BRIEFCASE
QUARTERLY REAL ESTATE UPDATE: CASES AND NEWS

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BRYAN CAVE LEIGHTON PAISNER BLP

KEY CASES

SERPENTINE BOATHOUSE IS GOING NOWHERE

The High Court held that the Serpentine boathouse formed part of the land at Hyde Park and could not be removed.

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CLEAR RENT REVIEW FORMULA IN A LEASE FOUND TO BE A MISTAKE

An indexation clause in the rent review provisions of a lease, the literal meaning of which was clear and undisputed, was found to be a mistake and corrected by the Court.

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VACANT POSSESSION: CAN PREMISES BE TOO VACANT?

The Court of Appeal has clarified the trilogy of requirements for "vacant possession". Premises must be free of people, things and legal interests.

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COURT REFUSES TO INCLUDE A PANDEMIC CLAUSE IN A 1954 ACT RENEWAL

The court refused a tenant's request to include a "pandemic clause" in a renewal lease to reduce the rent by 50% during any future lockdown.

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COVID RESTRICTIONS CONTINUE FOR COMMERCIAL RENT ARREARS

Commercial tenants continue to be sheltered from landlord enforcement action for rent arrears, as the Government extends "COVID" measures to 25 March 2022 pending new legislation that will replace these measures and apply only to rent debt accrued during the pandemic by businesses affected by closures, and will prescribe binding arbitration to resolve disputes about these "ring-fenced" arrears.

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CASE 1

THE ROYAL PARKS LIMITED AND THE SECRETARY OF STATE FOR DIGITAL, CULTURE, MEDIA AND SPORT V BLUEBIRD BOATS LIMITED

WHAT WAS IT ABOUT?

- At the heart of this dispute was the famous Serpentine boathouse in Hyde Park.
- In 1998, Bluebird was granted a concession (by the Crown, which owns Hyde Park) to operate boating facilities on the Serpentine. Bluebird spent c. £500,000 building and maintaining a lakeside boathouse and jetties for its operation, which it sought to remove when its concession expired in 2020.
- Royal Parks (the Crown's agent) argued that the boathouse and jetties were constructed to form part of Hyde Park – they were attached to the land as **"fixtures"** and consequently belonged to the Crown and should not be removed. Bluebird argued that it owned the boathouse and jetties – they remained **"chattels"** and were intended to be removed at the end of the concession.

WHAT DID THE COURT SAY?

- To determine whether the structures were fixtures or chattels, the Court first considered the degree and object of the annexation of the structures to the land, objectively without taking account of the subjective intention of the parties or any contractual arrangements between them. It found that the boathouse was permanently physically affixed to the land and formed part of the land. Removing it would involve more than simple dismantling and re-assembling, and would result in substantial destruction of its components, making it difficult to re-use elsewhere wholly intact.
- The Court also considered the purpose for which the structures were constructed, and found that they were intended to permanently enhance Hyde Park, and there was nothing in the concession agreement that entitled Bluebird to remove the boathouse and jetties at the expiry of the agreement.
- There was no evidence to support Bluebird's estoppel argument that it was encouraged by Royal Parks to spend considerable sums designing and installing the boathouse, thereby acting to its detriment, believing that it would retain ownership.

WHY IS IT IMPORTANT?

- The case is a helpful reminder of the legal principles applicable to fixtures (that form part of the land) and chattels (something that can be removed), and serves as a warning that ownership of structures erected on land by occupiers of that land should be clearly reflected in contracts to avoid costly misunderstandings.

> "The purpose for which the Boathouse was constructed by the Serpentine was the permanent and substantial improvement of the land."

> This is not just a case of a rent review clause that is unduly favourable to one party, or imprudent for the other party to enter into; this seems to me a paradigm example of a clause which, literally interpreted, leads to arbitrary and irrational results...

CASE 2 *MONSOLAR IQ LTD V WODEN PARK LTD*

WHAT WAS IT ABOUT?

- Monsolar's rent under its lease was subject to annual review applying a prescribed formula:
  Revised Rent = Rent payable prior to the Review Date x Revised Index Figure /Base Index Figure
  Revised Index Figure = RPI on a date shortly before the review date. Base Index Figure = the RPI on a date shortly before the lease commenced.
- The effect of this formula would increase the rent each year by an amount reflecting the ***cumulative change*** in the RPI since the start of the lease, rather than simply the change in the RPI from the previous year. Assuming an average RPI increase of 2.855% per year, the rent would increase from £15,000 to just over £76 million by the end of the term, as opposed to around £30,000 with non-cumulative RPI increases.
- The parties disputed whether or not the drafting was a mistake. Naturally the landlord wanted the literal interpretation of the clause to stand.

WHAT DID THE COURT SAY?

- The Court was not tasked with looking at an ambiguous clause that is open to different possible interpretations. Here, the words were clear. The Court applied the principle in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1011, whereby the literal meaning of a provision can be corrected if, objectively assessed, it is clear (1) there has been a mistake and (2) what was intended.
- The Court found: (1) the clause produced an irrational result and conflicted with other provisions in the lease, and (2) there were two formulae that would correct the provision, each having the same mathematical effect, that would reflect the parties' intention that the rent should change on the review date in accordance with the proportionate change in the RPI only during the previous year.

WHY IS IT IMPORTANT?

- This case can be differentiated from the case of *Arnold v Britton*, where the lease terms were also clear but the Supreme Court supported a literal interpretation even though the consequences were harsh and unreasonable for the individual tenants.
- But there is a difference between commercially imprudent or unreasonable provisions, and irrational or absurd ones. *Arnold v Britton* was concerned with the former, and *Chartbrook* can be deployed in the case of the latter, as long as it is clear there is a mistake, and what the parties intended.
- This case does not create new law. The court will not rescue parties from a bad bargain where a clearly-worded clause simply produces an unfair or unreasonable result.
- Here though, the stated rent review formula produced an irrational and absurd result, and the Court could intervene to correct what was an obvious mistake.

CASE 3

CAPITOL PARK LEEDS PLC AND CAPITOL PARK BARNSLEY LIMITED V GLOBAL RADIO SERVICES LIMITED

WHAT WAS IT ABOUT?

- Global Radio wished to exercise the break clause under its lease, which required six months' notice, and was conditional on giving "*vacant possession of the Premises to the Landlord on the relevant Tenant's Break Date*".
- Following service of Global's break notice, the landlord (Capitol Park) served a schedule of dilapidations on Global, including a requirement for Global to reinstate the premises in accordance with the lease.
- In an effort to comply with Capitol's schedule and requirement to reinstate, Global embarked on an extensive programme of works in the months leading up to the break date, which included stripping out all tenant's fixtures, and also radiators, lighting, heating pipework, ceiling tiles, cabling and the smoke detection system, but achieved little by way of reinstatement by the break date.
- Capitol argued that the break was not valid as Global had failed to give vacant possession of the Premises. The definition of Premises included '*all fixtures and fittings at the Premises whenever fixed*' as well as any '*improvements made to the Premises*'.

WHAT DID THE COURT SAY?

- At first instance, the High Court found that Global had failed to give vacant possession of the Premises because, having handed back "*an empty shell of a building*" Global had given back considerably less than the Premises as defined in the lease. Therefore the break condition was not satisfied.
- The Court of Appeal overturned the decision, holding that "vacant possession" of the premises (which the Court held should be understood to refer to "the Premises as they are from time to time"), is not concerned with the physical state of the unit but rather with whether the premises were free of "people, chattels and legal interests" - which in this case, they were.
- Whilst the "yield up" covenant in the lease required the Premises to be yielded up in a state of repair, condition and decoration consistent with the proper performance of Global's covenants, the break clause did not mention the physical state of the premises, so the failure to reinstate and the poor condition of the premises on the break date did not invalidate the exercise of the break. Capitol retained the right to claim damages for Global's failure to repair and reinstate.

WHY IS IT IMPORTANT?

- This case provides welcome clarity on the difficult concept of "vacant possession" in cases where, as is often the case in modern commercial leases, a break clause is conditional merely on the tenant handing back "vacant possession" with no reference to the physical state of the premises.

> True it may be that the building was left in a dire state...but that will not have precluded valid exercise of the break clause.

> It is not the purpose of the Act to protect or insulate the [tenant] other than to allow them to continue their business following the term end.

CASE 4 *POUNDLAND LIMITED V TOPLAIN LIMITED*

WHAT WAS IT ABOUT?

- In an unopposed lease renewal, the tenant proposed that the annual rent be reduced by 50% during any "use prevention measure", such as a lockdown as experienced during the COVID-19 pandemic.
- The tenant argued that it was in both parties' interests for the tenant to be given rent relief if it enables it to continue to trade and so meet its ongoing obligations to the landlord.
- The landlord argued that this clause would fundamentally change the relationship between the parties. The impact of any lockdown would be controlled by legislation and it was appropriate for the tenant to utilise any benefit the government may put in place.

WHAT DID THE COURT SAY?

- The court held that the tenant was seeking to impose a new risk on the landlord by sharing the tenant's risk to pay rent, which was not fair and reasonable.
- It is not the purpose of the 1954 Act to redesign previously negotiated risks, even though a national lockdown may not have been in contemplation at the time of the negotiation.
- This is different to the recent *WH Smith* case, where the parties had already agreed to include a "pandemic clause" in the new lease, and the dispute was simply how that clause would operate.

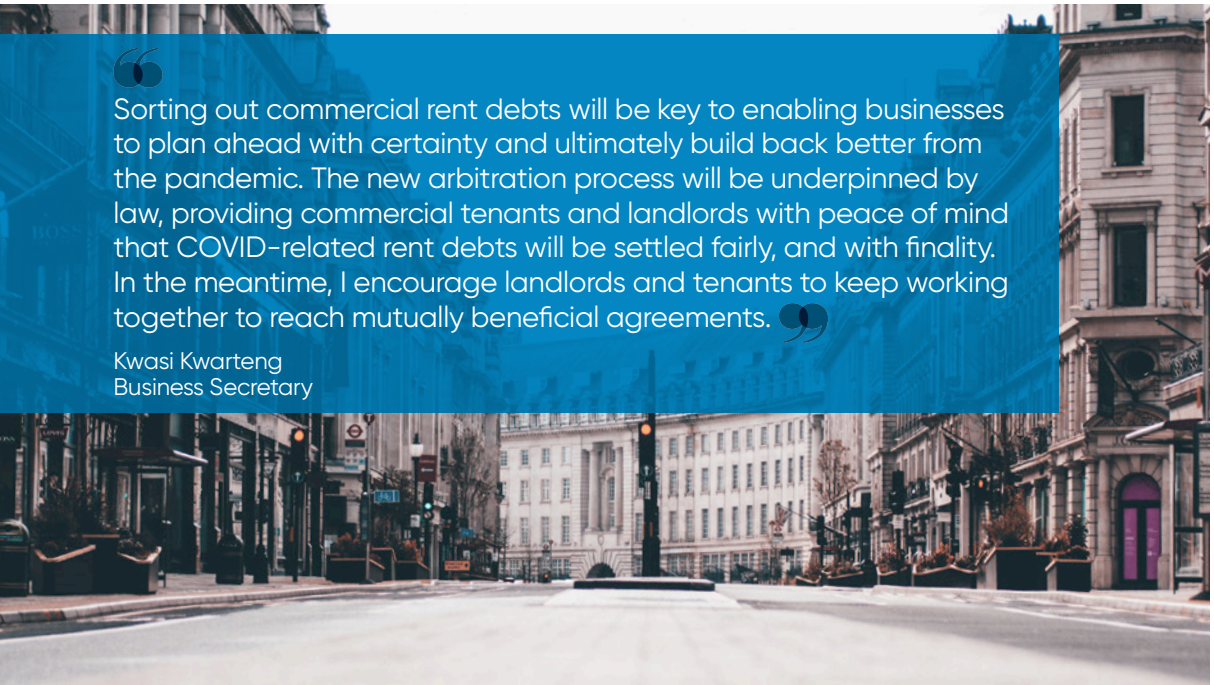
WHY IS IT IMPORTANT?

- This case will come as a welcome relief to landlords, as it reinforces that it is not the purpose of the 1954 Act to approve variations to the lease that would change the respective risks faced by the parties.
- Tenants cannot use the 1954 Act to insulate them against commercial and trading risks they may face, even if such risks were not in contemplation when the lease was being negotiated.

RECENT LEGAL NEWS
COVID RESTRICTIONS CONTINUE FOR COMMERCIAL RENT ARREARS

THE HEADLINES

- On 4 August 2021, the Government announced its plan to introduce new legislation to address the mountain of COVID-19 commercial rent arrears, estimated to exceed £7.5 billion.
- The existing forfeiture moratorium and CRAR restrictions have been extended to 31 March 2022, so will continue to apply in an unqualified way, but only until the new legislation is passed, likely to be before 31 March 2022.
- The new legislation will only apply to arrears incurred since March 2020 "by commercial tenants affected by COVID-19 business closures until restrictions for their sector are removed" ("ring-fenced arrears"), and will impose binding arbitration on landlords and tenants who cannot resolve disputes about ring-fenced arrears.
- When the legislation comes into force, the moratorium on forfeiture will no longer apply to tenants (1) who did not pay rent that accrued prior to March 2020 and/or (2) who failed to pay rent that accrued after restrictions for their sector were lifted and/or (3) who have not been affected by business closures during the pandemic.
- The Government intends to revise the voluntary Code of Practice (first introduced June 2020), and publish this ahead of the implementation of a system of binding arbitration. The revised Code of Practice will set out the principles that parties and arbitrators are expected to adhere to, which the government will seek to enshrine in the legislation.



> "Sorting out commercial rent debts will be key to enabling businesses to plan ahead with certainty and ultimately build back better from the pandemic. The new arbitration process will be underpinned by law, providing commercial tenants and landlords with peace of mind that COVID-related rent debts will be settled fairly, and with finality. In the meantime, I encourage landlords and tenants to keep working together to reach mutually beneficial agreements."
>
> Kwasi Kwarteng
> Business Secretary

WHAT DOES THIS MEAN IN PRACTICE?

Several questions remain unanswered regarding how the proposed new legislation will work:

- Will the legislation include a financial test for tenants, to ensure that it applies to only those tenants who were forced to close as a result of the government restrictions and, as a result, could not afford to pay their rent? This will be necessary to prevent businesses who could still afford to pay simply saying that they were forced to close, therefore the legislation applies to them.
- The legislation will apply to those businesses "affected by closures", but what does this actually mean? Will the legislation apply to business affected by a drop in footfall and passing trade, even if they were not legally obliged to close premises?
- Could the legislation also apply to businesses who could legally have remained open during the pandemic but were impacted government measures such as social distancing and recommendations to work from home? Many businesses closed premises for extended periods (when not legally required) because it made financial sense to take advantage of government support, including the furlough scheme.
- What about businesses who traded successfully online despite being forced to close premises? Will they be eligible for the same protection?
- Whilst the legislation may provide clearer answers for sectors such as retail and hospitality, there is likely to be uncertainty for commercial office tenants and businesses who were indirectly impacted by the government restrictions whilst not legally forced to close.
- The legislation will need to take into account many nuanced sectors and factors to ensure that it provides landlords and tenants with clarity as to which tenants will be able to rely on the legislation to avoid enforcement action.

INSOLVENCY MEASURES – UPDATE

- On 9 September 2021, the Government announced that the restrictions on statutory demands and winding up petitions will be extended to 31 March 2022, but only in relation to commercial rent arrears.
- For other types of debt, new legislation has been introduced which provides (broadly) that, from 1 October 2021 to 31 March 2022:
  - The threshold for serving a statutory demand or winding up will be increased from £750 to £10,000
  - Prior to presenting a winding up petition, the creditor must have served 21 days' notice on the debtor company, seeking their proposals for payment of the debt

GETTING IN TOUCH

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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