A roundup of 2018

Kathryn Copeland reviews the key developments in commercial landlord and tenant law in 2018

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Spotlight on CVAs

This year saw an unprecedented acceleration in the number of high-street retailers and restaurants adopting company voluntary arrangements (CVAs) in the face of challenging retail conditions. House of Fraser, Poundworld, Carpetright, Mothercare, Byron Burgers and New Look, to name but a few, entered into the insolvency process, with others following suit. This marks a departure from previous years in which administration was the favoured insolvency process for retailers.

Although a company's CVA proposal must be approved by 75% in value of its unsecured creditors, many commentators have argued that landlords are prejudiced from the outset, given the valuation mechanism utilised for future rental liabilities. Although arrears accrued are attributed full value in the calculation, unascertained sums such as future rent and dilapidations payments are only attributed a value of £1 for voting purposes.

Once in place, a CVA can allow a tenant to achieve significant reductions in rent payable across their portfolio and even to exit unprofitable premises altogether. Despite this, landlords have continued to approve CVAs, with many proposals far exceeding the 75% approval required from creditors. This appears to be largely down to the unappetising prospect of vacant units and rates liability reverting to landlords. However, some landlords have been able to use the process to their advantage in respect of sought-after premises, utilising the landlord break right often afforded by CVAs to install preferable tenants on more favourable terms.

The increase in CVAs has begun to cause a landlord backlash, most notably with House of Fraser's landlords banding together to oppose the proposed CVA on the grounds of 'unfair prejudice' and 'material irregularity'. The claim ultimately settled out of court,

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CVAs: key facts

- An insolvency procedure under Part I of the Insolvency Act 1986.
- A compromise between a company and its creditors supervised by an insolvency practitioner whereby creditors will agree to accept reduced sums or arrange a payment plan.
- If approved by the necessary majority of creditors, it will bind all unsecured creditors, but will not affect secured creditors (eg mortgagees) or preferential creditors (eg employees).

but gave a strong indication that landlords are not necessarily resigned to accepting the process. Tenants have also begun to react to the rise in CVAs in the market, with Next plc advertising its intention to seek rights to a rent reduction where its stores have neighbouring retailers subject to a CVA.

In June 2018 the British Property Federation issued a press release calling upon the government to conduct an 'urgent review' of CVAs, citing its belief that the process is now being misused. As CVAs continue to be a hot topic, this will be one to watch in 2019.

A new service charge code

In September 2018 the Royal Institution of Chartered Surveyors (RICS) published a professional statement entitled 'Service Charges in Commercial Property (1st Edition)' to update and replace the RICS Code of Practice 'Service Charges in Commercial Property (3rd Edition)' with effect from 1 April 2019.

In upgrading the Code of Practice to a professional statement, RICS has made many of the requirements mandatory obligations for RICS members, rather than simply guidelines as to good practice. For example, RICS members must now issue service charge accounts and budgets to all tenants annually with appropriate explanatory commentary and a service charge apportionment matrix and they must credit interest earned on sums held in the service charge account to the service charge.

While RICS members should generally seek to comply with all the professional guidelines, there may be legal and/or disciplinary consequences for failure to meet the mandatory obligations. This has the potential to be a source of tension between RICS members seeking to comply with their professional duties and their landlord clients, who may not be minded to comply with the move towards transparency and fairness in the application of service charge regimes.

While the professional statement will not override the service charge provisions in existing leases, RICS members are expected to interpret lease terms in accordance with the professional statement, where possible.

Similarly, the professional statement does not go so far as to place a positive obligation on RICS members to include compliant service charge provisions in new leases, but it does include a strong indication that:

> ... negotiating a new lease, or the renewal of an existing lease, provides an ideal opportunity to ensure that modern and flexible best practice service charge clauses are incorporated within the lease.

The professional statement also signposts readers to the City of London Law Society service charge provisions, which are RICS Code compliant.

Solicitors may therefore see an increase in requests from both surveyors and tenants for service charge provisions which comply with the new professional statement going forwards.

Electronic Communications Code overhaul

The new Electronic Communications Code came into force on 28 December 2017 and can be found in ss106-119 and Sch 3A of the Communications Act 2003 (as amended by the Digital Economy Act 2017). Transitional provisions apply to existing agreements entered into pursuant to the previous code.

Under the new code, only the occupier of land for the time being can grant 'code rights', but successors in title and those deriving title from the occupier will be bound. Landlords not in occupation will not be bound by agreements entered into pursuant to the new code, unless they expressly agree to be bound. In practice, this means that a well-advised tenant will always seek to join their landlord in as a party to a wayleave agreement.

If a landowner/occupier will not consent to an agreement under the new code, the telecoms operator can apply to the court to impose an agreement. Pursuant to one of the first judgments released in respect of the new code, *Cornerstone Telecommunications Infrastructure Ltd (CTIL) v University of London* [2018], telecoms operators can also apply to the court to impose interim rights allowing the operator to inspect and survey potential sites for apparatus, without making a formal application for a permanent agreement.

The new code is generally considered to be more favourable to telecoms operators and is more prescriptive in its

What are 'code rights'?

'Code rights' are rights granted to operators to install, maintain and repair telecommunications apparatus, such as masts or cabling, on private land in order to operate their networks.

'Operators' are electronic communications operators who are approved by Ofcom (the telecommunications regulator) to benefit from code rights.

application. The parties cannot contract out of the new code and attempts to do so will be void. Key provisions to be aware of are as follows:

- **Termination:** agreements under the new code will not benefit from security of tenure pursuant to the Landlord and Tenant Act 1954, but the term will continue under statute until terminated in accordance with the new code. Landowners/occupiers must give not less than 18 months' notice to terminate the agreement and must state which of the grounds for termination they are relying on. The grounds for termination include substantial breach of agreement by the telecoms operator, and the intention of the landowner/occupier to redevelop.

- **Assignment:** telecoms operators can assign an agreement under the new code to another telecoms operator regulated by the new code without consent and free from any conditions (although they can be required to guarantee their immediate assignee).

- **Upgrading/sharing:** telecoms operators can upgrade and share apparatus installed under the new code without landowner/occupier consent, provided that no more than minimal adverse impact is caused to the landowner/occupier. It will therefore be important to include an exact specification of apparatus in any new agreement so that the impact or additional burden of any upgrade or sharing can be more easily assessed.

- **Compensation:** if an agreement is imposed by the court, compensation will be calculated by reference to the market value of the agreement, but the following factors will be disregarded: rights to assign, upgrade and share; the proposed use of the site for an electronic communications network; and any scarcity of sites in the area. This is expected to lead to lower consideration being paid by telecoms operators.

MEES legislation starts to bite

As from 1 April 2018 landlords of non-domestic private rented properties can no longer grant a new lease of a property with an EPC rating of below E, pursuant to the minimum energy efficiency standards (MEES) brought in by the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015.

The Regulations apply to all non-domestic private rented properties, save for properties which are not required to have an EPC, or leases of less than six months (with no renewal rights) or for a term of 99 years or more. A separate regime applies to domestic private rented properties.

If a landlord intends to grant a new lease of a property with an EPC rating of below E, they must:

- carry out the energy efficiency improvement works required to bring the EPC rating of the property up to at least an E;

- show that there are no energy efficiency works which can be made, or that all energy efficiency improvements which can be made have been carried out (and register this exemption); or

- register the property for an exemption under one of the categories listed in Part 4 of the Regulations, which include:

  - the improvements would not pay for themselves in the next seven years;

  - third-party consents are a requirement to the improvement works which cannot be obtained; and

  - the improvement works would result in a reduction of more than 5% in the market value of the property.

The minimum energy efficiency standard may be reviewed upwards in future, with some commentators predicting the threshold will rise to a C rating. From 1 April 2023, the minimum energy efficiency standard will also apply to all existing lettings, as well as the grant of new leases.

To address the new legislation and provide landlords with flexibility should the minimum energy efficiency standard change in the future, leases are likely to increasingly include provisions permitting landlords to enter premises and carry out energy efficiency works, or even placing the onus and cost of such works on the tenant.

Electronic signatures at the Land Registry

In April 2018 the Land Registry announced the registration of the first digitally signed mortgage between Coventry Building Society and Enact Conveyancing for a house in Rotherhithe. The registration forms part of the Land Registry's plans to enable borrowers to securely verify their identity before digitally signing their mortgage deed online in an attempt to speed up and simplify the home buying process. The scheme has not yet been rolled out nationally, and while it does relate to bank-borrower scenarios, rather than the landlord-tenant relationship, it is an initial indicator of the Land Registry's intention to catch up with modern technology.

Until the new scheme is released, and in respect of documents other than mortgages, the Land Registry's position on e-signatures (released in February 2017) remains as follows:

- A document with an e-signature will not be accepted as a dispositionary deed for registration unless it complies with the Land Registration Act 2002 (LRA 2002). While the LRA 2002 sets out a framework for the acknowledgement of e-documents in the future, it relies on secondary legislation to enact the provisions. The Land Registration (Electronic Conveyancing) Rules 2008 were the relevant secondary legislation, but they have now been repealed. Consequently, the Land Registry will not currently accept any e-documents as deeds for registration. This will apply to all leases which are subject to mandatory registration, including leases for a term of more than seven years, the grant of easements and assignments of registered leases.
- The Land Registry will accept simple contracts signed as e-documents for noting on the register. This is on the basis that the noting of simple contracts at the Land Registry only protects the priority of an interest to the extent it is valid. The Land Registry can therefore leave the question of the validity of the document to the court. From a landlord and tenant perspective, this may include agreements for lease and option agreements.

Separately from the Land Registry's new electronic signature scheme, the Law Commission published a consultation paper on electronic execution of commercial documents in August 2018. The consultation paper explicitly does not seek to address registration of electronically signed documents at the Land Registry, but provides an early view that in general commercial contracts:

> ... an electronic signature is capable of meeting a statutory requirement for a signature if an authenticating intention can be demonstrated.

It remains to be seen whether the Land Registry will become reconciled to this view.

Case law developments

This year has seen judgments released for several high-profile cases relating to landlords withholding consent to tenant applications, as well as an examination of clauses seeking to exclude liability for misrepresentation.

***Rotrust Nominees Ltd v Hautford Ltd* [2018]**

The tenant under a long lease of a mixed-use building applied to the landlord for consent to apply for planning permission to change the use of several floors to residential. The user clause in the lease expressly permitted residential use, but the landlord's consent was required for any planning application. The landlord refused consent for the planning application, clearly because it would enhance the tenant's prospects of asserting that the building qualified as a 'house' for enfranchisement purposes under the Leasehold Reform Act 1967.

The High Court held that the refusal was unreasonable and this was upheld by the Court of Appeal. The purpose of the planning covenant was not to enable the landlord to limit the tenant's use of the property, especially when the use was expressly permitted by the user covenant. To attempt to use the clause in this way would subvert the original intention of the parties and secure a collateral advantage for the landlord.

***No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2018]**

The long leaseholder of a number of flats in a residential block sought the landlord's consent to assign, which was not to be unreasonably withheld pursuant to the terms

of the lease. The landlord sought to impose three conditions to its consent. At first instance the High Court found that one of the three conditions was unreasonable, but the other two conditions were reasonable. The High Court judgment concluded that the one unreasonable condition vitiated the two reasonable conditions, meaning the landlord had unreasonably withheld its consent. The Court of Appeal took the opposite view and concluded that one unreasonable condition did not outweigh the two other reasonable conditions, so in the context of the decision as a whole, the landlord had not unreasonably withheld its consent.

***First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018]**

The tenant took a lease of a warehouse and subsequently discovered asbestos in the premises requiring substantial works of remediation. The tenant had raised an enquiry of the landlord prior to entering into the lease regarding breaches of environmental law or environmental problems and the landlord had confirmed it was not aware of any. Prior to completion of the lease, the landlord received a report indicating the presence of asbestos in the premises and an e-mail from a specialist firm advising of health and safety risks arising from the same. It was clear that the landlord had negligently misrepresented the position to the tenant and the tenant had relied on that misrepresentation. However, the lease included the following non-reliance clause:

> The Tenant acknowledges that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the Landlord...

The Court of Appeal held that this clause was expressly attempting to exclude liability for misrepresentation and further that it was an unfair contract term pursuant to the Unfair Contract Terms Act 1977. Of particular importance was the lack of a carve-out from the provision entitling the tenant to rely on replies to pre-contract enquiries, which may have changed the assessment of the reasonableness of the clause.

Cornerstone Telecommunications Infrastructure Ltd (CTIL) v University of London
[2018] UKUT 356 (LC)

First Tower Trustees Ltd & anor v CDS (Superstores International) Ltd
[2018] EWCA Civ 1396

No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd
[2018] EWCA Civ 250

Rotrust Nominees Ltd v Hautford Ltd
[2018] EWCA Civ 765

Next on the agenda

Radical changes are afoot in residential leasehold with the Law Commission including 'Residential Leasehold' and 'Unfair Terms in Residential Leasehold' in its 13th Programme for Law Reform published on 13 December 2017. The biggest development facing commercial leasehold looks to be arising from Brexit. The outcome of the *European Medicines Agency (EMA) v Canary Wharf Group* case, which looks at whether Brexit has frustrated EMA's lease, could have a seismic impact across the market. ■