BRIEFCASE
QUARTERLY REAL ESTATE UPDATE:
CASES AND NEWS

March 2022

BRYAN CAVE LEIGHTON PAISNER BLP

KEY CASES

LANDLORD'S UNREASONABLE REFUSAL TO CONSENT TO AN ASSIGNMENT OF A LEASE

A tenant was awarded damages for his landlord's unreasonable withholding and delaying of consent to assign his long residential lease

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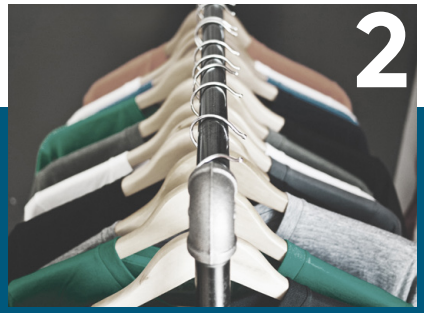

COURT REFUSED TO AWARD TURNOVER RENT IN UNOPPOSED LEASE RENEWAL

In a business lease renewal, the County Court refused to order a turnover rent that would have exceeded significantly the open market rent

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COURT OF APPEAL CONSIDERS RIGHT TO POSSESSION OF PREMISES OCCUPIED BY PROPERTY GUARDIAN

Was the defendant granted a lease or licence in her role as a property guardian? Who, under CPR Part 55, was entitled to bring a claim for possession against her?

READ MORE...

PLAY CARRIES ON FOR BATH RUGBY AS NO-ONE HAS BENEFIT OF RESTRICTIVE COVENANT

The Court of Appeal found in Bath Rugby's favour, finding that a neighbouring owner did not have the benefit of a restrictive covenant contained in a 1922 conveyance that could potentially hinder development

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CASE 1

HARRY ROLLO GABB –V- MEGHDAD FARROKHZAD - LANDLORD'S UNREASONABLE REFUSAL TO CONSENT TO AN ASSIGNMENT OF A LEASE

AUTHOR: AKHIL MARKANDAY

WHAT WAS IT ABOUT?

- Mr Gabb owned a flat in Kensington and had a difficult relationship with his landlord, Mr Farrokzhad. Following some disputes, Mr Gabb resolved to sell his flat and applied to his landlord by email for consent to assign his long lease.
- The lease contained a fully qualified covenant which meant that landlord's consent cannot be unreasonably withheld. The Landlord and Tenant Act 1988 also imposes obligations on a landlord to respond within a reasonable time.
- Some 18 months elapsed without consent being given and at least one buyer was lost, much to Mr Gabb's frustration.
- Mr Gabb claimed that Mr Farrokhzad had acted unreasonably in refusing consent and as such he was entitled to a declaration and damages under the 1988 Act to compensate him for the losses suffered. Interestingly Mr Gabb also claimed the unusually sought exemplary damages and an injunction requiring his landlord to comply with the lease obligations in future. In response, Mr Farrokhzad claimed that his actions had not been unreasonable, but even if they had been, Mr Gabb's application for consent had been invalid under the 1988 Act.

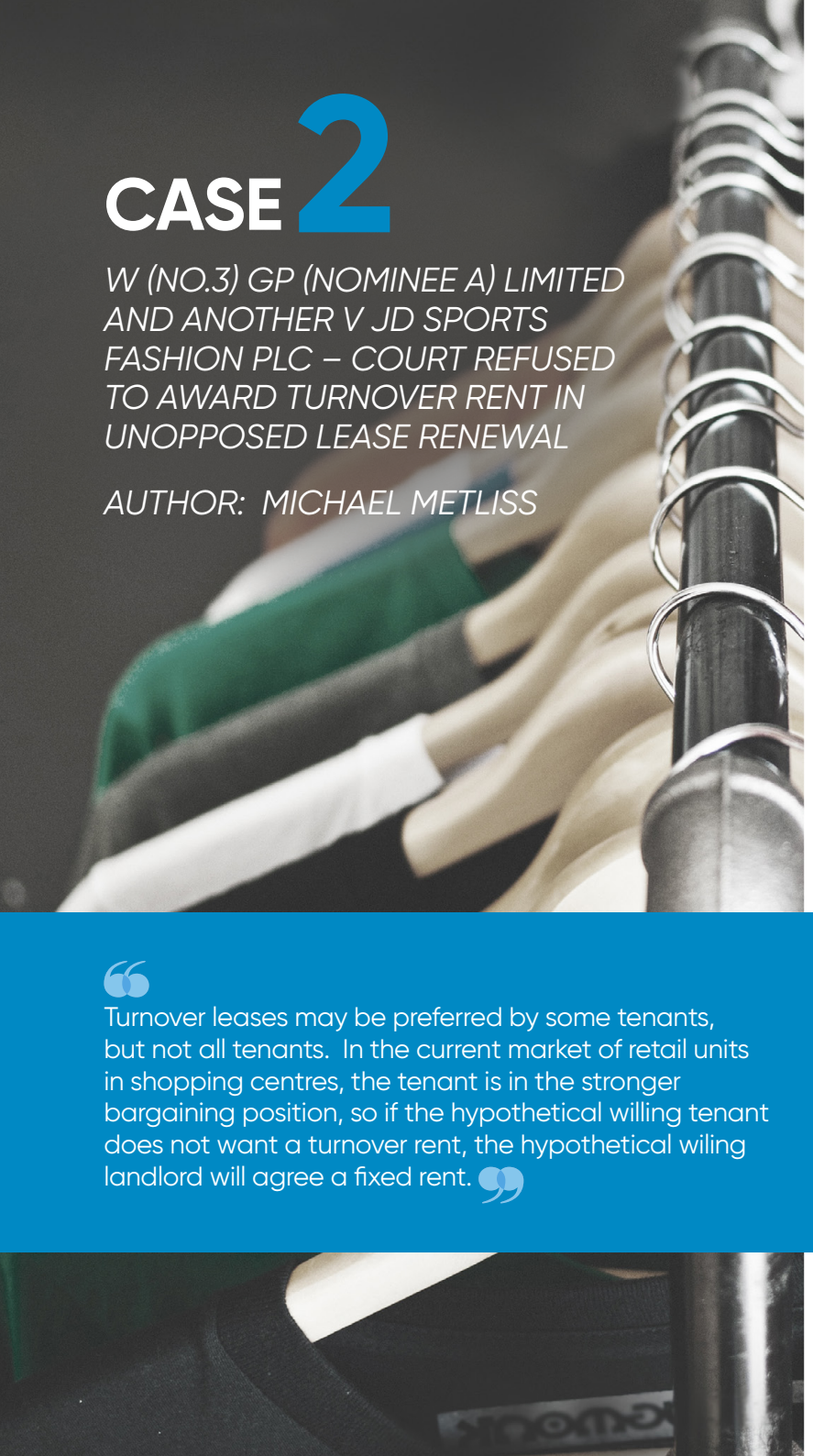
WHAT DID THE COURT SAY?

- In terms of validity of the application for consent, section 1(3) of the 1988 Act states that a "written application" must be "served." It is accepted that an email is a "written" application but the real question was whether it had been properly served. The lease in this case did not specify a method of service and therefore section 5(2) of the 1988 Act provided that service is valid if effected "in any manner provided by section 23 of the Landlord and Tenant Act 1927." Despite the somewhat creative arguments, the court had little trouble in finding that Mr Gabb's email application was valid and clearly understood as an application for consent such that Mr Farrokzhad's duty to respond within a reasonable time was triggered.
- Having considered the evidence the court found Mr Farrokzhad's conduct was unreasonable and that he had deliberately delayed providing a response at every stage. The Judge was unimpressed with Mr Farrokzhad as a witness and remarked on the difference in presentation of his oral evidence compared to his written evidence.
- The Court awarded Mr Gabb his declaration and damages. The court declined to award exemplary damages as there was insufficient evidence as to Mr Farrokzhad's motivations - it being a high bar to prove that a landlord is pursuing a "deliberately obstructive policy". The injunction was also refused as the Court felt Mr Farrokzhad's exposure to damages (i.e any shortfall between the aborted sale and any eventual sale) should provide the necessary motivation to ensure a more reasonable approach going forward.

WHY IS IT IMPORTANT?

- To trigger a landlord's duty and liability under the 1988 Act, an application for consent has to be in writing and properly served on the landlord. This should always be checked with solicitors so a formal application can be made.
- If a landlord fails to respond within a reasonable time, that is a refusal of consent. A reasonable time depends on the circumstances but is generally weeks not months and may be shorter in the residential context.
- A landlord may face significant damages if a sale is aborted albeit clear evidence of bad conduct will be needed to support an award of exemplary damages.
- Care must be taken to comply with the new formal rules in relation to witness evidence. Here the written evidence and oral evidence of the landlord did not match up so the Court had serious reservations as to the reliability of the evidence.
- You can read more about landlord consent to assign in this recent **BCLP Insight**.

> "It would be impossible, given the unreasonableness of Mr Farrokzhad's behaviour in respect of the Oppenheimer sale, to resist the action for a declaration that as a result of this unreasonable behaviour the covenant not to assign without consent in the lease has fallen away, and that Mr Gabb can validly assign the lease without that consent to any person he wishes"



CASE 2

W (NO.3) GP (NOMINEE A) LIMITED AND ANOTHER V JD SPORTS FASHION PLC – COURT REFUSED TO AWARD TURNOVER RENT IN UNOPPOSED LEASE RENEWAL

AUTHOR: MICHAEL METLISS

> Turnover leases may be preferred by some tenants, but not all tenants. In the current market of retail units in shopping centres, the tenant is in the stronger bargaining position, so if the hypothetical willing tenant does not want a turnover rent, the hypothetical wiling landlord will agree a fixed rent.

WHAT WAS IT ABOUT?

- This case concerned a business lease renewal under the Landlord and Tenant Act 1954, and whether or not the tenant, JD Sports, should pay a turnover rent under the renewal lease.
- The existing lease provided for a £175k base rent, plus an amount by which 8% of turnover exceeded the base rent.
- When the lease renewal process started 4 years earlier, JD Sports wanted to retain the turnover rent under the renewal lease, however the landlord proposed a fixed £282k annual rent.
- By 2021, mid-lockdown, the market changed to the extent that the landlord wanted to retain the turnover rent which, in year one, would have secured a rent of close to £500k, and JD Sports proposed an annual fixed rent of only £17.7k.
- Section 34 of the 1954 Act provides that the new rent must be the open market rent that disregards, amongst other things, the effect on rent of the tenant's occupation and goodwill. Under section 35, concerning new lease terms other than rent, the existing lease terms should be replicated in the new lease, unless there is a good reason why a term should be added, removed or changed.
- Relying on section 35, the landlord argued that the base rent plus turnover formula for calculating rent should be retained.
- JD Sports on the other hand relied on section 34 and sought a fixed open market rent, insofar as a turnover-based rent did not reflect the open market rent (it was significantly more), and there was also the fact that a turnover-based rent took into account the personality and performance of the tenant, that is meant to be disregarded.

WHAT DID THE COURT SAY?

- The judge decided that there should be a fixed market rent, which it assessed to be an annual £104.3k.
- The principal reason was that a turnover-based rent did not reflect the open market rent.
- Further the type of rent, as well as the amount, is governed by section 34 of the 1954 Act, not section 35, so that the court could ignore the fact that rent under the existing lease was turnover-based.

WHY IS IT IMPORTANT?

- Whilst the court inferred that it might, in special cases, have jurisdiction to order a turnover-based rent (there is no legal authority to say that it cannot be ordered), a turnover-based rent is inconsistent with section 34. In other words, it does not represent a hypothetical letting between hypothetical parties, disregarding a tenant's goodwill built up through its period of occupation.
- The 1954 Act exists to protect tenants, which is why a successfully established tenant should not be forced to pay a rent that is higher than the open market rent (indeed, no hypothetical willing landlord could/would force a tenant to pay an excessively high rent, especially in such a falling market).

CASE 3

GLOBAL 100 LIMITED V MARIA LALEVA- COURT OF APPEAL CONSIDERS RIGHT TO POSSESSION OF PREMISES OCCUPIED BY PROPERTY GUARDIAN

AUTHOR: PHIL SPENCER

WHAT WAS IT ABOUT?

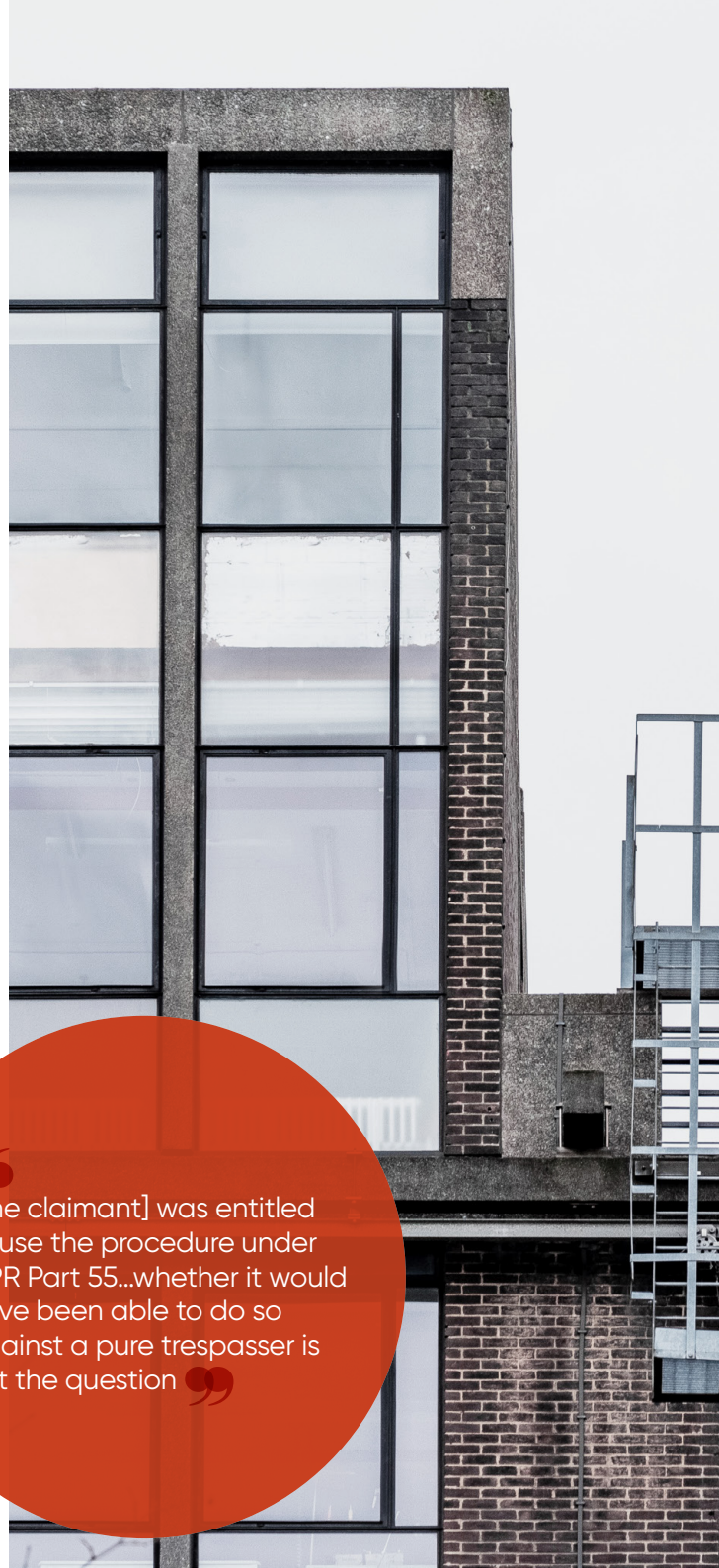
- NHS Property Services Ltd owned a vacant building that it wished to secure against squatters, vandals and dereliction, for which purpose it engaged a Property Guardian service ("PG") to grant short-term occupational licences of rooms to individual property guardians (and to regain possession of them in due course).
- PG empowered a group company ("GC") to actually grant the licences and commence possession proceedings against occupiers who refused to vacate.
- Ms Laleva entered into a written agreement with GC, described as a temporary licence agreement, for which she paid a weekly "rent" for use and occupation of a designated space (that could be altered from time to time). The arrangement was terminable on 28 days' notice, and provided that on termination, the guardian "shall immediately cease to be entitled to the use of the Property… and shall restore the Property leaving it clean and tidy, removing all of the Guardian's belongings…".
- Following GC's termination of her agreement, Ms Laleva refused to vacate, and defended CPR Part 55 possession proceedings brought against her by GC on the basis that (1) she had an assured shorthold tenancy so could challenge a claim for possession, (2) the written agreement was a sham arrangement - its purpose was "to create the appearance of a personal licence"; and (3) GC had no standing to bring a possession claim in any event due to an insufficient interest in the property – it was a mere licensee itself, and did not have the requisite "possessory" interest to bring an action for possession.

WHAT DID THE COURT SAY?

- On the proper interpretation of Ms Laleva's agreement considered in the light of the surrounding circumstances and the purpose of the agreement (her occupation was an essential necessity of the true purpose at hand, which was the provision of guardian services), the argument that it created a tenancy rather than a licence had no real prospect of success, regardless of exclusive possession of a particular room.
- Neither was the arrangement a sham on the basis that the very purpose of the arrangement between NHS Property Services and PG was so that the latter could provide guardian services to the former (which Ms Laleva accepted). It was essential, in order to fulfil that purpose, that PG should be able to hand back the Property as and when NHS Property Services required it, and the inter-company arrangement between PG and GC was made in furtherance of that arrangement.
- Whether GC did or did not have a possessory interest in the property for the purposes of a possession action was a red herring. Ms Laleva accepted the licence from GC and was therefore estopped from arguing that GC had no right to enforce its terms on termination, including via CPR Part 55 on permission from the freeholder.

WHY IS IT IMPORTANT?

- This case will provide some comfort to owners of vacant buildings who engage property guardians to secure their buildings, that property guardians can legitimately occupy the premises as licensees rather than tenants. You can read more about this issue in this recent **BCLP insight**.
- Whilst the absence of a possessory interest in a property may prevent a party from bringing a possession claim against a pure trespasser of that property, it will not prevent that party from bringing a possession action against its own licensee who was willing to accept a licence and is estopped from preventing the enforcement of its terms.



> "[The claimant] was entitled to use the procedure under CPR Part 55…whether it would have been able to do so against a pure trespasser is not the question"

CASE 4

BATH RUGBY LTD V GREENWOOD & ORS - PLAY CARRIES ON FOR BATH RUGBY AS NO-ONE HAS BENEFIT OF RESTRICTIVE COVENANT

AUTHOR: EDWARD GARDNER

WHAT WAS IT ABOUT?

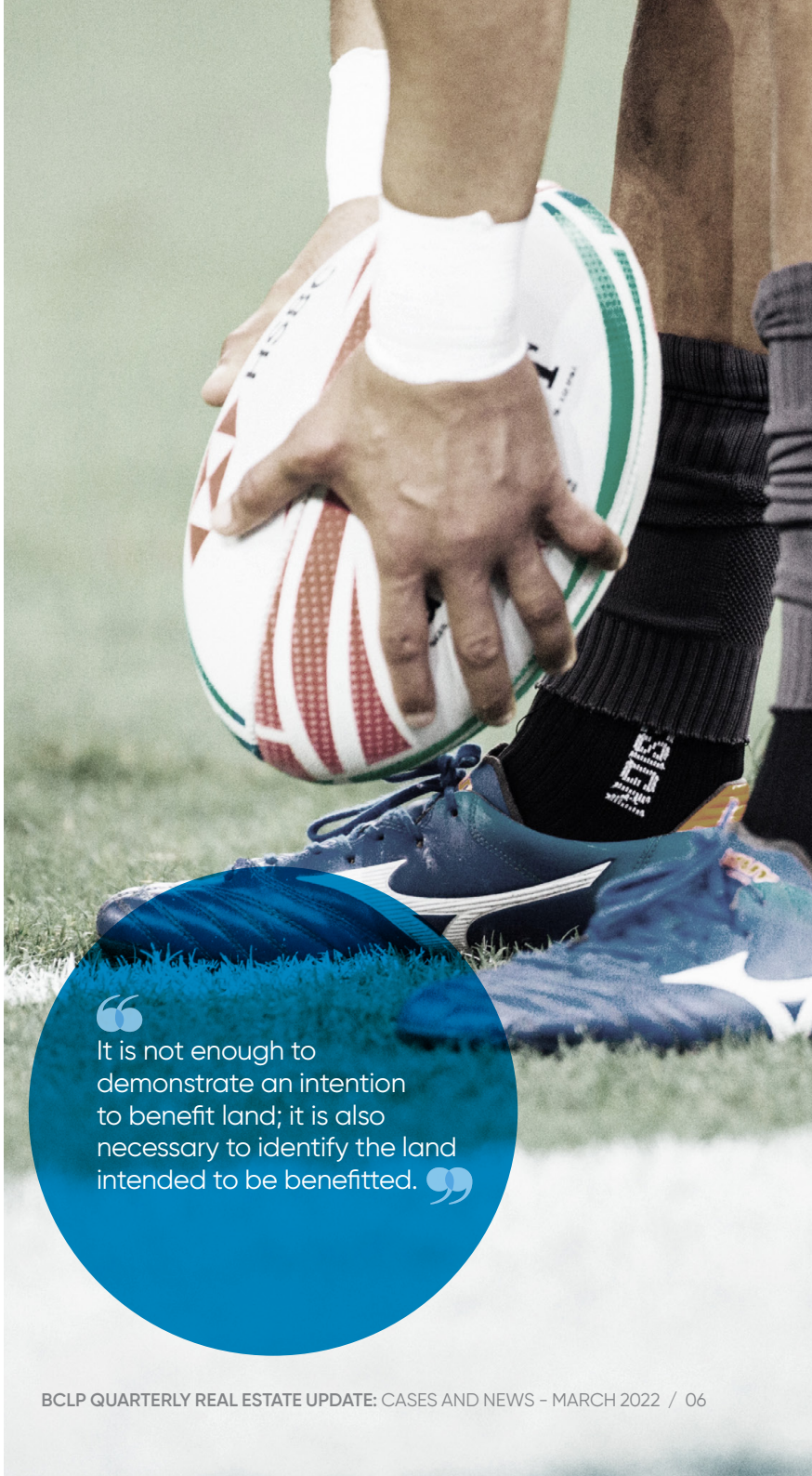
- Bath rugby is seeking to redevelop the 'Rec', by moving its pitch and replacing its existing stadium with a larger stadium and a retail/commercial offering. At the heart of this case was whether a covenant contained in a 1922 conveyance of the Rec was enforceable by neighbouring owners of the Rec.
- The covenant restricted anything being done on the Rec "which may be or grow to be a nuisance and annoyance or disturbance or otherwise prejudicially affect the adjoining premises or the neighbourhood".
- Bath rugby sought a declaration that the covenant was not enforceable. One of the Rec's neighbours successfully opposed the application in the high court.

WHAT DID THE COURT SAY?

- The Court of Appeal took a different view from the High Court, finding that the covenant was unenforceable. In order for the benefit of the covenant to be annexed to the Rec's neighbouring land, it is necessary for the covenant to identify the land, with sufficient precision/clarity, that is intended to be benfitted. The term "adjoining land or the neighbourhood" did not sufficiently indicate the land intended to benefit from the 1922 covenant - it is not possible to draw up a list of properties that may be within a "neighbourhood". As a result, the benefit of the covenant was not annexed to the land neighbouring the Rec and the neighbouring owner was not entitled to enforce the covenant to prevent Bath Rugby's proposed redevelopment.

WHY IS IT IMPORTANT?

- The Court of Appeal decision is a helpful reminder to identify clearly the land that is intended to have the benefit of a restrictive covenant. Two of the three Lord Justices commented that it is necessary for the benefit of the land "to be easily ascertainable" at the time of the covenant. Thorough descriptions and plans will help avoid issues with annexation.
- For Bath Rugby, play can resume again for its redevelopment plans.



> It is not enough to demonstrate an intention to benefit land; it is also necessary to identify the land intended to be benefitted.

RECENT LEGAL NEWS

THERE ARE 3 SIGNIFICANT NEW PIECES OF LEGISLATION THAT PROPERTY PRACTITIONERS SHOULD BE AWARE OF, SUMMARISED BELOW:

AUTHOR: LAUREN KING

1 THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022 dovetails the lifting of temporary restrictions on landlords' remedies for tenant default and provides further protection for qualifying business tenants

- The temporary restrictions on landlords' remedies for tenant default that have been in place throughout the pandemic have been or will shortly be lifted. This will enable many landlords to pursue tenants for rent arrears that aren't caught by the new Commercial Rent (Coronavirus) Act 2022, that received Royal Assent on 24 March 2022.
- The Act applies only to "protected rent debt" incurred (1) between 21 March 2020 and 18 July 2021 (2) by business tenants who were forced by coronavirus-related laws to fully or partly close or restrict their business operations. More detailed guidance on the types of businesses that qualify, and the relevant closure periods, can be found at Annex A of the November 2021 edition of the government's **Code of Practice** for commercial property relationships following the Covid 19 pandemic.
- Protected rent debt includes rent, service charges, insurance, interest, and VAT.
- Where landlords and tenants cannot agree how to resolve a protected rent debt, the Act provides for either party to refer the dispute to an arbitrator within 6 months from 24 March 2022, who can award relief from payment (a full or partial write off, or deferred payments) by applying prescribed principles, weighing up the tenant's viability with the landlord's solvency.
- Protected rent debt will now benefit from a moratorium on all landlords' remedies for 6 months, or until any arbitration referred under the Act is concluded.
- Arrears that do not fall in scope of the Act will not be subject to any further moratorium(s). The restrictions on forfeiture and Commercial Rent Arrears Recovery (CRAR) that were in place until 25 March 2022 have been fully lifted, and the existing restrictions on insolvency measures will be in place until 31 March 2022.

2 THE LEASEHOLD REFORM (GROUND RENT) ACT 2022

abolishes ground rents for new, qualifying long residential leasehold properties in England and Wales.

- Royal Assent was granted on 8 February and the Act will be brought into force within six months of this date. The legislation will not have retrospective effect.
- Once it commences, this Act means that if any ground rent is demanded as part of a new residential long lease (granted for a term of at least 21 years in return for a premium), it cannot be for more than one peppercorn per year.
- The Bill applies to newly established long residential leases. It does/will not apply to existing long residential leases, business leases, statutory lease extensions of houses and flats, Community Housing lease, home finance plan leases and shared ownership leases.
- The charging of a prohibited ground rent will be enforced by way of a civil penalty regime, including fines of up to £30,000 for freeholders that charge ground rent in contravention of the Act.
- The Act also bans freeholders from charging administration fees for collecting a peppercorn rent.
- This recent **BCLP Insight** provides more detail on the Act.

3 ECONOMIC CRIME (TRANSPARENCY AND ENFORCEMENT) ACT

creates a register of overseas entities and their beneficial owners, extends the existing regime for unexplained wealth orders (UWOs) (to include trustees, partners, directors etc who operate entities holding property in the UK) and establishes a strict civil liability test for sanctions violations.

- As part of its response to the Russian invasion of Ukraine, HM Government fast-tracked the long-awaited Economic Crime (Transparency and Enforcement) Bill, requiring overseas entities to register with, and provide details of their beneficial owners to UK Companies House before the overseas entity can be registered as the legal owner of UK land.
- An overseas entity that became the registered proprietor of a qualifying estate (a freehold estate or a leasehold estate granted for more than seven years from the date of grant of land in England & Wales) on or after 1 January 1999 but before the relevant part of the Act comes into force (on a date to be confirmed) (the In Force Date) will have six months from the In Force Date to apply to become a registered overseas entity or to dispose of the qualifying estate.
- On an acquisition, if an overseas entity fails to register with Companies House and provide the required information of its beneficial owners then, unless it is an 'exempt overseas entity' it will not be registered as the legal owner of any qualifying estate. In addition, a restriction will be placed on the land register (for both existing land holdings and any subsequently acquired) so that no disposition by the overseas entity will be registered unless the disposition is exempt.
- It will be a criminal offence both for the overseas entity and each of its officers to make a disposition of the UK land that is restricted as set out above, or to fail to provide an update on the information on the register annually, or to deliver (or cause to be delivered) misleading, false or deceptive information to the registrar. Non-criminal financial penalties may apply in the alternative.
- The overseas entities register will show where individuals and legal entities that are registrable beneficial owners meet a beneficial ownership condition by virtue of being a trustee. In addition, it will record where a registrable beneficial owner (including a government or public authority) is a designated person pursuant to the Sanctions and Anti-Money Laundering Act 2018, where that information is publically available.
- This recent **BCLP Insight** provides more detail on the Act.

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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