LANDLORD & TENANT

CASE LAW & PRACTICE

RELEVANT TO RECESSION

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LITIGIOUS RENEWALS – PACT OR CPR?

1.0 Introduction

1.1 My colleagues and I are regularly involved in contentious lease renewals, especially in this post *Lehman Brothers* climate. For whilst it is generally accepted [with few exceptions, such as Guildford High Street] that rents are reducing on renewal, disputes are almost invariably arising as to what level the rent [or package including rent-free] should now be at. Landlords generally appear to have been bolstered by the widely reported "bumper Christmas Sales" which, coupled with many feeling aggrieved at the savaging of their rent rolls caused both by increased voids and CVAs/pre-pack administrations, has led to renewed vigour in resisting much beyond renewal at the passing rent with a 3 month rent-free period.

1.2 Whilst I have personally gone to the time, trouble and expense of obtaining the highest standards of qualification from a cognate, or academic, perspective to best equip me for the expert witness role [be that in PACT or actual Court Proceedings], there is of course no substitute for experience. And that I have in abundance too, along with my colleagues. It is therefore from the perspective of "battle-wise" rather than "weary" that I consider we are well placed to objectively compare the attributes of PACT – v – CPR and, for the most part, commend the latter to you on its merits.

1.3 On the following pages we provide some key "bullet points" that we expect to be elaborated upon under what will no doubt be some spirited cross-examination from yourselves!

2.0 PACT – v – CPR

RICS, who of course receive an application fee for the appointment of an Arbitrator under PACT, promote it as superior to court on the grounds of: cheaper, quicker and better quality of outcome.

In our relatively substantial experience of both, this tends not to hold true in many cases, with each of these heads considered thus: -

- Cost

  You pay an Arbitrator, but you do not [unless in Italy, perhaps] pay a judge!

  It is of course each case on its own merits. If there are matters other than rent at issue, then you had probably best have a judge decide, rather than an arbitrator who usually does not have any formal legal training or qualification.

  If the matter is just one of rent, then the temptation is to assume that an arbitrator will always be better. But I can assure you from my substantial similar fact experience that this is certainly not the case. Arbitrators have pre-conceived [and often rather fixed] views that they are seeking to find in one of the reports they receive. Conversely, a judge is a blank canvas who I invariably find can be educated to provide end allowances that would have been all but unachievable from an arbitrator.

That said, if the rental difference between you is relatively small, it might seem imprudent to run the risk of often rapidly increasing costs by running to trial as opposed to the alternative of PACT.

In the event that you do choose trial, not only is my experience invariably that the result is more satisfying, I have seen some of my clients succeed in both managing and capping costs by such measures as: - Instructing their solicitor not to attend trial; having their advocacy representation by way of an in-house solicitor or solicitor-advocate; conscientious [and often tactical] use of the Part 36 process.

- Speed

  Arbitrators operating under PACT will usually move towards distinct awards on each issue, receiving written representations on each, hence time periods from start to finish often running to well over a year.

  CPR can be remarkably quick, as further expedited by The 1954 Act modernisations. Indeed, I have had cases at trial before the lease has actually expired!

- Quality of Outcome

  An Arbitrator has pre-conceived notions that he is looking for in written [untested] “evidence” on points such as: return frontage, premium bidders etc.

  Conversely, a judge is a [highly intelligent] “blank canvas” ready to be painted.

3.0 The Expert Report And Its Author

- Ideally, use a different surveyor as expert from the one who has been negotiating. Landlords usually use the same one. This therefore sets you apart on demonstrable objectivity and relative independence.

- In my consistent experience, judges are not bothered about whether or not your expert has recent involvement in the town [accepting that demonstrably thorough research is paramount]. But they do struggle to reconcile the concept of an inherently partisan negotiator managing to successfully morph into a truly objective expert witness.

- Your expert should, ideally, have a known reputation of success in court. That serves to increase the likelihood of the other side making you a potentially acceptable offer following exchange – or accepting your Part 36. Failing that, you can at least be confident that your expert can perform under the pressure of cross-examination.

- The skill in writing these comes in balancing saying enough, with not saying too much.

- It is recommended that certain "lead points" are left for your own "advocate" to pick up on when examining your witness to clarify or better explain certain points.

- Ensure they comply with the strict [and up-to-date] parameters of the court procedural rules including, but not exclusively, the most recent "Statement of Truth & Duty".

4.0 Commissioning the Advocate

- Would you normally contemplate employing anybody without first checking their experience?

- Check with your solicitor that they are approaching relatively local "advocates" which also serves to control costs.

- If not going as far as requesting a full "CV" at least ask and require a positive and specific response to a crucial question such as: "has your proposed "advocate" previously been to court to secure a five-year lease for a retailer and what was the outcome?"

- Bear in mind that cost/seniority does not necessarily mean quality. Also, that some judges can be tempted to *David* when faced with *Goliath*.

- Better still, use an advocate that your expert has actually worked – and succeeded – with at trial[s] before.

5.0 Expert/Advocate Liaison

- This is absolutely fundamental to maximising the likelihood of success.

- The quality of dialogue between expert and advocate can be inversely proportional to the seniority of the advocate employed i.e. we have found it to be most effective with in-house lawyers and solicitor advocates, and often least successful with senior counsel.

- Stopping short of an obviously rehearsed "script" the "examination" by your advocate of your expert must be well covered in advance.

- It is also crucial that your expert properly primes your advocate not only on what questions to ask the defendant's expert but also how to understand the likely answers to those questions in order to then ask further [hopefully disarming] questions in response to those answers.

6.0 On the Day

- Your "expert" can of course be briefed as to what terms can or cannot be accepted as a compromise during proceedings hence obviating the need [and additional cost] of your solicitor attending.

- Ensure that your advocate is briefed to readily receive, and act upon, "notes" [judiciously] passed from your expert – most likely to take place during "examination" of the defendant's expert.

LEASE RENEWAL UPDATE

1.0 1954 Act Reforms

1.1 It is now 5 years since the long awaited reforms to the 1954 Act were introduced by the Regulatory Reform (Business Tenancies) [England & Wales] Order 2003. These principally affected the notice procedure for lease renewal, and the "contracting out" process.

1.2 Under the old regime, a tenant had to serve a counter notice to a landlord section 25 notice within two months of its receipt, and make a court application within the 2-4 months period. If either of those steps were missed, the tenant forfeited its renewal rights. Moreover, since only the tenant could make the court application, it was able to dictate the pace, and could potentially delay a landlord's plans for redevelopment, or simply frustrate his investment security.

1.3 Only a landlord was empowered to make an application for interim rent, meaning a tenant could continue to pay a higher rate than market rent in a falling market. The reforms have made for a more balanced procedure, with the time limits more relaxed and providing for agreed extensions. However, a time limit does of course still apply and tenants may lose their rights if renewal applications are not made in time.

1.4 Similarly, both parties are now able to apply for a new lease or for a ground of opposition to a new lease to be tried. Although, in theory, this could mean that uncontested applications might come to court before the renewal date, it does not seem to be happening much in practice. Instead, grounds of opposition are the main issue, and these are being dealt with quickly, the pace being set either by landlords that want the lease to be resolved quickly or by tenants who perhaps want to catch out unprepared landlords. Either way, both parties now have their chance.

1.5 Many of the old issues regarding interim rent have been resolved, with both parties now able to apply, with the timing of such applications no longer critical. Unlike before, the interim rent will take effect from the earliest date that the landlord could have specified in his section 25 notice, or could have been specified in the tenant's section 26 request. In most cases, it will not be an issue as it will be fixed at the same level as the rent under the new lease. There is a proviso to allow for a different level in the event of a rapidly increasing [or falling?], market, or in the event of substantial alterations of lease terms.

1.6 As for contracting out, the new procedure requires a notice and a prescribed form to be served on the tenant and for the tenant to make a declaration that it has received and understood the "health warning". If the notice is served more than 14 days before the tenant commits to the lease, the tenant's declaration can be "simple". However, if it is served within 14 days of the commitment, it must be a statutory declaration.

1.7 Getting the form of "health warning" correct, and ensuring that it is properly served, is crucial to ensuring that a lease is sufficiently contracted out.

1.8 But cases are still arising under the "old" legislation, which required a joint court application, and resultant court order, made before the lease was completed. One of the requirements was that the (contracted out) lease was for a "term certain".

1.9 In *Newham London Borough Council – v – Thomas Van Staden* (2008) EWCA Civ 1414; (2009) 05 EG 108, a business tenancy which had been the subject of a joint court order to contract it out of protection within the 1954 Act was for a specified term "*from and including 1st January 2003 to 28th September 2004 [hereinafter called "the term" which expression shall include any period of holding over or extension of it whether by statute or at common law or by agreement]".* The latter wording was

held to contradict such being a “term certain” and was consequentially not contracted out. *Newham* was not challenged [to a higher court] and therefore, if followed, could create interesting scenarios such as: -

i. Tenants locked into long-term leases may be able to escape liability by contending that those leases are void for uncertainty and that at the most, the occupier under mere periodic tenancy;

ii. Landlords with redevelopment plans may be confronted with fully protected tenancy despite their careful contracting-out plans.

1.10 As to cases relating to the modernised 1954 Act notices procedure, this could have adverse costs implications for tenants who initially proceed, but then subsequently look to extract themselves from, the renewal process.

1.11 As a reminder, the 2003 Order (which came into effect in June 2004) modernised the pre-existing regime so that tenants no longer need to serve a counter notice (to a section 25 notice). Further, it lengthened the time limit for applying to court, and gave the parties the right to agree extensions of time. However, as the open debate prior to confirmation of this Order raised the concern that some tenants might “procrastinate”, it also introduced the right for landlords to apply to court either for a termination of the tenancy or a renewal. This was intended to be a mechanism by which landlords could force the pace. However, what then generally happened in practice, where a landlord applied for a new tenancy was that, if somewhere along the line the tenant notified the court that it did not wish the new tenancy (under section 29 (5)), the claim would be dismissed and, as the unsuccessful party, the landlord would be left paying its own costs.

1.12 In *Lay – v – Drexler* (2007) 31 EG 82, the Court of Appeal considered the case of the landlords, having served a section 25 Notice and subsequently having failed attempts to enter into dialogue with the tenants, issued proceedings on 20th April 2005. In other words, the landlord was the claimant. On 6th May, the tenants filed the Acknowledgement of Service, stating that they did not contest the claim but that they were opposed to the terms proposed by the landlords. Subsequent "stays" were agreed between the parties, up to an eventual trial date of 6th April 2006, shortly before which the tenants notified the court that they no longer required the new lease. The landlord's claim was therefore dismissed, but with the matter of costs to return to the court.

1.13 The judge took the view that the claim for a new lease had been compromised and that he was therefore bound by authority to make no order as to costs (i.e. each party bears their own). The landlord appealed.

1.14 The CA concluded that there had not been a compromise on the claim and indeed that the landlords had not commenced proceedings prematurely. Rather that this was a classic case in which the landlords were using their new power to bring matters to a head.

1.15 Furthermore, that by filing an Acknowledgement of Service indicating an intention to take a new lease, the tenants had, in effect, commenced their own proceedings for a new lease on better terms than those being offered by the landlords. Their notice under section 29 (5) was the equivalent of a notice to discontinue their own proceedings for a new tenancy. It should therefore have been for them to prove that there was good reason to depart from the normal rule that they should pay the landlord's costs. In the Court's view, there was, in this case, no reason to do so.

1.16 This case does not of course mean that tenants will always be ordered to pay the landlord's costs of making an application to court. It does however show that a tenant that uses such proceedings as an opportunity to "buy time" is very much at risk of having to do so!

1.17 Therefore, on this theme, consider the potential implications of a situation in which you have served a section 26 notice, the landlords subsequently commence proceedings, and you then decide you no longer wish to renew….

2.0 The *O'May* Principles Revisited

2.1 Under section 25 (1) of Part II of the 1954 Act, the court must decide the terms of a renewal lease where the landlord and the tenant have failed to reach agreement. It is fair to assume that the court accepts that leases should be updated to reflect developments in law and commercial drafting. However, disputes often focus elsewhere. Under the guise of modernisation, landlords may try to introduce onerous terms.

2.2 The principal case on this subject is *O'May – v – City of London Real Property Co Limited* (1982) 261 EG 1185, and it remains pivotal to this day. This outlined the court's role to have regard " *to the terms of the current tenancy and to all relevant circumstances*". It also stressed that the court should not "*attempt to bind the parties to the terms of the current tenancy in any permanent form*". The burden is on the party proposing the change to prove that it is "f*air and reasonable*", taking into account the weaker negotiating stance of the tenant and the purpose of the Act to protect the tenant's business on the termination of the existing lease, particularly its security of tenure.

2.3 In seeking to introduce a new term, a landlord may argue that modernisation is reasonable on the ground of changes to market conditions or practice (unlike section 34 of The Act which deals with the

determination of rent, section 35 does not invite the court to draw on current market practice). In *O'May* *Lord Wilberforce* indicated that good evidence of market forces may be persuasive, but the overriding objective of The Act is to prevent unfair treatment of the tenant.

2.4 The landlord in the case was prevented from changing the service charge provisions onto a "clear lease" basis [reflecting modern market practice] in exchange for a reduced rent. Shifting the burden of the risk of unquantifiable service charge costs was judged to be unfairly prejudicial to the tenant, despite the rent concession.

2.5 The length of the lease may influence the extent to which new terms would be acceptable on renewal; for example, those concerning the tenant's liability for repairs and redecoration of the common, structural and external parts, for which it would benefit only in the longer term. In *O'May*, *Lord Wilberforce* considered that the risk to the tenant's 5 year term interest would be disproportionate were the Landlord to be allowed to require the tenant to accept a clear lease and assume full repairing and maintenance liability. It was accepted that the Landlord's wishes and the market norm ought to be considered, but were deemed to be insufficient grounds for departing from the terms of the original lease.

2.6 In *Samuel Smith (Southern) Limited – v – Howard de Walden Estates Limited* (2007) (1) EGLR 107, the landlord tried to widen the permitted user definition in the lease to reflect market practice. It wanted to extend the provision of food from light snacks and refreshments to a full range of meals. It was held that the landlord could not force the tenant to change the use and risk increasing its rental liability (see also *Charles Clements (London) Limited – v – Rank City Wall Limited* (1978).

2.7 Section 32 of The Act, which prevents the court from enlarging the premises benefiting from security of tenure, may influence the scope of rights under section 35. In *Picture Warehouse Limited – v – Cornhill*

Investments Limited (2008) 12 EG 98, the existing lease did not contain parking rights. However, the landlord had issued a separate letter of assurance for temporary parking arrangements. The tenant argued that these should be included (and extended) in the renewal lease although the judge believed that a right granted outside of the original lease could be included in the lease renewal, the grant of further rights over the landlord's land was not permissible.

3.0 That Old Chestnut

3.1 In these parlous economic times, it is perhaps no surprise that landlords are cock a hoop in the event that they find they are dealing with renewal of a lease which contained a clause to the effect that the tenant shall, *inter alia* "…*pay to the landlord all costs, charges and expenses including legal costs and charges payable by the landlord….in respect of the preparation of this lease, and any renewal thereof".*

3.2 Contrary to the advice of some solicitors to their tenant clients, this is not a workable clause in practice. In the case of *Stevenson & Rush (Holdings) Limited – v – Langdon* (1978) 38 P & C R 208, the Court of Appeal ruled that such a clause was a "penalty" as defined by section 38 (1) of the Landlord & Tenant Act 1954 (such including any provision that would have the effect of deterring a tenant from exercising his rights under The Act), and as such, was void.

4.0 Compensating Tenants for Vacating due to Landlord's Misrepresentation

4.1 The 2004 Reforms also introduced a new section 37 (A) (replacing the old section 55), dealing with compensation for a tenant who has vacated premises on the basis of a misrepresentation, or concealment, by the landlord.

4.2 Under the old law, a tenant would only be compensated in the event that its application for a new tenancy was considered by the court and it was later shown that the court had been induced to refuse the new tenancy as a result of a misrepresentation or concealment of materials facts by the landlord.

4.3 Section 37 (A) (2) extends this to now include the situation in which a tenant quits without making (or after withdrawing) an application.

4.4 In *Inclusive Technology – v – Williamson* (2009) 39 EG 110, the Court of Appeal held where a landlord makes a representation of an intention to redevelop – ground (f) – the statutory context in which it is made means that the landlord is then under an ongoing duty to inform the tenant if things change. Failure to do so could amount to a misrepresentation, or concealment, under section 37 (A).

RENT REVIEW UPDATE

1.0 Hypothetical Term

1.1 Whilst debate seems to continue, and many legal practitioners seem to give inconsistent advice, the correct modern picture is that, unless the review assumption is defined with words about as clear as "…*a term of x specific years assumed to commence on each Review Date*…", then the hypothetical term will always be the unexpired residue.

1.2 Such even applies to words creating the assumptions such as "…*for a term of years commencing on the Review Date equivalent in length to the term hereby granted*…", after the High Court decision in *Monkspath Industrial Estate – v – Lucas Industries Limited* (2006) – unreported.

1.3 But few people (including lawyers) – know about this case, so keep it under your hat, and argue to the contrary!

2.0 Skeletons in the Cupboard

Absent time of the essence provisions, even a "*gross and inexplicable delay*" will not in itself deprive a landlord of its right to review. Nothing short of establishing the elements of an estoppel will free a tenant from review. *Amhurst – v – James Walker Goldsmith & Silversmith* [1982]; *Bello – v- Idealview Limited* [*2010*].

3.0 Appealing Arbitrator's Awards

Usually considered by the disgruntled (losing) party, but virtually impossible in practice, unless the Arbitrator has erred at law, primarily by either "giving evidence to himself", or by an obvious and extreme

misconduct of the proceedings. See previous Seminar Notes for more detail.

4.0 Challenging Expert Determinations

4.1 Should an Independent Expert give reasons?

4.2 First idea – I would like to test the scenario of both parties requiring that he gives reasons, in the tripartite context.

4.3 Secondly, consider the implicit requirement set by the Human Rights Act 1998 – the "*Right to a Fair Trial*" – Article 6 of the European Convention on Human Rights – inferring an obligation to give a reasoned decision; *Van der Hurk – v – The Netherlands* (1994).

4.4 In practice, if an Expert does give reasons (directly, or indirectly, as the case might be), his determination could be set aside (i.e. of no effect) by The Courts, if he decides something that he is not expressly empowered to do by either the lease, or both of the parties. For example, a misinterpretation of the lease; *National Grid Co plc – v – M25 Group Limited* (1999) 08 EG 169*; Level Properties – v – Ball Brothers Limited* (2007) 23 RG 166.

4.5 As to the wrong subject matter; *Homepace Limited – v – Sita South East Limited (2008)* 1 P & C R 24.

4.6 Scope to challenge will turn on whether or not the Expert has made a "speaking" (with reasons) Determination. If he has, then he can be compelled to give further reasons; *Halifax Life Limited – v – The Equitable Life Assurance Society* (2007).

4.7 If he has not, the court cannot speculate as to what they might have been; *Morgan Sindall plc – v – Sawston Farms* (1999) 07 EG 135.

4.8 Should Experts who have given non-speaking decisions reveal their reasoning if pressed to do so? The answer should properly be “yes”. If the decision, in law, should be set aside, it is better that a “correct” one is put in its place and that the Expert facilitates this process.

4.9 If the Expert does not co-operate, the only alternative is a negligence action. But if successful, that leaves the incorrect decision in place, albeit compensated for in terms of losses provable to the required civil standard.

DISCLAIMER

In the usual way, we must close by absolving ourselves of any liability whatsoever for poor, misleading or inaccurate information, or advice, herein. You should always seek legal advice from lawyers. Who will of course oblige. But it may be subject to a far more comprehensive disclaimer than ours!

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