BRIEFCASE
QUARTERLY REAL ESTATE DISPUTES UPDATE

September 2023

BRYAN CAVE LEIGHTON PAISNER

CONTENTS

VODAFONE LTD V POTTING SHED BAR & GARDENS LTD (FORMERLY GENCOMP (NO. 7) LTD) & AP WIRELESS II (UK) LTD

The Court of Appeal overturned the Upper Tribunal, adopting a purposive approach to Telecoms Code construction in the context of a concurrent leasehold interest.

READ MORE...

GREAT JACKSON ST ESTATES LTD V MANCHESTER CITY COUNCIL

The Upper Tribunal considered an application to modify restrictive covenants that prevented a residential development without landlord's consent.

READ MORE...

BMW (UK) LTD V K GROUP HOLDINGS LTD

BMW applied to renew the leases of its flagship showroom premises at 70 Park Lane in London. The two key issues in dispute were (1) whether the new lease of the central unit should contain a landlord's break right and (2) the level of rent payable.

READ MORE...

JOHN E. GRIGGS & SONS LIMITED V HIGH FIRS PENTHOUSES LIMITED

Even armed with judgment in their favour, Claimants should not assume that freezing injunctions will be granted if the evidence does not meet the key tests of (1) dissipation risk and (2) a just and convenient outcome.

READ MORE...

WAITE AND OTHERS V KEDAI LIMITED

To secure a Remediation Order under the Building Safety Act 2022, tenants of relevant buildings need only establish a "coherent initial case" that there are relevant defects causing a building safety risk to enable the Tribunal to then consider, by reference to all the evidence, whether to make a Remediation Order and its terms.

READ MORE...

CASE 1

VODAFONE LTD V POTTING SHED BAR & GARDENS LTD (FORMERLY GENCOMP (NO. 7) LTD) & AP WIRELESS II (UK) LTD

Court of Appeal closes a worrying loophole in the Telecoms Code (or has it?)

AUTHOR: ANNA ICETON

WHAT WAS IT ABOUT?

- A freeholder granted a lease to Vodafone allowing it to erect telecoms apparatus on the tower of its building. A few years later, the freeholder granted a concurrent leasehold interest of the building (and tower) to AP Wireless, whilst Vodafone was still in situ. When Vodafone applied to the Tribunal to renew its agreement (having served instigating notices on the freeholder and AP Wireless), it argued that only the freeholder could do so as the Code provides that only the original contracting party to the relevant Code agreement or their "successor in title" can modify, renew or terminate a Code agreement (and AP Wireless was neither an original contracting party nor the freeholder's successor in title).
- AP Wireless disagreed and argued that it was the "occupier" of the site (having a right to possession under its concurrent lease) and the freeholder's successor in title, so it was the only party who could renew, modify or terminate Vodafone's Code rights.
- The Upper Tribunal decided that AP Wireless did not satisfy the Code requirements to renew, modify or terminate Vodafone's Code agreement, being neither an original contracting party to Vodafone's Code agreement nor a successor in title to the freeholder. The freeholder also couldn't renew or modify Vodafone's Code rights, having granted a concurrent lease of the site to AP Wireless, leaving all parties in a very unsatisfactory state. AP Wireless appealed.

WHAT DID THE COURT SAY?

- The Court of Appeal adopted a wider and more purposive interpretation of the Code. The intention of the Code is to give parties with the benefit and burden of a Code agreement the essential ability to renew or terminate that agreement.
- Adopting that approach, it considered that a "party to an agreement" could extend to others apart from the original grantor, so a concurrent lessee such as AP Wireless could be deemed to be a party to a Code agreement, thereby enabling it to renew, modify or terminate Code rights.

WHY IS IT IMPORTANT?

- Concurrent leaseholders requiring the removal or relocation of telecommunications equipment to facilitate a development were particularly badly affected by the Upper Tribunal decision as they could be left at the mercy of the operators, or face costly revisions to adapt their scheme around telecoms apparatus and associated Code rights. The Court of Appeal brought welcome relief and clarity for both site providers and telecoms operators.
- This is not the end of the saga though as we understand Vodafone has sought permission to appeal this decision to the Supreme Court.

> But interpretation of a legal text is never simply a matter of language. It is always relevant to seek to understand how the instrument is intended to work and why.
>
> [2023] EWCA Civ 825 [74]

CASE 2

GREAT JACKSON ST ESTATES LTD V MANCHESTER CITY COUNCIL

Upper Tribunal refuses to modify restrictive covenants to permit development

AUTHOR: JESSICA HOPEWELL

WHAT WAS IT ABOUT?

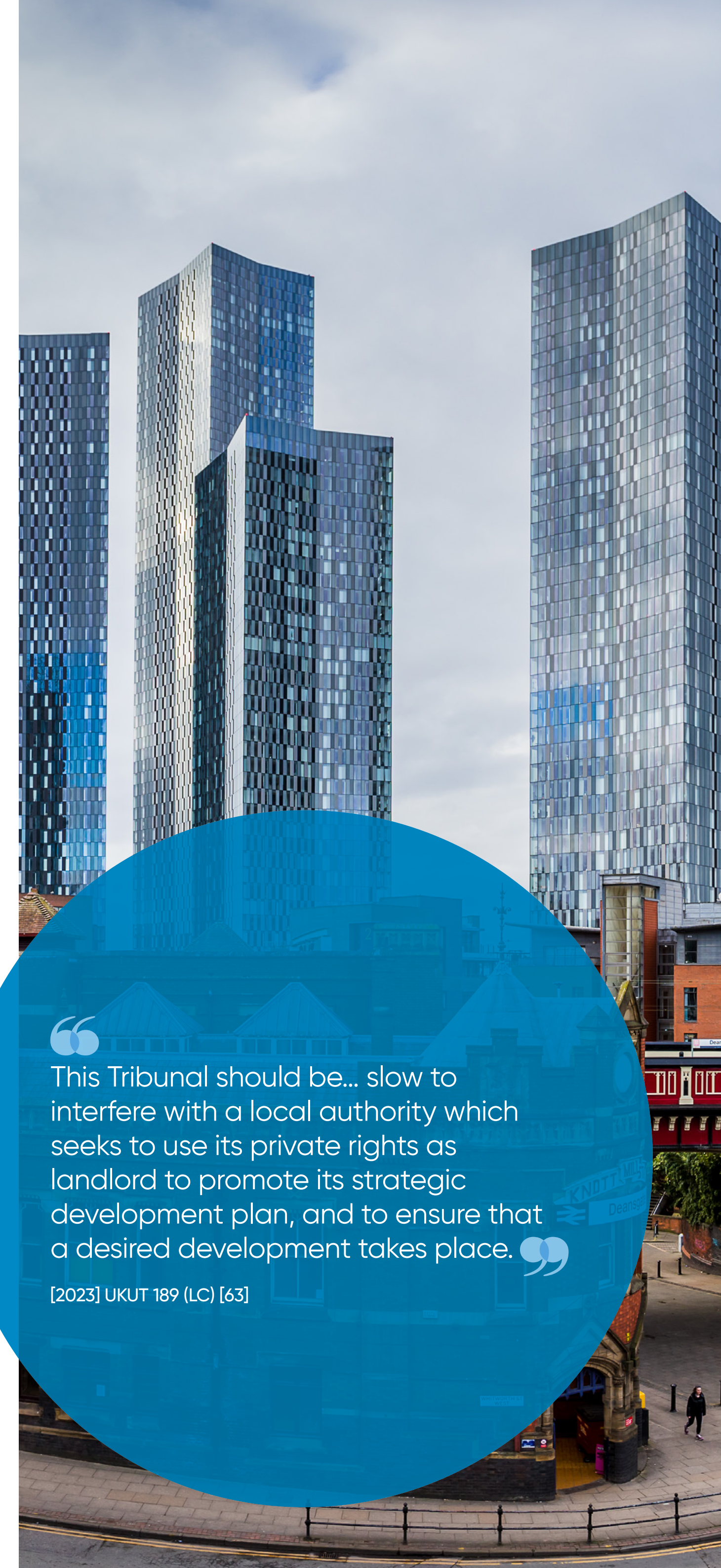
- The tenant of two redundant warehouses in Manchester wanted to redevelop the site into residential tower blocks. Its lease of the warehouses included covenants which prevented redevelopment without the landlord's consent. The landlord (Manchester City Council) was willing to consent to the redevelopment as part of its development plan for the area, but on terms which the tenant considered unacceptable.
- The tenant applied to the Upper Tribunal for the modification of the covenants to enable the redevelopment to be carried out without the landlord's consent.

WHY IS IT IMPORTANT?

- This case is a useful reminder of the high bar to discharge or modify a restrictive covenant, and is a good example of how the Tribunal will apply the statutory grounds and exercise its own discretion in these types of applications.
- It demonstrates the Tribunal's reluctance to use the legal framework or its discretion to interfere with a local authority's strategic plan for an area.

WHAT DID THE COURT SAY?

- To succeed with its application, the tenant had to demonstrate that the restrictive covenants were obsolete – that their purpose was no longer capable of fulfilment. Here, the purpose was to give the Council a degree of control over any change in the permitted use. The Tribunal was satisfied that the Council has a legitimate strategic interest in continuing to influence the use of land and to secure its orderly and appropriate development. So in this case the object of the relevant restrictions remained capable of fulfilment and they could not be considered to be obsolete.
- Alternatively, the tenant argued that the proposed residential development was a reasonable use of the land and its completion would not cause the landlord any substantial loss or disadvantage. The tenant succeeded in convincing the Tribunal that the proposed use was reasonable, but did not satisfy the Tribunal that modifying the restrictive covenants would not cause loss or disadvantage to the Council. The Tribunal found that the control that the restrictions provided to the Council as a local authority was a substantial advantage, as it could ensure that a development was commenced and completed within a reasonable period.
- Even if the tenant had persuaded the Tribunal on one of the above statutory grounds, the Tribunal held that it would be reluctant to use its discretionary power to interfere with the Council's strategic development plan and to disrupt continuing negotiations between the parties.



> "This Tribunal should be... slow to interfere with a local authority which seeks to use its private rights as landlord to promote its strategic development plan, and to ensure that a desired development takes place."
>
> [2023] UKUT 189 (LC) [63]

CASE 3

BMW (UK) LTD V K GROUP HOLDINGS LTD

Owner occupation break clause and rent on the agenda in a 1954 act lease renewal

AUTHOR: ALEX SELKA

WHAT WAS IT ABOUT?

- The landlord did not object to renewing BMW's showroom leases under the Landlord and Tenant Act 1954, however it sought to introduce a break right in the renewal lease of the central unit of the showroom premises to enable it to occupy the premises for its own car-based business venture in the future.
- BMW resisted this on the basis that it could not function at 70 Park Lane without its central unit (in the event of the break being exercised). Also, the landlord's assertion that it wished to occupy the premises for its own business purposes was "speculative and opportunistic kite-flying", and did not meet the requisite evidential test that the landlord's re-occupation was "on the cards" or "a real possibility" to justify the insertion of a break clause in the renewal lease.
- The parties could not agree on the rent: the landlord proposed £228 psf; BMW proposed a range of £76 to £100 psf. The parties' experts relied on comparable evidence at car showrooms on Park Lane and in the "Berkeley cluster".

WHAT DID THE COURT SAY?

- On the break clause issue, HHJ Monty KC held that the landlord's evidence was "so vague and unsupported" that it did not satisfy the evidential test. Accordingly, BMW resisted the imposition of the landlord break clause.
- On the second issue, applying the established principles in section 34 of the 1954 Act, and valuing the rent at the date of commencement of the renewal tenancies, the Judge determined the rent at £126 psf.
- Berkeley Square, by reference to lettings to Aston Martin and Lotus, was deemed more attractive to potential tenants of car showrooms than Park Lane. It had the 'wow factor'.
- Conversely, BMW's showroom, a genuine flagship premises, was superior to many of the Park Lane comparables. Although BMW's occupation of the lease in dispute had to be disregarded, its occupation of other nearby units did not. The presumption of reality applied. If a nearby owner would pay more than anyone else, this should be reflected in the open market valuation.

WHY IS IT IMPORTANT?

- Lease renewal cases involving a debate over the inclusion of a landlord break right are not uncommon, but typically the rights are sought for future redevelopment purposes. Here, the question of breaking in order for the landlord to operate its own business from the premises, gives the case some nuance.
- The Judge needed to be satisfied that the landlord's intention in relation to the owner occupation ground was "sufficiently on the cards" or "genuine and workable" such that it amounts to a "possibility of a bona fide decision to operate a break clause if one be granted".

"It is a question of whether such an intention is more than just a mere thought which has not matured into a genuine and workable decision."

Claim No K10CL172 [45]

CASE 4

JOHN E. GRIGGS & SONS LIMITED V HIGH FIRS PENTHOUSES LIMITED

Left out in the cold - freezing injunctions are not to be granted lightly

AUTHOR: PHIL SPENCER

WHAT WAS IT ABOUT?

- Under a construction contract, the employer (High Firs) had not paid its contractor (Griggs) around £122,000. By consent, judgment for the debt, costs and interest totalling £140,000 was entered, payable by High Firs within 14 days.
- High Firs indicated it would not pay but would instead offset the sum against a cross claim it alleged to be worth £444,000. It also suggested it would be selling its final remaining penthouse asset.
- In a without notice application for a freezing injunction, Griggs asserted (i) it had a good arguable case given the judgment debt; (ii) a planned sale indicated that High Firs had an interest in the asset and that there was a real risk of unjustified dissipation, and (iii) it would be just and convenient to grant an injunction as it would not cause disruption to High Firs.

WHY IS IT IMPORTANT?

- As well as confirming that freezing injunctions are not just to be granted pre-judgment, the case demonstrates that Courts will not focus solely on a clear good and arguable case. Proper evidence of unjustified risk of dissipation, as well as establishing that the injunction would be just and convenient, remain as important in a post-judgment application as a pre-judgment one.

WHAT DID THE COURT SAY?

- Although the application had been made without notice and around two months later than the Court would expect, and was not fully compliant with the rules of evidence, the Court decided that these flaws were not fatal to the application itself.
- Whilst accepting freezing orders historically arose as a pre-judgment tool, the Court made it clear that no such distinction now needs to be drawn and they are often a valuable post-judgment tool as well. However, even though Griggs plainly had a good arguable case based on the judgment, the Court did not accept that there was evidence to show a real risk of unjustified dissipation of assets by High Firs to warrant a freezing order.
- Absent sufficient evidence, and given the without notice application, the Court had to infer certain things in favour of High Firs. Primarily that as a property developer its desire to sell its penthouse would not be unusual and would be a natural attempt to realise its investment rather than dissipate an asset. In fact, on the evidence, it may well have needed to sell the penthouse to raise funds to actually pay the debt.
- Furthermore, the Court decided that it would not be just and convenient to grant an injunction on these facts. Firstly, the loss of a sale would disrupt High Firs. Secondly, whilst the delay in bringing the application did not cause it to fail at the first hurdle, it was relevant that the period would have allowed Griggs to secure less draconian relief (such as a charging order over High Firs leasehold interest) and it did not take that opportunity.

> While this is a post-judgment application, it is [still] necessary to consider whether there is a real risk of...unjustified dissipation.
>
> [2023] EWHC 2231 (TCC) [24]

CASE 5

WAITE AND OTHERS V KEDAI LIMITED

Tribunal grants first Building Safety Act Remediation Order

AUTHOR: LIAM LEE

The purpose of the legislation is not to impose a costly burden on leaseholders requiring them to obtain a detailed specification of works.

LON/00AY/HYI/2022/0005 & 0016 [85]

WHAT WAS IT ABOUT?

- The leaseholders of two residential blocks in Lambeth applied to the First Tier Tribunal for a Remediation Order under section 123 of the Building Safety Act 2022 ("BSA") against the freeholder of both blocks, Kedai Limited.
- A Remediation Order requires a relevant landlord to remedy "relevant defects" by a specified time. The relevant defects in this case included ACM cladding (category 3, the same cladding used on parts of Grenfell) and the lack of fire-stopping, cavity barriers and compartmentation.
- The key issues were whether the applicant leaseholders had identified the correct relevant defects and an appropriate remediation scheme; whether there was enough evidence to make a Remediation Order; and whether the FTT should make an order preventing the landlord from recovering the costs of the proceedings through the service charge.

WHY IS IT IMPORTANT?

- The case shows the wide approach that the FTT will take in interpreting the "leaseholder protections" under the BSA, including Remediation Orders.
- Although the Tribunal emphasised that there is no formal burden of proof on either party in Remediation Order proceedings, there are high expectations on landlords in defending these types of applications and in planning remedial works more generally. Whilst the FTT did not require the leaseholders to instruct an expert, the FTT's decisions were led by Kedai's expert evidence.

WHAT DID THE COURT SAY?

- The Applicants are simply required to establish a prima facie case, meaning "a coherent, initial case that there were relevant defects at the Development that caused a building safety risk and that would entitle a Tribunal to make a Remediation Order". Once a prima facie case is established, it then becomes an evidence-based process led by experts' reports, inspections and the Tribunal's own experience, to enable the Tribunal to determine that the relevant defects exist and to make an order to remedy those defects within a specified time. There is no formal burden of proof assigned to either party in this regard.
- Remediation Orders must be sufficiently precise to enable the landlord to identify the scope of works, but the extent of precision will vary case to case. In some cases a full specification will be provided, but in others a broad schedule will be sufficient (as in this case) with a power for either party to apply for further directions.
- The FTT granted a Remediation Order, and allowed Kedai to pass only 20% of the costs of the proceedings on to "non-qualifying leaseholders" through the service charge. (Qualifying leaseholders could not be required to pay costs relating to a relevant defect through the service charge under the BSA). It was relevant that Kedai (1) was associated with the original developer responsible for the relevant defects, and (2) did not act quickly after receiving expert evidence to carry out remedial works.

GETTING IN TOUCH

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

REAL ESTATE DISPUTES TEAM CONTRIBUTORS

LAUREN KING
Senior Knowledge Lawyer, London
lauren.king@bclplaw.com
T: +44 (0)20 3400 3197

ANNA ICETON
Associate Director, London
anna.iceton@bclplaw.com
+44 (0)20 3400 2371

JESSICA HOPEWELL
Senior Associate, London
jessica.hopewell@bclplaw.com
T: +44 (0)20 3400 3732

ALEX SELKA
Senior Associate, London
alex.selka@bclplaw.com
+44 (0)20 3400 3100

PHIL SPENCER
Associate, London
phil.spencer@bclplaw.com
+44 (0)20 3400 3119

LIAM LEE
Associate, London
liam.lee@bclplaw.com
+44 (0)20 3400 4768

bclplaw.com

ATTORNEY ADVERTISING

108255