

# Commercial Real Estate

SLAUGHTER AND MAY

Legal and regulatory developments in commercial property

## LANDLORD AND TENANT

### Whatever people say I am, that's what I'm not

**Virtual assignment was not in breach of alienation covenant**

#### *Clarence House Limited v National Westminster Bank Plc : [2009] EWCA Civ 1311*

National Westminster Bank Plc has successfully appealed the High Court decision that a virtual assignment amounted to a breach of a covenant in its lease which prevented the tenant from parting with or sharing possession or occupation. As part of a larger commercial agreement, NatWest had entered into a virtual assignment to New Liberty of a number of leasehold properties including the lease in question. Clarence House was the landlord of the property which was occupied by a third party to which NatWest had underlet with the landlord's consent. Under the virtual assignment, the assignee was to have all the economic benefits and burdens of the relevant lease and the underlease without an actual assignment of the lease taking place. New Liberty was appointed NatWest's agent to deal with the day-to-day management of the property and the payment of rent. The landlord subsequently found out about the virtual assignment and was suspicious about dealing with New Liberty and concerned about losing NatWest's covenant. NatWest's solicitors refused to produce copies of the virtual assignment documentation and the landlord applied for a declaration that the virtual assignment was in breach of the terms of the lease.

The Court of Appeal considered the nature of the virtual assignment and whether it was in breach of various alienation covenants in the lease. The judge had decided that the receipt of rent by the assignee put it in possession and that, by requiring the assignee to deal with the property as the tenant would otherwise have done, the tenant was at least parting with or sharing possession. The Court of Appeal considered the meaning of "possession" and decided that NatWest was not in breach of the covenant. By simply collecting rents as

NatWest's agent, New Liberty was not in possession of the premises and the virtual assignment did not amount to a parting with or sharing of possession of the demised premises. The Court of Appeal considered that the proper nature of the arrangement was one of agency and the judge had been correct to conclude that the virtual assignment did not amount to a breach of the prohibition against declaring any trust of the property. The Court of Appeal also confirmed that the prohibition on assignment in the lease related only to a legal assignment and that the substantive effect of the virtual assignment was not to grant an underlease to New Liberty. The effect of the Court of Appeal decision is that if a landlord wants to prevent a tenant from entering into a virtual assignment, it will need to include an express prohibition to that effect in the lease.

### This time it's personal

**Personal break clauses were not reactivated by reassignment**

#### *Norwich Union Life and Pensions v Linpac Mouldings Ltd : [2009] EWHC 1602*

This case considers whether a personal break clause can be revived by assigning the lease back to the person with the benefit of the right. The case involved three leases of units on an industrial estate, two of which were 99-year leases which were subject to substantive rents. These leases were old leases and could not be assigned without the consent of the landlord, such consent not to be unreasonably withheld. In 1986, the two leases were assigned to Linpac, the defendant company. As part of the deal, the landlord agreed that Linpac could have the right to break the leases in 2010 by serving at least 18 months' notice. The break clauses referred to the "assignee (meaning Linpac Mouldings Ltd only)" and were also conditional upon the payment of two years' rent or a fixed sum if higher, the performance of the tenant's covenants up to the break date and the two leases had to be terminated simultaneously. Linpac was subsequently granted a lease of a further unit which contained a similar break clause. Linpac then assigned all the leases to an associated company with the landlord's consent. The assignee company ceased

to be a member of Linpac's group and, in May 2005, went into administration. The units were empty and an application was made by the tenant to assign all three leases back to Linpac. The landlord refused to give its consent on the ground that Linpac would seek to exercise the personal rights to break and this would be to the landlord's disadvantage. Despite the landlord's refusal, the leases were re-assigned back to Linpac and Linpac purported to exercise the break clauses.

The court held that the break clauses ceased to exist after Linpac first assigned the leases and that they could not be revived by assigning the leases back to Linpac. In addition, the landlord had acted reasonably in refusing consent to assign the leases back to Linpac. Even though its fears about Linpac being able to exercise the break clauses proved to be unfounded, they had been reasonably held. The landlord had a genuine concern that the reassignment would be held to revive the personal break clauses and the risk of this happening would have a substantial adverse effect on the value of its reversion. By assigning the leases, Linpac had lost the right to break and this right could not be revived by reassigning the leases to it. If Linpac wished to retain the right to break, it could have underlet the units. The case is a reminder of the need to check for valuable personal rights which may be lost on an assignment. Such rights are often included in collateral documents, such as the licence to assign to Linpac, or in less formal documents such as side letters.

## My aim is true

### Landlord failed to establish intention to occupy business premises

#### *Patel and another v Keles and another : Lawtel 12th November 2009*

One of the grounds of opposition to a statutory renewal of a business tenancy under the Landlord and Tenant Act 1954 is that the landlord intends to occupy the premises for the purposes of a business to be carried on by him. In this case, the appellant landlord had objected to the renewal of a lease of premises which were occupied by the respondent tenant as a news agency business. The landlord contended that he intended to carry on his own news agency business at the premises. To substantiate the S30(1)(g) ground, the landlord had to show that there was a realistic prospect that he would be able to give practical effect to his intentions and that he actually intended to use the premises for the purposes of his business. The landlord gave an undertaking that he did not intend to use the premises for any purpose other than a news agency for a period of two years. The court

held that the landlord had satisfied the objective test but had failed to satisfy the subjective test regarding his real intentions. The landlord's intention was only temporary and it was likely that he would seek to dispose of the premises at the end of the two-year period.

The Court of Appeal dismissed the landlord's appeal. The courts had set a high hurdle in establishing the necessary subjective intention on the part of the landlord. Although S30(1)(g) did not require the landlord to intend to occupy for any particular length of time, there had to be substance to the landlord's intention and the intended period of occupation could not be short term. Case law suggested that the landlord would not be treated as having the necessary intention if he intended to sell the premises within five years. The landlord was highly likely to sell the premises and this was a factor which the judge had been correct to take into account. The case is a further illustration of the difficulty a landlord may face in establishing one of the non-default grounds of opposition to a renewal tenancy.

## Keep on running

### Landlord's administration did not prevent application for a new tenancy

#### *Somerfield Stores Ltd v Spring (Sutton Coldfield) Ltd : Lawtel 6th October 2009*

The applicant was the tenant of business premises and had applied to renew its lease under the Landlord and Tenant Act 1954. The landlord opposed the renewal on the ground that it intended to redevelop under S30(1)(f). The landlord's interest was charged to a bank. The landlord went into administration and the administrators did not consent to the tenant's application for a new lease. There was a possibility that the bank's position could be improved by delaying proceedings while the administrators considered redevelopment plans. The fact that the landlord was in administration made it difficult or impossible to prove its intentions at this stage. The tenant applied to the court for consent to continue its claim for a new lease. The tenant argued that the position was unaffected by the landlord's administration, that its tenancy continued under the Act and that it was entitled to a new lease unless the landlord could substantiate a statutory ground of opposition. The administrators sought to defer the renewal proceedings to a later date.

The court granted the tenant's application. Although one of the objectives of an administration was to realise the assets of the company to make a distribution to its secured creditors, the administrators could not defer the proceedings to enable them to put together

a redevelopment scheme. Improving the position of the bank at the expense of the tenant's statutory rights was not a proper objective of the administration. A balancing act had to be struck between the rights of the administrators to conduct the administration in pursuit of its objectives and the tenant's right to a new lease. In this case, the tenant should be granted consent to continue the renewal proceedings.

## COMMERCIAL

### Good times bad times

#### Purchaser had not taken on burden of sale agreement

##### *Davies and others v Jones and another : Lawtel 9th November 2009*

The respondents were trustees who had agreed to sell land to a third party. The third party had in turn agreed to sub-sell the land to the applicants, who operated a supermarket. The land had previously been used as a garage and it was necessary to remove various buildings and fixtures at the site. Both agreements contained provisions in relation to the carrying out of these works and for a retention from the purchase price. Under the original contract, the third party was to carry out the works and was entitled to retain half the cost of the works from a £100,000 retention, whereas the sub-sale agreement entitled the supermarket to retain the full cost of the work from a £100,000 retention. The third party assigned the benefit of the original contract to the supermarket and terminated the sub-sale contract. The original contract was completed by a transfer from the respondent trustees to the supermarket in consideration of the purchase price less the £100,000 retention. The supermarket carried out the works. The trustees contended that the proper cost of those works was £30,000 but the supermarket contended that they had cost £200,000 and that it was not bound by the provisions in the original contract. At first instance, the court held that by assuming the benefit of the original contract the supermarket was bound to accept the burden and was required to pay any balance of the retention.

The Court of Appeal held that whether a transaction had created a conditional burden which was annexed to the property depended on the proper construction of the transaction. In this case, the supermarket had not taken on the burden of the obligations in the original contract. Neither the assignment of the benefit of the contract nor the transfer of the land was expressly or impliedly conditional upon performing these obligations and there was no indication that the supermarket would be responsible for them. This case is a useful reminder

of the need to ensure that the assignor of a contractual right obtains express protection from the assignee in the deed of assignment. Typically, this would be by way of a covenant to observe and perform the assignor's remaining obligations backed up by an indemnity. Reliance on the doctrine of benefit and burden may not be sufficient to ensure that the assignee becomes liable for the assignor's obligations under the contract.

### Take the long way home

#### Change of route did not prevent prescriptive easement

##### *Propertypoint Ltd v Kirri : Lawtel 25th November 2009*

The respondent had registered an entry on the appellant's title in respect of a prescriptive right of way and the appellant was seeking to have this removed. The land had been freely used by the respondent for access from August 1982 until 2001 when a hoarding was erected which prevented direct access. Because of the hoarding, the manner in which the respondent used the land changed. Instead of gaining direct access, the land was used for turning vehicles and reversing into the respondent's garage. This revised use required access over a car park owned by a third party. Although the respondent continued to use the land for the purposes of access, the actual means of access to the garage had changed. The Land Registry deputy adjudicator found that the respondent had acquired a prescriptive easement over the appellant's land. There had been use and enjoyment of the land from 1982 to 2001 and thereafter the land continued to be used for turning and parking vehicles in connection with the use of the respondent's land. The appellant contended that a right for the purpose of turning was not a known easement, that such a use would effectively sterilise the land and that the two distinct periods of usage would not be added together because the use for each period was different.

The court held that there was no reason why a right of way should not be established for the purpose of turning vehicles using the respondent's garage. The question was whether the servient land had been used for the entirety of the required 20-year period and the precise manner in which the servient land was used was not an issue. The continuous exercise and usage of the right to enter the servient land in order to turn vehicles using the garage on the dominant land had not been broken simply because the vehicles had been entering the land using a different route after 2001. Accordingly, a prescriptive right to turn and park cars for the purposes of accessing the respondent's land had been acquired.

## CONSTRUCTION

### You'd better stop

#### Adjudication did not prevent termination of construction contract

##### *Ericsson AB v EADS Defence & Security Systems Ltd : [2009] EWHC 2598*

The applicant sub-contractor applied for an injunction to prevent the respondent contractor from terminating the sub-contract before the outcome of an outstanding adjudication. The respondent applied for an order to prevent the sub-contractor taking any further steps in the adjudication. The sub-contract was for the supply of software and related support services and provided that the contractor could terminate if there was a material breach by the sub-contractor. The contract also contained limitations on liability and both mediation and adjudication provisions for the referral of disputes. There was delay in delivering the product and a dispute arose as to when the contractual delivery period was and who was at fault. The sub-contractor gave notice of its intention to refer the dispute to mediation and subsequently gave notice of its intention to refer the dispute to adjudication. The contractor gave notice to terminate the contract claiming that the sub-contractor was in material breach and also argued that, because the sub-contractor had initially chosen mediation, it was not open to it to also pursue an adjudication.

The court held that the sub-contractor could pursue the adjudication even though it had also instituted a mediation. The sub-contract allowed a party to pursue either or both dispute resolution options. It was not appropriate to grant an injunction to prevent the contractor from terminating the contract. The dispute resolution provisions in the contract did not prevent a party from exercising its contractual rights, including the contractor's right to terminate.

## NEWS

### Open season

#### Government revokes land agreements exclusion from competition law

A copy of a briefing note on the repeal of the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 is provided with this edition.

## OUR RECENT TRANSACTIONS

We acted for 5 Churchill Place L.P. on its £208 million acquisition of 5 Churchill Place, Canary Wharf. The deal is believed to be the third biggest single asset purchase of last year.

We have advised Centrica PLC on the sale of stakes in a number of its offshore wind farms and on related project finance, joint venture and power off-take arrangements.

We acted for Qatar National Bank on the £1.15 billion financing of two landmark developments, known as The Shard of Glass and London Bridge Place. When completed, The Shard will be the tallest building in the United Kingdom.

We advised Arsenal on the mixed-use development of the Queensland Road site to the south of the Emirates Stadium.

## AND FINALLY

### Tall story

A South Korean man has filed a complaint against the country's leading television broadcaster seeking compensation for distress after watching a programme which included an interview with a female student who described short men as "losers".

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If you require further information or advice, please contact your usual adviser at Slaughter and May or any of the following real estate partners at our London office: Steve Edwards, Dermot Rice, Edward Keeble, David Waterfield, Jane Edwards and John Nevin.