Quarterly Real Estate Disputes Update

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Case 1: Patel and others v Spender and others

The applicants sought to modify a covenant against external alterations relying on the "limited benefit" ground in section 84 of the Law of Property Act 1925.

What was it about?

- Mr Patel and the owners of ten other houses on an estate near Canary Wharf brought an application under section 84 LPA 1925 to modify a covenant restricting the right to make external alterations to their properties.
- Section 84 gives the Tribunal power to discharge or modify a restriction on the use of land on being satisfied of certain statutory conditions. In this case, the conditions were:
  - → that the restriction either secured "no practical benefits of substantial value or advantage" to the person with the benefit of the restriction, or that it was contrary to the public interest; and
  - → that money would provide adequate compensation for the loss or disadvantage (if any) which that person would suffer from the discharge or modification.
- The applicants wanted to carry out ground floor extensions and loft conversions, which they claimed would have minimal impact on the neighbouring properties.
- The application was vehemently opposed by over 100 of the other estate owners.

What did the court say?

- The court considered and rejected various objections including:
  - → increased nuisance from HMO occupiers
  - → increased strain on estate services
  - → damage to trees
  - → overlooking from new balconies
  - → disturbance from the construction works
- But the court found that the covenant restricting the alterations **did** provide a practical benefit of substantial advantage in preventing:
  - → further cumulative erosion of the building scheme to which the estate was subject (the "thin end of the wedge" argument)
  - → piecemeal changes that could impact the overall aesthetic and unified appearance of the estate.
- It followed that the Tribunal did not have jurisdiction to modify the covenant.

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We regard the avoidance of the thin-end-of-the-wedge effect, preventing even further erosion of the design and character of the estate as a practical benefit of substantial advantage… That being the case we have no jurisdiction to modify the covenant.

[2024] UKUT 62 (LC) [93]

Why is it important?

- The judgment provides helpful guidance as to the strengths of various common objections made in the context of such applications.
- It is a reminder that in section 84 applications, the applicant must first establish a statutory ground for discharge/modification. Even if this is established, the Tribunal then has a discretion whether or not to modify/discharge, for which separate/distinct evidence must be adduced.

Case 2: Davies v Bridgend County Borough Council

The Court held that the Council's delay in treating Japanese knotweed did not cause the diminution in value of the claimant's land.

What was it about?

- The claimant, Mr Davies, purchased a house in Bridgend in 2004. The house was situated adjacent to land owned by Bridgend County Borough Council.
- Since "well before 2004", Japanese knotweed ("**JKW**") spread from the Council's land to Mr Davies' garden.
- From 2013, the Council was (or ought to have been) aware of the risk arising from the JKW, but only carried out an effective treatment programme in 2018. The Council thus committed a breach of duty in private nuisance that continued from 2013 to 2018.
- Mr Davies claimed damages from the Council (£4,900) for the diminution in value of his land due to the stigma attached to land that has had JKW on it.
- The main issue was: the diminution in value of Mr Davies' land was caused by the original spread of JPW before 2004 – it was a natural, non-actionable encroachment. But did the Council's failure to treat the JKW from 2013 – 2018 (which the court found was an actionable continuing nuisance) mean that the Council was liable for the diminution in value of Mr Davies' property?

What did the court say?

- Mr. Davies was not entitled to claim damages because the diminution in value was not caused by the Council's failure to treat the JKW - the actionable nuisance.
- The relevant question was: would the diminution in value have occurred "but for" the Council's wrongdoing between 2013 and 2018? There was no evidence that the delay in 2013 – 2018 increased or materially contributed to the diminution in value of Mr Davies' property. The diminution would have occurred in any event, as the JKW was present before 2004.

Why is it important?

- The case clarifies how to establish causation in private nuisance claims. It confirms that the "but for" test is the appropriate test in most cases, including in the context of continuing nuisance and claims relating to JKW.
- If a party is claiming damages for **additional** diminution in value caused by the defendant's delay in addressing a nuisance (which in itself is an actionable nuisance), it must prove that the delay caused further diminution. Mr. Davies did not have any evidence, but the outcome could have been different if the Court had robust evidence to consider.

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> **… the diminution in value had occurred long before any breach by the defendant of the relevant duty in private nuisance first occurred in 2013… The diminution in value would have occurred in any event so that there is no causal link between the defendant's breach of duty and the diminution in value claimed.**
>
> [2024] UKSC 15 [70]

Case 3: Peachside Limited v (1) Mr Koon Yau Kee and (2) Mr Tak Chang Keung

The substantial costs incurred by the landlord in rectifying the tenant's disrepair are found to be recoverable in this terminal dilapidations claim, despite the tenant's section 18 defences.

What was it about?

- The tenant ran a Chinese restaurant 'Pearl City' from premises in Manchester's Chinatown, until the lease expired and it vacated in March 2021. The landlord brought a dilapidations claim against the tenant seeking damages for disrepair.
- By the time of trial, the landlord had carried out significant work to rectify the disrepair. Initially it restored the premises to a shell condition in the hope that it could re-let the premises and obtain some income. But when it was unable to re-let the premises, it carried out a larger refurbishment to create ready-to-let office accommodation.
- The tenant argued that the premises were unlettable as offices due to their location, and that the landlord's plans were "an elaborate charade" to extract as much as it could from the tenant whilst concealing its true intention to undertake a full-scale redevelopment from the outset, once it had possession of the whole of the building.
- The tenant's case was that the landlord was not entitled to recover the sums expended. It relied on both limbs of section 18(1) of the Landlord and Tenant Act 1927, contending that the cost of the landlord's works exceeded the diminution in value of the landlord's reversion caused by the tenant's disrepair (the first limb); and given the landlord's plans to redevelop the whole of the premises in any event, the landlord's repairs to remedy the tenant's breaches of repairing obligation were superseded by the landlord's extensive redevelopment, and rendered valueless (the second limb).

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What did the court say?

- Finding that the city centre office market remains strong, the Judge sided with the landlord on almost every point, awarding damages in excess of £500,000.
- The Judge was satisfied that the amount expended by the landlord did not exceed the statutory limit under the first limb of the section 18(1) defence, and reiterated that, where works have actually been done, diminution can be inferred by reference to the costs of those works reasonably necessary to remedy the disrepair.
- The Judge did not accept the tenant's assertion that the works were valueless owing to the landlord's "real intention" to redevelop the whole premises, and so the second limb of the s18(1) defence was also not engaged.

Why is it important?

- The case is a stark reminder to tenants approaching lease expiry to adopt a proactive approach to dilapidations to minimise liability for disrepair.
- Whilst only a starting point in the assessment of tenant dilapidations liability, landlords will be reassured that costs reasonably incurred in rectifying disrepair are likely to be recoverable.

> **The starting point for analysis in situations where the landlord has done the work is that the amount of the diminution can be inferred from the costs of the repairs reasonably necessary to make good the loss caused by the tenant's breaches of covenant...**
>
> [2024] EWHC 921 (TCC) [27]

Case 4: Sainsbury's Supermarkets Limited v Medley Assets Limited

Court ruling provides a new tactical option for tenants who can reduce their occupation of business premises in opposed lease renewal cases.

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What was it about?

- Sainsbury's landlord opposed the renewal of its lease on the grounds of redevelopment ('**ground (f)**').
- Under the Landlord and Tenant Act 1954, to successfully oppose renewal of a tenant's business tenancy, the landlord has to prove that it intends to redevelop the premises comprised in **the holding**.
- Sainsbury's reduced its occupation to a small part of the leased premises not impacted by the landlord's works. It argued that **the holding** means the part of the premises occupied for business purposes at the time of the hearing, and so ground (f) was not satisfied.
- The landlord argued that, since it would require Sainsbury's to take a new lease of the entire premises if it's opposition was unsuccessful, the court should assume that **the holding** was the whole demised premises, and ground (f) was satisfied.

What did the court say?

- The court agreed with Sainsbury's that, for the purpose of ground (f), **the holding** is confined to the part of the leased premises occupied by the tenant for business purposes at the time of the ground(f) hearing.
- As the landlord's works did not impact that part, the landlord had not satisfied ground (f) and the lease should be renewed.
- The court was also not persuaded that the landlord had a genuine intention to redevelop, or that the proposed works were sufficient to satisfy ground (f).

Why is it important?

- Not many tenants can retreat into part of their premises to defeat a landlord's redevelopment plans but this case demonstrates that the possibility is nonetheless there.

I conclude that for the purposes of considering ground (f) of s30 of the Act the defining section is s23(3) and the holding is the occupied part of the premises.

Sainsbury's Supermarkets Limited v Medley Assets Limited, County Court at Central London, 21 March 2024 [265]

New law: Leasehold and Freehold Reform Act 2024 (LAFRA)

The snap election led to LAFRA being rushed through Parliament. What changes will this bring, and when?

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What will LAFRA do?

- Generally, make it cheaper and easier for leaseholders to extend their leases or buy freeholds.
- Introduce a new standard valuation method for enfranchisement and lease extensions, removing the requirement for leaseholders to pay "marriage value" and discounting the value of any ground rent in excess of 0.1% of freehold value.
- Increase the standard lease extension term for both houses and flats to 990 years, and remove the two-year ownership precondition.
- Increase the non-residential limit to enfranchise from 25% to 50%.
- Make it easier for leaseholders to manage their own buildings.
- Extend tenant access to redress schemes.
- Prevent excessive buildings insurance commissions and costs being charged to tenants through the service charge.
- Ban the sale of new leasehold houses (subject to limited exceptions).
- Require landlords to issue service charge bills in a standardised format.
- Scrap the presumption that landlord's legal costs are recoverable through the service charge (where the lease allows), requiring landlords to apply to the First Tier Tribunal for costs orders if "just and equitable."
- Generally, remove the requirement for tenants to pay their landlord's costs for lease extensions and enfranchisement.

Is LAFRA in force?

- Although LAFRA is now technically law, most of the provisions require secondary legislation - that will flesh out the precise detail/workings of the provisions - before they come into force.
- Provisions concerning the regulation of rentcharges and amendments to the Building Safety Act 2022 will come into force on 24 July 2024.
- The rest of the provisions will be brought into force by regulations made by the Secretary of State, the timing of which will depend on the result of the election and priorities of the winning party (though the remaining provisions are unlikely to be in force before 2025/26).

What didn't make it?

- The Government had hoped to ban ground rents in all existing leases (or at least impose a cap), but that did not make it into LAFRA.
- There is no ban on forfeiture of long residential leases or the introduction of commonhold.

Homeowners will receive more rights, power and protections over their homes under the Leasehold and Freehold Reform Act.

Department for Levelling Up Housing and Communities

Getting in touch

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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