LANDLORD AND TENANT UPDATE - SEPTEMBER 2016

By Richard Snape
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- London: Real Estate
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RECENT COMMERCIAL LEASE CASE LAW

Break Clauses

Vacant Possession

**Mourant Property Trust Ltd v Fusion Electronics Ltd [2009] EWHC 3659.**

A break clause contained conditions precedent requiring that the tenant would give up vacant possession, pay the rent due and not be in other material breach. On the termination date the tenant had retained keys in order for contractors to access and finish repair works. The break was void.

**In NYK Logistics (UK) Ltd v Ibrend Estates [2011] EWCA 683,**

The break clause required vacant possession. The tenants gave notice and cleared the premises. Arrangements were made to surrender keys and the tenant agreed to carry out some repairs. The landlord did not collect the keys on the date and the contractors did not complete the repairs until six days afterwards. The tenant had not given up occupation and could not break the lease.

See the Code for Leasing Business Premises. The Code suggests that conditions precedent should not be used with the exception of the basic rent being up to date, the tenant giving up occupation, and any subleases ending.

**Riverside Park Ltd v NHS Property Services [2016] EWHC 1313** The tenant was required to give up vacant possession as a condition of exercising the break clause. The premises contained a large number of partitions, floor coverings and kitchen fittings which were not removed. The court decided that as they were not substantially attached and could readily have been removed they were fittings belonging to the tenant who had therefore failed to vacate and could not exercise the break. The court went on to say that even if they had been fixtures there was no provision in the lease whereby they had been part of the demise. They were therefore tenants fixtures which should have been removed.

Correct Service

**In Vanquish Properties (UK) Ltd Partnership v Brook Street (UK) Ltd [2016] EWHC 1508 (Ch)** the landlord created an overriding lease in favour of Vanquish Properties (UK) Ltd Partnership, a limited partnership. The limited partnership then purported to terminate the original lease by means of a break clause in their name. The tenants successfully argued that a limited partnership, unlike a limited liability partnership did not constitute a separate legal entity and could not hold the overriding lease. The break should have been served by their controlling company, Vanquish GP.
LANDLORD & TENANT ACT 1954

Renewal Terms

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.

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.
CAR PARKING

Car Parking Rights

**Moncrieff v Jamieson [2007] UKHL42**

For some years there has been a debate about whether an easement to car parking exists. The argument goes that an easement is a right that one person enjoys over another person’s land, there can be no easement which constitutes exclusive possession. The earliest cases which discussed this issue, in fact, involved storage, as in *Copeland v Greenhalf [1952] Ch. 488*, where a claim for an easement of storage of trailers on a narrow stretch of agricultural land failed as it amounted to a claim of exclusive possession. If exclusive possession is being claimed as a property right then this would have to arise as an estate in land.

Several Commonwealth decisions enforced this argument throughout the 1960’s and 1970’s and then, in 1982, a first instance and, unfortunately, unreported decision in *Newman v Jones*. This case involved parking a car on a first come, first serve basis around a block of flats. The judge decided that, as there was a genuine sharing and no guarantee to an individual space, this could constitute an easement. Therefore, here there was an easement but, if there was an allocated space in which a flat owner parked, there could not be an easement.

During the following twenty years, cases suggested problems but with no definite conclusions. Then, starting with a commercial property case: *Batchelor v Marlow* in 2001 and following on with a case involving residential flats: *Saeed v Plustrade Ltd and Another [2002]*, the Court of Appeal held that *Newman v Jones* was correct. There could be no easement to park a car in an allocated space as this constituted a claim of exclusive possession which was contrary to the whole concept of an easement. This was subsequently followed in two further cases: *Central Midland Estates v Leicester Dyers [2004]* and *Montrose Court v Shamash [2006]*. In the latter case an easement was held to genuinely exist as there were fewer car parking spaces around the 19th Century block of flats than there were long leaseholders, and occupiers were genuinely required to share. However, again it was recognised that a right to an allocated space could not constitute an easement.

Why this distinction is important is that if a right to park in an allocated space cannot constitute an easement and is not demised, then it cannot amount to a property right. It will merely amount to a licence. This, as in *Saeed v Plustrade Ltd* above, will bind the original landlord/developer but will not be binding against a purchaser of the reversion. Moreover, historically, car parking in relation to leaseholds which may have a major impact on value, would be granted in the schedule of rights and not demised, i.e. a purported easement would be created. As the majority of car parking rights give allocated spaces, this would render the lease defective.
Although cases such as *Saeed v Plustrade Ltd* seem to have taken time to filtrate through to practice, over the past few years it has become increasingly common to demise car parking spaces in leasehold flat developments with the qualification that the developer commences the development in that manner. It is very difficult to change the developer’s mind mid-way through! The service charge must also be changed as the tenant would normally be responsible for maintenance of their demise. In anything but the smallest development, a landlord would be advised to be responsible for maintenance of car parking spaces and should then be able to collect the cost via service charge.

If a development is already underway then a landlord is unlikely to accept an argument to demise car parking if existing tenants only have purported easements. Moreover, deeds of variation may not be possible in anything but the smallest developments. In this situation a landlord may be prepared to accept a deed of covenant whereby any purchaser of the reversion is bound by the car parking rights contractually. This should be supported by a restriction at the Land Registry whereby such a purchaser cannot become the new registered proprietor without the written consent of the tenant, who will give their consent if a deed of covenant is entered into.

Slowly then, things were settling down and the argument that car parking rights in allocated spaces should be demised was holding sway. Then came the House of Lords decision of *Moncrieff v Jamieson* in late 2007. This is a Scottish case from the Outer Hebrides involving the law of servitude. It is not a direct precedent in England and Wales, however, the House of Lords allowed a right to park on an allocated space as a servitude. Moreover, two of the judges, including Lord Neuberger, doubted whether the previous Court of Appeal cases from England were correct. It seems that there may be such a thing as an easement to park in an allocated space after all.

**Conclusion**

I have already seen *Moncrieff* quoted by developers’ solicitors as a reason for not demising car parking. It might also be noted that leaseholds and flats in particular, contain several rights which would be defined to constitute exclusive possession, which should possibly be demised. Examples include for example, exclusive use of a balcony, storage and perhaps, most significant of all in terms of the effect on valuing a roof terrace, all of which potentially could be withdrawn by a reversioner.

**Note:** In *Virdi v Chana [2008] EWHC 280*, the High Court refused to follow Moncrieff as they felt bound by the English Court of Appeal decisions.

*Kettel and others v Bloomfold Ltd [2012] EWHC 1422 (Ch)* - car parking in the same space all the time amounts to exclusive possession and the right should have been demised and cannot be an easement: see *Batchelor v Marlow [2003] 1 WLR 764*. Parking in whichever space becomes available without an absolute right can constitute an easement. Here, the landlord gave the tenant exclusive rights to park but the tenant could be moved on management grounds. This was held to be an easement as there was no exclusive possession.
In Winterburn v Bennett [2016] EWCA Civ 482 the Court of Appeal recognised that an easement to park a car in one of several spaces could exist. In this case the claimant owned a fish and chip shop adjacent to the entrance of a car park and over a period of time had left vehicles in the car park. They claimed a prescriptive easement. The Court of Appeal stated that such an easement must be exercised without force, secrecy or permission. The law in this area is similar to that in relation to village greens: see Taylor v Betterment Properties [2015] EWCA Civ 250. As in the present case there were two signs clearly visible to all users that it was a private car park for use of patrons of the defendant’s premises only. The claim failed. The signs themselves were sufficient to make contentious the parking of vehicles by the claimant and their customers. There was no need to take enforcement action.
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