COMMERCIAL PROPERTY CASE UPDATE

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Martin Retail Group Limited v Crawley Borough Council [2013] EW Misc 32 (CC)

Preliminary issue hearing determining whether a local council's proposed user clause for a business tenancy was prohibited by Competition Act 1998

Facts

1. By lease dated March 2001, CBC granted C a business tenancy for term of 10 years in respect of a shop premises and garage in Crawley East Sussex. The existing user clause covenanted not to use the shop for any purpose whatsoever other than a retail shop nor to carry on any trade other than newsagents, tobacconist, confectionary, stationery and the sale of books, records, fancy goods and greeting cards AND a positive obligation to keep the premises open for trade and use best not to do or permit anything to be done to injure such trade.

2. The claimant wanted to widen its range to groceries, fresh foods, beers, wines and spirits and household goods. In March 2011, the existing lease expired. The Defendant served notice under s25 of the '54 Act to terminate the tenancy but on the basis it would not oppose a new tenancy. C commenced proceedings seeking a new tenancy with the user clause: The premises as a retail shop for the business of Newsagent Tobacconist Sweet Confectioner Stationer Bookseller and for the sale of toys, CDs fancy goods greeting cards and the installation and use of an ATM and Lottery Sales.

3. D's acknowledgment of service had a proposed user clause which expressly excluded the sale of alcohol, grocery, convenience goods and other uses falling within Class 1 as set out in Part A of the Schedule to the Town and Country Planning (Use Classes) Order 1987.

4. C argued that such a clause would be void. The matter was dealt with as a preliminary issue before Judge Dight sitting in the Central London County Court.

5. The shopping parade in the south east of Crawley Town Centre and was one of 11 parades of shops located in the centre of a residential housing estate. C did not occupy the premises but rather McColls Limited did under trading name of "Martin's". The other shops in the parade were takeaway restaurant, accountants, a hairdressers, a bric a brac shop, a bakery a supermarket, a chemist, a dry cleaner, a floor tile shop and a fish and chip shop. Nearest tesco was 100m over a railway line and 2 other convenience stores 1000-1200m away.

6. C argued that the property was ideally situated to "take advantage of the local market". It was a nationwide business with 1272 units and many shops had opened in the country in direct competition with its own shops. Effectively the supermarket had been given a monopoly over this market.

7. D argued that widening the user clause would be to the detriment of the local community. All the shops enjoyed the benefit of letting restrictions, small businesses had the chance to prosper, the supermarket was a family run business and McColls was a large company enjoying the economies of scale.

8. Section 2 of the Competition Act 1998:

   (1) Subjection to s3, agreements between undertakings, decisions of associations of undertakings or concerted practices which:

      (a) May affect trade within the United Kingdom, and
      (b) Have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which:

(a) Directly or indirectly fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development or investment

(b) Share markets or sources of supply

(c) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage

(d) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

9. D conceded that the letting scheme fell as an agreement within the scope of the CA and that the proposed user clause was restrictive of competition. The issue was whether it was exempt.

10. Section 9 of the Act provides:

(1) An agreement is exempt from Chapter I prohibition if it:

(a) Contributes to:

(i) Improving production or distribution, or

(ii) Promoting technical or economic progress,

While allowing consumers a fair share of the resulting benefit;

And

(b) Does not:

(i) Impose on the undertakings concerned restrictions which are not indispensible to the attainment of those objectives; or

(ii) Afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the product in question

11. The burden of proof was on the person seeking to establish the exemption.

12. There are no reported decisions dealing with the impact of the Competition Act on letting schemes. The Judge did consider the OFT's publication "Land Agreements. The application of competition law following the revocation of the Land Agreements Exclusion Order" of March 2011. It applied 4 exemption critera:

(1) The agreement must contribute to improving production or distribution or to promote technical or economic progress
(2) It must allow consumers a fair share of the resulting benefits
(3) It must no impose restrictions beyond those indispensible to achieving those objectives
(4) It must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

Judgment:

13. The Judge commented that having 2 witness statements from each party was not particularly persuasive as neither was independent or cross-examined. The Defendant, on whom the burden fell, had therefore failed to prove its case on the issues to which the evidence went.

14. There was no policy document in relation to the letting scheme explaining why it was thought that it improved economic progress to have it. The Defendant failed to show evidence that without the letting scheme, small traders would not come to the parade. No evidence that the community would benefit from the scheme.

15. Therefore held that the agreement was not exempt and was therefore void.

Marks & Spencer PLC v BNP Paribas [2014] EWCA Civ 603

Whether it was implied into a lease that the advanced rent would be returned upon a valid use of the break clause

Facts:

1. Marks & Spencers were the lessees of one floor of an office block in Paddington. BNP Paribas were the landlords. Basic rent was payable in advance on quarter days with additional payments for car parking, insurance and services. Break clause allowed for lessee to terminate on either 24 January 2012 or 24 January 2016 as long as 6 months advance notice was given, no arrears of rent and substantial break premium had to be paid.

2. M&S complied with the conditions to enable it to exercise the break clause on 24 Jan 2012. It paid a quarter's rent on 25 December 2011 and break premium on 18 January 2012. It then demanded repayment of the rent paid in advance from 25 January to 24 March 2012. BNP refused to make repayment.

3. M&S argued (i) breach of express term of the lease (ii) restitution (iii) total failure of consideration and (iv) implied term. Trial before Morgan J who found in favour of M&S on ground (iv) alone primarily on the basis that a) the lessee should be in the same position as a lessee who paid the break premium on the last quarter day and b) the break premium was a full year's rent so this was the amount agreed to compensate without the further broken period's rent. BNP appealed.

Judgment: Lady Justice Arden in main judgment

4. There is only one question, what the instrument, read as a whole against the relevant background, would reasonably be understood to mean (per Lord Hoffmann in A.G of Belize v Belize Telecom Ltd [2009] 1 WLR 1988).

5. Interpretation enables the court to take into account the parties' common aim in entering into a transaction or any provision in it (Investors Compensation v West Bromwich Building Society [1998] 1 WLR 896).

6. The party seeking to establish an implied term must show not simply that the term *could* be a part of the agreement but that a term *would* be part of the agreement.

7. The starting point is that if there is no express term, none should be implied because if the parties intended that a particular term should apply to their relationship they would have included it.

8. The court will not imply a term unless it is necessary that the agreement should contain such a term to achieve the parties' express agreement, purposively construed against the admissible background. Necessary to achieve the parties' objective rather than necessary to function.

9. There was no precedent for implying a term for repayment of rent for the broken period. This made it more likely that a reasonable person, having knowledge of this background, would conclude that if the parties had really intended such an implied term they would have made express provision for it.

10. There was no reason for implying a term in relation to service charge or insurance premiums or parking fees paid before the break clause.

Coventry & Others v Lawrence & Others [2014] UKSC 46

Supreme Court reviews the law on private nuisance

1. Starting position in nuisance is that it is an action/failure to act which is not otherwise authorised and which causes an interference with the claimant's reasonable enjoyment of his land. What is reasonable is determined by reference to circumstances (famous expression from *Sturges v Bridgman* – what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey".

2. In Feb 1975, permission granted to Terence Walters to construct a stadium on agricultural land in suffolk. Stadium was to be used for speedway racing for a period of 10 years. Planning thereafter renewed and in 1984 it started to be used for stock car and banger racing and a Certificate of Lawfulness of Existing Use or Development was issued in 1997. In 2002 a permanent personal planning permission was granted subject to conditions about days and hours. D purchased the stadium in 2008. To the rear of the Stadium was a motorcross track.

3. Across open fields, about 560m from the Stadium and 860m from the Track was a bungalow called Fenland. C purchased it in 2006.

4. Judge Seymour found that the noise did constitute a nuisance and he rejected the argument that a right to commit nuisance could be acquired as a matter of law and that, if he was wrong on that, there had been an interruption of use in respect of the stock car/banger racing which defeated a claim for prescription. He said he had in mind to restrain the Ds from carrying on activities of more noise than a prescribed level with lower levels in the evening.

5. This was over-turned on appeal on the basis that C had failed to establish that the use constituted a nuisance on the basis of the planning permission and actual use over a number of years. C appealed to the Supreme Court.

Judgment (Lord Neuberger in leading judgment)

6. A person can certainly acquire the right to carry on an activity which would otherwise be a nuisance.

7. A right to make noise can be acquired by prescription. However on the facts, the 20 year period had not been satisfied as the first complaints had only been lodged 16 years ago.

8. Provided the Claimant uses his property for essentially the same purpose as his predecessors before the nuisance started, the defendant cannot argue that the claimant "came to the nuisance". But if the claimant changes the use of their property after the nuisance starts then the claim may fail.

9. The defendant's activities up to a level which would not constitute a nuisance are considered when assessing the character of the locality. If the activities are in breach of planning permission they will not be considered.

10. The fact that planning permission has been granted does not mean it is lawful and therefore does not assist the court. However, where the planning permission stipulates limits as to frequency and level of noise, then the conditions may be relevant.

11. The normal measure of damages in an injunction and the defendant will have to prove why damages should be awarded instead.

12. In exercising the discretion, *Shelfer v City of London Electric Lighting Co* [1895] applied:

    (a) whether the injury to the claimant's rights is small
    (b) where the injury to the claimant is capable of being estimated in money
    (c) whether it can be adequately compensated by a small money payment
    (d) whether it would be oppressive to the defendant to grant an injunction.

13. There may also be public interest in refusing an injunction – ie where a lot of jobs are at risk.

14. Having reviewed the principles, the Supreme Court overturned the decision of the Court of Appeal and restored the injunction of Judge Seymour.

Youseffi v Mussell-White [2014] EWCA Civ 885

Facts:

1. Y was the lessor of dwelling house and shop including rear garden and yard. Original term expired middle of 2009 and Y sought new tenancy to commence Jan 2010. M serves s26(6) notice to terminate the tenancy giving following grounds:

    (i) Y had failed to comply with covenant to keep in good state of repair or in a tenant-like manner (Ground A)

    (ii) Persistent failure to pay rent when due (Ground B)

    (iii) Substantial other breaches-breach of access covenant and breach of user covenant (Ground C)

2. The Judge at first instance found as follows:

    (a) Creeper growth ("rampant and uncontrolled climbing plants") was serious. Y was described as combative and obstructive and the Judge had no confidence that she would voluntarily carry out the works. Ground A established.

    (b) Not right to treat arrears of rent as ground of objection. There were arrears of £1,076.25 at the date of the hearing and the Judge found an "apparently wilful refusal not to remedy that situation". He did not find evidence of a significant default of the insurance rent. Ground B failed.

    (c) There had been long-standing intransigence on the part of Y to afford access by the landlord to the property. Ground C established.

    (d) There had been a breach of the user covenant which was substantial. Y had not produced any evidence of the business she was running (which should have been for sale of food and drink to visiting members of the public) which appeared to be "vestigial". Ground C established.

3. Vos LJ granted permission to appeal.

Lady Justice Gloster:

4. Under s30(1)(a) of the '54 Act, the court has to ask itself "in view of the state of repair of the holding" brought about by the tenant's breach of its obligation to repair and maintain the holding, the tenant ought not to be granted a new tenancy. This involves the court focusing on the state of repair and asking whether the "proper interests of the landlord would be prejudiced" by continuing in a landlord/tenant relationship with the tenant (*John Kay Ltd v Kay*

5. [1952] 2 QB 258) or whether it would “be unfair to the landlord” (*Lyons v Central Commercial Properties London Ltd* [1958] 1 WLR 869).

6. For Ground A, the neglect has to be substantial (Lyons). Whilst the garden had been demised to her and it may have been her responsibility to keep down weeds, the removal of a creeper from the structure was not her responsibility. Furthermore, even if it were a breach, the sum involved in removing it was only said to be £300.

7. The Judge should not have relied in connection with Ground A upon his view that she was not a model tenant.

8. The Judge was entitled to refuse to grant the tenancy on Ground C alone for the access breach.

9. The user covenant was a positive obligation on the tenant to use the property for stipulated purpose.

10. The findings of Ground B were upheld.

11. The Judge was entitled to find under s30(1)(c) and s29(4) that the tenant ought not to be granted a new tenancy.