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PMA Conference

Legal update

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Topics to cover

1. Landlord and Tenant Act 1954 Reform consultation
2. Redevelopment break rights under the Landlord and Tenant Act 1954 (*B&M v HSBC* (2023))
3. Landlord's service charge certification – how conclusive? (*Sara Asset Holdings v Blacks Outdoor Retail Limited* (2023))

1954 Act Reform

- Government's "Anti-social Behaviour Action Plan" (27 March 2023)
- To "*tackle the blight of anti-social behaviour facing communities across England and Wales*"
- Para 59: "*we know people see empty shops and buildings as a sign of decline ... the proliferation of online retail has changed how we shop ... the high street must find new ways to attract people and kindle local pride*"

1954 Act Reform

- Para 60: *“To help revitalise our high streets and prevent further decline, we are changing laws and arming councils with new tools”*:
 - a) High Street Rental Auctions
 - b) High Street Accelerators to incentivise and empower local people to work together to tackle vacancy and reinvent high streets
 - c) Consultation on whether national planning policy framework should explicitly refer to the need for planning policies and decisions to reduce anti-social behaviour
 - d) *“Because complex commercial leasing rules are holding back high streets, we will launch the Landlord and Tenant Act review – led by the Law Commission – with a view to their reform. Our aim is to make the system easier to understand and more transparent and attract more investment into UK commercial property”*
 - e) e/f/g etc

1954 Act Reform

Law Commission's announcement of review (28 March 2023):

- *“20 years since the legislation was last reviewed”*
- *“Act is inflexible, bureaucratic and out of date causing extra cost and delay for landlords and tenants”*
- *“Preventing spaces in high streets and other commercial centres from being occupied quickly and efficiently”*
- *“Online retail, 2008 financial crisis and pandemic has shifted the landscape requiring modernisation of legislation with a view to developing a modern legal framework that is widely used rather than opted out of and helps businesses to grow and communities to thrive”*
- *“Considering Government priorities of net zero and levelling up”*



1954 Act Reform

- Matter of debate as to whether the 1954 Act is responsible for anti-social behaviour and the demise of the high street
- That is not to say the 1954 Act should not be reformed
- Will the reforms, however, be ones that property owners and occupiers really want or will they simply be to fit in with the government's current agenda?

1954 Act Reform

Possible areas of reform

- Security of tenure:
 - Government paper suggests contracting out is the norm but that is not the case
 - Unclear as to whether security of tenure is seen by the government as a problem (preventing easy redevelopment/regeneration?) or encouraging investment and growth in high street
 - Little prospect of the Act or SoT being completely abolished
 - SoT automatic for certain class of leases eg hospitality and retail, but not otherwise?
 - Abolition of SoT applying to periodic/ oral leases?

1954 Act Reform

Possible areas of reform

- Contracting out process:
 - Perhaps improved since 2003 (court order) but current notice procedure seems cumbersome and over complicated
 - A simpler methodology eg a separate lease clause, separately signed off, or service of notices by email, with e-signatures?
 - Automatic contracting out if lease for less than, say 3 or 5 years?
 - Requirement to opt into the Act?
 - Allowing lease changes after notice served but before lease completes?

1954 Act Reform

Renewal procedure reforms

- Current renewal procedure can be costly, time consuming and overly penal if time limits are missed
- Need for streamlining procedure
- Possible arbitration scheme similar to that for Covid rent arrears?
- More use of First Tier Tribunal (pilot scheme and cf. telecoms leases under the Telecoms Code)?
- Pre-action protocol?

1954 Act Reform

Some other areas for reform?

- Redevelopment ground (f):
 - Does the definition need to be reformed (throwback to 1950s)?
 - Artificial schemes worked up so as to qualify as redevelopment so as to secure VP (*S Franses*)
 - Should it be easier or harder for redevelopment to be made out?
 - Works for MEES counting as redevelopment?
 - Ease of inserting new green terms in renewal lease (*O'May*)
- Turnover rents:
 - Should court/tribunal be given specific jurisdiction to allow such on renewal (*JD Sports* case – no turnover rent allowed)?

Statutory compensation – spurious use of fault grounds/ is it too much or too little ?

1954 Act Reform

- Consultation paper expected in December 2023
- All stakeholders should be encouraged to respond with views
- Expect responses from industry bodies such as BRC and BPF as well as the PLA
- May be a wide range of opinions on what needs reforming that the Law Commission will need to take into account
- How much may be disregarded or shaped by the original terms of reference?
- An interesting time ahead.....



B&M Retail v HSBC Bank Pension Trust (2023)

- Issue:
 - Should a landlord's redevelopment break clause be allowed in a renewal lease under the 1954 Act?
 - Particularly interesting, because the landlord had mistakenly omitted to formerly oppose renewal on ground (f)

B&M Retail v HSBC Bank Pension Trust (2023)

- B&M served a section 26 request seeking a new lease
- The landlord HSBC inadvertently failed to serve a counter notice to oppose renewal in time (two months after section 26 request)
- HSBC had agreed to relet to Aldi if VP could be obtained by a set long-stop date
- Unable to oppose renewal altogether, HSBC applied to court for an early break right in the renewal lease

B&M Retail v HSBC Bank Pension Trust (2023)

- New lease terms were agreed save for:
 - a) Length of term of new lease; and
 - b) Whether the lease should include a redevelopment break clause

B&M Retail v HSBC Bank Pension Trust (2023)

- Legal principles the court took into account
 - The 1954 Act “*should clearly not be used as an instrument to defeat a development*” (*Reohorn v Barry* (1956))
 - Relevant test is whether there was a “*real possibility (as opposed to a probability) that the premises in question will be required for reconstruction during the continuance of the proposed new tenancy*” (*NCP v Paternoster* (1990))
 - That test depended upon whether HSBC’s planning application for its redevelopment would be successful
 - Court heard expert planning evidence and decided there was indeed a real possibility of planning permission being granted

B&M Retail v HSBC Bank Pension Trust (2023)

- B&M's argument: Allowing a break for redevelopment would have significant financial implications for their business and local jobs

Court accepted that “*the consequences of a break clause will act harshly on B&M*”

- But previous authorities showed that B&M's security of tenure should not be of “*paramount consideration*”
- Instead, HSBC's wish to allow Aldi to redevelop the site should “*trump B&M's position*”
- As VP was required quickly to facilitate the letting to Aldi (where there was a long-stop date) the court ordered an immediately effective break right on six months notice

B&M: Practical considerations for landlords and tenants

- Tenant likely to face difficulties in opposing a redevelopment break clause in a renewal lease if there is a “real possibility” the premises will be required for reconstruction during the new tenancy
- Benefits of maintaining security of tenure (jobs and tenant’s business) is of little weight
- Landlord managed to avoid significant consequences of missing serving counter notice
- Still better to serve a ground (f) redevelopment counter notice in time if you are a landlord.....



Landlord's service charge certification – how conclusive?

Sara Asset Holdings v Blacks Outdoor Retail Limited (2023)

- Blacks' lease contained a service charge clause providing that the landlord should provide a certificate “*as to the amount of the total cost and the sum payable by the tenant*”.
- This certificate was to be “conclusive” in the absence of “*manifest or mathematical error or fraud*”.
- The issue: how conclusive is such a certificate?
- Blacks contended that such a certificate was only conclusive as to the amount of costs incurred but not as to its actual service charge liability.



Landlord's service charge certification – how conclusive?

- Two decisions in lower courts found in favour of Blacks but the Court of Appeal found in favour of the landlord.
- For service charge year 2017/18, the landlord certified that over £400,000.00 was payable even though lease would end in 2019.
- Blacks objected, claiming that this charge was excessive and included unnecessary items and expenses which fell outside the terms of the lease.
- The lease contained the normal “no set off” provision.

Service charge liability provisions

- At end of each service charge year, the landlord is required to calculate “*the total reasonable and proper costs*” of the services.
- Tenants were required to pay “*a fair and reasonable proportion*” of such total cost (proportion assessed according to net internal area).
- Certification: “*landlord shall furnish the tenant as soon as practicable after such total cost and the sum payable by the tenant shall have been ascertained a certificate as to the amount of the total cost and the sum payable by the tenant and in the absence of manifest or mathematical error or fraud such certificate shall be conclusive*”.



Supreme Court's decision

- Cash flow is an important consideration for a landlord.
- Blacks' argument: it would be surprising if the landlord, by its own certification, could prevent the tenant arguing at all about whether eg costs were properly incurred or fell within the tenant's liability.
- Landlord's argument: landlord needed to recoup monies spent quickly and efficiently without the possibility of argument from the tenant.



Supreme Court's decision

- Certificate is stated to be conclusive both as to “*amount of the total costs*” and as to “*the sum payable by the tenant*”. This strongly implies that the certificate should be conclusive as to the sum payable by the tenant ie its liability.
- However it would be very surprising if the landlord, by certifying, could avoid the effects of eg it being negligent in providing services so making them more costly than they should be.
- Neither party's interpretation is satisfactory.
- Certificate must, therefore, impose a liability on the tenant to pay the sum certified, without set off, eg for a negligence claim. This ensures landlord's cash flow.
- However, this does not preclude the tenant from then arguing that in fact the service charge paid should not have been paid and a refund is due.
- The “conclusiveness” of the certificate is as to the tenant's obligation to pay when required, but not that it is necessarily finally liable for that sum.
- A “pay now, argue later” provision, a contractual arrangement commonly found.