REAL ESTATE

March 2019 Issue No. 108

NEWS

Common people

Law Commission seeks to reinvigorate commonhold

The Law Commission has published a consultation on reforming commonhold. The intention is to make commonhold a viable alternative to leasehold ownership. The take-up for the existing commonhold regime has been poor since it was introduced in 2002 and fewer than 20 commonhold schemes have been created. Commonhold allows commercial and leasehold occupiers to own the freehold of their flats or other properties. Although the traditional lease allows for the enforcement of positive covenants, a lease is a wasting asset and at some point the owner will be required to incur further expenditure to maintain the property's value. In addition to the commonhold consultation, the Law Commission will also be consulting on residential leasehold reform, including enfranchisement and the right to manage. Commonhold provides a structure to manage the relationship between separate individually owned units within a building or development. The owner acquires freehold title to his or her unit and also becomes a member of a commonhold association. This company owns and manages the common parts of the building or development. Each commonhold has a commonhold community statement that sets out the rights and obligations of the unit owners and the commonhold association. A number of terms are prescribed and must be included in the statement. The unit owners make commonhold contributions to pay for the management and maintenance of the building or the development.
The Law Commission has looked into a number of legal issues to help make commonhold a viable alternative to leasehold ownership. In addition, commonhold has failed to gain traction in the real estate industry, where there has been little enthusiasm to adopt the new form of ownership. The government will need to persuade an industry traditionally reluctant to embrace change that commonhold should be part of developers' plans. Key legal issues include the process for converting existing buildings or developments to commonhold, changing the rules of the commonhold, resolving disputes, enforcement of obligations and the sharing of costs. Other issues include the structuring of mixed-use developments, the building of developments in phases and the incorporation of shared ownership and other forms of affordable housing. Concerns for lenders include the solvency of the commonhold association.

CASES ROUND UP

Do you really want to hurt me

Supreme Court rules on landlord's intention to redevelop

S Franses Ltd v The Cavendish Hotel (London) Limited: [2018] UKSC 62

The Supreme Court has allowed the tenant's appeal in this case concerning the landlord's intention to carry out redevelopment works for the purposes of S30(1)(f) of the Landlord and Tenant Act 1954. A landlord can oppose the grant of a new lease if it "intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof that he could not reasonably do so without obtaining possession of the holding". The landlord must show both a firm settled intention to do the works and a reasonable prospect of achieving that intention. This case considers the relevance of the landlord's motive for intending to carry out the works. The landlord operated the Cavendish Hotel and the tenant held a lease of the ground floor and basement that it used in connection with its textiles dealership and consultancy. The tenant

served a S26 notice requesting the grant of a new tenancy. The landlord wished to secure vacant possession of the premises and designed a schedule of works to satisfy S30(1)(f). The landlord provided a written undertaking to carry out the works. However, it was accepted that the scheme of works had no practical utility and the sole purpose of carrying out the works was to defeat the tenant's claim for a new tenancy. The High Court ruled that the landlord's motive was irrelevant provided it could establish the intention to carry out the works.

The Supreme Court has ruled that the landlord did not have the necessary intention for the purposes of S30(1)(f) because the landlord's intention to carry out the works was conditional on the tenant choosing to claim security of tenure under the Act. The landlord would not have carried out the works if the tenant left voluntarily. Accordingly, the landlord did not have the requisite intention and the tenant was entitled to a new lease. The only value to the landlord in carrying out the works was to obtain vacant possession. The landlord's intention to carry out the works must exist independently of the tenant's claim to a new tenancy.

Parklife

Right to use sports and leisure facilities was an easement

Regency Villas Title Ltd and others v Diamond Resorts (Europe) Ltd and others: [2018] UKSC 57

The Supreme Court has confirmed that rights to use sporting and recreational facilities amounted to easements and were not purely personal rights. The Broom Park Estate had sold off land for use as timeshare properties under a 1981 transfer. The transfer granted rights in favour of the timeshare land to use sporting and leisure facilities on the Estate free of charge. The facilities included gardens, a golf course and an outdoor swimming pool. The swimming pool was subsequently filled in and replaced by an indoor pool. The timeshare owners sought a declaration that the rights in the 1981 transfer amounted to easements that benefited successors in title. At first instance, the judge held that the transfer had created easements to use the sporting and leisure facilities on the Estate without charge. The Court of Appeal agreed but not in respect of those facilities, such as the indoor swimming pool, that had been built after the transfer.

The Supreme Court held that all the rights conferred by the 1981 transfer amounted to easements. The parties to the transfer had intended to confer rights in the nature of proprietary rights and not of a purely personal nature. In substance, the grant was of a comprehensive single right to use a bundle of sports and leisure facilities. The right covered those facilities in place when the land was sold and extended to any additional or replacement facilities constructed and operated as part of the Estate's leisure complex after 1981, such as the indoor pool. It was known that the dominant land would be used for timeshare apartments and the recreational and sporting facilities conferred utility and benefit on the owners and occupiers of those properties.

Say hello, wave goodbye

Exercise of CRAR waived right to forfeit

Thirunavukkrasu v Brar and another: [2018] All ER (D) 11

This case considered whether the exercise of the Commercial Rent Arrears Recovery (CRAR) procedure by a landlord amounted to a waiver of its right to forfeit. CRAR replaced the common law remedy of distress with effect from 6 April 2014. The tenant fell into arrears of rent and the landlord instructed enforcement agents to exercise CRAR over the tenant's goods in respect of the arrears. Shortly thereafter, the landlord purported to forfeit the lease by re-entry. The tenant argued that by exercising CRAR, the landlord had unequivocally acknowledged the continued existence of the lease and had waived the right to forfeit for the arrears. The tenant issued proceedings for a declaration that the re-entry was

unlawful and sought damages for trespass and for conversion of the tenant's goods. At first instance, the judge ruled that the purported forfeiture was unlawful. The landlord had waived its right to forfeit by exercising the CRAR procedure.

The High Court dismissed the landlord's appeal. The landlord had exercised CRAR while the lease was continuing and this was not consistent with forfeiture. By electing to exercise CRAR, the landlord had given an unequivocal representation that the lease was continuing and this was not consistent with the landlord's contention that it had ended. The landlord's exercise of CRAR was a clear acknowledgement of the continuing landlord and tenant relationship.

I can't go for that (no can do)

Landlord could not put itself in breach of covenant

Duval v 11-13 Randolph Crescent Ltd: [2018] EWCA Civ 2298

This case related to a property that had been converted into flats held on long leases. The appellant was the tenant of one flat and the respondent was the landlord, a company owned and controlled by the tenants of the building. One of the tenants wanted to carry out some improvement works and applied for consent. The leases contained an absolute prohibition on works that cut into a structural wall of the flat. The tenant's works included cutting a load-bearing wall at basement level that would be in breach of the absolute prohibition. The leases of the flats were in substantially the same form and the landlord covenanted to enforce the covenants on the part of the other tenants in the building. The issue was whether the landlord could grant consent. The County Court held that the landlord could grant consent notwithstanding its obligation to enforce the tenant covenants.

The Court of Appeal allowed the appellant's appeal. The appellant's lease contained a covenant by the landlord that all leases would be on similar terms together with a covenant to enforce the covenants in the other leases at the request of the tenant. The Court of Appeal had to decide whether it was reasonable to require the landlord to consent to something that would result in a breach of a covenant it was required to enforce. Once a tenant has requested the landlord to enforce a covenant, it would be a plain breach of covenant for the landlord to consent to the relevant breach. The landlord could not put itself out of its power to enforce the covenant if required to do so by a tenant. This also applied where a request had not been made and the obligation to enforce remained contingent. Accordingly, a landlord could not consent to something if that would amount to a breach of the landlord's covenants.

Don't stop me now

Landlord could not prevent planning application for change of use

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

The landlord was the owner of a mixed-use building forming part of an estate. The building was used as retail on the ground floor and basement, with offices on the upper floors. The tenant had a long lease of the building and wanted to change the use of the upper floors from office to residential. The user clause in the lease allowed residential use but there was a covenant preventing the tenant from applying for planning permission without consent, such consent not to be unreasonably withheld. The tenant applied for consent to apply for planning permission and this was refused. The landlord was concerned that residential use would give rise to a claim for enfranchisement and enfranchisement would adversely affect the landlord's management of the estate. The County Court decided that the landlord had unreasonably withheld its consent.

The Court of Appeal found in favour of the tenant. There was no reported case on a landlord's refusal to grant consent to apply for planning permission. However, the same principles would apply as those

to an application for consent to assign or underlet. The tenant had to show that the landlord had acted unreasonably. Looking at the lease as a whole, the purpose of the planning consent clause was not to prevent residential use of the upper floors or to prevent statutory enfranchisement. The user clause permitted residential use without the landlord's consent and this was not consistent with the planning consent clause. It would not be practical to limit the user clause through the planning clause because any person and not just the tenant could apply for planning permission. Estate management concerns could be met through the mechanics of the enfranchisement legislation. The planning consent clause could not be used to prevent the tenant from carrying out an authorised use. The landlord's refusal to grant consent for the planning application was unreasonable.

OUR RECENT TRANSACTIONS

We advised Arsenal Football Club on the battery storage project with Pivot Power at the Emirates Stadium. The project is one of the largest of its kind at any sports ground in the world, and is capable of powering the 60,000-seat stadium for an entire match.

We advised Dobbies Garden Centres on the acquisition of six garden centres from Wyevale Garden Centres. The acquisition strengthens Dobbies Garden Centres' position as one of the UK's largest garden centre retailers and brings its estate to 40 centres across the UK.

AND FINALLY

Old man

A Dutch court has ruled that a 69-year-old man could not legally change his official age to improve his employment prospects and his success on Tinder. The pensioner claimed that his official age discriminated against him.

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