly that the landlord cannot recover the cost of this ‘extra’ work from the tenant and secondly that this ‘extra’ work may make some of the tenant’s repair works redundant – and so the landlord has suffered no loss if the tenant fails to carry out such ‘redundant’ repair works.
In **Hammersatch Properties (Welwyn) Limited v Saint-Gobain Ceramics and Plastics Ltd [2013] EWHC 1161 (TCC)** the tenant claimed that the property was obsolete and even if repairs were carried out, the property would be unlettable.

The parties’ experts differed in their valuation of the property in and out of repair. The tenant argued that the difference in the two values was only £100,000; the landlord argued that in repair the premises could have been sub-divided with only a minimal amount of work and could have been relet in full within 36 months.

The court concluded that the property in repair was worth £3,061,251 (calculated by looking at the letting values minus the cost of works and sub-division) and that in its current state of disrepair, the property was worth £2.1 million. The court rounded down the £3,061,251 to £3 million holding therefore that the diminution (for which the tenant was liable) was £900,000.

**LANDLORD AND TENANT ACT 1954**

**Exclusion of the Landlord and Tenant Act 1954**

**Erimus Housing Limited v Barclays Wealth Trustees (Jersey) Limited [2014] EWCA Civ 303**

In this case, the landlord had granted to the tenant a lease which was contracted out of the protection of the Landlord and Tenant Act 1954. The contracted-out lease came to an end, and although at first there were some attempts to negotiate a new lease, it was eventually accepted that the tenant was holding over on the terms of the expired lease. Heads of terms for a new contracted-out lease were later agreed, but no new lease was ever completed. Nearly two years after the original lease had expired, the tenant suggested that it should continue to hold over for another six months or so, and the landlord made no objection to this.

In fact, the tenant vacated in September 2012, almost three years after the original lease had expired. The tenant argued that it had validly given three months’ notice to quit ending on 28 September 2012, but the landlord argued, successfully, that there was a yearly periodic tenancy, so that the tenant was required to give at least six months’ notice, expiring on the anniversary of the term (so that the lease could not be brought to an end before 31 October 2013).

The judge concluded that it was accepted on both sides that the landlord would have to give notice to terminate the tenant’s occupation, and that the landlord had been content to allow that situation to develop, with the tenant having the protection of the 1954 Act. A yearly periodic tenancy had arisen, and the tenant was liable for the rent up to 31 October 2013.

On appeal, the Court of Appeal unanimously allowed the appeal. Although the progress of negotiations had been slow and lacking any urgency, there was no evidence that the negotiations had ever ceased or been abandoned by the parties because of an inability to agree terms.
Cricket v Shaftesbury Ltd [1999] AllER 283
S43(3) LTA 1954 expressly excludes short term leases 6 or less months duration from its scope. However, if the total duration of occupation under a series of leases exceeds 12 months the exclusions will not apply.

Here the occupier was given two purported licenses for 5 months each followed by a tenancy at will. The total time in occupation was for over 12 months. The landlord claimed that even if the tenant had leases they were short-term and within the S43(3) exclusion. The Court held that as a tenancy at will does not attract business security (Wheeler v Mercer [1956] 3 AllER 631) the total term was less than 12 months and the tenant was excluded. A periodic tenancy implication on payment of rent can be rebutted in the circumstances: see Javad v Aqil [1990] 2ELGR 82, and more recently, London Baggage Co. v Railtrack [2000] EGCS 57 where there was a tenancy at will on the tenant holding over and paying rent, pending negotiations for a new lease.

To be sure, an express tenancy at will may be agreed. The above presents a convenient way of allowing a tenant in occupation, and allowing the landlord a rental pending negotiation for a lease. Note: Be sure of having exclusion notices available at the end of the fixed term and enter into a tenancy at will if there is a gap whilst a new lease is negotiated – be careful also with implied surrender and re-grant by adding to the term or duration as this would require new exclusion notices.

Rent: s34
Flanders Community Centre v Newham London Borough Council [2016] EWHC 1089 (Ch)
Here the original rent was £1 per annum as the tenant was required to do substantial works on the premises and the landlord had the right to monitor the diversity of users of the community centre. The lease was renewed and the landlord wanted to increase the rent to £16,000 per annum. It was decided that as the landlord had produced no evidence of what the new market rent should be, the tenant was able to remain paying the original rent of £1 per annum payable quarterly.

Renewal Terms
Other terms of the new tenancy: s35

Again, in the absence of written agreement between the parties the Court can determine any other terms of the tenancy, having regard to the terms of the current tenancy and to all other relevant circumstances.

The new lease will usually be on the same terms as the old tenancy but the Court may, occasionally, sanction a change. Nevertheless the initial assumption is that the terms will not be varied or changed.

See e.g. O'May v City of London Real Property Co [1983] HC and Wallis v General Accident [2000] EGCS45: a change in the law does not mean that the landlord can insist on an authorised guarantee agreement in the new lease – the landlord cannot upgrade the new lease to modern standards by
including full repairing and insurance provisions - see also Cairnplace v CBL Ltd [1982] 2 WLR

In Samuel Smiths v Howard de Walden [2007] a judge accepted the tenants’ argument that user covenants in relation to a public house could not be changed on a renewal without the consent of the tenants. The landlords wished to allow the sale of food arguing that this was the industry norm. The tenants objected to this as he felt it would have the effect of increasing future rent on review.

Edwards and Walkden v Mayor of London [2012] EWHC 2527

In spite of O’May, the judge held that a relevant circumstance on a lease renewal was a different tenant had a different service charge liability in the original leases. These were allowed to be standardised.

Note: These cases are extremely important in relation to CRC and Green Leases (below). A landlord cannot change the terms on a 1954 Act renewal to upgrade or meet statutory changes. Unless the tenant is provided with incentives, it will be very difficult to obtain the tenant’s agreement to detrimental changes. If the lease is excluded, the landlord may change the terms or not offer a renewal. In the current market this may not, however, be feasible.

Ground (c)

Horne and Meredith v Cox [2014] EWCA 423. Ground (c), which is little used, allows opposition to a new lease on grounds of user or management. Here there had been over 16 years of litigation between landlord and tenant which had been initiated by the latter. On the facts it was held that this was a good ground on which to oppose the new lease.

GROUND (g) – Intention to Occupy

Gulf Agencies Ltd v Ahmed [2016] EWCA Civ 44 The landlord was a solicitor and a notary public. The property was a ground floor and basement let out to the tenant. The landlord and tenant had poor relations ever since the landlord required the freehold in 2007.

The landlord served a s.25 notice to obtain possession to which the tenant objected. The landlord opposed this on ground (g) i.e. occupation for his own purposes. He intended to occupy the premises as a solicitors practice and minicab business which he also owned. The first instance judge rejected the claim and accordingly to the Court of Appeal, showed bias against the landlord.

The Court of Appeal stated that for ground (g) to apply the landlord must show:

(a) A fixed and settled desire to do what he says he intends to do, ‘out of the zone of contemplation and in to the valley of decision’ to quote from the case of Cunliffe v Goodman [1950] 2 KB 237
(b) There was a reasonable prospect of being able to bring about the desired effect including a real chance or reasonable prospect for planning permission for the proposed change of use.

The Court of Appeal decided that the landlord had a clear intention to occupy. This is subjective and the first instance judge had erred. The second test was objective but there was a real prospect of occupation which was not illusory or short term as under current planning legislation there was a possibility of the landlord occupying under Class A2. The case was sent back to be heard by a different trial judge.

All a landlord need do is to show a genuine intention to occupy, whatever the reasons. See also Dolgellau Golf Club v Hett (1999), the landlord may succeed even if his intended plans are doomed to failure.

**Authorised Guarantee Agreements**


The Court of Appeal have held that a tenant's liability under an Aga continues on disclaimer by the assignee. This in spite of the fact that the Aga was only stated to apply whilst the assignee had to comply with tenant covenants.

See KS Victoria v House of Fraser [2011] EWCA 904

**Good Harvest Partnership v Centaur [2010] UKHC 330** - Section 24 of the Landlord and Tenant (Covenants) Act 1995 states that, on the original tenants ceasing to be liable, anyone whose liability is dependent on the original tenant will also cease to be liable for breaches. Section 25 of the Act states that the provisions of the Act cannot be avoided. Here the guarantor was required as a condition of assignment to enter into an authorised guarantee agreement (AGA) which would guarantee the assignee’s debts. The Judge held that such an absolute condition would be a breach of Section 25 and seemed also to suggest that such a requirement, even though not a condition of the lease, would also be a breach. Furthermore, the Judge refused to accept as established law that an original guarantor could be made liable to guarantee a tenant under an AGA.

Tindall Cobham v Adda Hotels [2014] EWCA 1215. Here the clause that required the guarantor to enter into an authorised guarantee agreement with the assignee as a condition of assignment was void. However, it could be severed from the rest of the lease and acted as a provision whereby a guarantor could be required if reasonable.

Contrast this case with the House of Lords decision in Avonridge v Mashru [2005] UKHL 70. Sections 6 to 8 of the Act allow the landlord to serve notice after assignment of the reversion requesting that the tenant release him from his covenants, and if the tenant refuses, the court will decide if such a release is reasonable. Most leases circumvent this requirement by stating that the landlord’s liability
automatically ceases on assignment of the reversion and, in the present case, this was held not to fall foul of the avoidance provisions.

The Court of Appeal has now heard the case of KS Victoria. This case has confirmed that a guarantor cannot be directly required in the lease to guarantee an authorised guarantee agreement as it would render s24 of the Act redundant. Moreover, a guarantor cannot be required to guarantee an assignee. However, if reasonable to do so, the guarantor may be required to guarantee the tenant’s AGA, and if the lease allows it, the guarantor may be required to guarantee the tenant’s AGA.

**Pavillion Property Trustees Limited v Permira Advisers LLP [2014] EWHC 145 (Ch)**

This case concerned a badly drafted document that purported to be an Authorised Guarantee Agreement. The document stated that the guarantee would remain in force until after the party to whom the immediate assignee had assigned the lease had itself assigned the lease, i.e. beyond the period of time permitted by s16 of the Landlord and Tenant (Covenants) Act 1995. The landlord sought a declaration by consent that the guarantee should be amended so as to limit its period in force to that permitted by s16, i.e. until the immediate assignee had itself assigned the lease, and that after such amendment, the guarantee should be valid and enforceable.

Morgan J was not prepared to grant the declaration sought. However, he construed the guarantee and considered the operation of the 1995 Act in relation to it. He ultimately made a declaration to the effect that the guarantee was effective and valid in relation to the obligations of the immediate assignee only and that the clause relating to the obligations of the subsequent assignee was of no effect.

**Administration: Remedies**

**Innovative Logistics v Sunberry Properties [2008] EWCA CIV 126**

The Company, who held a thirty year lease, was in administration. The administrators granted a six month licence of the premises for storage without consent. The Landlord obtained an injunction. The Court of Appeal set aside the injunction as, when a company is in receivership, not merely do the Landlord’s interests have to be taken into account in deciding any remedies available but also those of other creditors.

**Goldacre (Offices) Ltd v Nortel Networks Ltd [2009] EWHC 3389**

Rent falling due under the lease during administration will amount to a cost of administration, even if only a part of the premises is being used to pay the creditors. There is no element of discretion to this and it will apply whether or not the Landlord has requested rent.

**Leisure Norwich II v Luminar Lava Ignite [2012] EWHC 951**
Here the High Court confirmed that rent due prior to administration was not a cost of administration.

**Re Games Station Limited (also known as Jervis v Pillar Denton Limited) [2014] EWCA Civ 180**

On 26 March 2012, a group of companies went into administration. A pre-pack sale to a new company enabled the new company to take over the business and occupy more than half of the stores under a licence from the administrators.

Under the leases of those stores the tenant was due to pay rent on the usual quarter days. Rent was therefore due on the March quarter day, which was the day before the administration.

The administrators decided not to make those March rent payments relying on the following cases.

Relying on Goldacre and Leisure Norwich above.

In the instant case the administrators paid the rents that fell due for subsequent quarters as expenses of the administration.

At first instance, on an application by the administrators for directions as to payment of rent, the judge had followed the above decisions and held that rent falling due before administration was simply provable as a debt in the administration, but rent due in a period when administrators were using the property amounted to an administration expense. The landlord appealed to the Court of Appeal.

The Court of Appeal allowed the landlord’s appeal.

Lord Justice Lewison, delivering the judgment of the court, said that the Goldacre and Leisure (Norwich) decisions had left the law “in a very unsatisfactory state’ as administrators would either end up paying “more than the true benefit” of their use of the property or less – depending on the timing of the administration.

**Holme v Brunskill [1878]**. It was held that where a tenant surrenders the lease or a part thereof without the guarantors consent the agreements will come to an end. Likewise, if the landlord allows the tenant to pay the rent late without the consent of the guarantor in writing, the guarantor’s liability will also be discharged.

In **Howard de Walden v Pasta Place [1995] 1 EGLR 79** a revocable licence to widen permitted use also without the consent of the guarantor also brought the guarantee agreements to an end. Any variation of the lease unless they are insubstantial or incapable of adversely affecting the tenant will have this effect.

More recently in the **Topland Portfolio No 1 Ltd v Smith News Trading Ltd [2014] EWCA Civ 18 21st January (2014) Court of Appeal.** 20 years previously the tenant obtained permission to alter the
premises without any formal guarantor’s consent. Subsequently the tenant went into administration. The Court of Appeal has confirmed that as the guarantor was not a party to any supplemental documents, the guarantor was not liable.

**RVB v Bibby [2013] EWHC 65**

On the liquidation of the tenant, the liquidator disclaimed one lease and the other lease was later disclaimed by the Crown. The surety was expressed to be bound until “the date on which the lessee ceases to be bound by the covenants in this lease”.

The guarantor, argued that once the lease has been disclaimed, their liability would cease. They failed. Following the House of Lords decision in *Hindcastle v Barbara Attenborough (1996)* on a disclaimer under the *Companies Act 2006* as under *s.178 Insolvency Act 1986* on a disclaimer then any other parties’ liability remains.
DILAPIDATIONS

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Where windows were not replaced like for like, due to intervening changes in Part L of the Building Regulations, it was implied that the landlord could improve the windows to modern standards under the repairing obligation and add the cost to the service charge. This in spite of the fact that the building was listed and potentially exempt from Part L. Contrast this with Mullaney v Maybourne Grange Ltd [1982] where service charges which allowed repairs, but not improvements, to be charged for did not cover replacement of wooden single glazed window frames with UPVC double glazing. The difference between the two cases seems to be due to the intervening statutory provisions. If correct, this may be an extremely useful argument for landlords, e.g. in relation to increased energy performance of buildings.

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Erimus Housing Limited v Barclays Wealth Trustees (Jersey) Limited [2014] EWCA Civ 303

In this case, the landlord had granted to the tenant a lease which was contracted out of the protection of the Landlord and Tenant Act 1954. The contracted-out lease came to an end, and although at first there were some attempts to negotiate a new lease, it was eventually accepted that the tenant was holding over on the terms of the expired lease. Heads of terms for a new contracted-out lease were later agreed, but no new lease was ever completed. Nearly two years after the original lease had expired, the tenant suggested that it should continue to hold over for another six months or so, and the landlord made no objection to this.

In fact, the tenant vacated in September 2012, almost three years after the original lease had expired. The tenant argued that it had validly given three months’ notice to quit ending on 28 September 2012, but the landlord argued, successfully, that there was a yearly periodic tenancy, so that the tenant was required to give at least six months’ notice, expiring on the anniversary of the term (so that the lease could not be brought to an end before 31 October 2013).

The judge concluded that it was accepted on both sides that the landlord would have to give notice to terminate the tenant’s occupation, and that the landlord had been content to allow that situation to develop, with the tenant having the protection of the 1954 Act. A yearly periodic tenancy had arisen, and the tenant was liable for the rent up to 31 October 2013.

On appeal, the Court of Appeal unanimously allowed the appeal. Although the progress of negotiations had been slow and lacking any urgency, there was no evidence that the negotiations had ever ceased or been abandoned by the parties because of an inability to agree terms.

Cricket v Shaftesbury Ltd [1999] AllER 283
S43(3) LTA 1954 expressly excludes short term leases 6 or less months duration from its scope. However, if the total duration of occupation under a series of leases exceeds 12 months the exclusions will not apply.

Here the occupier was given two purported licenses for 5 months each followed by a tenancy at will. The total time in occupation was for over 12 months. The landlord claimed that even if the tenant had leases they were short-term and within the S43(3) exclusion. The Court held that as a tenancy at will does not attract business security (Wheeler v Mercer [1956] 3 ALLER 631) the total term was less than 12 months and the tenant was excluded. A periodic tenancy implication on payment of rent can be
 rebutted in the circumstances: see Javad v Aqil [1990] 2ELGR 82, and more recently, London Baggage Co. v Railtrack [2000] EGCS 57 where there was a tenancy at will on the tenant holding over and paying rent, pending negotiations for a new lease.

To be sure, an express tenancy at will may be agreed. The above presents a convenient way of allowing a tenant in occupation, and allowing the landlord a rental pending negotiation for a lease. 

Note: Be sure of having exclusion notices available at the end of the fixed term and enter into a tenancy at will if there is a gap whilst a new lease is negotiated – be careful also with implied surrender and re-grant by adding to the term or duration as this would require new exclusion notices.

Renewal Terms

Other terms of the new tenancy: s35

Again, in the absence of written agreement between the parties the Court can determine any other terms of the tenancy, having regard to the terms of the current tenancy and to all other relevant circumstances.

The new lease will usually be on the same terms as the old tenancy but the Court may, occasionally, sanction a change. Nevertheless the initial assumption is that the terms will not be varied or changed.

See e.g. O’May v City of London Real Property Co [1983] HC and Wallis v General Accident [2000] EGCS45 : a change in the law does not mean that the landlord can insist on an authorised guarantee agreement in the new lease – the landlord cannot upgrade the new lease to modern standards by including full repairing and insurance provisions - see also Cairnplace v CBL Ltd [1982] 2 WLR

In Samuel Smiths v Howard de Walden [2007] a judge accepted the tenants’ argument that user covenants in relation to a public house could not be changed on a renewal without the consent of the tenants. The landlords wished to allow the sale of food arguing that this was the industry norm. The tenants objected to this as he felt it would have the effect of increasing future rent on review.

Edwards and Walkden v Mayor of London [2012] EWHC 2527

In spite of O’May, the judge held that a relevant circumstance on a lease renewal was a different tenant had a different service charge liability in the original leases. These were allowed to be standardised.

Note: These cases are extremely important in relation to CRC and Green Leases (below). A landlord cannot change the terms on a 1954 Act renewal to upgrade or meet statutory changes. Unless the tenant is provided with incentives, it will be very difficult to obtain the tenant’s agreement to detrimental changes. If the lease is excluded, the landlord may change the terms or not offer a renewal. In the current market this may not, however, be feasible.
Ground (c)

Horne and Meredith v Cox [2014] EWCA 423.  Ground (c), which is little used, allows opposition to a new lease on grounds of user or management.  Here there had been over 16 years of litigation between landlord and tenant which had been initiated by the latter.  On the facts it was held that this was a good ground on which to oppose the new lease.

GROUND (g) – Intention to Occupy

Gulf Agencies Ltd v Ahmed [2016] EWCA Civ 44  The landlord was a solicitor and a notary public.  The property was a ground floor and basement let out to the tenant.  The landlord and tenant had poor relations ever since the landlord required the freehold in 2007.

The landlord served a s.25 notice to obtain possession to which the tenant objected.  The landlord opposed this on ground (g) i.e. occupation for his own purposes.  He intended to occupy the premises as a solicitors practice and minicab business which he also owned.  The first instance judge rejected the claim and accordingly to the Court of Appeal, showed bias against the landlord.

The Court of Appeal stated that for ground (g) to apply the landlord must show:

(c) A fixed and settled desire to do what he says he intends to do, ‘out of the zone of contemplation and in to the valley of decision’ to quote from the case of Cunliffe v Goodman [1950] 2 KB 237

(d) There was a reasonable prospect of being able to bring about the desired effect including a real chance or reasonable prospect for planning permission for the proposed change of use.

The Court of Appeal decided that the landlord had a clear intention to occupy.  This is subjective and the first instance judge had erred.  The second test was objective but there was a real prospect of occupation which was not illusory or short term as under current planning legislation there was a possibility of the landlord occupying under Class A2.  The case was sent back to be heard by a different trial judge.

All a landlord need do is to show a genuine intention to occupy, whatever the reasons.  See also Dolgellau Golf Club v Hett (1999), the landlord may succeed even if his intended plans are doomed to failure.

Authorised Guarantee Agreements


The Court of Appeal have held that a tenant’s liability under an Aga continues on disclaimer by the assignee.  This in spite of the fact that the Aga was only stated to apply whilst the assignee had to comply with tenant covenants.
See **KS Victoria v House of Fraser [2011] EWCA 904**

**Good Harvest Partnership v Centaur [2010] UKHC 330** - Section 24 of the Landlord and Tenant (Covenants) Act 1995 states that, on the original tenants ceasing to be liable, anyone whose liability is dependent on the original tenant will also cease to be liable for breaches. Section 25 of the Act states that the provisions of the Act cannot be avoided. Here the guarantor was required as a condition of assignment to enter into an authorised guarantee agreement (AGA) which would guarantee the assignee’s debts. The Judge held that such an absolute condition would be a breach of Section 25 and seemed also to suggest that such a requirement, even though not a condition of the lease, would also be a breach. Furthermore, the Judge refused to accept as established law that an original guarantor could be made liable to guarantee a tenant under an AGA.

**Tindall Cobham v Adda Hotels [2014] EWCA 1215.** Here the clause that required the guarantor to enter into an authorised guarantee agreement with the assignee as a condition of assignment was void. However, it could be severed from the rest of the lease and acted as a provision whereby a guarantor could be required if reasonable.

Contrast this case with the House of Lords decision in **Avonridge v Mashru [2005] UKHL 70.** Sections 6 to 8 of the Act allow the landlord to serve notice after assignment of the reversion requesting that the tenant release him from his covenants, and if the tenant refuses, the court will decide if such a release is reasonable. Most leases circumvent this requirement by stating that the landlord’s liability automatically ceases on assignment of the reversion and, in the present case, this was held not to fall foul of the avoidance provisions.

The Court of Appeal has now heard the case of **KS Victoria.** This case has confirmed that a guarantor cannot be directly required in the lease to guarantee an authorised guarantee agreement as it would render s24 of the Act redundant. Moreover, a guarantor cannot be required to guarantee an assignee. However, if reasonable to do so, the guarantor may be required to guarantee the tenant’s AGA, and if the lease allows it, the guarantor may be required to guarantee the tenant’s AGA.

**Pavillion Property Trustees Limited v Permira Advisers LLP [2014] EWHC 145 (Ch)**

This case concerned a badly drafted document that purported to be an Authorised Guarantee Agreement. The document stated that the guarantee would remain in force until after the party to whom the immediate assignee had assigned the lease had itself assigned the lease, i.e. beyond the period of time permitted by s16 of the Landlord and Tenant (Covenants) Act 1995. The landlord sought a declaration by consent that the guarantee should be amended so as to limit its period in force to that permitted by s16, i.e. until the immediate assignee had itself assigned the lease, and that after such amendment, the guarantee should be valid and enforceable.

Morgan J was not prepared to grant the declaration sought. However, he construed the guarantee and considered the operation of the 1995 Act in relation to it. He ultimately made a declaration to the
effect that the guarantee was effective and valid in relation to the obligations of the immediate assignee only and that the clause relating to the obligations of the subsequent assignee was of no effect.

**Administration: Remedies**

**Innovative Logistics v Sunberry Properties [2008] EWCA CIV 126**

The Company, who held a thirty year lease, was in administration. The administrators granted a six month licence of the premises for storage without consent. The Landlord obtained an injunction. The Court of Appeal set aside the injunction as, when a company is in receivership, not merely do the Landlord’s interests have to be taken into account in deciding any remedies available but also those of other creditors.

**Goldacre (Offices) Ltd v Nortel Networks Ltd [2009] EWHC 3389**

Rent falling due under the lease during administration will amount to a cost of administration, even if only a part of the premises is being used to pay the creditors. There is no element of discretion to this and it will apply whether or not the Landlord has requested rent.

**Leisure Norwich II v Luminar Lava Ignite [2012] EWHC 951**

Here the High Court confirmed that rent due prior to administration was not a cost of administration.

**Re Games Station Limited (also known as Jervis v Pillar Denton Limited) [2014] EWCA Civ 180**

On 26 March 2012, a group of companies went into administration. A pre-pack sale to a new company enabled the new company to take over the business and occupy more than half of the stores under a licence from the administrators.

Under the leases of those stores the tenant was due to pay rent on the usual quarter days. Rent was therefore due on the March quarter day, which was the day before the administration.

The administrators decided not to make those March rent payments relying on the following cases.

Relying on Goldacre and Leisure Norwich above.

In the instant case the administrators paid the rents that fell due for subsequent quarters as expenses of the administration.
At first instance, on an application by the administrators for directions as to payment of rent, the judge had followed the above decisions and held that rent falling due before administration was simply provable as a debt in the administration, but rent due in a period when administrators were using the property amounted to an administration expense. The landlord appealed to the Court of Appeal.

The Court of Appeal allowed the landlord’s appeal.

Lord Justice Lewison, delivering the judgment of the court, said that the Goldacre and Leisure (Norwich) decisions had left the law “in a very unsatisfactory state” as administrators would either end up paying “more than the true benefit” of their use of the property or less – depending on the timing of the administration.

Holme v Brunskill [1878]. It was held that where a tenant surrenders the lease or a part thereof without the guarantors consent the agreements will come to an end. Likewise, if the landlord allows the tenant to pay the rent late without the consent of the guarantor in writing, the guarantor’s liability will also be discharged.

In Howard de Walden v Pasta Place [1995] 1 EGLR 79 a revocable licence to widen permitted use also without the consent of the guarantor also brought the guarantee agreements to an end. Any variation of the lease unless they are insubstantial or incapable of adversely affecting the tenant will have this effect

More recently in the Topland Portfolio No 1 Ltd v Smith News Trading Ltd [2014] EWCA Civ 18 21st January (2014) Court of Appeal. 20 years previously the tenant obtained permission to alter the premises without any formal guarantor’s consent. Subsequently the tenant went into administration. The Court of Appeal has confirmed that as the guarantor was not a party to any supplemental documents, the guarantor was not liable.

RVB v Bibby [2013] EWHC 65

On the liquidation of the tenant, the liquidator disclaimed one lease and the other lease was later disclaimed by the Crown. The surety was expressed to be bound until “the date on which the lessee ceases to be bound by the covenants in this lease”.

The guarantor, argued that once the lease has been disclaimed, their liability would cease. They failed. Following the House of Lords decision in Hindcastle v Barbara Attenborough (1996) on a disclaimer under the Companies Act 2006 as under s.178 Insolvency Act 1986 on a disclaimer then any other parties’ liability remains.
S1 LANDLORD AND TENANT ACT 1988

1) THE LANDLORD AND TENANT ACT 1988

The Landlord and Tenant Act 1927 gave rise to a practical problem, i.e that landlords when asked to give consent to an assignment would not reply to any written request either at all, or within a reasonable period of time. The tenant was, therefore, unsure whether consent was being withheld or not.

To meet this difficulty, the Landlord and Tenant Act 1988 was passed. By s1, when a landlord is asked in writing for consent pursuant to a qualified covenant against assignment, sub-letting or parting with possession, he is required:

(1) to give consent (unless it is reasonable not to) within a reasonable time, and to give written notice to the tenant of his decision, also within a reasonable time, specifying any conditions attached to consent; or

(2) if consent is refused, the reasons for refusal (within a reasonable time).

These provisions effectively shift the burden on to the landlord either to give a reasonably swift, unequivocal consent, or to give precise reasons for withholding consent, which the tenant can either challenge, if he consider them unreasonable, or accept. If the landlord fails to comply with s1 the tenant may sue for damages in tort: s1 should not be forgotten and should always be discussed in conjunction with s19 above.

It seems that the parties cannot contract out of s1, but it is possible that the landlord could require an indemnity, e.g. against a guarantor against potential liability.

In the few cases which discuss the subject, a reasonable time for the purpose of replying to a request for assignment or sub-letting is enough time to allow the landlord to check the creditworthiness and suitability of the proposed assignee. Thus, in Midland Bank v Chart Enterprises [1990] 44 EG 8, the landlord was successfully sued on not replying to the tenant’s request after three months. In Kened LTD v Connie Investments Ltd [1997] 04 EG 141 assignment was subject to a satisfactory replacement surety being found. The Court of Appeal found for the tenant. The landlord was not entitled to particulars of the assignment but was only concerned with the character and identity of the assignee. Moreover, an objectively suitable surety should have been accepted by the landlord.

Finally, the fact that the landlord had not notified the tenant of a reason for refusal suggested that it was not in his mind at the time of refusal. There was consequently a breach of s1 by the landlord.

Dong Bang Minerva Ltd v Davina Ltd [1996] 31 EG 87, CA
The Court of Appeal have confirmed that the landlord could not withhold consent to assignment by requiring an undertaking as to costs which were estimated as being unreasonably high.

The question of whether consent to an assignment can be refused prior to any undertaking as to costs being given was left open, as was the question as to when time began to run for the purpose of S.1, i.e. whether or not before a reasonable undertaking as to costs had been requested.

In Norwich Union Life Insurance Society v Shopmoor Ltd [1998] 3 AllER 681, the court made it clear that the landlord must decide any information required to make his decision and then put the questions clearly and precisely to the tenant. Where the landlord had not asked the tenant about the financial standing of the proposed assignee, he could not subsequently use the lack of information as a reason for refusing consent.

This has been taken further in Footwear Corporation Ltd v Amplight Properties Ltd [1998] 25 EG 171. The landlord could not refuse consent to a sub-letting for reasons he had intimated to the tenant in a telephone conversation but were not given in writing. The Court said that the policy behind the 1988 Act is that a landlord who has not given his reasons for refusing consent in writing within a reasonable time cannot afterwards justify his refusal by putting reasons forward which he had in his mind but had not sufficiently notified the tenant of.

Note: That the case also said that there was no blanket rate that if profits were not 3 times rental, consent to a sub-letting could be refused. In relation to an assignment, post Landlord and Tenant (Covenants) Act 1995, there could be an absolute condition here.

In NCR v Riverland Properties the court said that lack of creditworthiness of a sub-tenant was a good reason for refusal of consent as if the head lease were disclaimed the sub-tenant would become the immediate tenant.

In Proxima GR Properties v Dr T D McGhee [2014] UKUT 0059 (LC) the Tribunal held that under s1 of the Landlord and Tenant Act 1988 the landlord had to show that the charge for a notice of assignment was reasonable. Moreover the response must be given in a reasonable time. If a landlord tried to charge an unreasonable amount for a notice of assignment then the tenant would not have to pay anything as the landlord would be deemed to have given their consent. In this case £90 was held to be reasonable.

In Singh v Danji [2014] AllER(D)131 the landlord refused consent to an assignment of a 15 year lease unless alleged breaches arising out of refurbishment work were remedied. It was held that breaches were not proven but even if they were they would be minor and would not be a good reason for refusing consent.

Quiet Enjoyment

In Owen v Gadd [1956] 2QB99 erection of scaffolding outside the tenanted building constituted a breach of quiet enjoyment. In Century Projects v Almacantar the landlord had reserved the right to
carry out external works on the building. It was held that the works could still be done but only in a reasonable fashion so as to cause minimal interference to the tenant.

**Tenants Fixtures**

**Peel Land & Property Ltd v TS Sheerness [2014] EWCA 100** no particularly clear words are needed to oust the tenant’s common law rights to remove fixtures. All that is required is that the language of the lease has this effect.

This case also provides a useful summary of when something amounts to a fixture which is a part of the land or a fitting which can be removed. If something is a tenant’s fixture then the tenant may remove it at the end of the lease. Factors to take into account include the degree and purpose of annexation and also whether it can be removed without damage even though it might be difficult to remove.

Here a large crane amounted to a fitting and a track on which it was placed was a tenant’s fixture. A very large rolling mill was however sufficiently attached to be a part of the land.

In the future it may be appropriate for the landlord and tenant to discuss what is and is not a tenant’s fixture at the beginning prior to the lease being granted. The landlord may also think whether they want to include machinery as part of the demise.

**Creative Foundation v Dreamland Leisure [2015] EWHC 2556.** This is a well reported case which appears in the national press. It does have some legal significance however. In September 2014 the mural apparently by Banksy, the street artist, appeared on the wall of a tenanted amusement arcade in Folkestone. The tenant removed the mural and part of the wall and shipped it to an art fair in Miami intending to sell it. The mural however remained unsold and the landlord sought a declaration that it was their property.

The tenant argued that the mural had been removed as a part of its repairing obligations. The court accepted that this might possibly be the case but that the means of removal was not reasonable. The basic principle is that attachments remain under the ownership of the landlord for the duration of the lease. If the removed part was of little value then it may belong to the tenant but this is not the case here.

**Reinstatement at the end of the Lease**

**L Batley Pet Products Ltd v North Lanarkshire [2014] UKSC 27** This was an appeal from the Court of Session in Scotland to the Supreme Court. The landlord did not request reinstatement after alterations in writing at the end of the lease but merely verbally. This was held to be sufficient. Provision in the lease may be included to the contrary. Although the lease required any notices to be in writing, this was not the case in the licence to alter which prevailed.
RECENT COMMERCIAL PROPERTY CASE LAW

**Cosmichome v Southampton City Council [2013] EWHC 1378.** In this case the Council sold land with restrictive covenants against building. The covenants could be released if a development charge was paid. The covenants did not bind a purchaser as they did not benefit any dominant land but were personal.

**Harris v Berkeley Strategic Land Ltd [2014] EWHC 3355 (Ch).** Here 60 flats for use in a care home and 15 units of sheltered accommodation constituted residential accommodation by reference to the physical character of the land and the fact that it was within current planning permission. Overage therefore had to be paid.

**Conditional Contracts**

In **Rentokil Initial 1927 Plc v Goodman Derrick LLP [2014] EWHC 2994 (Ch)** relates to a claim in negligence by a seller of property, Rentokil, against its lawyers. Rentokil had agreed to sell property to Taylor Wimpey for £4.388m conditionally upon the grant of a satisfactory planning permission for residential development. A satisfactory planning permission was one that was free from “Unacceptable Planning Conditions”. Following the grant of planning permission on appeal (subject to conditions largely on terms the same as those negotiated by Taylor Wimpey with the local planning authority) Taylor Wimpey asserted that some of the planning conditions attached to its planning permission fell within the definition of “Unacceptable Planning Conditions” under the conditional sale agreement. Rentokil contested this, and brought about arbitration proceedings, but ultimately compromised those proceedings on terms that resulted in a revised sale to Taylor Wimpey at £2.5m. Rentokil brought an action in negligence against its lawyers, alleging that as a result of the definition of "Unacceptable Planning Conditions" Taylor Wimpey was able to argue that the planning conditions that were ultimately imposed were unacceptable and entitled to treat the contract as terminated.

The court held that the solicitors were not liable as it is there job to draft the clause in accordance with the wishes of the client and their agents and not to decide the detail of the clause.

**Good Faith**

In **Berkeley Group v Pullen 2007 EWHC 1330** there was provision in the overage clause that the parties would act in good faith. B would maximise potential value by procuring planning permission and when P disposed of the land B would obtain further payment. B acted to obtain planning permission but became aware that P wished to sell the property to a third party. B successfully obtained an injunction to prevent this on the basis of the good faith clause. Likewise, in **Ross River and Blue River v Cambridge City Football Club [2007] EWHC 2115** presence of good faith enabled an overage buyout agreement to be rescinded because of lack of openness of the developer.
See also *Sainsburys Plc v Bristol Rovers Football Club [2016] EWCA Civ 160*. In this case a requirement of good faith did not mean that Sainsburys had to appeal conditions as to planning permission and therefore could avoid a contract which was subject to satisfactory planning permission. In the present case Sainsburys had contracted to buy the Memorial Ground, home of Bristol Rovers Football Club, from the latter. They were then going to lease back the site to Bristol Rovers for £1 whilst the latter built a new stadium that the University of West of England. The purchase price was £30m.

The contract was subject to satisfactory planning permission for a supermarket. Planning permission was granted but it placed restrictions on delivery which the contract specifically stated would allow Sainsburys to terminate it. Sainsburys were seeking judicial review but applied out of time as they had decided that they did not want the site after all.

Bristol Rovers argued that a good faith provision in the contract required them to pursue an appeal. The courts held otherwise especially as legal opinion was that there would be less than 60% chance of success.

The Court of Appeal have now confirmed this decision. A requirement to act in good faith will not override clear provisions of the contract.

**Architects Certificates**

*Hunt v Optima (Cambridge) Ltd [2014] EWCA 714*

The architects confirmed completion of a block of flats and provided certificates. Subsequently major defects were found including water ingress. The purchasers of the flats were not able to rely on the certificates and could not claim damages. The Court of Appeal held that the certificates did not constitute warranties. Moreover, as the purchasers had committed themselves before the certificates were provided they could not have relied on them.

**Reporting on Title**

*Orientfield Holdings v Bird & Bird LLP [2015] EWHC 1963* Here the client was purchasing a £25m house in London. The solicitor was aware that there was planning permission for two schools with 1400 pupils in the same street. They did not disclose this in their Report on Title. The sellers’ response to related questions seemed vague. When the purchaser found out about the planning permission they refused to go ahead with completion and eventually negotiated with the seller to forfeit half of their deposit. They subsequently successfully sued the solicitors for their loss. The court refused to accept an argument that the purchasers had not mitigated their loss by completing the purchase. The judge did state that there was no obligation to carry out additional searches unless upon the express or implied instruction of the client.
In *Luffeorm Ltd v Kitsons LLP [2015] EWHC B10*, the court held the solicitors liable on the freehold sale of a public house for not including restraint of trade clauses against the seller even though these had not been requested by the client. The seller subsequently began to trade in another public house in the locality and the purchasers argued that this was reducing their profits. Fortunately for the solicitors the court held that there was no causal link between the breach and the loss as the purchasers would have bought the public house in any case. However, the Judge did say that the retainer would not be limited to conveyancing matters but would require the solicitors to talk about other business related matters.

**Injunctions**

The Supreme Court held in the case of *Coventry v Lawrence [2014] UKSC 13* that Shelfer does not give rise to an inflexible principle. The starting point is that an injunction should be awarded and it is up to the defendant to prove that this is unreasonable. If the requirements of Shelfer are met then in the absence of other relevant circumstances an injunction will probably not be available but even this is not definite. In the present case the Courts awarded an injunction to prevent noise nuisance caused by a nearby motor rally circuit. The circuit had planning permission but this did not overrule an unlawful act. Moreover, there was no defence that the applicant had come to the nuisance even though they had built the house after the planning permission had been obtained. There was a possibility, although not on the facts, of obtaining a prescriptive right to commit a nuisance.

**Notice to Complete**

*Hakimzay v Swailes [2015] EWHC B14 (Ch)* A notice to complete where the server did not subsequently rescind the contract does not allow the recipient to rescind.
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