SHEPHERD+WEDDERBURN

PROPERTY DISPUTES UPDATE

Summer 2016



In our summer Property Disputes Update, we offer you some Brexit respite and instead look at recent court decisions covering a range of tantalising topics including the interplay between a tenant's right to quiet enjoyment and a landlord's right to rebuild, how the creation of easements by prescription may be prevented, and the impact of human rights arguments on possession claims against residential tenants. We finish by looking at what happens when a mortgage lender's standard conditions differ from those in an offer made to a borrower.

The interplay between quiet enjoyment and rebuilding works

Even if the wording of a lease expressly grants the landlord the right to carry out rebuilding works, he must still take all reasonable steps to ensure that disturbance to his tenant is minimised and he must not prevent his tenant from enjoying the property he has granted to him. This was what was decided in the recent High Court case of *Timothy Taylor Ltd v Mayfair House Corporation*.

This case concerned the lease of premises on the ground floor and basement of a building in London's Mayfair, used as an art gallery business. The lease granted the landlord a right to rebuild even if the premises or their use and enjoyment were materially affected. Nevertheless, the tenant, Timothy Taylor Ltd, claimed that its use and enjoyment was being seriously interfered with by the landlord's works to the upper floors of the building, which were being redeveloped into flats. The tenant complained of various issues, including increased noise levels and a scaffolding design that gave the impression that the gallery was part of the building site.

The court awarded the tenant substantial damages equating to a 20% reduction in its rent from the date on which the scaffolding was erected and continuing until the completion of the works. In coming to this conclusion, the judge explained that, no matter how widely drafted the landlord's rights are, the tenant is still entitled to a minimum level of enjoyment of the premises without over-interference on the part of the landlord. This is the concept of "quiet enjoyment". Furthermore the landlord must not derogate from grant by preventing the tenant from enjoying what it has been granted under the lease. There is no need for express wording in a lease. A landlord is under implied obligations to give a tenant quiet enjoyment and not to derogate from grant.

Although a tenant is expected to tolerate a certain amount of disruption if the landlord is carrying out works, the landlord must take all reasonable precautions to minimise the disturbance to the tenant, which in this case, the landlord failed to do.

Such steps could include giving the tenant sufficient notice and information, warning him of the likely disruption, exploring ways to mitigate any disturbance, and/or offering him a rental discount. The particular circumstances must be taken into account. In this case, for example, the landlord had failed to take the use of the premises into consideration. These premises had been let for a high rent for use as a high class art gallery in central London. By compromising this essential and necessary quality of the premises, not only was the tenant's reasonable enjoyment affected, but so was the tenant's economic activity, which was the sole reason why it had leased these particular premises.

Case: Timothy Taylor Ltd v Mayfair House Corporation [2016] EWHC 1075 (Ch)

Prevention of easements arising via prescription

If someone uses another's land as of right, namely without force, without secrecy and without permission for an uninterrupted period of 20 years, they may acquire an easement by prescription and thus a legally recognised right over that land.

The recent case of *Winterburn v Bennett* concerned disputed rights over a car park. The car park and nearby clubhouse had belonged to the Conservative Club until 2010, when they were sold to Mr and Mrs Bennett. Mr and Mrs Winterburn owned a fish and chip shop by the car park entrance and they, their customers and suppliers had all been using the car park several times a week for 20 years. The 20 years' use had been without secrecy. It had also been without permission and up to 2007 a sign had been clearly visible at the car park entrance that stated that it was a private car park for use of club patrons only. There was also a sign in the window of the clubhouse.

As regards the requirement for the use to be without force, the Court of Appeal made it clear that this does not refer to violence; it simply means that the use must not be contentious.

The Court of Appeal held that the presence of the sign had been enough to show that use of the car park by the Winterburns, their suppliers and customers was contentious. Thus, no easement had been acquired.

This decision will come as a relief to landowners who may be concerned about their land being used by others for purposes such as access and parking. There is no need to take physical steps or to commence legal proceedings in order to prevent the acquisition of an easement by prescription. Landowners can simply put up a clearly visible notice indicating that the land is for private use only.

This decision is in line with the earlier case of T*aylor v Betterment Properties (Weymouth) Ltd*, which concerned the registration of a piece of land as a town or village green based on 20 years' use as of right for lawful sports and pastimes. The registration was cancelled after the Court of Appeal held that the various signs telling trespassers to keep out made it clear to a reasonable person that their use of the land would be contentious, even though the signs were often vandalised or removed over the years.

In order to be effective, notices must of course be clearly visible and must make the position clear in a way that a reasonable person would understand.

Case: Winterburn & Anor v Bennett & Anor [2016] EWCA Civ 482

Can you vary your contract informally even when it says you can't?

A "variation clause" is frequently inserted into a contract to state that any variations to the contract have to be made in writing and signed by both parties in order to be binding. This is a precaution against the creation of informal, perhaps even unintended, variations, including oral variations.

There has long been uncertainty as to whether such a clause is effective, due to the fact that it seems to undermine the principle of freedom of contract and also due in part to two inconsistent Court of Appeal decisions on the point in 2000 and 2002.

However, in the case of *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* the Court of Appeal has held that such a clause does not prevent a valid variation by oral agreement.

In this case the licensee of office space had fallen into arrears. The licensor excluded the licensee from the premises on 30 March, served notice to terminate the licence agreement on 4 May and then took the licensee to court, claiming the arrears and other charges and damages. The licensee defended the claim and counterclaimed for damages for wrongful exclusion from the premises, stating that the licence agreement had been varied.

The licensee's managing director claimed to have made an oral agreement with the licensor's credit controller on 27 February to re-schedule the licence fee payments over the coming months, and the licensee had made an immediate lump sum payment on that date, which was the first instalment due under the revised payment plan.

The licence agreement, however, contained a variation clause, which stated that all variations had to be agreed, set out in writing and signed on behalf of both parties.

Giving the leading judgment in the Court of Appeal, Lord Justice Kitchin quoted the words of a New York judge in a case from 1919: *"Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other."* Thus, the variation clause did not preclude an oral variation.

That does not mean that any such variation will automatically be binding. There needs to be consideration, in other words, some value must be given. That does not have to be in money and can be in terms of a practical benefit. In this particular case, the court found that the licensor would obtain a practical benefit from the licensee because there was a possible commercial benefit in retaining a licensee with the hope of recovering the arrears rather than facing the risk of a void.

Reliance on oral and other information variations is not to be recommended, however. There will always be issues of proof to be overcome as well as the issue of whether the people agreeing the variation had the authority to bind the principals. In this case, the court found that the credit controller had at least ostensible authority, and so the agreement did not fail for want of authority.

Case: MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553

Human rights and s21 residential possession proceedings

The recent case of *McDonald v McDonald* has considered the interplay between residential possession claims and the Human Rights Act 1998 and follows on from the 2010 case of *Manchester City Council v Pinnock.*

In *Pinnock,* the Supreme Court held that where a possession claim is brought by a local authority or other public authority against a residential tenant, Article 8 of the European Convention on Human Rights ("ECHR") entitles the tenant to have the court assess the proportionality of the making of a possession order. By way of reminder, Article 8 provides that everyone has a qualified right to respect for his private and family life, his home and his correspondence. Accordingly, if the court is persuaded that there is unjustified interference with that right, it may grant the tenant more time, suspend the execution of the order, or simply refuse to order possession at all.

Fast-forward to 2016 and the Supreme Court now had to determine whether a court should make a similar such assessment of proportionality when entertaining a claim for possession by a private sector landlord against a residential tenant after the landlord had served the tenant with a notice under section 21(4)(b) of the Housing Act 1988.

The Supreme Court held that it did not. It concluded that once a court had determined that the landlord was entitled to an order for possession, the court had no further role. It simply had to determine the outcome of the two parties' contractual relationship. Furthermore, the Supreme Court recognised that there was no clear authority in the European Court of Human Rights to establish that an Article 8 defence was available in purely private proceedings. In any event, the Supreme Court noted that the proportionality test was stringent and that hurdle would not have been overcome even if the Article 8 defence had been available.

Therefore, this case answers the question that *Pinnock* left open. When entertaining a claim for possession brought by a private sector owner as opposed to one by a public authority, the court does not have to consider the proportionality of making a possession order under Article 8 ECHR.

Case: McDonald v McDonald [2016] UKSC 28

Always read the small print?

The Court of Appeal's decision in *Alexander v West Bromwich Mortgage Company Ltd* looks at what happens when the terms of a mortgage lender's standard conditions differ from those in an offer made to a borrower.

The claimant had been offered what is commonly known as a 'tracker mortgage' loan by the defendant. The offer letter stated that the loan was to be for 25 years, with the interest rate fixed for the first two years. Thereafter the rate was to revert to a variable rate 'tracking' the Bank of England base rate with a premium of 1.99%. However, the lender's mortgage conditions provided that the variable rate could be changed by the lender for any one of a number of reasons, including to reflect market conditions and to make sure its business was carried out prudently, efficiently and competitively. That being said, the mortgage conditions provided that the terms contained in the offer of loan would prevail in the case of inconsistency. The claimant accepted the offer and signed the mortgage deed.

In 2013, after the fixed rate period had expired, the defendant informed the claimant that it had decided to

increase the margin over base rate applicable from 1.99% to 3.99%. The claimant argued that the condition relied on by the lender was inconsistent with the terms of the offer and therefore not incorporated into the contract.

The Court of Appeal agreed. The Court acknowledged that it would be reasonably understood that a tracker mortgage generally involves a rate which tracks a base rate and thereby only varies in accordance with the specified base rate. As such, the terms of the offer prevailed and trumped the lender's standard conditions.

The Court of Appeal also gave weight to the fact that the particular standard condition was widely drafted as compared with the clear, unqualified terms of the offer. The decision therefore emphasises the importance of ensuring clear and harmonious contractual drafting, especially with reference to marketing material and subsequent conditions. It also reinforces that lenders cannot simply rely on their standard conditions when they provide other contradictory documentation.

Case: Alexander v West Bromwich Mortgage Company Ltd [2016] EWCA Civ 476

Brexit briefing: Real Estate

For those who have not yet had their fill of Brexit related commentary, please click **here** to read our Real Estate briefing which explores the ramifications of the EU referendum result for the UK property sector.

Key contacts

If you require advice or further information on any of the matters raised in this update, please get in touch with any of our London property disputes lawyers listed below, or your usual Shepherd and Wedderburn contact.

Guy Harvey
T +44(0)20 7429 4948
M +44(0)752 567 9660
E guy.harvey@shepwedd.co.uk

Katie Logan
T +44(0)20 7429 4683
M +44(0)791 206 9345
E katie.logan@shepwedd.co.uk

Alastair Brown
T +44(0)20 7429 4993
M +44(0)789 448 0939
E alastair.brown@shepwedd.co.uk