



Update: commercial

It's been a busy six months for solicitors – but what did you miss? **Michael Fahy** provides a snapshot of the cases that have shaken things up and of the new code on service charges

Break notices

It is something of an indication of the state of the current market that there have been several recent cases concerning the topic of break clauses in leases – as landlords are understandably reluctant to lose tenants.

It can be extremely costly for tenants – and possibly their advisers – to get it wrong when serving a break notice as was illustrated in the case of *NW Trustees Limited and Others v Telular Corporation* [2011].

The facts concerned a ten-year lease with usual break notice requiring the service of not less than six months' notice in writing to the landlord. The mechanics for service included special delivery and delivery by hand to the landlord's registered office.

Complications arose as a result of the reversionary interest changing hands on several occasions, and predictably the notice was served on the wrong landlord. Somewhat fortunately for the tenant, it received a response from the previous landlord informing the tenant that the reversionary interest had changed hands

and giving the purported details of the current landlord – which incorrectly named the managing agents as the current landlord and they responded, in an email, by stating: "We accept the attached letter and can confirm that we are happy for you to break the lease."

The email was copied to representatives of the landlord who asked the tenant for details of any subtenant.

It was held that the landlord was estopped from challenging the validity of the notice by the wording of the earlier email and in particular the statement, from the managing agents, that the notice had been accepted.

It is vital to seek legal advice on the service of break notices and comply – to the letter – with the provisions for service set out in the lease. The tenant was fortunate in this case, but the matter took some 11 months to come to court and no doubt a considerable sum in costs. Landlords should also be wary of entering into correspondence on break notices, without

recourse to legal advice, for fear of waiving any breaches for service.

Conditional contracts

A party to a contract may waive a condition if the condition is solely for that party's benefit and it is severable from the remainder of the contract.

A recent case illustrates the muddle parties can create when they do not cater for all eventualities when drafting conditional contracts. In *Irwin v Wilson* [2011] EWHC 326 (Ch), a case concerning a residential lease with a defective plan, the parties agreed to deal with the issue by allowing the buyer into occupation on condition that the sale be completed 14 days from the seller: producing a deed of variation to correct the lease plan, and obtaining the mortgagee's consent to the variation.

The contract provided that if the deed of variation and consent of the seller's mortgagees have not been obtained by a long stop date of three months, either party could terminate the contract by giving five working days' notice. Despite using reasonable endeavours the seller did not obtain the consents before the long stop date and gave notice to terminate the contract.

However, the buyer had already moved into the flat and understandably wanted to proceed with the purchase and the day before the seller's five-day notice expired, the buyer wrote to the seller waiving the condition and requiring the seller to complete the sale. The issue then arose as to whether the buyer could waive the condition or whether the contract was terminated by the service of the seller's notice.

This turned on whether the condition was solely for the benefit of the buyer and the test laid down in *Heron Garages Properties Limited v Moss* [1974] 1 WLR 148 was applied in that the condition must be "in terms for the exclusive benefit of the party seeking to waive it because it is the power or right vested by the contract in him alone".

The seller in *Irwin* tried to argue that: a) the mutual rights to terminate militated against the condition being solely for the benefit of the buyer; and b) the condition could not be waived because it was not severable from the remainder of the contract as the completion date was by reference to it.

Both points were given short shrift: the first on the basis that the mutual right to terminate was irrelevant on the question of

whether conditions were for the sole benefit of the buyer, and the second on the basis that the completion date could be ascertained if the condition was treated as if it had been performed: or the condition could be deleted from the contract altogether.

Unfortunately for the buyer, this was a pyrrhic victory as the court held that the seller's earlier termination notice terminated the contract on the date from which it was served and not on the date when the notice period expired.

It is essential when drafting conditions in a contract to address the issues of whether, by whom, and in what circumstances, a condition may be waived. It should also be clearly specified when drafting termination rights when the parties' contractual obligations cease.

Restrictive covenants

Some developers adopt a somewhat cavalier approach to the presence of restrictive covenants by assuming they can proceed with the development and simply pay damages in lieu of an injunction. The decision of the Lands Tribunal in *George Wimpey Bristol Limited v Gloucestershire Housing Association* [2011] should cause developers to stop and reassess their policy in this area.

In this case, in October 2006, planning permission was obtained for 124 dwellings in a semi-rural location in Gloucestershire including some substantial residential properties. In May 2007, the solicitor acting for two of the houses benefiting from a restrictive covenant, contained in the 1936 conveyance, wrote to Wimpey requesting it to cease development on the land affected by the restrictive covenants. Wimpey ignored the letter and continued with the construction of the houses and garages.

Proceedings were issued in 2008 claiming an injunction and Wimpey responded by making an application under section 84 of the Law of Property Act 1925 to modify the restrictive covenant. The question before the tribunal was whether Wimpey could satisfy section 84 of the Act, namely that the restrictive covenant should be wholly or partially modified because "the unmodified restriction impedes some reasonable use of the land for public or private purposes".

The tribunal held that to modify the restrictive covenant would change the character of the area from semi-rural to suburban; decrease, by up to 15 per cent, the value of some of the applicant's properties; increase the risk of flooding; and set a precedent for further applications

for modification of the restrictive covenant.

Interestingly, the tribunal commented that even if Wimpey had successfully made a case to modify the restrictive covenant – and in this case it had not – it would not have done so due to Wimpey's conduct in the matter.

This is likely to amount to just round one in the fight as Wimpey are now likely to end up in court – with all the uncertainty and additional costs that this will involve – trying to avoid a mandatory injunction to demolish the buildings.

The position is emerging that mandatory injunctions may well be issued in cases where developers choose to flagrantly breach the terms of restrictive covenants. Developers should address restrictive covenants either by negotiation or by an application to modify to the Lands Tribunal before commencing any development – especially bearing in mind the current margins under which developers are operating.

Service charges code

The Service Charges in Commercial Property Code, published by the Royal Institute of Chartered Surveyors, is in its second edition and will come into effect on 1 October 2011, replacing the first edition published in 2007. The aims and objectives of the code are: to improve general standards and promote best practice, uniformity, fairness and transparency; to ensure the timely issue of budgets and year-end certificates; to reduce disputes and provide guidance on resolving them; and to provide guidance to solicitors, landlords, tenants and managers in negotiating, drafting, interpreting and operating leases in accordance with best practice.

The code itself is broken down into sections which include topics such as: how managers should run their teams to provide value for money; management fees; certification of accounts; environmental sustainability; and an additional section on shopping centres.

The code is another example of expertise being applied to set a benchmark in the commercial property sector and produce some suggested standards of best practice that can be applied across the sector.

The code is of practicable assistance to lawyers both as a useful checklist for items to include in standard service charge clauses, and as a negotiating tool as it can be said to set a benchmark for best practice on how to deal with service charges.

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