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COMMERCIAL LEASES UPDATE

5th July 2023

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ABOUT RICHARD SNAPE

Richard has been the Head of Legal Training at Davitt Jones Bould (DJB) since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors' firms and has also talked extensively to local authorities and central government bodies. His areas of specialism include both commercial and residential property, in particular in relation to local government law, conveyancing issues, development land, commercial property and incumbrances in relation to land.

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OUTCOME FOCUSED TRAINING INFORMATION

Lecture is aimed at: Property professionals and fee earners involved in both contentious and non-contentious property work

Learning Outcome: To give an increased knowledge of the subject matter. To update on current issues, case law and statutory provisions and to be able to apply the knowledge gained in the better provision of a service to the client.

Satisfying Competency Statement Section: B – Technical Legal Practice

For further information please see http://www.sra.org.uk/competence

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RECENT COMMERCIAL LEASE CASE LAW

Forfeiture

Hush Brasserie v RL UK REF Nominees [2022] EWHC 3082. H. had been unable to pay the rent during various lockdown periods. They had an option to renew the lease but the landlord could forfeit the option in relation to tenants breaches. The courts allowed the relief of forfeiture in relation to the option agreement. This follows on from the case of ***Vauxhall Motors v Manchester Ship Canal Company [2019] EWSC 46*** where relief of forfeiture was granted.

Tenancies at Will and Periodic Tenancies

Under a tenancy at will either side can terminate at any time and a tenancy at will not have the benefit of security of tenure under the **Landlord and Tenant Act 1954**. In the case of ***Javid v Aqil [1991] 1WLR 1007*** the tenant paid three months' rent in advance on entry into the premises whilst negotiating the final lease. They remained and made three further payments of rent. As negotiations were going nowhere, the landlord required the tenant to leave. The tenant claimed that they were a periodic tenant within the 1954 Act. It was held by the Court of Appeal that payment of rent would not give rise to a periodic tenancy but, as the parties were still negotiating, there would be a tenancy at will.

Erimus Housing Limited v Barclays Wealth Trustees (Jersey) Ltd [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 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).

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.

Valley View Health Centre v NHS Property Services [2022] EWHC 1393 In early 2007 Valley View partners entered premises the immediate landlord of which was a Primary Care Trust. In April 2013 the landlord's interests passed to NHS Property Services. Rent was paid, but no formal agreement was reached. It appears that there was no negotiation as to a lease for the first four years and after that, negotiations were sporadic and for substantial time periods there seemed to be no negotiation at all. Nevertheless, the High Court held that this gave rise to a tenancy at will on the basis of the above cases. The Court also implied service charge liability primarily in relation to maintenance of the boiler system.

St Andrew's Medical Centre v NHS Property Services [2022] EWHC 1393 Here, the medical centre was given a 15-year lease which terminated in 2019. They then remained negotiating a new lease and paying the rent. Negotiations were temporarily suspended due to a dispute over service charge liability. This also gave rise to a tenancy at will.

Break Clauses

O.G. Thomas Amaethyddiath v Turner [2022] EWCA 1446 this was an agricultural tenancy case on notices to quit but is equally applicable to break notices. The tenant had an oral yearly tenancy. He assigned the Lease to a company of which he was sole director and shareholder. The landlord did not know this and three days later served notice to quit on the original tenant. The court of appeal decided that a failure to satisfy a formal condition such as a name of a party can not be saved under ***The Mannai v Eagle Star [1997] Principle***. This will only validate an incorrect notice in relation to such matters typographical errors or on dates.

In ***Capitol Park Leeds plc v Global Radio Services [2021] EWCA 95*** the High Court held that a condition precedent as to vacant possession had not been complied with when the tenant vacated but removed ceiling tiles, window frames and grids which belonged to the landlord. The Court of Appeal have now reversed this decision. All that is needed is that the tenant removes fittings and tenant's fixtures, people, and there is no legal interest remaining. If the tenant has removed landlord's fixtures or is in breach in any other way they can be sued in damages.

Ventgrove Ltd v Kuehne + Nagel [2022] although a Scottish case this is equally applicable in England and Wales. A break clause was exercisable subject to paying a premium of £112,500.00 plus any VAT properly due. The Court decided that VAT should be added to the premium to exercise the break.

Heads of Terms

Pretoria Energy Company (Chittering) Limited v Blankney Estates Limited [2022] EWHC 1467 Here, there were negotiations for Pretoria to have an anaerobic digester on the site of a former flax factory. Heads of Terms were produced in November 2013 for a 25-year lease at £150,000 per annum subject to full planning approval. These were signed by both parties. Unlike a previous draft, they included an exclusivity clause not to negotiate with anyone else until 31 July 2014. Subsequently, it was found that the demolishing of the flax factory, which was to be done at Blankney's expense, would be more expensive than originally thought and Blankney corresponded with Pretoria to foot some of the bill. Pretoria seems largely to have ignored the correspondence and would not agree undertakings as to solicitor's costs or provide details of their solicitors. In November 2014 Blankney announced that they would be granting a lease to someone else. Nothing happened subsequently until September 2020 when Pretoria brought an action claiming that Heads of Terms constituted a contract and Blankney were in breach. The High Court held that **S.2 Law of Property (Miscellaneous Provisions) Act 1989** had been complied with as the Heads of Terms were in writing, signed and contained all express terms. However, they were not intended to be legally binding for the following reasons:

- The exclusivity clause meant that after the lockout period Blankney could negotiate with other people
- There were no key specific terms and no detail. It would be too difficult to imply such terms.
- The Heads of Terms required the lease to be contracted out of the **Landlord and Tenant Act 1954**, but no notice had been served. They referred to the "proposed agreement". This

suggested no intention to be legally bound and there is no need to use the words “subject to contract.”

- There may have been a different outcome but for the lockout agreement and the legal status of the Heads of Terms should be clear.

The Court of Appeal have now heard this case. [2023] EWCA 482. They decided that heads of terms did not give rights to a legally binding contract but on different grounds to the High Court. A decision depends on documentation as it stands and not on negotiations and preliminary data. Heads of terms stated that a formal document would be drawn up and the actual lease would have to be much more detailed. Heads of terms also referred to the Lease being outside The LTA 1954 and this would not be possible if there was already an agreement. Moreover, the lockout agreement would be irrelevant if there was already a legally binding contract.

To be certain the words subject to contract should be used.

Post-Covid Debt Claims

Commerz Real Investmentgesellschaft v TFS Stores [2021] EWHC 863

TFS Stores had been closed during the various lockdowns. Since April 2020 it had not paid any rent. The landlord sued for non payment of rent. In a summary judgment the High Court found for the landlord. Although Commercial Rent Arrears Recovery is suspended it was clear that this did not stop the landlord from suing for the arrears.

The tenant also argued that the landlord had not adhered to the Government Code of Practice for commercial property relationships during the Covid-19 pandemic. The Court held that this is merely voluntary.

The tenant also argued that the landlord should have insured against notifiable disease. This claim failed as there is no such term in the lease and it would not be implied.

Bank of New York Mellon (International) Limited v Cine-UK Limited
London Trocadero (2015) LLP v Picturehouse Cinemas Limited [2022] EWCA 1021

The Court of Appeal gave judgment on these cases on 27 July 2022 and confirmed the previous High Court decisions. The first case involved Cine-UK. The second case involved Picturehouse Cinemas and Gallery Cinemas together with their holding company Cineworld who acted as guarantors. No rent had been paid since the beginning of the lockdowns in 2020.

The Court of Appeal held:

1. There was no implied term that rent would not be payable either using the business efficacy test or the obviousness test. Both leases worked without implied terms and allocated to the tenant the risk that the premises could not be used for their intended purpose.

2. If one accepted that Covid restrictions were unprecedented (which was debatable) that was not a good reason to disapply fundamental principles of contract law.

3. Failure of basis could rarely be made out when a valid contract existed and was being performed. The leases contained considered contractual terms setting out circumstances in which the obligation to pay rent would be suspended and pandemic restrictions were not amongst them.

4. The rent suspension clause in the Bank of New York Mellon lease required damage to mean physical damage and did not include financial or non-physical damage caused by Covid restrictions.

The landlords were successful in claiming rent arrears as debt.

LANDLORD & TENANT ACT 1954

Renewal terms

Clipper Logistics v Scottish Equitable (2022) County Court. On a renewal the landlord wished to ban alterations which would bring the premises below an E rating in relation to energy efficiency. He also wanted to be indemnified for the costs of a new EPC if the tenant made alterations which adversely affected or invalidated the EPC and wanted to oblige the tenant to maintain the current EPC rating and return the premises with the current rating. The landlord lost on most of these and it was decided that the changes to alterations covenant were not needed anyway. The lease was changed in relation to returning the premises with the same rating.

W (No. 3) GP v JD Sports (2022) County Court. Here the court held that the Landlord and Tenant Act 1954 did not envisage the possibility of a turnover rent on a renewal as the new rent had to be a market rent and it would be impossible to ascertain which part was a turnover rent.

B&M Retail Limited v HSBC Pension Trust (UK Limited) (2023) County Court. B&M had a Twenty year Lease from 2000. The premises were outdated. HSBC entered into a conditional agreement with Aldi that on obtaining vacant possession they would be granted a lease and would redevelop although there was some evidence that they may be prepared to wait until 2029.

B&M served a S.26 request for a new lease. This was not opposed by the Landlord as they had problems with the post room during the lockdowns. They would have opposed underground F, demolition and reconstruction. The Court relied on the case of ***National Car Parks v Paternoster Consortium [1990] 1EGLR 99*** where the tenant was given a ten year lease but the landlord successfully included a rolling redevelopment break exercisable after two years by which time planning issues might have been decided. In the current case the tenant was given a five year Lease with a six month rolling redevelopment break exercisable immediately.

Grounds of Opposition

Man Limited v Back Inn Time Diner Limited [2023] EWHC 363 Here the tenant served a S.26 request which the landlord opposed on ground (f), intending to develop the premises into a multi-storey mixed use development. The landlord produced evidence of an ability to fund the development but as this was not provided until the start of the trial it could not be considered. They also produced evidence of ownership of other property which could be used as security but this was not clearly identified.

The High Court stated that there must be a realistic prospect of funding, similar to the test for obtaining planning permission. The landlords ownership of other properties may also be relevant. Here there was no realistic prospect and the landlord failed

SERVICE CHARGE LIABILITY

In the case of ***Sara and Hossein Asset Holdings v Blacks Outdoor Retail [2020] EWCA 1521*** a landlord's certificate in relation to service charge was stated to be conclusive as to liability. The Court of Appeal held that this applied to both the itemised works and total amount. The clause was clear and unambiguous and could not be contested.

The Supreme Court have now heard this case ***[2023] UKSC 2.*** The Tenant had to pay the service charge. If they objected to the amount they would have to bring a separate court action.

In ***Criterion Buildings v McKinsey & Co [2021] EWHC 256*** the landlord successfully claimed £2.2 million plus interest of service charge arrears. The lease stated that the tenant would pay a "due proportion" of the service charge as determined by the landlord. The court decided that as long as the lease covered the works done the landlord's determination would be conclusive save in exceptional circumstances.

THE LEVELLING-UP AND REGENERATION BILL 2022-23: HIGH STREET RENTAL AUCTIONS

This was announced in the Queen's Speech and introduced into the House of Commons on 11 May 2022. Part 10 allows local authorities to designate high streets or town centre streets or areas as being important to the local economy because of a concentration of high street users. This will include shops, offices, restaurants, pubs, meeting places, community halls and light industrial units, but not warehouses.

If premises are vacant for at least one year or 366 days or more in the last two years, but are suitable for high street use the local authority can notify the landlord that they intend to put the premises up for high street rental auction. The local authority must consider that occupation would be beneficial to the local economy, society or environment. Occupation involves regular presence of people at the premises but there is no clear definition of what this means, for instance, what about use as storage? Premises includes the whole or part of the building or any that with reasonable adaptation can be used as such.

The first stage is for the local authority to serve an initial notice which may last up to 10 weeks. During this period the owner cannot rent out the premises without the consent of the local authority unless a contract is already in place. The local authority must consent to letting if the tenancy is for at least one year and the local authority is satisfied that the lease will result in occupation by the regular presence of people.

If the premises have not been let within 8 weeks the local authority may serve a final letting notice expiring a maximum of 14 weeks later. During the period the landlord cannot let out the premises or carry out works without local authority's consent.

The local authority can then conduct a rental auction for a lease of between one and five years' duration. The lease will be excluded from the **Landlord and Tenant Act 1954**. The local authority acts in its own name but with an indication that it is binding on the landlord. The local authority will give the landlord a signed copy of the tenancy agreement as soon as is reasonably possible. The terms of the tenancy will be down to regulations but it can include a requirement for the landlord to carry out works or allowing the tenant to do works. The local authority must have regard to any representations by the landlord.

The landlord can counter-notice on the final letting notice being served. The counter-notice may include the fact that the landlord intends to carry out substantial works of construction, demolition or reconstruction affecting the premises, or they intend to occupy for their own business or residential purpose.

Consultation commenced on March 31st 2023 and ends on June 23rd 2023. Local Authorities should cooperate with Landlords and should not use their powers if the landlord is trying to find a tenant or intends to develop the site. They should also co-operate in relation to the type of use and include user covenants in the lease. For planning purposes most premises will come within Class E where they do not, for instance pubs and community halls, there will be no need for a change of use for planning purposes. Moreover, there will be no need to comply with minimum energy efficiency standards. At the auction there will be no reserve but there will be a rent deposit of either 3 months rent or £1000 whichever is the greater.

There will be an agreement for lease during which time the landlord must bring the premises up to a minimum standard, for instance in relation to water ingress, mould and damp, fire, gas and electrical safety. It is envisaged that the lease itself will be standardised. The tenant must yield that in the same condition and there must be a schedule of condition.

ENERGY ACT 2011

Minimum Energy Performance of Buildings Standard

Energy Efficiency Regulations 2015 - Minimum Energy Performance of Buildings Standard

S49 of the Energy Act 2011 required the Secretary of State to introduce legislation on minimum energy performance standards by 1st April 2018 for rented property at the latest.

Firstly, the minimum standard is an E rated building. (The Government is consulting on reducing this and the proposal is to introduce a minimum B rating by April 2030.) It is estimated that around 20% of buildings of rented property will fail on this. Secondly, the legislation will apply to all new leases (with exceptions below). Thirdly, for existing lettings there was a backstop of 1st April 2023 when they came within the legislation.

For residential lettings the Government has stated that as of 1 April 2025 the minimum energy rating will be C for new lettings. This will become retrospective on 1 April 2028.

Exclusions are as follows:

- The regulations will only apply to buildings where there is an EPC. There may be lettings in place before the introduction of EPCs in 2007 which therefore escape the regulations.
- Where EPC regulations exempt landlords from providing an EPC, the minimum efficiency regulations will contain the same exemptions, e.g. a short term letting of a building prior to its demolition.
- Lettings under 6 months subject to a maximum of two such lettings to the same tenant.
- Leases where the length is more than 99 years.
- Lettings where the landlord cannot obtain the necessary consents for the efficiency works. Necessary consents can include:

    a) Planning or buildings regulation approval

    b) Consents from lenders or superior landlords

    c) Consent from a sitting tenant to allow the landlord access to do the works.

- Where the works cause a material net decrease in the property's capital value.

There are still some major issues to be determined, for instance whether any non-compliant leases will be illegal and thus unenforceable. There will also be major issues in relation to post 2018 rent reviews and dilapidations claims. In relation to the latter s18 Landlord & Tenant Act 1927 might limit the tenant's liability if the landlord has to bring the building up to minimum energy standards in order to re-let it. The tenant may also possibly find themselves liable, especially for leases terminating post April 2023 and April 2020 for residential properties, due to the statutory compliance provisions within the lease.

The Energy Efficiency of Buildings (Private Rented Property) (England & Wales) regulation will apply to any commercial lease of more than 6 months and less than 99 years duration and to residential assured, assured shorthold and protected tenancies and to any other tenancy designated by the Secretary of State. Any exemption in relation to detracting from value will have to be confirmed by

an independent surveyor and will only last for 5 years. The penalties will be a maximum fine of £5,000 or 5% of rateable value for commercial property where the breach has occurred for less than 3 months and a maximum £2,000 fine for residential property. The fine will be doubled after 3 months.

Note: Guidance suggests that the reduction in capital value referred to above should be at least 5%. Any exemption will only last for 5 years and any reduction must be confirmed by an independent surveyor.

Note: On 23rd February 2017 the Government produced guidance on minimum energy Efficiency standards for non-domestic premises. In particular, an exemption must be specifically applied for and will only last for 5 years. If the landlord cannot obtain necessary consents for the work, they must show that they have taken all reasonable steps to obtain such consent. There will be a register of exempt premises. The landlord may also be able to show that he has taken all steps that can be expected and cannot make the property E rated. There will also be an exemption if the landlord can show that the proposed work would not be paid for by the energy savings within 7 years.

If a property continues to be let after 1st April 2023 with a F or G rated EPC then they may be faced with enforcement action and the leasing out of the premises will be unlawful. It is unclear how this affects the landlord and tenant relationship.

If a listed building exemption is being claimed then the landlord must show that any EPC recommendation report would unacceptably alter the appearance of the building.

Any exemptions are personal and will not benefit a purchaser of the reversion who must apply for a new exemption. If they are an unexpected landlord, e.g. an inheritance or disclaimer, they have 6 months to apply for the exemption.

THE BUILDING SAFETY ACT 2022

Higher-Risk Residential Buildings

The Act has also introduced the Building Safety Regulator who will be a part of the Health and Safety Executive. They will have a general role in relation to building safety, but will also be responsible for building control in high risk residential buildings. A high risk residential building is one with at least two dwellings which is at 18 metres or more in height or, if less than 18 metres, which has 7 or more storeys. Such a building will have an accountable person who has a legal estate in possession in the common parts or is responsible for repair of the common parts. This will include any Right to Manage Company and any Residents Management Company if there is more than one accountable person then there will be a principal accountable person. A residents' panel must be constituted and the accountable person must listen to health and safety complaints. They will have to produce reports to the Regulator and keep records in relation to health and safety and report any fire safety or structural safety problems that have occurred. Originally, there was meant to be a Building Safety Manager who would be an intermediary between the building safety regulator and the accountable person. This was dropped due to cost. Also, the original Bill provided for a building safety charge whereby any costs could be charged to the long leaseholders. This was also dropped and any charges will now be covered by the service charge.

The accountable person will have access rights to individual flats on giving at least 48 hours' notice. If there is more than one accountable person, there will be a principal accountable person. They will have an interest in possession of the structure and exterior or be responsible for repair and maintenance of the structure or exterior of the building. There are also offences if anyone removes or disturbs a relevant safety item. Any high-risk buildings must be registered with the Building Safety Regulator. This came into force on April 6th 2023 and the principal accountable person will have to register the building with the Regulator by October 2023.

In England, the Act came into force on April 6th 2023**. The Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations** were introduced into parliament on March 9th 2023. There will be a registration fee of £251 which must be paid on the application. For new builds then the accountable person will commit a criminal offence if they allow anyone into residential occupation before completion certificates are available. This will include adding new residential units and doing work that results in the building becoming Higher-Risk. The principal accountable person will have to register the building with the Regulator within six months otherwise they will commit a criminal offence.

There are also **Higher-Risk Buildings (Key Building Information) (England) Regulations 2023**. Within 28 days of an application the principal accountable person must provide details as to use of the occupied building, any attachments or outbuildings, details of materials used, information about structure, storeys and staircases, energy supply and storage and emergency evacuation plans.

There are also **Higher-Risk Buildings (Descriptions and Supplementary Provisions) (England) Regulations 2023** which were laid in front of Parliament on March 6th 2023. A Higher-Risk Building is one which is 18 metres or more in height or has seven or more storeys. Any floor where the ceiling is below ground level will not be included, nor will any top floor which only includes rooftop plant and machinery. The measurement will be from the lowest part of the ground floor.

Although the legislation will apply to Wales, the ability to decide on the height of the building has been delegated to the Welsh Government who are still consulting until May 2023.

Published January 2022

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