BRIEFCASE
QUARTERLY REAL ESTATE CASE UPDATE

December 2022

Season's Greetings and best wishes for 2023

BRYAN CAVE LEIGHTON PAISNER BCLP

KEY CASES

COURT DISMISSES "BUBBLE WRAP" NOISE NUISANCE CASE

A tenant of a prestigious West End residential development failed to make out his claim that a clicking façade noise was a nuisance, breach of contract and a breach of the covenant for quiet enjoyment.

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WHAT A RELIEF! HIGH COURT GRANTS RELIEF FROM FORFEITURE OF AN OPTION TO TAKE A NEW LEASE

The court considered whether a clause in an option agreement which permitted the grantor to terminate on the grantee's default of its obligations in a related lease was a forfeiture provision in respect of which the court could grant relief from forfeiture.

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LANDLORD DENIED RECOVERY OF THE COST OF SERVING NOTICES DEMANDING GROUND RENTS

A landlord attempted to recover the costs of serving statutory notices demanding ground rent on the basis that these costs were part of the process of collecting ground rents. The Court of Appeal disagreed.

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ENGLISH LAW REIGNS SUPREME AT CASTLE WHERE FOREIGN COMPANY IS DISSOLVED

If an English company which owns freehold property in England is dissolved and subsequently restored to the register, its property is automatically revested in the company upon restoration. But what happens in the case of a foreign company which owns property in England that is dissolved and subsequently restored? Do the same rules apply?

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PYRRHIC VICTORY FOR LANDLORD IN SERVICE CHARGE DISPUTE

The costs of a waking watch, imposed by the landlord in reliance on expert advice, were reasonable and recoverable from residents through the service charge.

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> ...the noise complained of is not such as to awaken the average person when sleeping in the apartment, let alone frequently. That leaves the question of whether, although the noise is not such as to disturb sleep in any meaningful way, it is still such as to materially interfere with the ordinary comfort of the average person living in the apartment. I have concluded that it is not.

CASE 1 NAZIRALI SHARIF TEJANI V FITZROY PLACE RESIDENTIAL LIMITED (1) 2-10 MORTIMER STREET GP LIMITED AS A GENERAL PARTNER OF 2-10 MORTIMER STREET LIMITED PARTNERSHIP (2)

Court dismisses "bubble wrap" noise nuisance case

AUTHOR: ANNA ICETON

WHAT WAS IT ABOUT?

- The Claimant tenant bought the long leasehold interest in a luxury apartment in 2016 for £2.6million. He complained of noises described as pops, clicks, and taps akin to bubble wrap popping, emanating from the façade adjacent to his flat, and claimed that they were sufficiently noisy to be considered a nuisance, a breach of the sale contract, and a breach of the quiet enjoyment covenant in his lease.
- The Claimant claimed that the noises were so loud as to prevent him and his family from sleeping or living at the apartment, and would prevent him from renting or selling the property. He claimed substantial damages from the landlord.

WHAT DID THE COURT SAY?

- The court dismissed the Claimant's claim. After considering acoustic evidence and recordings of the noises which were played in court, the Judge found that although some of the noises were audible, they were not at a level high enough to disturb sleep in any meaningful way and would not materially interfere with the ordinary comfort of the average person living in the flat. They therefore did not amount to an actionable nuisance or breach of quiet enjoyment.
- The Claimant's contractual claim failed as notice of the defect in the facade that the Claimant claimed was causing the noise nuisance was not given to the landlord in time or in accordance with the requirements of the sale contract. The Judge also found that it could not be said that the Defendant landlords had not taken reasonable steps to investigate and seek to remedy the defect as soon as reasonably practicable.

WHY IS IT IMPORTANT?

- The case demonstrates the significance and central role of expert evidence in such claims. Here the Claimant might well have found the noises emanating from the façade annoying, but the court applied an objective test – whether the noise was sufficiently loud to affect the average person's enjoyment of the flat so as constitute an actionable nuisance – determined entirely on the basis of the expert evidence, that threshold was not met in this case. BCLP acted for the successful Defendant landlord.

CASE 2

HUSH BRASSERIES LIMITED V (1) RLUKREF NOMINEES (UK) ONE LIMITED (2) RLUKREF NOMINEES (UK) TWO LIMITED

What a relief! High Court grants relief from forfeiture of an option to take a new lease

AUTHOR: JESSICA HOPEWELL

WHAT WAS IT ABOUT?

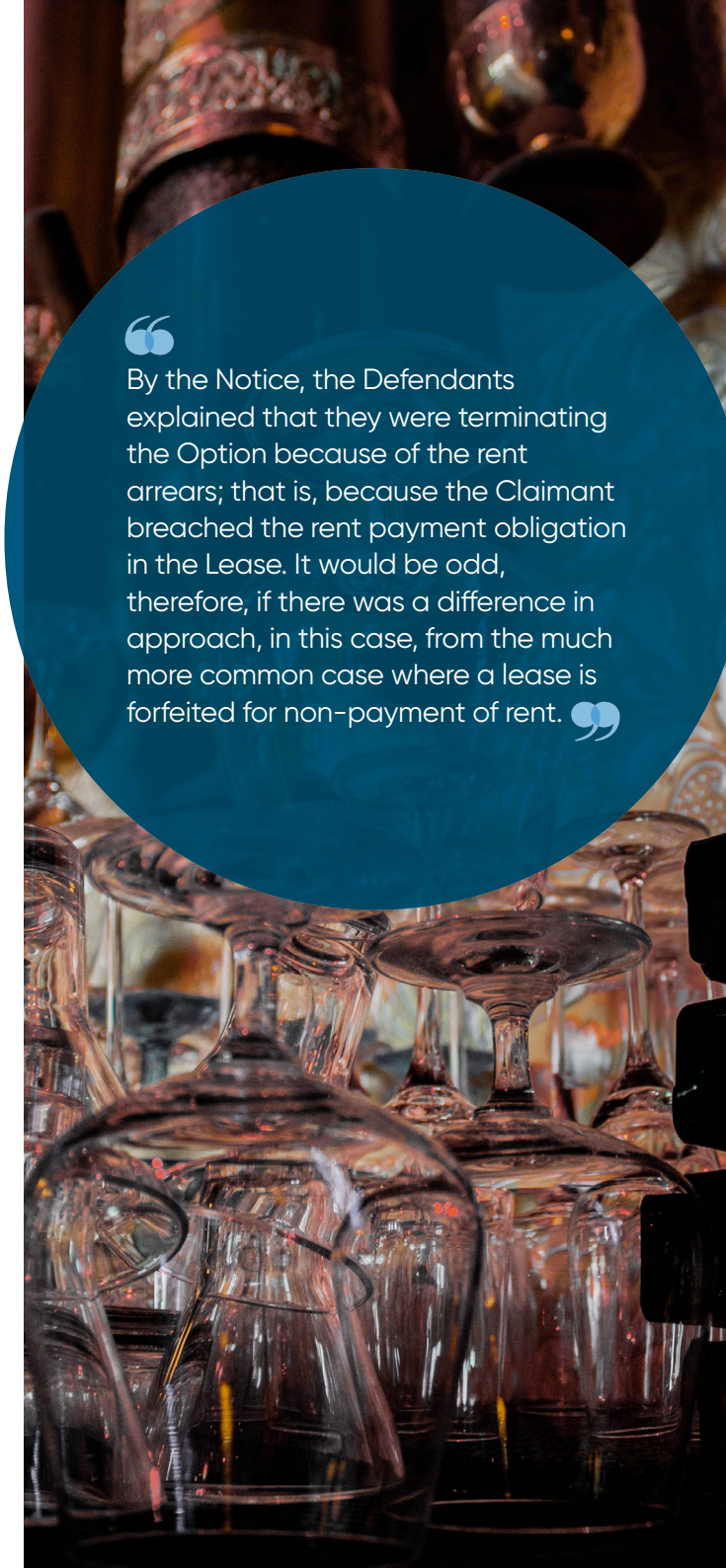
- The tenant of Mayfair restaurant Hush had an option to call for its landlord to grant it a new lease. The option was registered at the Land Registry and could be terminated by the landlord in the event of non-payment of rent by the tenant.
- During the Covid-19 pandemic, the tenant fell into arrears and the landlord served notice to terminate the option because of the rent arrears. It did not seek to forfeit the lease.
- Following a period of negotiation, the landlord agreed to waive some of the arrears and the tenant paid the rest in instalments pursuant to a concession agreement.
- The tenant sought relief from forfeiture of the option because all the rent arrears were paid.

WHY IS IT IMPORTANT?

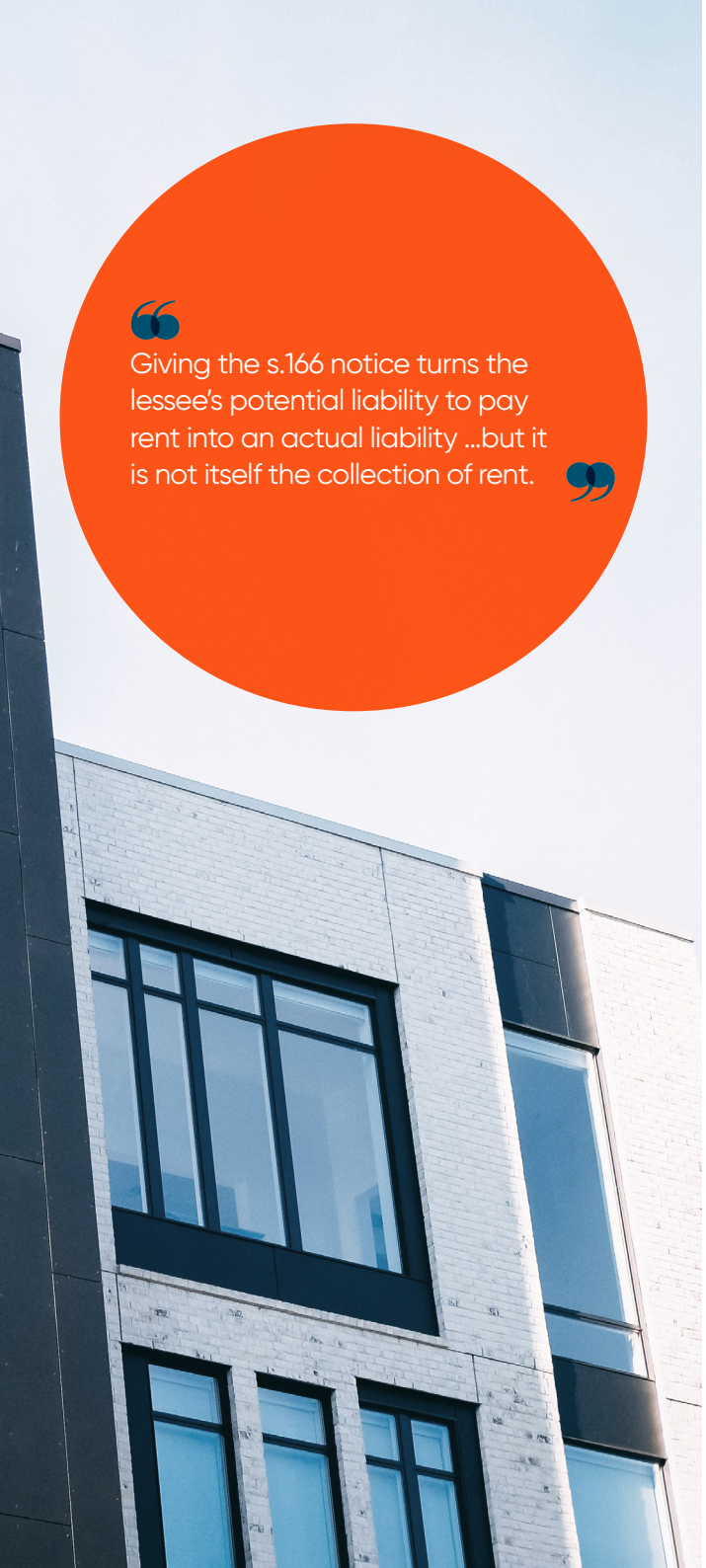
- In the current economic climate, landlords are likely to see tenants across a wide range of sectors coming under increasing pressure, and forfeiture and relief from forfeiture are likely to be hot topics in 2023. This decision is a timely reminder of the principles the court will consider when exercising its discretion to grant relief from forfeiture – not just of leases but any agreement that establishes a relevant and sufficient land interest.

WHAT DID THE COURT SAY?

- For the court to have jurisdiction to grant relief from forfeiture, the tenant had to satisfy these pre-conditions:
  (1) By the option, did the tenant obtain a sufficient proprietary land interest?
  (2) Did the termination clause in the option secure performance of the tenant covenant to pay rent in the lease?
- Even if the tenant satisfied those pre-conditions, the court still had a discretion whether or not to grant relief from forfeiture.
- The court held that (1) the tenant only needed to establish that it had a proprietary land interest, and it had done so; (2) the termination clause in the option was intended to secure the performance of the tenant covenant to pay rent in the lease. So, the court had jurisdiction and it exercised its jurisdiction to grant relief from forfeiture in the tenant's favour as follows:
  - Had the landlord forfeited the lease (rather than the option) because of the rent arrears, it is likely that the tenant would have been granted relief. It would be odd if there was a difference in approach just because the underlying document was an option agreement rather than a lease.
  - By not forfeiting the lease at the same time as the option, the landlord created a situation in which they would still have a source of rent for the remainder of the lease term.
  - The tenant's default was not wilful, and the arrears were caused by the Covid-19 pandemic and resulting restrictions on trade. It was not otherwise in breach of lease.
  - Therefore, the court held that it would be unconscionable for the landlord to retain the benefit of the termination of the option.



> "By the Notice, the Defendants explained that they were terminating the Option because of the rent arrears; that is, because the Claimant breached the rent payment obligation in the Lease. It would be odd, therefore, if there was a difference in approach, in this case, from the much more common case where a lease is forfeited for non-payment of rent."



> Giving the s.166 notice turns the lessee's potential liability to pay rent into an actual liability ...but it is not itself the collection of rent.

CASE 3

STAMPFER V AVON GROUND RENTS LIMITED [2022] EWCA CIV 1375

Landlord denied recovery of the cost of serving notices demanding ground rents

AUTHOR: LIAM LEE

WHAT WAS IT ABOUT?

- The Defendant ("Avon") owned two blocks of residential flats in London and charged each leaseholder £125 in ground rent every six months. Avon began to charge a "ground rent collection fee" of £30 plus VAT per ground rent demand. The Claimant leaseholder refused to pay the fee.
- Section 166 of the Commonhold and Leasehold Reform Act 2002 provides that a tenant under a long lease of a dwelling is not liable to make a payment of rent unless the landlord has served a notice on them demanding the payment. The ground rent collection fee was charged to cover the cost of serving the required notices under s166.
- Avon attempted to recover the cost of serving s166 notices under the leases' service charge provisions, as a landlord's expense for "the collection of rents from the Building". In Avon's view, the cost of serving the notices was part and parcel of the process of collecting the ground rents.

WHAT DID THE COURT SAY?

- The Court of Appeal held that service of the s166 notices is a "prior stage" and "necessary prerequisite" to the collection of rent, but is not in itself the collection of rent.
- The cost of serving of the notices could not therefore be recovered under the service charge provisions of the leases and Avon's appeal was dismissed.

WHY IS IT IMPORTANT?

- Although it will depend on the specific lease, the cost of serving statutory notices or demands that trigger a liability to pay rent is not generally viewed as part of "collecting" such rent, which may mean that it is not recoverable under the lease.
- If a landlord wants to recover the cost of serving s166 notices, this should be expressly incorporated into the lease, and the cost charged should be reasonable. Nugee LJ noted that:
  - the leases in this case contained the typical tenant covenant to pay the landlord's costs of serving of a s146 notice, but did not expressly refer to notices under s166; and
  - the sum of £30 plus VAT per leaseholder may not be reasonable compared to the task of preparing the notices.

Please also read our **blog** on this case by Roger Cohen.

CASE 4

HAMILTON V HER MAJESTY'S ATTORNEY GENERAL AND OTHERS; WALTON PROPERTIES LTD V HER MAJESTY'S ATTORNEY-GENERAL [2022] EWHC 2132 (CH)

English law reigns supreme at castle where foreign company is dissolved

AUTHOR: EDWARD GARDNER

WHAT WAS IT ABOUT?

- The freehold of Walton Castle in Somerset was owned by a Guernsey-registered company. The company held the castle on trust, with Margarita Hamilton being the majority beneficial owner.
- In May 2020, the freeholder was struck off the Guernsey register of companies but then restored to the register in May 2021.
- At the heart of the dispute was what happens to property in England, owned by a foreign company that is dissolved and then subsequently restored. The effect of section 1032 of the Companies Act 2006 is to automatically "re-vest" the property of a dissolved English company in that company upon its restoration, as if it had not been dissolved. Section 1032 does not apply to foreign companies who own property in England, so what happened to the castle when the Guernsey company was restored?

WHY IS IT IMPORTANT?

- Ownership of land in England and Wales by foreign companies is widespread. It is common for foreign companies to hold land on trust. Foreign companies do not benefit from the simple and well-understood provisions applying to ownership of property by English companies. This case highlights the significant difficulties that English common law can pose where foreign companies are dissolved and subsequently restored. Relatively trivial omissions such as failure to file accounts on time or pay small fees resulting in dissolution could have far-reaching consequences.

WHAT DID THE COURT SAY?

- The court reaffirmed the principle that land in England is subject to English law. It was not relevant that Guernsey had similar automatic revesting provisions to those found within the Companies Act 2006. The ownership of Walton Castle was guided by English common law. That the Guernsey company remained the registered freeholder at the Land Registry was not determinative as to legal ownership of the property.
- Regardless of the legal position in the relevant foreign jurisdiction, freehold property in England owned by a foreign entity that is dissolved will not automatically re-vest in the foreign company when it is restored to its foreign companies register. Instead, upon dissolution, its freehold will normally escheat to the Crown, which brings its freehold interest to an end and allows the Crown to take possession.
- In this case, given that the Guernsey company held Walton Castle on trust, the freehold of Walton Castle passed to the Crown but remained subject to the trust. As a result, the court has the discretion under section 44 of the Trustee Act 1925 to determine how to vest Walton Castle upon the restoration of the Guernsey company.
- In the circumstances, the court vested Walton Castle in the majority beneficial owner (as opposed to the restored Guernsey company) who was already in occupation and operating a wedding events business from the property.

> "Put simply, land in England is subject to English law"

> "...to put in place an interim safety measure in response to a report that said the fire risk was "intolerable" cannot be said to have been irrational... nor unreasonable..."

CASE 5

ASSETHOLD LIMITED V ALEXANDRA ADAM AND 14 OTHER LEASEHOLDERS OF CORBEN MEWS

Pyrrhic victory for landlord in service charge dispute

AUTHOR: KATIE KOZLOWSKA

WHAT WAS IT ABOUT?

- The freeholder of a four-storey residential building obtained a report stating that the presence of combustible materials in the external walls presented an "intolerable" risk to the occupiers. The risk of fire was put as "medium" and the potential consequences as "extreme". Remedial measures, including the removal of the combustible material and the provision of a waking watch until the risk was lowered, were recommended.
- The freeholder hired a waking watch at a cost of £28,000 per month, for around 10 months, and sought to recover the cost through the service charge.
- The residents, who were separately advised that the fire risk to the building was low and did not justify a waking watch, asserted that the cost had not been reasonably incurred, as required by section 19(1) of the Landlord and Tenant Act 1985, and they applied to the First Tier Tribunal (FTT) to determine whether the charge was payable.

WHAT DID THE COURT SAY?

- The FTT held that the relevant test in applying section 19 is one of reasonableness, not a lower standard of rationality. A landlord must follow a reasonable decision-making process and adopt a reasonable course of action which leads to a reasonable outcome; if the outcome is not reasonable, the costs will not have been reasonably incurred, regardless of the process.
- The FTT found that the freeholder's fire safety report was flawed and overstated the risk, and it was therefore unreasonable for the freeholder to rely on it and incur the costs of a waking watch.
- The freeholder appealed to the Upper Tribunal (UT), who did not agree with the FTT's reliance on the hindsight of the expert witness in the application of the test. The correct approach was to consider what was reasonable in the circumstances at the time the expenditure was incurred. The freeholder had received a report from reputable surveyors stating that the risk to life from fire in the building was "intolerable". It was therefore reasonable for the freeholder to incur the cost of a waking watch, but only for an interim period of one month, whilst remedial works were completed. The UT overturned the FTT's decision that the decision to employ a waking watch was unreasonable, but upheld the FTT's decision that charges should be reduced by 50% for the poor quality of the waking watch service.

WHY IS IT IMPORTANT?

- The decision is confirmation that costs incurred on fire safety measures are recoverable through the service charge, where the lease allows it, and the landlord acts reasonably at the time the expenditure is incurred, without the benefit of hindsight.
- It represents a pyrrhic victory for the freeholder, who will be dismayed to recover only £14,000 of waking watch costs exceeding £200,000, although relieved it can rely on competent expert advice when dealing with similar issues.

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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