

## Case Round Up

Lien Tran and Paul Tonkin summarise recent case law

### ***No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2016] EWHC 2438 Ch***

High Court considers when landlords can reasonably refuse consent

The High Court has ruled that a landlord unreasonably withheld consent to assign under the Landlord and Tenant Act 1988, even though only one of its three reasons for withholding consent was unreasonable. The tenant, East Tower Apartments, held long residential leases of 42 apartments at No.1 West India Quay. The tenant wished to assign a number of its leases and sought the landlord's consent to assign. The leases expressly stated that consent was not to be unreasonably withheld.

The landlord imposed several conditions of granting consent, which the tenant argued were unreasonable. Ultimately, it refused consent to assign on the basis that the tenant:

1. challenged the landlord's request for the proposed assignees' bank references and refused to provide them;
2. challenged the landlord's request to inspect the property and refused to pay the associated fees; and
3. refused to give an undertaking of £1,600 plus VAT for the landlord's costs.

The High Court held that the landlord's first two grounds were reasonable. The landlord was entitled to require bank references of the proposed assignees to assess their covenant strength and ensure that they would be able to perform their obligations under the leases. Inspecting the premises at a cost of £350 plus VAT was also a reasonable request, as the landlord is entitled to assess whether any covenants have been breached.

However, the landlord's third reason was held to be unreasonable and in fact vitiated the other two good reasons. Citing the Upper Tribunal decision of *Proxima GR Properties Ltd v Dr Thomas D McGhee [2014] UKUT 0059 (LC)*, the Court stated that the consent provision "may not be used as a source of profit for landlords or their managing agents". On the facts of this case, a reasonable figure for landlord's costs would have been £350 plus VAT. The requirement for the tenant to pay £1,600 plus VAT for the landlord's costs was therefore unreasonable.

The Court considered that the landlord's decision to grant consent turned on the tenant giving the undertaking for costs, and consent would have still been refused even if the first two conditions had been satisfied. The overall conclusion was therefore that the landlord's refusal of consent was unreasonable.

***Francia Properties Ltd v Aristou [2016]***  
***(unreported)***

**Landlord's right to develop not incompatible with Right To Manage company's management obligations**

A landlord sought to extend its freehold property by building a new flat on the top floor. The property was managed by a Right to Manage (RTM) company, who objected to the development plans on the basis that it had acquired the landlord's management functions under section 96(2) of the Commonhold and Leasehold Reform Act 2002. Under section 97(2) of the Act, landlords are not entitled to do anything which the RTM company is "required or empowered" to do. As the RTM company's management obligations included maintaining and repairing the roof, it argued that the landlord's development would prevent it from carrying out these functions. The tenants of the top floor also objected to the proposed works on the grounds that the resulting loss of light would amount to a breach of quiet enjoyment.

The Court held that the RTM company's acquisition of the right to manage did not in itself prohibit the landlord from redeveloping the property. Although the RTM company was obliged to maintain the roof, it was not "required or empowered" to carry out any development as part of its management functions. Furthermore, there was little evidence that Parliament had intended the Act to restrict a landlord's right to develop. The Court concluded that the landlord could carry out its development works, as long as it took all reasonable steps to minimise the disturbance to the RTM company's management functions.

The Court further ruled that the loss of light to the top floor tenants' flat would not render it substantially or materially less fit for purpose. The landlord's development would therefore not constitute a breach of the covenant for quiet enjoyment or derogation from grant.

***Nemcova v Fairfield Rents Ltd [2016]***  
***UKUT 303 (LC)***

**Tenant's use of flat for 'airbnb' lettings breached user covenant**

A tenant owned a long lease of a flat in Enfield. The lease contained a covenant not to use the demised premises for any purpose other than as a private residence. However, the tenant granted several short-term lettings of her flat after advertising it online using "airbnb". The landlord sought a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 that the tenant had breached the user covenant in her lease.

The Upper Tribunal (Lands Chamber) agreed with the landlord's submission that the tenant had breached the user covenant. The Upper Tribunal reasoned that the lease required the tenant to use the premises as a "private residence", which did not necessarily have to be her own private residence. However, for an occupier to be using it as a private residence, there must be a degree of permanence. The fact that the short-term lettings were for days and weeks, rather than months, was material. As the occupation was transient, the short-term occupiers would not have considered the flat as their private residence even for the time they were there. The Upper Tribunal made clear that each case depends on its specific facts, but in this case the very short duration of the lettings meant that the tenant had breached the lease's user covenant.

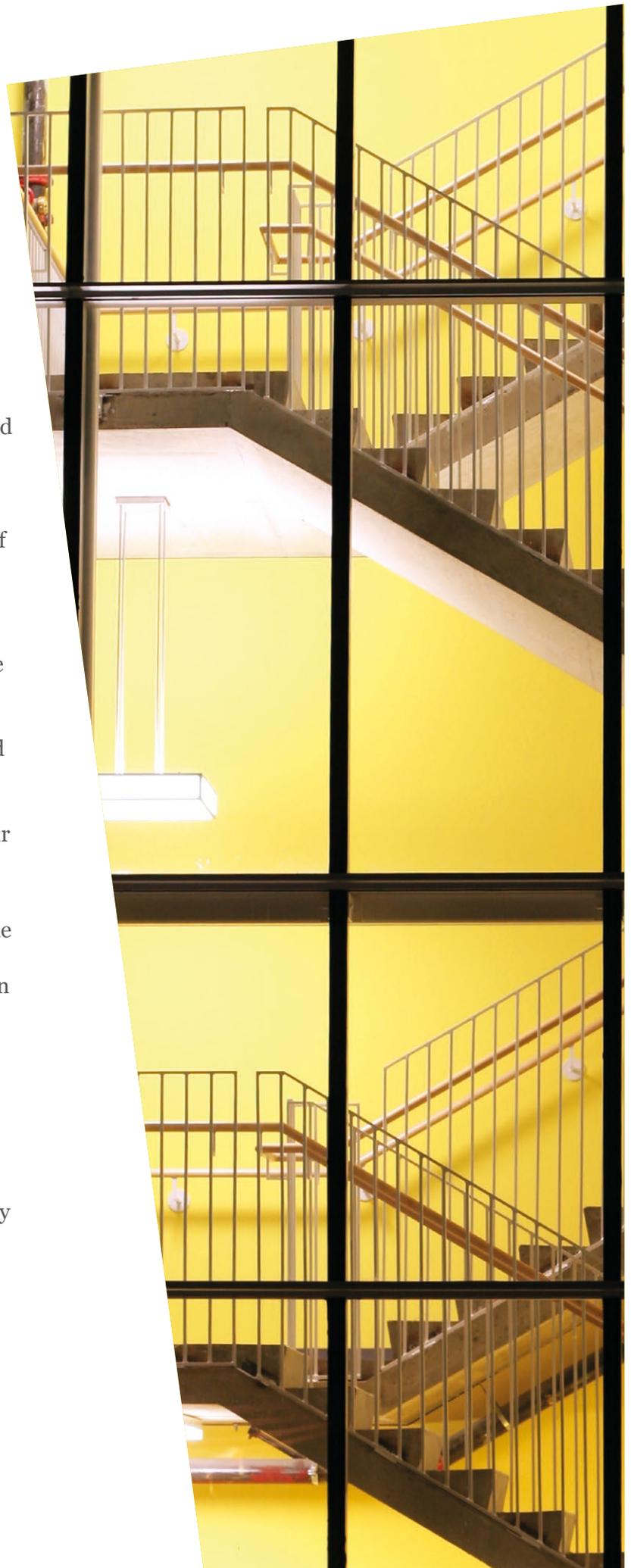
### ***Trevallion v Watmore [2016]*** **(REF/2015/0295)**

#### **Buyer bound by lease that would have been revealed by a reasonably careful inspection of premises**

The First-Tier Tribunal held that a buyer purchased a property subject to her neighbour's overriding interest, despite having no actual knowledge of the interest at the time of purchase. Although the neighbour's occupation was not visible from a brief look at the property, it would have been obvious had the buyer undertaken a reasonably careful inspection of the boundaries.

In 2013, Watmore (W) purchased a property in the Isle of Wight, which included a triangular piece of land in the corner of the freehold title. Trevallion (T) owned the freehold property next door and had been granted a long lease of the triangle of land in 1954 and had been using it for storage for many years. In December 2013, T applied to register their lease. W objected to the application on the basis that she had not been aware of T's interest.

The First-Tier Tribunal held that T's lease overrode the first registration of W's property. Under paragraph 2 of Schedule 3 to the Land Registration Act 2002, an interest will attract overriding status if either the buyer had actual knowledge of the occupation or it would have been obvious on a reasonably careful inspection of the land. It was accepted that W did not have actual knowledge of T's occupation of the disputed triangle at the time of purchase, as the land was obscured by a large bush. However, if she had undertaken a reasonably careful inspection of the garden, she would have looked behind the bush concealing the triangular land and discovered that T used it for storage. A reasonably careful inspection of the property, rather than a quick look, would at least involve inspecting the boundaries. T's application was granted and W was bound by the lease.



## ***Publity AG v Chesterhill Properties Ltd [2016] EWHC 1994 (Ch)***

### **No clear acceptance of landlord's offer results in no binding tenancy**

Chesterhill was the landlord of a property in Mayfair. Publity wanted to rent the property and the parties entered into negotiations for a tenancy agreement. They agreed that Chesterhill would undertake various works to the property, Publity would pay a £52,000 deposit and the term commencement date would be 14 January 2016.

The first version of the tenancy agreement stated that the term would begin on the date originally agreed. It was signed by the landlord. However, the tenant was not granted access to the property on this date. As a result, the parties later created another version of the tenancy agreement which stated that the commencement date was 1 February 2016.

This second version was signed by the tenant and the landlord's agent. The following week, a senior officer of the tenant printed off a further copy of the original tenancy agreement with the 14 January commencement date. The senior officer signed the document and sent it to the landlord.

The tenant claimed a declaration that a tenancy had been agreed. The landlord claimed that the parties had not entered into a binding agreement. The landlord further argued that it was entitled to keep the £52,000 deposit as it was in fact payment to undertake works to the property.

The Court held that the parties had not entered into a binding contract. The second version of the tenancy agreement (with the 1 February 2016 commencement date) constituted a counter-offer by the tenant and rejection of the landlord's original offer. The tenant could not accept the landlord's original offer by signing the first version of the agreement (with the 14 January 2016 commencement date) after it had lapsed. Although the counter-offer appeared to have been signed by both parties, it was not clear that the landlord's agent had authority to sign the amended contract on the landlord's behalf. No tenancy agreement had been completed.

However, the Court ordered that the £52,000 deposit should be returned to the tenant. It concluded that the parties had agreed that the money was to be paid as a deposit, not as payment under a side agreement for the landlord to carry out works.

***23 Dollis Avenue (1998) Limited v Vejdani [2016] UKUT 365***

**Statutory consultation not required for on account payments of future service charge**

The appellant (D) was the management company of a house which had been converted into four flats, which were let to the respondent tenants (V). D had served a demand on V for £10,200 in respect of sums to be paid on account for works to be carried out at the property during the following year. V claimed that D had failed to comply with its statutory consultation requirements under section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultations Requirements) (England) Regulations 2003.

The First-Tier Tribunal held that D's estimated costs of the works had not been sufficiently detailed, which invalidated the section 20 notice procedure. The tenants were therefore only liable to contribute £250 each towards the works.

On appeal, the Upper Tribunal held that the £250 limit is only applicable to costs incurred by the landlord in carrying out works, rather than in respect of sums payable on account of works to be carried out in the future. Therefore the statutory consultation requirements do not apply where sums in excess of £250 are requested on account of future service charge payments for intended works. Such service charge which is payable in advance only has to be reasonable. The landlord's failure to fulfil the consultation requirements may be taken into account in assessing the reasonableness of the service charge sum, but did not in itself prevent the landlord from recovering amounts exceeding £250. It is still necessary for landlords to consult before carrying out any proposed works, as its ability to draw down on the service charge may be challenged if it fails to satisfy the statutory requirements.

***Fairhold Freeholds No. 2 Limited v Moody [2016] UKUT 311 (LC)***

**Landlord unable to recover enforcement costs under indemnity covenant**

Moody (M) was the tenant under a lease which included an obligation to pay ground rent of £100 per year. When M moved out of the flat, he failed to notify the landlord, Fairhold (F), or their agents who collected the ground rent. The agents sent several letters to M's previous address which he did not receive, leaving the ground rent unpaid. When they finally found M's current address, they demanded payment of the ground rent and a further £50 in administration charges for pursuing the arrears.

The lease contained a clause which stated that the tenant would "indemnify the Lessor against all actions, proceedings, costs, claims and demands in respect of any breach non-observance or non-performance thereof." A separate clause gave F the right to recover costs incurred in enforcing the tenant's obligations under the lease.

The Upper Tribunal held that the purpose of the indemnity clause was to protect the landlord against a third party action arising from a breach by the tenant. This liability would only arise if F had been liable to a third party, which was not the case here. The tenant was not liable under the indemnity covenant to pay the landlord's costs where the landlord had taken enforcement action against the tenant itself, particularly as there was a separate clause which dealt with such circumstances. As the administration charges and solicitors' fees arose only as a result of F's instructions, rather than as a result of M's failure to pay the ground rent, the costs were not recoverable under the indemnity covenant.

## ***Secretary of State for Communities and Local Government v South Essex College of Further and Higher Education [2016] PLSCS 249***

### **Tenant failed to exercise break option where vacant possession was not given**

The claimant was the landlord of a commercial property, which it leased to the defendant tenant for a term of 11 years. The tenant had installed non-structural, internal partitioning to create several teaching areas and other rooms for use as a college. The lease contained a break option for the tenant to terminate the tenancy in September 2012, provided that there was no outstanding rent and the tenant gave up vacant possession. Although the tenant paid the rent, it failed to return the keys and alarm codes. It also failed to remove the internal partitioning and other chattels from the property, including reception desks, photocopiers and student files. The landlord claimed that the tenant had not given vacant possession, which meant that the break option had not been validly exercised and the lease would continue. The tenant countered that the assets left behind were moveable and did not obstruct the landlord from regaining possession.

The Court held that the tenant had failed to give vacant possession of the property on the break date. The tenant should have complied strictly with the break conditions, which included giving vacant possession of the entire premises. The tenant had not taken positive action to demonstrate to the outside world that it had given up vacant possession, particularly as it had neither communicated that it was giving up possession nor arranged a handover meeting with the landlord. The failure to hand over the keys and alarm codes was also particularly relevant in this case, as the landlord did not have its own keys and did not know the codes to access the property. The tenant was deemed to be continuing to make use of the premises after the break date by keeping its items on site. The landlord would have to remove the partitioning and other chattels before it could occupy the premises itself, which amounted to a substantial interference with a substantial part of the property.



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