BRIEFCASE

QUARTERLY UPDATE:
KEY REAL ESTATE CASES

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KEY CASES

TESTING CASE ABOUT BUSINESS INTERRUPTION INSURANCE

The Supreme Court decision on sample clauses in the FCA test case means more business interruption insurance claims likely to be covered.

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COURT WAVES OFF WAIVER ARGUMENTS IN FORFEITURE DISPUTE

Right to forfeit not waived where tenants couldn't prove the landlord knew rent accepted fell due after the breach date.

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WATERCOURSE RIGHTS WASH OUT HAMPERS REDEVELOPMENT PLANS

A property owner intending to redevelop did not have rights to discharge water and sewage through a pipe into a canal on neighbouring land.

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RESIDENTIAL LEASE SERVICE CHARGE VARIATION CLAUSE SURVIVES WITH MODIFICATION

A clause varying a fixed service charge percentage was not struck out but read to allow the Tribunal to determine the variation.

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£1 OPTION TO ACQUIRE FARM AT 30% DISCOUNT NOT TRIGGERED BY PITCHED ROOF

An option conditional on "any development of the Property" was not triggered by a minor planning permission for a pitched roof on an existing building.

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CASE 1

THE FINANCIAL CONDUCT AUTHORITY v ARCH INSURANCE (UK) LTD AND OTHERS [2021] UKSC 1

What was it about?

- The Supreme Court gave its view on various business interruption insurance policy clauses.
- The case was brought by the FCA (Financial Conduct Authority) on behalf of policyholders as a test case.

What did the court say?

- The court substantially sided with the FCA (on behalf of policyholders).
- It made specific findings about various sample policy clauses, including 'disease clauses' - that provide cover where a certain disease occurs within a specific radius of the business premises.
- The court did not accept the insurers' argument that there was not a sufficient connection between the particular case of COVID-19 and the loss, because lockdowns and losses would have been incurred even if there was not a COVID-19 case within the specified radius.
- This means cover is likely to be available to a policyholder under a disease clause if it can demonstrate that there had been a single case of COVID-19 within the specified radius before lockdowns/ restrictions were introduced.
- A further hearing is likely to be required to agree the precise wording of the court's determinations summarising its findings, which are intended to be used by insurers and policyholders to assess whether claims are covered.

Why is it important?

- This decision on disease clauses and other sample policy wording means more business interruption claims are likely to be covered under insurance policies.
- Such insurance payouts will potentially enable tenants to clear rent arrears before restrictions on forfeiting commercial leases are lifted, to safeguard their business premises.

CASE 2

FAIZ AND OTHERS v BURNLEY BOROUGH COUNCIL [2021] EWCA CIV 55

What was it about?

- Did a landlord waive its right to forfeit (terminate) a lease by accepting rent after it found tenants had sublet their business premises in breach of their lease?
- After the landlord found out the breach, it sent a revised insurance rent invoice, for part of the sums originally demanded, apportioned up to the date the landlord found out about the breach. The landlord then accepted payment of the apportioned sum.
- The tenant argued that by demanding and accepting the rent in the second/apportioned insurance rent invoice, the landlord had waived its right to forfeit (terminate) the lease for the subletting breach.

What did the court say?

- The burden was on the tenants to prove waiver and they failed.
- The second invoice was not a fresh demand; just an offer to accept less than the amount originally demanded.
- There was uncertainty about the breach date. The sublease term was back-dated and the completion/breach date was unclear.
- In light of this uncertainty, the tenants couldn't show the landlord knew the apportioned insurance rent sums it accepted fell due after the breach date, and this was crucial to establish the waiver.

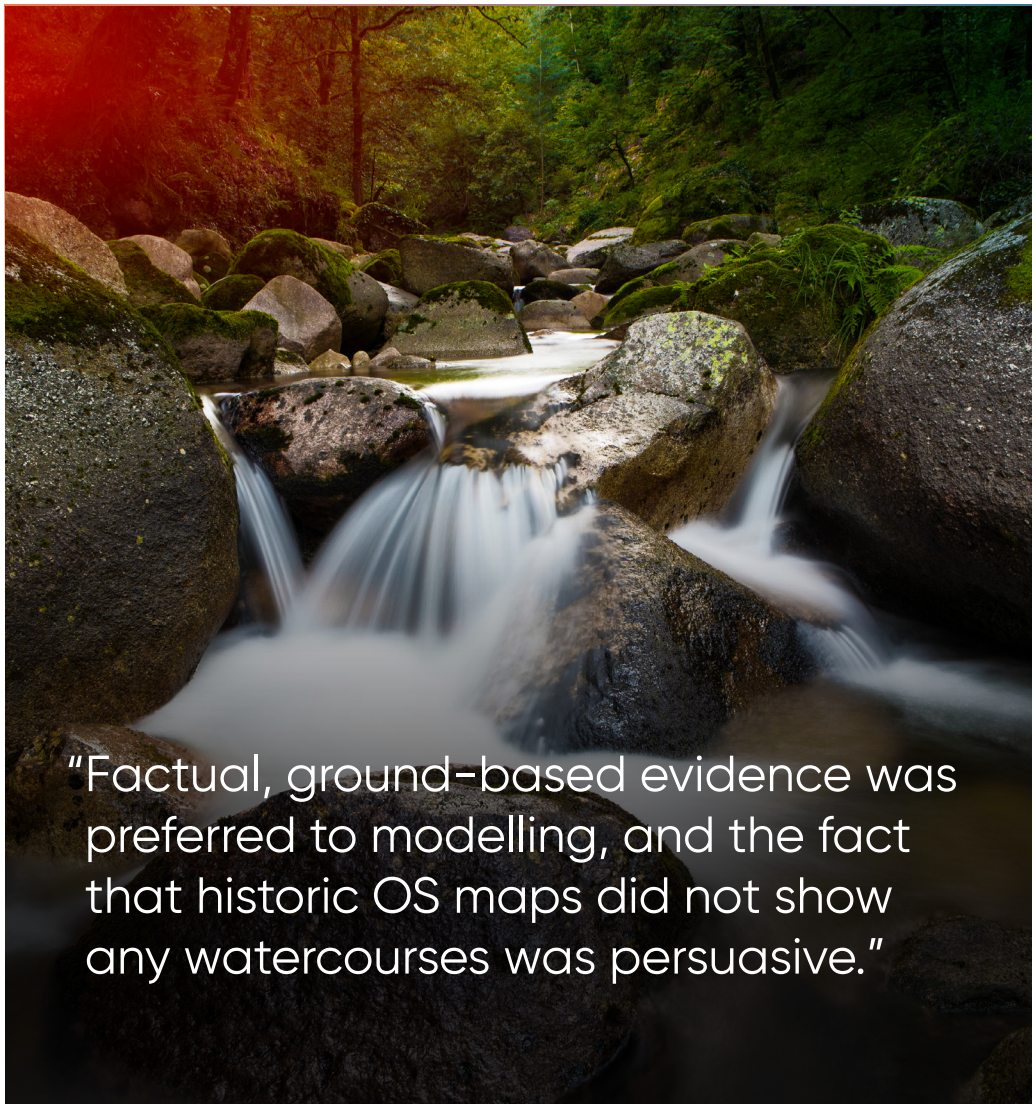
Why is it important?

- It clarifies that the relevant timing issue is whether the rent demanded/accepted fell due after the breach date, not whether it fell due after the landlord found out about the breach.
- So, we now know that a landlord will waive its right to forfeit if it demands or excepts rent where it:
    - knows about the breach; and
    - knows the rent demanded or accepted fell due after the breach date.

It is risky for landlords to demand or accept rent after knowledge of a breach, especially if they don't have all the details about the breach timing. Landlords who want to preserve the right to forfeit should take a cautious approach. Arguments about waiver can lead to disputes and delay recovering possession.

CASE 3

BERNEL LTD v CANAL AND RIVER TRUST [2021] EWHC 16 (CH)



What was it about?

- Did a property owner have rights to discharge water and sewage through a pipe into a canal on nearby land.
- The owner, which wanted the rights in connection with its redevelopment plans, argued it had 'riparian' rights (legal rights over natural watercourses) because the pipe followed a natural watercourse, or alternatively had acquired prescriptive rights by use over time.

What did the court say?

- The property owner did not have rights to discharge water or sewage through the pipe.
- The court held it was unlikely the pipe followed a natural watercourse, and there was insufficient evidence to show the owner had acquired prescriptive rights.

Why is it important?

- Riparian rights, and prescriptive water drainage rights, can be very valuable, particularly in the redevelopment context.
- The judge's comments in this case indicate such watercourse rights can even be used by owners/developers where a redevelopment involves a radical change in the character of the site, as long as the burden on the downstream land doesn't increase substantially.
- On the facts though, there was insufficient evidence to prove that the owner had the relevant rights.
- It provides useful guidance on the evidence preferred by the court in such cases. Factual, ground-based evidence was preferred to modelling, and the fact that historic OS maps did not show any watercourses was persuasive. As with any case based on prescription, ample evidence of use is required.

What was it about?

- Was a residential long lease clause which said the tenant had to pay a fixed percentage of the service charge 'or such part as the Landlord may otherwise reasonably determine' void?
- The Upper Tribunal decided that the clause was struck out, essentially because it was an attempt to oust the Tribunal's jurisdiction to determine the reasonableness of the service charge variation, so void under the relevant legislation. The landlord appealed.

What did the court say?

- The court said the lease clause should be read as if it said the tenant had to pay a fixed percentage "or such other part as….may otherwise reasonably determine" acknowledging that ''if further slight linguistic adjustment is needed to make grammatical sense, so be it".
- This reading left a vacuum, which was to be filled by the Tribunal. Importantly, either the landlord or the tenant could apply to have the reasonableness of the service charge variation determined by the Tribunal.

Why is it important?

- Had the Upper Tribunal decision stood, a number of residential landlords would have been stuck with fixed service charge percentages contained in original leases, with only limited grounds to vary those percentages (for example, where they don't equal 100%).
- The decision allows residential property landlords with similar lease terms the flexibility to vary fixed service charge percentages where it is reasonable to do so. Although, any variation will be subject to Tribunal determination which the tenant can apply for, so variations should not be undertaken lightly.

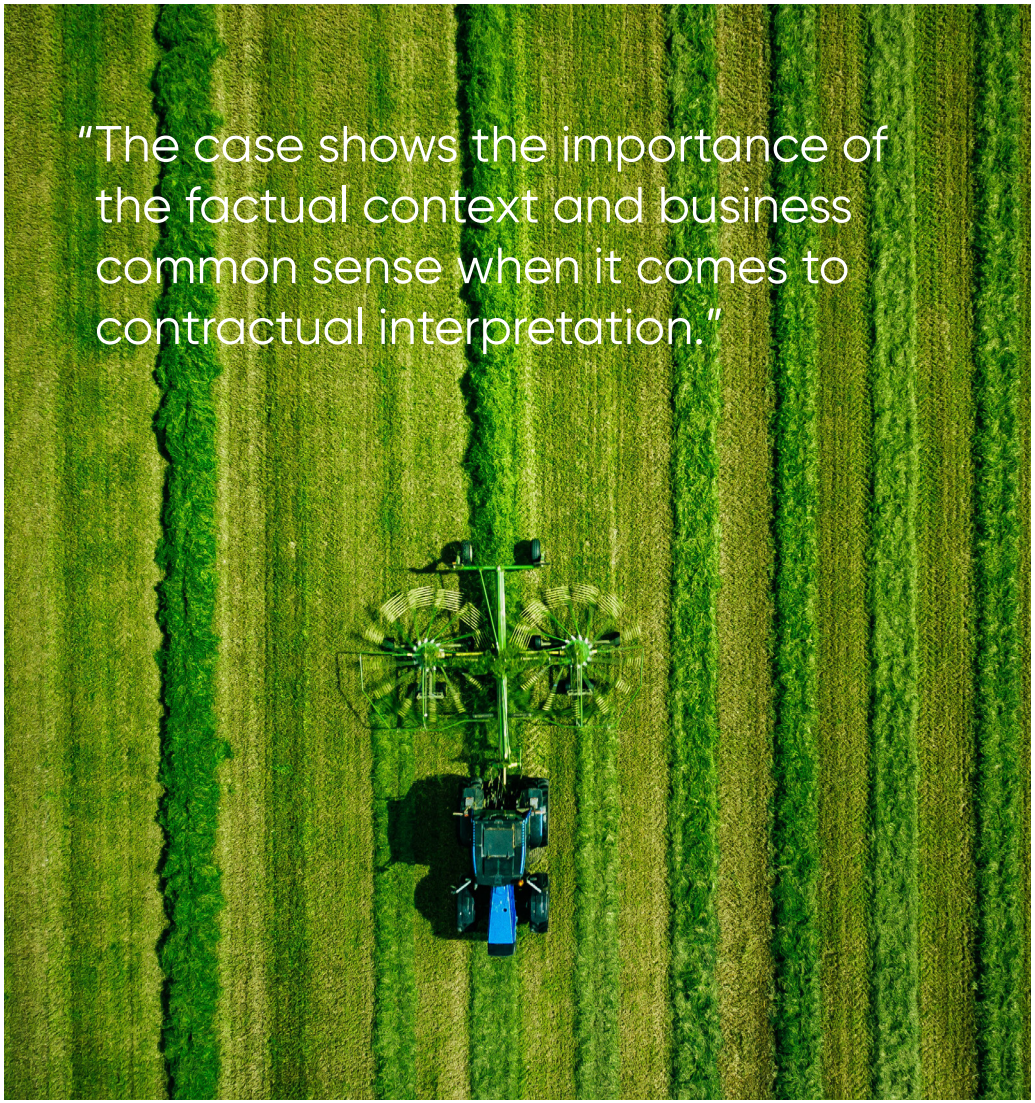
"A number of residential landlords would have been stuck with fixed service charge percentages contained in original leases."

CASE 4

AVIVA INVESTORS GROUND RENT GP LTD AND ANOTHER v WILLIAMS AND OTHERS [2021] EWCA CIV 27

CASE 5

FISHBOURNE DEVELOPMENT LIMITED v STEPHENS [2020] EWCA CIV 1704



What was it about?

- Was an option which allowed the option holder to buy a farm at a 30% discount triggered by a minor planning permission to erect a new pitched roof on one of the existing buildings?
- The option trigger was the obtaining of "a planning permission granted by the Local Planning Authority permitting any development of the Property".
- The option holder argued that 'development' should be given the meaning set out in the Town and County Planning Act 1990, which covered a wide range of activities, and meant the option was triggered by the pitched roof planning application.

What did the court say?

- The option was not triggered.
- The context of the clause, the contract as a whole, the factual matrix and commercial common sense was important when construing the meaning of "any development of the Property".
- Here, the option cost £1 and the successful exercise meant the option holder could purchase the farm at a 30% discount, with no claw-back or overage provisions.
- An inconsequential planning permission which didn't increase the land value didn't make commercial sense - there would be no reason for the owner to grant the option on that basis, or agree to a 30% discount.
- Accordingly, "any development of the Property" meant planning permission for the whole or substantially the whole of the Property, not part only. 'Development' did not have the wider meaning advocated by the option holder.

Why is it important?

- The case shows the importance of the factual context and business common sense when it comes to contractual interpretation.
- Where there is a dispute over the meaning of a property contract, the court will ascertain the objective meaning of the words, in the context of the agreement as a whole, taking into account the relevant background available to both parties. If there is ambiguity or rival meanings, business common sense will be applied.

GETTING IN TOUCH

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