

**Insights**

# **PERIODIC TENANCIES AND PROPRIETARY ESTOPPEL: NOT ALL SMOKE AND MIRRORS**

May 11, 2021

## **SUMMARY**

In *Smoke Club Ltd and others v Network Rail Infrastructure Limited*, the Upper Tribunal held that the claimants had an inferred periodic tenancy but no claim under proprietary estoppel. A lease of any kind was never agreed. However on the facts, none of the parties involved in negotiations had an objection on principle to a periodic tenancy and the tenants were clear that they would not accept a tenancy at will.

## **BACKGROUND**

The case concerned an arch beneath London Bridge railway station that operated as Cable nightclub from 2009. The nightclub operators – Smoke Club - had entered occupation of the arch on an informal basis, following discussions and with the knowledge of the freeholder and head tenant, without a formal lease or licence in place. When Network Rail exercised its powers of compulsory purchase and took possession of the arch in May 2013 for the Thames Link project, Smoke Club (now in administration) and its creditors argued that they could claim compensation on the basis that (1) Smoke Club had acquired a 20 year lease of the arches under the doctrine of proprietary estoppel or constructive trust, alternatively, (2) it had acquired an annual periodic tenancy of the site, with rights under the Landlord and Tenant Act 1954 (1954 Act), on the basis of its occupation and payment of rent.

Network Rail disputed Smoke Club's assertion that it had any compensatable interest in the site, arguing that it had merely occupied the arch as a tenant at will during negotiations for a longer lease that never completed.

The Upper Tribunal had to decide the basis upon which Smoke Club had occupied the arch – whether as a tenant at will (with no right to compensation); as a tenant with a 20-year lease of the site;; or alternatively as a tenant with an annual periodic tenancy with 1954 Act rights.

## PROPRIETARY ESTOPPEL

Smoke Club argued that at a November 2008 meeting between all the parties, a binding agreement had been made, that Smoke Club would be granted a lease of the site for a term of at least 20 years at a rent not exceeding £50,000 pa. On the faith of that agreement, with the knowledge of the landlord and head tenant, Smoke Club spent in excess of £1.2 million fitting out and improving the premises, and then opened Cable nightclub towards the end of May 2009. This, Smoke Club claimed, gave rise to a proprietary estoppel or constructive trust, entitling it to a lease of the arch for a term of 20 years or more from the date of occupation.

On the facts, the Tribunal found that only an agreement in principle had been made at the November 2008 meeting. Whilst all parties recognised that a formal lease would in due course be prepared and executed, the length and commencement of the term of years was not agreed, nor was the rent to be paid, nor the basis of the rent review, nor even the grantor of the lease. The Tribunal was clear that an agreement in principle to grant a lease is not sufficient for proprietary estoppel or a constructive trust to arise. There was also the fact that the freeholder's representative at the 2008 meeting did not have authority to commit the freeholder to a long lease of the arch.

## PERIODIC TENANCY

Although the Tribunal was not convinced by Smoke Club's proprietary estoppel/constructive trust argument, it did take account of the fact that none of the parties had expressed any objection in principle to the creation of a periodic tenancy, even with 1954 Act rights, pending the grant of a long lease. Smoke Club had also expressly rejected the possibility of occupying the arch as a tenant at will during that interim period, refusing to pay rent other than as a "tenant", without any objection.

The Tribunal therefore found that an annual periodic tenancy could be inferred as opposed to a tenancy at will, which typically arises where a tenant is occupying premises during negotiations for the grant of a lease of those premises.

## WHAT DOES THIS MEAN?

The Tribunal emphasised that the question of whether a periodic tenancy exists, as opposed to a tenancy at will, is a question of fact. The facts in this case were unusual – none of the parties had any objection in principle to a periodic tenancy (with security of tenure) at the time of negotiations, and the tenants clearly expressed that they were not content to occupy the arch on the basis of a tenancy at will, pending completion of the intended lease.

However, disputes about periodic tenancies are common, and the facts are not always as clear-cut as this case. Indeed, the Tribunal's reference to the significance of the facts of this particular case show the importance of parties clearly documenting their intentions and interests at an early stage, ideally before the tenant occupies the premises.

If you want to discuss how this case impacts your tenancy agreements, contact me at [Rebecca.Campbell@bclplaw.com](mailto:Rebecca.Campbell@bclplaw.com).

Naomi Hoggett, Trainee Solicitor, assisted with the publication of this blog,

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