SLAUGHTER AND MAY

REAL ESTATE

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NEWS

Born of frustration

Canary Wharf and European Medicines Agency settle

The *European Medicines Agency v Canary Wharf* case will not be going to the Court of Appeal. The parties have settled after the EMA agreed to sub-let 30 Churchill Place to WeWork. Accordingly, the High Court decision that Brexit would not frustrate the Agency's lease stands. The EMA held a 25-year lease without a break right. Following the outcome of the 2016 referendum, the EMA made it clear that it would need to leave London and relocate to a new European headquarters. The EMA had argued that Brexit would frustrate the lease and entitle it to walk away without any further liability to pay the rent or comply with the other tenant covenants. Canary Wharf obtained a declaration from the High Court that Brexit will not frustrate the lease and that it can continue to look to the EMA for the £13 million annual rent. The deal with WeWork means that the EMA has dropped its appeal. This is good news for landlords offering some certainty in uncertain times.

CASES ROUND UP

Stand by me

Guarantor can only be bound by a sub-guarantee

Co-operative Group Foods Ltd v A&A Shah Properties Ltd: [2019] EWHC 941 (Ch)

This case considered whether guarantee provisions in a licence to assign were enforceable or whether they were caught by the anti-avoidance provisions in the Landlord and Tenant (Covenants) Act 1995. The appellant was the original guarantor under a lease of supermarket premises. The original tenant assigned the lease and the guarantor entered into guarantee obligations in the licence to assign in respect of the performance of the lease obligations. The tenant and the assignee entered into administration and the landlord sought to recover from the guarantor. The guarantor argued that the guarantee obligations were void under the Act. The crucial question was whether the obligations arose under a sub-guarantee guaranteeing the obligations of the former tenant or whether they amounted to a direct guarantee of the assignee's obligations. At first instance it was held that the obligations in the licence to assign were sub-guarantees and were valid and enforceable.

The High Court dismissed the guarantor's appeal. Under the Act, the tenant of a new lease could only remain liable on an assignment if it entered into an AGA. The licence contained two separate obligations in relation to the future performance of the lease obligations. The first provided that "The Tenant and the Tenant's Guarantor covenant to observe and perform the obligations set out in the AGA immediately after completion of the assignment". The next provided that "The Tenant's Guarantor agrees that its guarantee and other obligations under the Lease shall remain fully effective and … shall extend and apply to the covenants given by and the obligations on the part of the Tenant under this Licence". The AGA given by the tenant was a valid AGA under the Act. The wording of the first obligation was clear, both the tenant and the guarantor covenanted to observe the obligations under the AGA and had given guarantees of the obligations of the assignee. That made the guarantor's obligations a direct guarantee which was not valid under the Act. However, on a true construction of the second

obligation, it amounted to a guarantee of a guarantee. The guarantor was agreeing to guarantee the tenant's obligations under the AGA. This obligation was therefore a sub-guarantee that was valid and enforceable under the Act.

You'd better go now

Court considers contracting out of the 1954 Act

TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) General Partner Ltd and others: [2019] EWHC 1363 (Ch)

In this case, the court considered the contracting-out procedure under the Landlord and Tenant Act 1954 and whether leases of designer outlet units had been validly contracted out or whether the tenant was entitled to a renewal lease under the Act. The tenant had entered into leases of six retail units. In each case, the contracting-out procedure had been followed with a statutory declaration given on behalf of the tenant. On the expiry of the leases, the landlords planned to grant new leases to a competitor retailer and did not want to renew the leases with the tenant. The tenant sought to remain in occupation and claimed that the contracting-out procedure had not been carried out properly. Accordingly, the tenant was entitled to security of tenure and to the grant of a new lease in respect of each unit.

The court considered the issues raised by the tenant in turn. First, the tenant's solicitors did have authority to receive the landlord's warning notice. The solicitors had instructions to complete the leases in accordance with the agreed heads of terms and that included entering into a contracted-out lease. The tenant's solicitor had express authority or implied authority incidental to their instructions on the transaction. In any event, the tenant's solicitors would have apparent authority to receive the notices and to represent to the landlords' solicitors that was the case. The court confirmed that service on the tenant's solicitors as agent was effective. Secondly, the tenant's retail director had authority to make the statutory declarations. The court found that he had actual authority to make the declarations on behalf of the tenant. The retail director also had apparent authority and had been held out as having authority by the tenant's solicitors. Although not necessary, the court also looked into whether it was possible to ratify any previous lack of authority. Ratification was not possible in this case and estoppel could not save a defective contracting-out procedure. Thirdly, the statutory declaration did not require a fixed calendar date to be inserted indicating the commencement date of the lease. To do so would make it much more difficult in practice to comply with the contracting-out procedure. Finally, the court held that the tenant was not liable for double rent under the Landlord and Tenant Act 1730 because it had argued its case in good faith and had not held over wilfully.

Let 'Em In

Landlord's right to enter property was not conditional

New Crane Wharf Freehold Ltd v Dovener: [2019] UKUT 98 (LC)

The tenant was the tenant of a flat in the landlord's residential building in Wapping. The lease contained a tenant covenant requiring the tenant to permit the landlord "at all reasonable times on giving not less than 48 hours' notice (except in case of emergency) to enter the demised premises" for a number of reasons. The landlord required access for one of the permitted reasons. The landlord's solicitor wrote to the tenant on the two occasions requesting access on a particular date, but there was no response. The landlord applied to the First-tier Tribunal claiming that the tenant's failure to respond amounted to a breach of covenant. The landlord had not attempted to enter on the specified dates as it was expecting a response from the tenant. The First-tier Tribunal held that there had been no breach of covenant. There was nothing contained or implied in the covenant requiring the tenant to respond. The landlord had to give 48 hours' notice and, once it had done so, it was entitled to enter, provided that the stipulated time was a reasonable time. If

the landlord sought to enter and this was prevented, the tenant would be in breach at that point. The landlord appealed.

The Upper Tribunal: Lands Chamber dismissed the landlord's appeal. When interpreting a contract, the court was required to identify the intention of the parties by what a reasonable person having all the background information available to the parties would have understood them to mean by the language used. The Tribunal could not imply a term requiring a positive act by the tenant to grant the landlord permission to enter on the date and time specified in the notice. The natural and ordinary meaning of the clause was that permission would be granted on the date and time specified in the notice. It was not necessary to imply a term requiring the tenant to give permission before that time to give business efficacy to the lease.

There's a ghost in my house

Church did not have adverse possession of crypt

King and another v Benefice of Newburn in the Diocese of Newcastle and another: [2019] UKUT 176 (LC)

This case concerns a claim for adverse possession in relation to a burial vault below a church in Newcastle. The church was conveyed to the Church Building Commissioners in 1837 and title to the burial vault was expressly excepted and reserved to the seller's family. Four members of the family were interned in the vault between 1840 and 1940. The church closed in 2004 but the family visited the church and were given access to the vault. The Commissioners wished to dispose of the church and a dispute arose in relation to the ownership of the vault. The Commissioners claimed to have been in possession and control of the vault since 1940. At first instance the First-tier Tribunal decided that the Commissioners had acquired title by adverse possession.

The Upper Tribunal upheld the family's appeal. The Commissioners had not been in exclusive physical possession and control of the vault and did not have the requisite intention to possess the vault by treating it as their own. The Commissioners had never entered the vault nor had they sought to exclude the family from it. The family had never been dispossessed nor had they discontinued or abandoned their possession of the vault. Although the church doors had been locked, the family had been given access whenever required.

Pretty vacant

Rateable value of stripped out premises

Jackson (VO) v Canary Wharf Ltd: [2019] UKUT 136 (LC)

This case concerned One Canada Square, Canary Wharf. When a tenant moved out, Canary Wharf's practice was to strip out the premises and market the vacant space in a shell state. The 45th and 46th floors had been stripped out and remained vacant between 17 February 2011 and 30 November 2014. In *SJ and J Monk v Newbigin*, the Supreme Court had considered the statutory assumption that a property was in a reasonable state of repair for rating valuation purposes. The Supreme Court held that a nominal value should be ascribed to a property undergoing redevelopment. The Valuation Officer decided that the premises should be valued for rating purposes in an assumed state of repair. Canary Wharf argued that they should be valued in their actual condition as premises undergoing redevelopment. The Valuation Officer claimed the rateable value was £1,830,000 while Canary Wharf believed that the premises only had a nominal rateable value and £1 should be entered on the valuation list. The Valuation Tribunal found that the premises were a building under construction and determined a rateable value of £1.

The Valuation Officer's appeal was dismissed. The Supreme Court had not created "a building under reconstruction exception" to the repair assumption. The key question was whether the premises were capable of beneficial occupation. If they were not, the premises would not be a rateable hereditament. The premises in this case

were not capable of beneficial occupation. A valuation officer had to ascertain whether premises were undergoing reconstruction or simply in a state of disrepair and this was a matter of objective fact. In this case, refurbishment was inevitable. The premises had been stripped back to their shell so that substantial reconstruction and improvement work could be carried out. In such a case, the property should be considered in its actual state on the material day. As it was incapable of beneficial use it should be removed from the rating list.

OUR RECENT TRANSACTIONS

We advised Derwent London on the pre-let of six floors of offices at 1 Soho Place, London W1 to G-Research, a financial data research and software development company.

We are advising Equinix (UK) Limited on the English real estate aspects of a U.S. $1 billion initial joint venture with GIC to develop and operate Hyperscale data centres in Europe.

We advised Legal & General on a new 10-year partnership with Oxford University to deliver housing and academic facilities for the University.

We are advising an informal steering committee of landlords in relation to the restructuring of the Arcadia group through a series of CVAs. This is the first time landlords have coordinated to negotiate the terms of a CVA.

We are advising Elysian Residences on the financing of the Landsby, a 101-home senior living project in Stanmore, North-West London.

We are advising Lendlease on its role as construction delivery partner for a major international sporting event to be held in Birmingham in 2022.

We are advising Ocado in connection with its new customer fulfilment centre in Purfleet. It is Ocado's fifth centre in the UK.

AND FINALLY

Gone fishing

Four children in Australia embarked on a 600-mile fishing trip in a stolen SUV. The children, aged between 10 and 14, "borrowed" a parent's Nissan Patrol and drove from Rockhampton in Queensland to Grafton in New South Wales, "borrowing" fuel on the way.

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