Commercial property update

Magnus Hassett, **Ed Tennant** and **Ben Brayford** consider recent developments in commercial property law including changes that may free property owners from chancel repair liability and lessons over parking enforcement

Chancel repair liability, as practitioners will be aware, is an ancient rule allowing certain churches to claim the cost of repairing the church chancel from those who own land previously owned by the church. There have been many calls for its abolition but the House of Lords in the 2003 Aston Cantlow case upheld a couple's liability for repair costs of £186,000 (as well as legal costs) and the government has repeatedly confirmed it has no plans to legislate to abolish chancel repair liability.

However, changes to the Land Registration rules in 2003 provided for ten year transitional provisions for certain ancient property rights, including chancel repair liability. After 12 October 2013, these rights – including franchises, manorial rights, crown rents and chancel repair – will cease to be 'overriding interests'. In other words, liabilities that bind the property even if there is no record of the interest at the Land Registry.

Chancel repair liability will therefore lose its status as an overriding interest and will only bind purchasers for value where registered (or noted as a caution against first registration in relation to unregistered land) prior to 13 October 2013. This means that those who purchase land after 12 October 2013, and who register the transfer before the local parochial church council (PCC) attempts to register the liability, will no longer be liable for chancel repair. However, those who continue to own affected land on 13 October 2013 will retain the liability, even if not protected by a notice registered by the local PCC. Once registered, chancel repair liability will last indefinitely.

Guidance circulated by the General Synod of the Church of England encourages PCC's to register any chancel liability of which they are aware. The advice of the General Synod is that the liability is an asset of a PCC and, as charity trustees, the PCC is obliged to act in the charity's best interests by taking reasonable steps to investigate, register and enforce the liability.

It remains to be seen whether political pressure and the potential availability of Heritage Lottery Funding for church repairs leads to PCC's deciding not to pursue registration and/or enforcement of chancel repair liability. In such cases, PCC's are advised to seek Charity Commission advice to ensure that the steps they are taking are reasonable.

Homeowners and practitioners will no doubt follow the unfolding situation in the approach to 13 October 2013 with interest.

Updating lease renewal

The general rule on lease renewals under the Landlord and Tenant Act 1954 is well established - where there is a dispute as to the provisions of a new lease, the presumption is that the terms of the current lease will be preserved. The onus is therefore on the party seeking a change to the previously agreed commercial arrangement to justify why such a departure would be reasonable (see *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726).

The recent case of *Edwards & Walkden (Norfolk) Limited v The Mayor and Commonalty and Citizens of the City of London* [2012] EWHC 24527 (Ch) is an example of the Court allowing a quite significant departure from the provisions of an existing lease.

In this case the tenants of Smithfield Market in London sought new tenancies under the 1954 Act. One of the key points of dispute was whether the rent to be fixed by the Court should be a simple fixed rent which was all-inclusive (including the service charge for each unit), as favoured by

the tenants, or as a rent and variable service charge as proposed by the landlord.

Notwithstanding the terms of the existing leases, the majority of which provided for an all-inclusive rent, the court focused on what would be fair and reasonable and ultimately held that there were good and sufficient reasons to justify the change in the payment structure under the new tenancies. In coming to this conclusion the court took into account the fact that:

- current market practice supported the inference that adoption of a variable service charge in a multi-occupied commercial premises is generally regarded as fair;
- a large element of the running costs related directly to the business carried on by the tenants and as such it was only fair that the tenants should bear the risk of any cost fluctuations;
- the provision of services by the landlord would allow for economies of scale and overall efficiency for the benefit of the tenants; and
- the tenants were better placed than the landlord to manage and control the costs by adapting their behaviour and that of their employees so as to minimise costs.

Each 1954 Act renewal case will of course turn on its facts and the onus will be on the party seeking the change to justify why it would be reasonable. However, solicitors acting for tenants will be left arguing that the Smithfield case was a judgment on its own facts and does not represent a significant departure from the principles stated in *O'May*.

Retail administrations

The timing of two recent retail administrations has once again left landlords irate. On 1 October 2012 (the first working day after the September quarter day), JJB Sports went into administration and finalised a prepack administration to sell 20 stores to rival Sports Direct, with the remaining 133 stores closing with immediate effect. On the same day, Optical Express put into administration a subsidiary which held 83 leases. The following day, Optical Express bought back half of these stores.

The timing of the administrations was no coincidence. The 2009 case *Goldacre (Offices) Limited v Nortel Networks UK Limited* (in administration) [2009] EWHC 3389 held that if a company in administration uses leasehold property for the benefit of its creditors, any rent which falls due during the period of use automatically ranks as an administration expense. If this rent was held to be an administration expense, this would have a significant impact on how the rent was to rank in insolvency terms with a landlord having a much greater chance that this rent would be paid. If the rent was not held to be an administration expense, the landlord's rights to claim for these arrears would only rank as an unsecured creditor.

Following the decision in *Goldacre*, commentators speculated that administrators would look to ensure that the timing of the administration would avoid periods during which any rents would fall due (most commonly the usual rent quarter days). The recent case brought by X Leisure confirmed this possibility, as the High Court held that any rent that falls due before the period of the administration would not be classed as an administration expense. Likewise, administrators are likely to try to ensure that administration comes to an end before any rent payment dates under the leases.

The timings of the administrations of JJB Sports and Optical Express follows that of Game, which fell into administration the day after the rent quarter day in March. Some landlords affected by Game's administrations, British Land, Hammerson and Land Securities, have started a legal challenge against the timings of Game's administration.

Until either such challenges by landlords bear fruit, or the government legislates to end the practice, landlords can expect administrations to commence just after the quarter days and end just before a quarter day, thereby leaving landlords left seeking rent arrears that are unlikely to be paid.

Parking enforcement

It is not uncommon for supermarkets and landlords of out of town retail parks to hand over parking enforcement on their properties to third party operators. The Court of Appeal has recently had to consider a case where problems arose due to the supermarket taking exception to the manner in which the parking company was enforcing those controls more aggressively than the supermarket wanted (*ParkingEye Limited v Somerfield Stores Limited* [2012] EWCA Civ 1338).

The outcome of the case suggests that anyone acting for landlords and supermarkets should advise their clients to look carefully at the controls they are handing over to the parking company in these situations, because it may be a difficult contract to escape from.

In 2005, Somerfield entered into a contact with ParkingEye for the provision of an automated parking control system for some of their supermarket car parks. A customer who stayed too long was liable to pay a fine. ParkingEye received no payment from Somerfield and therefore was completely dependent on recovery of fines for its income. It sent letters to customers who parked longer than allowed. The Court of Appeal found that the letters which ParkingEye sent to the owners of the vehicles were "aggressive" and contained a number of "falsehoods".

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Somerfield terminated the contract early, partly because of the manner in which ParkingEye were seeking to collect fines from their customers who did not pay immediately. When ParkingEye sued it for damages for breach of contract, Somerfield claimed the contract was void for illegality because of the unlawful means ParkingEye used to collect some of the fines. Both the judge at first instance and the Court of Appeal disagreed with Somerfield and said that, on the facts of the case, it would be disproportionate to hold the entire contract as unenforceable. In this case, the objectionable letters sent to extract payment could have been corrected if Somerfield had so required. The illegality was not sufficient to entitle Somerfield to lawfully terminate the contract.

The lesson for anyone handing over control of parking enforcement on their land, such as landlords, managing agents and supermarkets, should be to make sure that they are happy with whatever steps the parking enforcer expects to be able to take when collecting fines.

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