LANDLORD AND TENANT RECENT CASES – A SELECTION

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Moorjani v Durban Estates Ltd [2015] EWCA Civ 1252

1. This was a recent decision of the Court of Appeal in which consideration was given to the approach to be taken to a lessee's claim for damages for disrepair affecting his residential flat in circumstances where he had not occupied the flat for a substantial part of the relevant period of damage, for reasons unconnected with the disrepair.

2. The facts can be summarised as follows. For about 3 years from 2005 until 2008, the lessee did not reside in the flat and was instead living with his sister. A serious leak in the flat above caused damage within the flat. Inadequate repair works were undertaken by the landlord's agent. There was then a further leak and also the common parts of the building were becoming increasingly dilapidated. In 2008, the lessee moved back.

3. The lessee brought a claim against his landlord for damages for (1) breach of insurance and reinstatement obligations in respect of the period after the landlord had

received insurance monies in respect of the leak and (2) breach of the obligation to maintain and repair the common parts.

4. At first instance the county court judge dismissed the claim in respect of reinsurance and reinstatement on the ground that the lessee had not been living in the flat in the relevant period between the 2005 flood and the 2007 repair works. She held that the tenant had not suffered any inconvenience or loss of amenity as result of the breach. She also dismissed the claim for breach of the repairing covenant for the same reason in respect of the period from 2005 to 2008. For the period after the lessee had returned to live at the flat, the judge awarded £1500 for the disrepair to the common parts.

5. The Court of Appeal allowed the appeal, which concerned the issue of whether, as a matter of principle, damages in such a case were to compensate for the impairment of the amenity value of the lessee's proprietary interest in the flat or whether they could only be awarded for discomfort, inconvenience and distress actually suffered as a result of the disrepair.

6. Briggs LJ, with whom King LJ and Longmore LJ agreed, stated five *'tentative conclusions'* which can be summarised as follows:-

   - The loss arising from these types of breaches consists of the impairment to the rights of amenity afforded to the lessee by the lease, of which discomfort, inconvenience and distress are only symptoms. The lessee pays a premium for the assignable right to the enjoyment of occupation of a specific property for a period usually longer than his own lifetime, the quality of which is underpinned by the lessor's repairing and reinstatement obligations.

   - Secondly, it is therefore not fatal to the claim for damages for that impairment that the lessee may not have chosen to make full use of then during the relevant period.

   - Thirdly, it does not follow that the use or non-use of the property during the period of disrepair is irrelevant for all purposes and it could, for example, be relevant to mitigation of loss.

   - Fourthly, mitigation would not be the only principle by reference to which the limited use or non-use during the period of disrepair would be relevant. For

example, Briggs LJ took the view that non-use for reasons unconnected with the disrepair should be regarded as a form of mitigation of loss which reduced the claim in damages – but it would not wholly cancel out the loss constituted by the impairment of amenity, even if the lessee was living elsewhere rent-free.

- Fifthly, the court is entitled to temper the rigour of the rules which seek to implement the compensatory principle in relation to awards of damages where particular circumstances make it just do so. There could be quantification of damages in excess of the current rental value in particular circumstances (eg where health was affected by disrepair). In other cases, the particular circumstances of the lessee could reduce the damages and this could apply not merely where the relevant conduct consists of what may be conventionally described as mitigation.

7. The outcome was that the tenant's non-occupation was not fatal to the claim. He was held to have suffered precisely the same loss as would have been suffered by a lessee who, in comparable circumstances, had remained in the flat, namely a serious although temporary impairment of the rights conferred by the lease.

8. In assessing damages in respect of that loss, the starting point for that valuation ought to be by reference to the rental value of the flat but with a substantial discount to reflect the Judge's conclusion that the disrepair was cosmetic and did not render it uninhabitable and also to reflect the fact that the disrepair of the common parts was not of a particularly severe kind. The damages were then to be further substantially reduced by reference to the fact that the tenant had chosen not to occupy the property for most of the relevant period, so that the effect upon him was very much less than it would have been upon a lessee who had remained in occupation. The reduction which was applied in respect of this adjustment was one half.

Arnold v Britton & Others **[2015] UKSC 36**

1. This is an important decision of the Supreme Court in relation to service charges, focusing upon the court's approach to interpretation and the extent to which the court may consider "commercial common sense" and broader considerations in relation to the meaning of a contractual term,

2. The facts concerned the grant of a number of leases of holiday chalets to be built on a holiday park. The leases were granted from 1974 and were all for terms of 99 years.

3. Under the terms of each lease the landlord had agreed to provide various services, in respect of which the landlord could recover a fixed fee. The service charge was to be £90 for the first year of the term with an uplift of 10% per annum for the remainder of the terms. For example, one of the clauses was as follows:-

> "To pay the Lessor without any deduction in addition to the said rent as a proportionate part of the expenses and outgoings incurred by the Lessors in the repair and maintenance and renewal of the facilities of the Estate and the provision of services hereinafter set out the yearly sum of Ninety pounds and Value Added Tax (if any) for the first year of the term hereby granted increasing thereafter by ten pounds per hundred for every subsequent part thereof"

4. On a mathematical analysis, the tenant could therefore be required to pay over £500,000 in service charges by the end of the term.

5. Lord Neuberger gave the leading judgment. He emphasised that the following factors should be considered when presented with a case of "commercial absurdity":

   (1) Commercial common sense and surrounding circumstances should not undervalue the importance of the language used;

   (2) The clearer the natural meaning of the words used, the less readily they should be departed from;

   (3) Commercial common sense should not be imputed on a term retrospectively;

   (4) Although commercial common sense should be considered, courts should be very slow to move away from the natural meaning of words just because they appear unfavourable;

(5) Only facts known to both parties at the time of the contract are relevant;

(6) Service charge provisions do not have their own special rules of interpretation.

6. Applying these principles, Lord Neuberger adopted a holistic approach and found that the clarity of the drafting and the rationale for the commercial decisions made at the time of the drafting meant that the clause should be given its natural meaning and there should be no interference with this interpretation. This was not a case in which the parties had done something which was not contemplated by the terms of their contract. The 10% increase had been included to allow for a factor, namely inflation, which was out of the control of either party. There was no principle of interpretation which entitled the court to rewrite their contractual provision in relation to this simply because the factor for which the parties catered did not seem to be developing in the way that they had expected.

Tindall Cobham 1 Ltd and others v Adda Hotels and others **[2014] EWCA Civ 1215**

1. This is a case in which the Court of Appeal has provided much needed guidance on the scope and effect of the anti-avoidance provision to be found in section 25 of the Landlord and Tenant (Covenants) Act 1995 ("the 1995 Act"). In particular, section 25 provides that any agreement is void if it would *"exclude, modify or otherwise frustrate the operation of any provision of this Act".*

2. The facts were as follows. The predecessors in title to T had granted to A and P separate leases of 10 hotels. A and P subsequently assigned to 9 subsidiary companies without having first sought landlord's consent. Clause 3.14.6 of the relevant leases provided as follows:-

> "The Tenant shall not assign the Lease to any Associated Company of the Tenant without the prior consent of the Landlord Provided Always that for the purposes of Section 19(1A) of the Landlord and Tenant (Covenants) Act 1995, the Landlord shall be entitled to impose any or all of the following conditions set out in sub clauses (a) and (b) below:
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> (a) that the Tenant shall provide the Landlord with notice of any such assignment within 10 Working Days of completion of the same;
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> (b) that on any such assignment, the Tenant shall procure that the Guarantor and any other guarantor of the Tenant shall covenant by deed with the Landlord in the terms set out in the Sixth Schedule at the Tenant's sole cost
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> and subject to the tenant's compliance with such conditions the Landlords consent shall be given"

3. T issued proceedings for a declaration that the assignment was unlawful, so that under section 11 of the 1995 Act, A and P and also the guarantor, H, were not released from further contractual liabilities.

4. At first instance Peter Smith J held that the assignments were in breach of clause 3.1.4.6 and hence that they were excluded assignments for the purposes of section 11 of the 1995 Act. Consent had to be sought before there could be a lawful assignment and the landlord was entitled to require compliance with clause 3.14(a) and (b).

5. The Court of Appeal dismissed the appeal. However, Patten LJ, giving the leading judgment, held that the first instance judge's interpretation of the clause was incorrect. As a matter of ordinary language, the words "*the guarantor and any other guarantor*

of the tenant" were held to refer to persons at the time of the assignment who are guarantors. The condition imposed on the tenant required a new guarantee from those guarantors. The landlord's construction of the clause was incorrect as it would impose an obligation on the tenant to obtain not only new guarantees but also new guarantors.

6. In relation to section 25 of the 1995 Act, the primary argument was that section 25 did not operate to invalidate clause 3.14.6 or sub-section (b) but that it prevented the landlords from exercising their contractual rights to impose condition (b) as a condition for consent to assignment. It was submitted that it was only when a landlord chose to exercise its option to insist on condition (b) that section 25 would come into effect. It was also argued, as an alternative, that if the effect of section 25 was to invalidate clause 3.1.4(b) then the remainder of the clause would remain, in effect to allow the tenant to avoid compliance with it. As a result, the only condition that the tenant would have to fulfil would be to notify the landlord of the assignment.

7. The Court of Appeal dismissed these arguments. Patten LJ considered that section 25(1) concerns the invalidation of *agreements* which would have the section 25(1)(a) consequences. It is not limited to applying upon the *exercise of the rights* which such agreements contained.

8. In considering the extent to which clause 3.14.6 should be invalidated, Patten LJ noted the reference in section 25 to the words "*void to the extent*" and found that the intention of the 1995 Act was to invalidate only that which was necessary to protect the objectives of the 1995 Act. However, this would not preclude the court from taking a balanced approach to invalidation which, which whilst invalidating the offending part of the contract, would not leave it emasculated and unworkable. Applying the structure of the agreement in an objective and common sense way, Patten LJ declared that the correct approach in this case was to treat the whole of the proviso as being avoided by the legislation.

***Youssefi v Musselwhite/Horne & Meredith Properties v Cox and Billingsley* [2014] EWCA Civ 423**

1. Ground 30(1)(c) of the Landlord and Tenant Act 1954 ("the 1954 Act") has rarely received much attention or scrutiny in the decided cases but these two recent cases have produced useful guidance on the application of this ground.

2. The facts in the *Yousssefi* case were as follows. The tenant held a 15 year lease of premises comprising a dwelling house, shop and garden. The repairing covenants in the lease had been the subject of a number of breaches. There had also been late payments of rent and various other breaches of the lease. The tenant served notice under section 26 of the 1954 Act requesting a new tenancy and the landlord served a notice opposing this request and applied under section 29(2) of the 1954 Act for the tenancy to be terminated without the grant of a new tenancy.

3. The statutory grounds of opposition under section 30(1)(a), (b) and (c) apply in the following circumstances:-

> "(a)where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations;
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> (b) that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due;
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> (c) that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding."

4. The first instance judge in the *Youssefi* case held that the tenancy should be terminated on the basis of the grounds appearing in section 30(1)(a) and (c) but that the ground in section 30(1)(b) was not made out.

5. The appeal was allowed in part.

6. In relation to ground (a), the court had to consider whether a new tenancy *"ought not to be granted"*, focusing entirely on the state of repair of the property due to the

failure to repair. The court held that unrestricted plant growth on the rear wall of the property was not a breach of the express repairing obligation because this only applied to the interior of the premises. Nor was there a breach of the implied covenant to use the premises in a tenant like manner. Nor would any breach have been substantial. It was in fact the landlord who was liable under the covenants to keep the exterior in tenantable repair and condition. Ground (a) was therefore not applicable.

7. In relation to ground (c), the judge was entitled to focus not only on *"other substantial breaches"* but also on "*any other reason connected with the tenant's use or management of the holding"*. There had been many attempts to gain access. Furthermore, there had been a substantial breaches of the user covenant in the lease. The fact that the tenant had not attempted to start a business or demonstrated any intention of doing so meant that the judge was able to conclude that the breach of the user covenant was prejudicial to the landlord's legitimate interests and therefore substantial.

8. In the *Cox* case, Lewison LJ considered the effect, for the purposes of ground (c), of the fact that the tenant had initiated no less than ten sets of proceedings. This frequent litigation over 16 years had involved disputes in which the tenant had claimed obstructions of a right of way. The judge at first instance had referred to there being "*very spurious or exaggerated legal infringements*". The cost of such proceedings had also been very substantial indeed, amounting to £300,000 in relation to one set of proceedings. Lewison LJ considered the effect of this on relationship between the parties and held that it had irretrievably broken down and that it would not be fair to compel the landlord to grant a new tenancy.

9. Thus, in both cases, the court found that it would not be fair on the landlord if a new tenancy was granted and therefore the tenancy was terminated without the grant of a new tenancy on ground (c).