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Legal Update

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Case law update

- **Signed heads of terms: when do they bind?** - *Pretoria Energy Company (Chittering) Ltd v Blankney Estates Ltd*
- **Service charge certification** - *Sara & Hossein Asset Holdings Ltd –v- Blacks Outdoor Retail Ltd*
- **Nuisance: has the law changed?** - *Fearn and others (Appellants) v Board of Trustees of the Tate Gallery*
- **Break clauses and termination: getting notices right** - *Vistra Trust Corporation (UK) Ltd* v *CDS (Superstores International) Ltd* [2022] EWHC 3382 (Ch) and *OG Thomas Amaethyddiaeth CYF v Turner* [2022] EWCA Civ 1446:
- **Redevelopment under the 1954 Act (ground (f))** - *Man Ltd v Back Inn Time Diner Ltd*

Heads of Terms: when do they bind?

- The question of whether Heads of Terms bound parties to enter into a lease was considered by the Court of Appeal in ***Pretoria Energy Company (Chittering) Ltd v Blankney Estates Ltd***

Facts

- Pretoria looking to develop several anaerobic digestion plants in Eastern England and approached Blankney regarding a factory site in Lincolnshire
- The parties agreed Heads of Terms (HoTs)
- The HoTs were not marked "subject to contract" but they stipulated that:
    1. a 25-year lease would be granted, outside the Landlord and Tenant Act 1954 (LTA);
    2. a "formal agreement" would be created once planning consent was achieved; and
    3. there would be a short period for exclusive negotiation (lock-out clause), which was legally binding
- Pretoria claimed that the HoTs amounted to a binding agreement for lease

Heads of terms (2)

Issue

- Whether the signed document marked “Heads of Terms”, but not marked “subject to contract”, amounted to a binding agreement for a lease

Held

- **High Court**: parties had not entered a binding agreement for a lease
- **Court of Appeal**: agreed – no binding agreement for lease on the basis that:
  - for a 25 year lease of a unique site, too many important items were missing from the HoTs;
  - the lockout clause (clause 3) was incompatible with Pretoria’s claim that there was a binding agreement; and
  - proposed LTA 1954 exclusion needed formalities (that were not carried out)

Takeaway**:**

- When drafting HOTs:
  - make clear that they do not create legally binding obligations
  - head them “subject to contract”

Sara & Hossein Asset Holdings Ltd –v- Blacks Outdoor Retail Ltd (1)

service charge certification

Facts

- Service charge provision:
  - Tenant was responsible for paying a "*fair and reasonable proportion*" of total service cost "*without set-off or counterclaim*"
  - Landlord's agent to certify service charge amount and that sum would be "*conclusive*" unless there was "*manifest or mathematical error or fraud*".
- Landlord issued an unusually large service charge demand
- Tenant challenged the amount on grounds the charge was excessive and included unnecessary items not due under lease

Issue

- Landlord's position: certificate final and binding as to (a) both costs incurred and (b) sum payable
- Tenant's position: certificate not binding where sums excessive or not within scope

Sara & Hossein Asset Holdings Ltd –v- Blacks Outdoor Retail Ltd (2)

Held

- **High Court**: conclusive as to the amount incurred, but not whether the sums were in scope
- **Court of Appeal**: conclusive as to the amount and scope
- **Supreme Court**:
  - 'Pay Now, Argue Later': correct interpretation was that certificate was conclusive as to the sum payable by tenant for the relevant items, but not as to tenant's underlying liability for the service charge
  - Tenant was not entitled to withhold payment: tenant should pay sum and then dispute liability thereafter
  - 'No set-off' provision in lease did not prevent a counterclaim: purpose was to ensure no delay in payment, not prevent counterclaim

Comment

- Displaces traditional position in commercial leases of "*Pay up and don't ever argue*"
- Whilst provides comfort and balance on both sides (landlord has certainty of cash flow and tenant retains rights of challenge), decision likely to result in more (rather than less) service charge disputes
- A more 'purposive' approach by the courts going forward?

Nuisance: Where are we now?

Fearn and others (Appellants) v Board of Trustees of the Tate Gallery

- Long awaited Supreme Court decision handed down in February 2023
- Heralded as a landmark decision on the law of nuisance…but does this change the law on nuisance?

What is a nuisance?

- Private nuisance: an unauthorised act or omission:
  - which unduly interferes with the claimant's reasonable enjoyment of its land
  - interference must cause an objectively substantial interference with the neighbour's ordinary use of their land

Facts

- Claim in nuisance brought by residents of Neo Bankside, a building adjacent to the Tate Modern.
- Residents had acquired their flats in 2013/2014, before the Tate had completed its extension and creation of viewing platform
- Residents objected to the use by the museum of the gallery platform (which enjoyed up to 600,000 visitors a year)
- Residents sought an injunction in nuisance to prohibit visitors from certain areas of the viewing platform

Nuisance (2)

Outcome

- **High Court**
  - Judge rejected claim on basis that Tate's use of floor as a viewing gallery was reasonable and residents had failed to take steps to mitigate e.g. by lowering blinds/hanging net curtains
- **Court of Appeal**
  - Rejected the appeal, albeit on different grounds: they considered that the common law of nuisance was not capable of extending to overlooking
- **Supreme Court** (3 to 2 majority decision)**:**
  - Visual intrusion can constitute a nuisance (judges unanimous on that point)
  - There was a substantial interference with the ordinary use and enjoyment of the claimants' properties
  - Tate's viewing platform was a very particular and exceptional use of land
  - Ability for the residents to mitigate (with blinds/curtains) was not a defence, especially where the act constitutes 'special use'

Nuisance (3): Have the floodgates been opened?

Where are we now?

- No real expansion of principles of nuisance
- Confirms that visual intrusion is capable of being a nuisance (not a law change)
- In this case, the court were dealing with two extraordinary and unusual buildings
- In reality, very fact specific, unlikely to be many similar cases (given the unusual use and extent of visual intrusion)

Break clauses and termination: getting notices right

- Break provisions need to be complied with strictly – no compliance no break
- Termination provisions also require adherence to contractual/statutory provisions
- Two recent cases highlight importance of getting termination and break notices right:
  - *Vistra Trust Corporation (UK) Ltd* v *CDS (Superstores International) Ltd* [2022] EWHC 3382 (Ch); and
  - *OG Thomas Amaethyddiaeth CYF v Turner* [2022] EWCA Civ 1446

***Vistra Trust Corporation (UK) Ltd* v *CDS (Superstores International) Ltd* [2022] EWHC 3382 (Ch)**

Facts

- Tenant occupied retail superstore in Cheshire under a lease expiring in 2029 (protected by 1954 Act)
- Tenant break option as at 11 February 2023 on 6 months' notice
- Tenant served a break notice on 10 December 2018 to expire on 11 February 2023 (i.e. over 3 years later)
- Lease was subsequently assigned and new tenant served a s26 request for new tenancy starting in June 2023

Break clauses and termination: getting notices right (2)

Two issues

- Was the break notice valid (served so far in advance)?
- Was the s26 request valid (given that the tenant had served a contractual break notice)?

Held

- Break notice was valid – no implied term limiting tenant to how far in advance it can serve
- s26 request was not valid – s26(2) is clear: a tenant cannot serve a s26 request where it has contractually terminated (not saved by the assignment – i.e. different entities served contractual notice and statutory notice)

Comment

- No need to imply a term creating maximum period of notice – works without it
- Case would have been differently decided if there had been a contractual maximum period (albeit rare)
- Assignee adopts position of assignor re break notices

Break clauses and termination: getting notices right (3)

***OG Thomas Amaethyddiaeth CYF v Turner* [2022] EWCA Civ 1446**

Facts

- Landlord served notice to quit on tenant of agricultural holding
- The tenant had, without notifying the landlord, assigned the tenancy to a newly incorporated company (no alienation restrictions)
- Notice therefore addressed to wrong entity (i.e. to the former tenant)

Issue

- Whether the notice was valid and whether could be saved on *Mannai* principles:
  - Mannai will save a notice where it is clear and unambiguous and leaves no reasonable doubt about its intention

Held

- **First instance and first appeal**: notice valid (Mannai applied)
- **Court of Appeal (second appeal):** overturned both decisions – not unambiguous as addressed to the wrong person (i.e. the former tenant)

Break clauses and termination (4)

- Takeaways:
  - Mannai will not save a notice which does not comply with formal requirements
  - Where there is any doubt as to the identity of the correct recipient, make enquiries before service
  - Seek specialist assistance to limit prospect of future dispute on the question of validity

Redevelopment under the 1954 Act

Man Limited v Back Inn Time Diner Limited [2023] EWHC 363 (Ch)

- Ground (f) of Landlord Tenant Act 1954 - fertile ground for dispute between parties and likely to be reviewed by the Law Commission (as part of its review of the 1954 Act)
- s30(1)(f) provides that a landlord may oppose an application for a new tenancy where it is able to show:
  - "*that on the termination of the current tenancy the landlord intends to **demolish or reconstruct** the premises comprised in the holding or a substantial part of those premises or to carry out **substantial work of construction** on the holding or part thereof and that he could **not reasonably do so without obtaining possession** of the holding".*

Facts

- Tenant operated premises as a diner and sought new lease pursuant to a s26 request
- Landlord contested this on a number of grounds, most notably ground (f)

Issue :

- Whether the landlord met the 'ground f' test

Redevelopment under the 1954 Act (2)

Held

- **High Court**:
  - In this case:
    - lack of any real prospect of obtaining planning consent
    - lack of evidence as to landlord's ability to fund the development
  - Subjective intention to carry out the development proved
  - Failed to establish an "*objectively realistic prospect of implementing"* that intention - no "*real chance*" (rather than "*fanciful*")
- **On appeal**:
  - Planning: HC had applied the correct test: "*real*", not "*fanciful*"
  - Funding: overall HC had also applied correct test, notwithstanding repeated references by judge that the landlord had to prove that it "*would be able to fund the development*" (which suggested a higher threshold required)
  - Held: (i) no planning consent (yet) and (ii) late disclosure of bank statements to evidence funding meant that appeal was dismissed

Redevelopment under the 1954 Act (3)

Takeaways:

- Correct test:
  - Funding: '*realistic prospect*' test
  - Planning permission: also '*realistic prospect*' test
- Preparation and organisation key to landlords establishing intention to redevelop:
  - Ensure all evidential requirements met by the date of hearing
  - Disclose contemporaneous evidence of funding as soon as possible
  - Planning permission either granted or clearly will be granted

In summary

- **Signed heads of terms – not binding in this case:** *Pretoria Energy Company (Chittering) Ltd v Blankney Estates Ltd*
- **Service charge certification – pay now and argue later:** *Sara & Hossein Asset Holdings Ltd –v- Blacks Outdoor Retail Ltd*
- **Nuisance – no real change in the law:** *Fearn and others (Appellants) v Board of Trustees of the Tate Gallery*
- **Break clauses and termination – importance of getting notices right:** *Vistra Trust Corporation (UK) Ltd* v *CDS (Superstores International) Ltd* [2022] EWHC 3382 (Ch) and *OG Thomas Amaethyddiaeth CYF v Turner* [2022] EWCA Civ 1446:
- **Redevelopment under the 1954 Act - clear evidence required**: *Man Ltd v Back Inn Time Diner Ltd*

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