



QuarterDay

Issue 82

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Rent review: the landlord could review the rent after a 13 year delay

Summary and implications

The High Court has held that a delay of 13 years in implementing a rent review did not prevent a landlord from triggering the review.¹

- The long-standing principle that time is not generally of the essence in rent review clauses has been reinforced.
- Landlords will be comforted in that, if they overlook a rent review, triggering it late will not mean that they lose the right to an increase.

Ask a question

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¹ *Idealview Ltd v Bello* [2010] 04 EG 118

The rent rose from £60 to £1,700 per year

In 1969, premises in Wandsworth had been let on a 50 year lease at a rent of £60 per year. The lease contained a rent review in March 1994. If the new rent was not agreed by December 1993 the issue could be referred to arbitration. The clause did not set any end limit.

The review provision stated that, in the event of a late review, the existing rent would continue to be payable and any uplift would become payable on the first quarter day after the determination of the review.

Bello bought the premises in July 2005. The terms of the sale excluded the seller's liability for arrears of rent above £60 per year. The review had not been triggered when Idealview bought the reversion in March 2006.

Idealview subsequently started the rent review process and the matter was referred to arbitration. In August 2007 an award was obtained, which increased the rent substantially to £1,700 per year.

Idealview issued proceedings for possession

Idealview claimed the increased rent from March 1994. Bello failed to pay and Idealview issued proceeding for possession based on rent arrears.

Bello's arguments: it was too late to trigger the review

Bello argued that:

- Idealview could not bring an action for rent arrears if more than six years had passed since the date the arrears became due.²
- Idealview were too late to trigger the rent review clause because time was impliedly of the essence of the rent review clause.
- Idealview's delay was sufficiently gross and unconscionable and signalled abandonment by Idealview of its right to a rent review.

² Section 19, Limitation Act 1980: "No action shall be brought ... to recover arrears of rent, or damages in respect of arrears of rent, after the expiration of six years from the date on which the arrears fell due."

The Judge found in favour of Idealview

The court held that:

- The claim was not statute barred as the top up amount did not become due until 29 September 2007 (the first quarter day after the determination).
- If time is not of the essence, delay will not prevent rent review being triggered. **If time is not of the essence, delay will not prevent the rent review being triggered**
- The rent review clause did not make time of the essence.
- Bello had failed to prove the elements of estoppel.
- Delay on its own cannot prevent a landlord from implementing a rent review.
- Any prejudice resulting from the fact that Bello had to pay rent backdated to a period before it became the tenant was largely of its own making: it should have sought legal advice prior to purchase.

Implications: important warnings for tenants and assignees

This case contains some important warnings for tenants in particular.

There are a number of issues which should be considered:

- If a tenant wants to complain about the fact that the landlord has delayed in implementing a rent review, the tenant should raise these issues with the arbitrator. The tenant should not wait to raise them by way of a defence to any claim for increased rent made by the landlord.
- If a tenant wants to bring a rent review to a head, he should serve notice on the landlord making time of the essence and requiring the landlord to conduct the rent review within a reasonable time.
- An assignee of a lease should ask for evidence of the outcome of any rent reviews which should have been completed before the assignment. An assignee should also make sure the contract contains provisions for the assignor to contribute to the top-up payment when the rent review is eventually agreed.

For landlords buying reversions, this case confirms that they can initiate historic rent reviews where the lease allows. But, they must ask the seller about any communication with the tenant which may amount to a representation that the rent review would not be implemented.

Time of the essence

There is a presumption that time is not of the essence in a rent review clause (*United Scientific Holdings Limited v Burnley Borough Council* [1978] A.C. 904).

There are some exceptions to that presumption, where:

1. The clause expressly provides that time is of the essence.
2. The clause states the consequence of failure to comply with a time stipulation.
3. Time becomes of the essence because of the relationship between the rent review clause and the break clause, or other provision in the lease.
4. Time is made of the essence by a notice.
5. The structure of the clause demonstrates an intention that time is of the essence.

Professional negligence: solicitors' advice should not be too bullish

Summary and implications

The Court of Appeal recently reminded both solicitors and clients about the standard of care a client is entitled to expect from its legal advisers.¹ The case also confirms the presumption that the client will rely on legal advice given by its solicitor. This may make it easier for a client to establish loss if the advice is later proved to be incorrect.

Advisers and clients should note that:

- Clients who want robust early advice on the merits of a complex claim must appreciate the need for their solicitor to undertake significant analysis to reach a proper view.
- Any change in that advice or in relation to the prospects of success of an action must be justified by the solicitor and properly explained to the client.
- Solicitors must properly document a client's reasons for refusing a settlement offer and/or proceeding to court or arbitration.
- Both solicitor and client will benefit from advice that is clear and unambiguous, and steps should be taken to iron-out any misunderstandings.

The advice was given by a top City firm of solicitors

The case involved a claim of professional negligence against a "Magic Circle" law firm.

It was held by the Court of Appeal that:

- The law firm gave advice to its client which was too optimistic and negligent.
- This caused the client to refuse what turned out to be a favourable settlement offer and begin an expensive arbitration.

The case turned on the meaning of a telecoms agreement

Levicom operated a media and telecommunications business in the Baltic States. It wanted to generate cash to expand its operations. In 1996, it sold shares in its Estonian cellular business to the Swedish companies NetCom and Tele2.

In order to protect its home market, Levicom entered into two shareholders' agreements with the Swedish companies which restricted their ability to operate in the Baltic States.

Tele2 subsequently bought an interest in Baltkom, a Latvian mobile phone network. Levicom found out about this and complained that Tele2 was in breach of the shareholders' agreement. The parties began

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¹ *Levicom v Linklaters* [2010] EWCA Civ 494

“without prejudice” correspondence. Tele2 accepted that there had been a breach of the agreement and offered \$US27m in settlement. Levicom sought advice from solicitors on its position and on the offer of settlement.

The legal advice was very positive and Levicom went to arbitration

The advice was that:

- There had been a “clear” breach of the shareholders’ agreement and the prospects of success were “in the region of, but not less than 70%”.
- Levicom was “on strong ground” in any negotiations and should take a “hard line”.
- Damages could be “substantial”.

Based on this advice, Levicom rejected the settlement proposals and began arbitration proceedings. It subsequently became apparent that, even if they succeeded in establishing a breach, the damages payable would be insignificant.

As a result, Levicom settled the dispute on less favourable terms than they could, and would, have agreed if they had settled earlier and they incurred further costs. Levicom brought a claim.

High Court decision: Levicom were only awarded £5 damages

The judge found that, although some aspects of the advice were negligent, this was academic. Levicom could not show that they would have acted differently if they had received proper advice. In other words, Levicom could not show that the negligent advice had caused their loss.

The High Court only awarded Levicom nominal damages of £5.

Levicom was granted permission to appeal

The Court of Appeal took a very different approach and made the following comments:

- Solicitors have a duty to give realistic advice on the prospects of success and the commercial value of a claim.
- The advice on the remedies and quantum was “striking” in its “bullish nature” and lacking in “any significant analysis or discussion of the issues”.
- As a result of the negligent advice, Levicom lost the chance to settle the dispute at an early stage on favourable terms and began expensive arbitration proceedings. If Levicom had been properly advised, they would have settled earlier and saved a substantial amount in costs.
- There is a presumption that, where a party seeks legal advice and pays handsomely for it, the party will rely on that advice.

Levicom would not have sought the advice of a Magic Circle firm if it did not consider such advice to be crucial

Developers must check carefully for restrictive covenants

Summary and implications

Developers must ensure that they check carefully and take legal advice when buying land which has the benefit of restrictive covenants.

A developer was recently forced to take legal action to prove that restrictive covenants affecting the land it owned were no longer enforceable.¹

The covenants prevented the land being used as a road or right of way without consent. If enforceable, the covenants would have stopped the developer fully implementing his scheme.

The case is a useful reminder that:

- When buying freehold property, the buyer must check whether any valid restrictive covenants apply to the land.
- Restrictive covenants can be either personal or enforceable by successors in title, depending on how they are drafted.
- The benefit of a restrictive covenant can only pass to successors in title in certain limited situations (see text box below for more information).

The restrictive covenants would have prevented the developer carrying out its plans

Seymour Road Ltd (a development company) bought a plot of land in Southampton. The land had once been owned by the County of Hants Land and Building Society. The building society ceased to exist in 1929.

When the building society sold the land in 1896, the original buyer covenanted with the seller and its “successors and assigns” that the site would only be used as “a private dwelling house” and not as a road, without the seller’s consent. The covenants also reserved the right for the building society to modify the covenants.

The covenants would have prevented the developer carrying out his scheme

The site was landlocked and the developer needed to build an access road

The site was landlocked by the gardens of various residential properties. It was originally intended to be tennis courts, but had never been developed. Seymour Road obtained planning permission for five houses to be built on the site.

In order to carry out the development, Seymour Road needed to build an access road on an adjacent piece of land, which it also owned.

Ask a question

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¹ *Seymour Road (Southampton) Ltd v Robin Williams and others* [2010] EWHC 111(Ch)

The owners of neighbouring properties objected to the construction of the access road, claiming that the restrictive covenants applied to the site. The neighbours alleged that they were entitled to enforce the restrictive covenants against the developer.

The developer went to court for a declaration that the restrictive covenants were no longer enforceable.

The court agreed with the developer: the covenants could not be enforced

The developer argued that the covenants were in favour of the original seller only. As the seller had ceased to exist, the covenants could not be enforced.

The court held that the covenants were not enforceable, for the following reasons:

- The covenants were intended to apply only whilst the building society owned land in the area.
- As the building society had, in fact, ceased to exist, it could not own any land which could have the benefit of the covenants.
- The use of the word “successors” in the covenant was intended to cover the situation where the building society sold part of the land to a third party, which would then have the benefit of the covenant but only until the building society had sold the remainder of its land.

However, the judge said that, if the covenants had been enforceable by the neighbours, the construction of the access road would have been a breach. This would have left the developer with a landlocked site and no means of access, trying to do a deal with the neighbours.

Restrictive covenants: a reminder

- A restrictive covenant is an agreement in a deed that one party will restrict the use of its freehold land for the benefit of somebody else’s land.
- A restrictive covenant is negative in nature, i.e. it restricts the use and enjoyment of land.
- If a covenant is positive in nature (i.e. it obliges somebody to take action or pay money), it is not a restrictive covenant and cannot bind successors in title.
- Restrictive covenants are enforceable between the original parties as a matter of contract law.
- They can also be enforceable by successors in title if (1) the covenant “touches and concerns” the land owned by the person seeking to enforce the covenant, (2) the benefit of the covenant has been passed to a successor in title by annexation (this can occur by statute or by the wording used in the document), assignment or a building scheme and (3) the land to which the covenant relates is clearly identified in the covenant.

Break clauses: a tenant cannot exercise a personal break right after assigning its lease

Summary and implications

In the absence of explicit wording, a personal break right granted under a lease (or by way of a licence) is not exercisable by the tenant once it has assigned the lease. This applies even if the tenant subsequently takes a re-assignment.

A recent Court of Appeal decision¹ confirmed that similar break clauses in commercial leases should be construed in the same way, despite minor differences in wording, unless the clause was obviously intended to achieve a different objective.

- The courts will try to interpret break clauses in a uniform way. This will help to give certainty to property professionals who have to advise clients about the meaning and effect of break clauses.
- Personal break rights are only exercisable until the tenant assigns, unless the clause explicitly states otherwise.
- Where a tenant wishes to retain a personal right to break the lease, it should choose to underlet instead of assigning.

99 year leases at a rack rent, with no contractual right to break

The background to this case concerned two commercial leases of units on an industrial estate in Southend-on-Sea. The leases were particularly onerous as they required the tenant to pay a rack rent over a 99 year term, with no contractual right for the tenant to break the lease.

The original tenant assigned the leases to Linpac Mouldings Limited in 1986. The original tenant was discharged from all liability under the leases in exchange for a covenant from Linpac to observe and perform the tenant's covenants during the remainder of the term.

The licences to assign granted a right for “the Assignee (meaning Linpac Mouldings Ltd only)” to determine the leases on 1 December 2010 on 18 months’ notice. The break right was subject to vacant possession being given and the “Assignee” having paid the rent and materially performed and observed the tenant’s covenants.

There was only one chance for the tenant to break the lease

Subsequent assignments of the leases

Linpac assigned the leases to an associated company, which later went into administration. The landlord refused consent to an assignment back to Linpac, on the basis that, if it granted consent, there was a risk that

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¹ *Linpac Mouldings Ltd and others v Aviva Life and Pensions UK Ltd (formerly known as Norwich Union Life and Pensions) [2010] EWCA Civ 395*

Linpac would try to determine the leases by operating its personal break right.

Despite the refusal of consent, the tenant executed a transfer of the leases back to Linpac and Linpac served notices on the same day. The notices sought to determine the leases pursuant to the break right under the 1986 licences to assign. Linpac was only the beneficial owner of the leases at that date, as the transfer had not been registered at the Land Registry.

The High Court held that Linpac could not break the leases

The High Court refused to construe the break clauses as permitting Linpac to terminate the leases. Linpac had assigned the leases and it was not the tenant in possession when it served the notices. The court held that Linpac's personal break right did not "revive" upon a future re-assignment.

Linpac appealed: it claimed that the court should look at the commercial sense behind the clause

Linpac appealed, arguing that it could break the leases because the break clauses under the licences to assign did not explicitly state that Linpac could only exercise the right while it remained the tenant in possession.

Linpac tried to differentiate its case from a previous decision.² It argued that a break right granted under a licence should be viewed differently from a break clause under a lease. It claimed that there was commercial sense behind such an interpretation. In 1986, the landlord benefitted from a solvent company covenanting to fulfil the tenant's covenants and pay the rent for the remainder of the term, with certainty of income for at least 25 years before the break date.

² *Max Factor Ltd v Wesleyan Assurance Society* [1996] 2 EGLR 210

The Court of Appeal agreed with the High Court and refused the appeal

The Court of Appeal noted that no reported case had ever interpreted a contractual provision as conferring on a person a right to break a lease at a time when they were neither the landlord nor the tenant.

A break right is usually incidental to the relationship of landlord and tenant. On that basis, a provision that a former tenant could bring a lease to an end when the lease is not vested in that tenant would be extraordinary.

Only unambiguous wording could support a contention that a party could break a lease after they have assigned it

There would also be logistical difficulties in obtaining vacant possession, especially if the lease was protected by the Landlord and Tenant Act 1954. The Court of Appeal thought it unlikely that any landlord or assignee of the tenant would accept the uncertainty posed by such a provision.

Only unambiguous wording could support an argument that a person could break a lease after they had assigned it.

Linpac's break clauses applied only as long as Linpac remained the tenant, so the appeal was dismissed. It made no difference that the break rights were contained in licences rather than the leases.

Fraudulent misrepresentation: the court upholds non-reliance clauses in an agreement for lease

Summary and implications

A well drafted non-reliance and entire agreement clause can be particularly important to developers; especially if the scheme does not prove to be as successful as the developer had hoped.

A well drafted non-reliance clause, together with an entire agreement clause, can exclude a landlord from liability for innocent and negligent misrepresentation, but will not protect against fraudulent misrepresentation.

Such a clause, in an agreement for lease, was recently upheld in favour of a landlord.¹ The clause excluded the landlord's liability for innocent and negligent misrepresentations, except for written responses given by its solicitors to enquiries made by the prospective tenants' solicitors.

The court held:

- These clauses are subject to the test of reasonableness in the Unfair Contract Terms Act 1977.
- The duty to correct continuing misrepresentations only arises where the landlord knows that its previous representations have become false or does not care that they have.
- These clauses preserved a claim for fraudulent misrepresentation, although a high burden of proof must be met.

Henry Boot Developments opened a motorway service area and marketed it to potential tenants

In January 2008, Henry Boot opened "Stop 242" at junction 11 of the M20. The service area was conveniently located just two miles from the Channel Tunnel and five miles from Dover.

The marketing material sent out to prospective tenants predicted that the site would be visited by around 88,000 customers a week, and made representations about the extent of signage that would be provided and the facilities that the site would offer.

The service area was not successful and retailers lost money

The reality was somewhat different: the number of customers who visited the site fell well short of the estimate. There were no signs directing traffic to it and live departure information on cross channel services and a coach interchange were not provided.

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¹ *FoodCo UK LLP and others v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch)

The service area was described as a “commercial disaster”. Six retailers sought damages on the basis that the landlord had tricked them into taking leases. They alleged misrepresentations about the extent of motorway signage and on-site facilities, and a “wildly optimistic” forecast of customer numbers.

The service area was a commercial disaster

Henry Boot had not made representations fraudulently and there was no ongoing duty to correct representations

The court found that the representations made by Henry Boot were true when they were made, or were not fraudulently made. Henry Boot had reasonable grounds for making them, or had an honest belief that they were true.

The court held that Henry Boot did have a duty to correct representations it had made. The duty only extended to the extent that Henry Boot knew that its previous representations had become false, or did not care that they had.

It had not occurred to Henry Boot that it was unreasonable to continue to rely on its marketing material and therefore no duty to correct its representations arose.

Although Henry Boot saw off the challenges mounted by six of its tenants, it still incurred significant expenditure acquiring and developing a site which is valued at a considerable loss.

Types of Misrepresentation

Innocent Misrepresentation

- Innocent misrepresentation describes a situation where the person making the statement can show he had reasonable grounds to believe his statement was true.

Negligent Misrepresentation

- Negligent misrepresentation describes a statement which is made carelessly or without reasonable grounds for believing its truth.
- The test is objective.
- There is no requirement to establish fraud.
- If the person relying on the statement proves it to be false, it is for the person making the statement to establish he reasonably believed the statement to be true.

Fraudulent Misrepresentation

- Fraudulent misrepresentation occurs when a false statement is made knowingly, or without a belief that it is true or recklessly as to its truth.
- There is no fraud if the person making the statement honestly believes the statement to be true.
- A claimant will need to prove an absence of honest belief in the truth of the statement for an action for fraudulent misrepresentation to succeed. It is enough to show that the person making the statement suspected it might be inaccurate, or that he neglected to make enquiries, without proving that the maker knew his statement was false.
- Absence of reasonable grounds for a belief does not amount to fraud but may be used as evidence from which an inference can be drawn that there was no honest belief in the truth of the statement.
- The test of misrepresentation is usually objective. Where the representation is claimed to be fraudulent, the court will inquire into the subjective state of mind of the maker of the statement.

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