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Big Property Cases of the Last Year (and a bit on COVID regulations)

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The five big cases and some COVID regulations

1. Jones and another –v- Ministry of Defence (HC) [2021] EWHC 2276 (QB)
Noise nuisance
2. Faiz and others –v- Burnley Borough Council (CA) [2021] EWCA Civ 55
Forfeiture - waiver
3. Keshwala and another –v- Bhalsod and another (CA) [2021] EWCA Civ 492
Forfeiture – relief from forfeiture
4. Capitol Park Leeds plc –v- Global Radio Services Ltd [2021] EWCA Civ 995
Lease break option
5. Sara & Hossein Asset Holdings Ltd –v- Blacks Outdoor Retail Ltd [2020] EWCA Civ 1521
Service charge certification

Jones and another –v- Ministry of Defence

Facts

- Claimants acquired land near a reservoir in 2003 to create a holiday and leisure park
 - planning permission obtained
- Sold the land in 2016, the business having not been a success

Claim

- Claimants claimed that:
 - noise from jets to/from nearby RAF Mona had led to the failure of the business
 - flight patterns and frequency had changed since 2007

Jones and another –v- Ministry of Defence

Held

- Presumption of reality (Lawrence –v- Fen Tigers Ltd [2014] UKSC 13) – nature of locality:
 - agricultural area
 - frequent aircraft noise
- Defendant had taken reasonable steps to minimise noise
- Any increase in aircraft frequency between 2003 and 2016 was not sufficiently material

Take-aways

- *“what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey”* Thesiger LJ in Sturges –v- Bridgman [1879]
- Look at the use, nature and character of the locality to assess whether an activity amounts to a nuisance

Faiz and others –v- Burnley Borough Council

Facts

- 30 October 2019: landlord served a section 146 notice on tenant of a café for breach of the alienation provision (unlawful subletting)
- 4 November 2019: landlord sent tenant a revised invoice for insurance for period to February 2020 (which had originally been sent on 26 September 2019)
- 22 November 2019: landlord purported to forfeit lease

Issue

- By sending the revised invoice, whether landlord waived the right to forfeit – what was material:
 - that the revised invoice was sent after service of the breach/s146 notice?
 - that the invoice period ran until after all of the material events?
 - that it was a revised invoice, making the relevant date the date of the first invoice (which was before the material events)?

Faiz and others –v- Burnley Borough Council

Held

- The revised invoice was not a fresh invoice, but an indication that the landlord was willing to accept payment for part of the period covered by the original invoice
- No acknowledgement of existence of lease
- Therefore, no waiver

Take-aways

- Once a landlord has knowledge of a breach, it is at risk of waiving right to forfeit
- A wide range of acts by landlord can affirm continuation of lease

Keshwala and another –v- Bhalsod and another

Facts

- 20 year lease with 10 years unexpired
- 13 September 2018: landlord forfeits lease for non-payment of £500 rent by peaceable re-entry
- 26 February 2019: tenant applies for relief from forfeiture

Issue

- Whether an application nearly 6 months after forfeiture is made with “*reasonable promptitude*”

Keshwala and another –v- Bhalsod and another

Held

- County Court: no relief
- High Court: relief
- Court of Appeal: no relief

Take-aways

- Landlord: a tenant always has a right to apply for relief, which may be made many weeks/months after forfeiture
- Tenant: make an application for relief promptly

Capitol Park Leeds plc –v- Global Radio Services Ltd

Facts

- Tenant break option conditional on the tenant giving vacant possession of the “premises”
- “Premises” defined in the lease as including fixtures
- Tenant stripped out some fixtures and removed all chattels
- Landlord challenged break on the basis that the “premises” (as defined) had not been returned to them (as some fixtures removed)

Issue

- Whether the removal of some fixtures frustrated the break

Capitol Park Leeds plc –v- Global Radio Services Ltd

Held

- CA overturned HC decision – vacant possession given
- Conventional definition of vacant possession applies:
 - Free of people
 - Free of chattels
 - Free of third party interests

Take-aways

- Emphasises (again) the need for extreme care when operating break options in leases

Sara & Hossein Asset Holdings Ltd –v- Blacks Outdoor Retail Ltd

Facts

- Landlord's agent required by the lease to certify service charge amount
- This duly happened
- The tenant challenged the amount

Issue

- Landlord: certificate final and binding as to the sum incurred and within scope
- Tenant: certificate not binding where sums excessive or not within scope

Sara & Hossein Asset Holdings Ltd –v- Blacks Outdoor Retail Ltd

Held

- High Court: conclusive as to the amount incurred, but not whether the sums were in scope
- Court of Appeal: conclusive both as to the amount and scope

Take-aways

- Service charges often contentious, so proper regard should be taken when:
 - agreeing heads of terms and drafting leases; and
 - making a demand for/challenging service charges

COVID Regulations

- **Forfeiture:** no forfeiture for non-payment of rent pre-25 March 2022
- **Rents:** commercial rents ring-fenced from March 2020 where business impacted by COVID closures:
 - Landlords and tenants encouraged to come to agreement
 - Arbitration if they can't agree
 - CRAR only available where rent has been due for more than 554 days
- **Winding up:**
 - 1 March 2020 – 30 September 2021: no wind ups
 - 1 October 2021 – 31 March 2022:
 - Excluded debt: rent or other sum not paid not paid for COVID-related reasons – no wind ups
 - Non-excluded debt: no wind ups for sums less than £10,000 and no proposals within 21 days in response to a landlord's notice inviting proposals