

A photograph of three business professionals (two men and one woman) sitting around a table in a modern office or cafe at night. They are engaged in a discussion, with laptops and coffee cups on the table. The background shows a window with a view of city lights at night. The image is partially overlaid with a dark green geometric pattern.

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# Property Law Update

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# Agenda

## Review of recent case law and legislative changes:

- Break Conditions in Leases – *Capitol Park Leeds plc v Global Radio Services Ltd* [2021] EWCA Civ 995
- Importance of Careful Drafting – *Monsolar IQ Limited v Woden Park Ltd* [2021] EWCA Civ 961
- Lease Repairing Obligations – *Stonecrest Marble Ltd v Shepherds Bush Housing Association Ltd* [2021] EWHC 2621 (Ch)
- Contracting Out – *TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) Ltd and others* [2021] EWCA Civ 688
- Pre 1926 Restrictive Covenants – *Bath Rugby Ltd v Greenwood and others* [2021] EWCA Civ 1927
- Access order made under Access to Neighbouring Land Act 1992 – *Prime London Holdings 11 Ltd v Thurloe Lodge Ltd* [2022] EWHC 303 (Ch)
- Commercial Service Charge Disputes – *Criterion Buildings Ltd v McKinsey & Company Inc* [2021] EWHC 216 (Ch)
- Land held for different purposes - *Brent LBC v Johnson* [2022] EWCA Civ 28
- Charities Act 2022
- The Leasehold Reform (Ground Rent) Act 2022
- Commercial Rent (Coronavirus) Act 2022

# Break Conditions in Lease

*Capitol Park Leeds plc v Global Radio Services Ltd [2021] EWCA Civ 995*

A break condition requiring the tenant to hand back property with vacant possession had been satisfied even where the tenant left it in a dysfunctional condition.

## *Facts*

- The tenant of a commercial lease had the right to break if it gave vacant possession of the "Premises".
- After giving notice to terminate, the Tenant stripped out various key features of the premises, including ceiling tiles, lighting and heating, with a view to replacing them before vacating. Works were paused and the Tenant did not replace the features
- High Court held that the requirement for vacant possession had not been satisfied

# Break Conditions in Lease

*Capitol Park Leeds plc v Global Radio Services Ltd [2021]*  
*EWCA Civ 995*

Court of Appeal overturned High Court Decision and held:

- A condition for vacant possession requires the tenant to return the property to the landlord free from people, chattels and legal interests, rather than being concerned with the physical condition of the property
- In this particular lease, the break clause was not expressed to be conditional on the tenant having observed and performed any covenants in the lease, including any repairing obligations.

# Importance of careful drafting in Leases

## *Monsolar IQ Limited v Woden Park Ltd [2021] EWCA Civ 961*

This case raised the issue of whether there was a **clear mistake** in the drafting, and if so, what the parties **intended** the clause to say.

*Facts* - Lease of agricultural land for the development of a solar farm. The rent review in the Lease was based on a formula:

*Rent payable prior to the Review Date x (Revised Index Figure / Base Index Figure)*

The High Court found that the clause applied literally, produced absurd irrational and arbitrary results, and that what the parties actually intended was that rent on each review would either increase or decrease in accordance with the change in RPI that year.

Landlord appealed against the High Court finding

# Importance of careful drafting in Leases

## *Monsolar IQ Limited v Woden Park Ltd [2021] EWCA Civ 961*

The Court of Appeal however dismissed the Landlord's appeal and maintained the position of the High Court

The court confirmed that there is a difference between clauses which are irrational, like here, and those which are just imprudent (and the court will not override literal wording because it is commercially unattractive to one party).

### Practical points

- Rent review provisions should be drafted **clearly**.
- You must not rely on the court correcting a mistake in drafting.
- If a Lease contains a formula, it is prudent to include a **worked example** which can help to identify problems in the operation of the provision in practice.

# Repairing Obligations in Leases

*Stonecrest Marble Ltd v Shepherds Bush Housing Association Ltd [2021] EWHC 2621 (Ch)*

## *Facts*

- Tenant had a long lease of premises comprising a ground floor commercial unit. The upper floors remained in the landlord's possession.
- Lease provided:
  - L covenanted to allow the T quiet enjoyment of the property
  - T covenanted to keep the Property in good repair and condition. L was required to clean, maintain and repair the common parts.
  - L was required to insure against the "insured risks", including "flood ... and overflowing of water ... apparatus", but L had no obligation to repair where L had no obligation to insure.
- Water ingress from L's retained premises caused damage rendering the demised property unusable

# Repairing Obligations in Leases

*Stonecrest Marble Ltd v Shepherds Bush Housing Association Ltd [2021] EWHC 2621 (Ch)*

The court concluded that:

- The parties intended that the lease provide a comprehensive scheme for the repair and insurance for the demised premises and retained premises sufficient to exclude L's liability in tort.
- It was not for the court to consider the scheme's practical effectiveness nor to fill any resulting gaps by importing common law liability; its function was to give the lease the meaning and effect that the parties must have intended.



# Contracting Out

*TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) Ltd and others [2021] EWCA Civ 688*

## *Facts*

- The Fragrance Shop (TFS) was the tenant in a number of designer retail outlet centres.
- TFS claimed that the leases had not been validly contracted out of the 1954 Act on the basis that the statutory declarations made by the original tenant were not in the form (or substantially in the form) prescribed by the legislation
- The issue concerned how the part of the prescribed form of statutory declaration “for a term commencing on...” was completed.

# Contracting Out

*TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) Ltd and others [2021] EWCA Civ 688*

The Council held:

- All of the statutory declarations were in the form (or substantially in the form) prescribed by the legislation.
- The form of wording describing the term commencement is not important as long as the declaration (read as a whole) is sufficient to identify the lease in question
- Here there was no doubt which leases the declarations referred to and, in each case, the declaration made clear that the tenant had received a landlord's warning notice (as required by the legislation) and understood and accepted that the Tenant would have no security of tenure.

# Pre 1926 Restrictive Covenants

## *Bath Rugby Ltd v Greenwood and others [2021] EWCA Civ 1927*

- Restrictive covenant created in 1922

*“...no workshops warehouses factories or other buildings for the purpose of any trade or business which may be or grow to be a nuisance annoyance or disturbance or otherwise prejudicially affect the adjoining premises or the neighbourhood shall at any time hereafter be erected upon the said hereditaments and premises...”*

- Bath Rugby Club wanted to replace its existing stadium with a new, larger stadium incorporating various retail and commercial outlets, with associated car parking. Proposed new development might be in breach of the covenant
- Claim made under section 84(2) of the Law of Property Act 1925 for declarations that the Property was free from the Covenant on the basis no one could be shown as benefiting from the covenant.

# Pre 1926 Restrictive Covenants

*Bath Rugby Ltd v Greenwood and others [2021] EWCA Civ 1927*

The Court of Appeal found that a restrictive covenant that pre-dated the Law of Property Act 1925 had not been annexed to benefiting land, because the extent of that land had not been identified.

The covenant was deemed to be for the benefit of the 'neighbourhood' and this was insufficient as that term did not sufficiently identify the land to which the benefit of the covenant was intended to be annexed

Practical Point: clearly identify any land that is to benefit from a restrictive covenant

# Access order made under Access to Neighbouring Land Act 1992

*Prime London Holdings 11 Ltd v Thurloe Lodge Ltd [2022] EWHC 303 (Ch)*

- Dispute between two wealthy owners of properties in South Kensington, both properties were being extensively rebuilt.
- One owner needed access to a passageway within the curtilage of the other property so it could erect scaffolding. Application was resisted.
- High Court made an access order under the Access to Neighbouring Land Act 1992 but asked itself 5 questions to test whether it should make the Order

The decision provides practical guidance that will help parties assess whether or not their works meet the required tests, the basis of compensation and the liability of the claimant to pay consideration.

# High Value Commercial Service Charge Dispute

*Criterion Buildings Ltd v McKinsey & Company Inc [2021] EWHC 216 (Ch)*

- A landlord sought £2.3 million plus interest in respect of unpaid service charges due under commercial leases
- Under the lease in this case, the “due proportion” of the service charge payable by the tenant was “a fair proportion to be determined... by the Landlord...”
- The Court accepted the landlord’s submission that the question of what amounted to a “fair” proportion was one for the landlord not the Court. In other words, fairness in this context is to be assessed by reference to a subjective standard, albeit subject to a rationality requirement

# Distinction between land held for charitable purpose and land held for other purposes

*Brent LBC v Johnson [2022] EWCA Civ 28*

## Facts

- Centre had been established by a community organisation in 1982
- Council purchased the property using its own funds and various grants. Community organisation secured further grants to develop it
- The centre subsequently experienced financial difficulties and ceased to operate.
- Council recovered possession and planned to sell part of the site and redevelop the remainder

Court of Appeal upheld a High Court declaration that no charitable trust had been created. The fact that a property was held for charitable purposes did not necessarily mean that it was held on charitable trusts nor did the fact that a charity had contributed.

# Charities Act 2022

- Received Royal Assent on 24 February 2022
- The Act implements the majority of recommendations made by the Law Commission in its 2017 report 'Technical issues in charity law'
- Aims to reduce the administrative burden on charities
- To be implemented on a staggered basis – implementation plan awaited



# Charities Act 2022

## Key changes in respect of Property Disposals

- Confirmation as to when the restrictions of dispositions of land apply
- Relaxation of the requirements for surveyors reports
- Changes to the requirements for advertising a proposed disposition
- Amendments to provisions requiring Contract Statements confirming compliance with Part 7 of 2011 Act

# The Leasehold Reform (Ground Rent) Act 2022

- Received Royal Assent on 8 February 2022
- Expected to come fully into force within six months
- Different commencement days may be set for different types of leases
- Act will apply to leases granted after the relevant commencement date (not retrospective)
  - for a term exceeding 21 years;
  - in respect of a single dwelling; and
  - for a premium

# The Leasehold Reform (Ground Rent) Act 2022

- Some leases excepted from the Act
- Landlords of regulated leases must not require the tenant to pay a prohibited rent (i.e. anything other than a peppercorn)
- Sums payable for insurance and services (even where reserved as rent) can still be demanded
- No administration charges in relation to the collection of ground rent
- A breach could result in fines of up to £30,000 and/or a repayment order or a recovery order.
- Consider due diligence / warranties / indemnities on acquisitions

A photograph of three business professionals (two men and one woman) sitting around a table in a modern office or meeting room at night. They are looking at laptops and talking. The room has large windows showing a city view at night. The lighting is warm and focused on the people.

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# Commercial Rent (Coronavirus) Act 2022

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4 May 2022

("CRCA")

# Aim and Purpose

- To support landlords and tenants in resolving disputes relating to commercial rent arrears which accrued while businesses were forced, by law, to close during the Covid-19 pandemic, which is known as 'protected rent debt'
- Introduces a binding arbitration process where the parties have not already reached an agreement.
- Landlords are prevented from exercising their usual remedies to recover the protected rent debt until 24 September 2022 OR where a referral has been made, until the arbitration has concluded.

# Tenancies to which the CRCA 2022 applies

- The CRCA 2022 applies to business tenancies, which means a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (LTA 1954) applies (section 2(5), CRCA 2022).
- It is considered that, with some possible exceptions, the CRCA 2022 will therefore apply to tenancies that satisfy the qualifying criteria in section 23 of the LTA 1954, including the following:
  - a lease;
  - an underlease;
  - a tenancy by estoppel;
  - a periodic tenancy, whether express or implied;
  - an agreement for lease; or
  - an agreement for underlease.

# Tenancies to which the CRCA 2022 applies

- It is considered that a "contracted out" lease will also be a business tenancy for the purposes of the CRCA 2022 because Part 2 of the LTA 1954 applies to those tenancies (the contracting out procedure only excludes the provisions of sections 24 to 28 of Part 2 of the LTA 1954, and not the whole of Part 2).

# Rent to which the CRCA 2022 applies

- Protects rent arrears (including service charges, insurance rent, interest and VAT) that accrued during a ringfenced period from 21 March 2020, when the first requirements on businesses to close their premises or cease trading (in whole or part) came into force under regulations made under public health legislation, to the date when specific restrictions (other than generally applicable restrictions such as displaying information about wearing face coverings) were last removed for the relevant sector.



# Rent to which the CRCA 2022 applies

- Rent due under a tenancy is "protected rent" if both of the following apply:
  - The tenancy was "adversely affected by coronavirus".
  - The rent is attributable to a period of occupation by the tenant for, or for a period within, the "protected period" applying to the tenancy.

(Section 3(2), CRCA 2022)

- For these purposes, a business tenancy will be treated as having been "adversely affected by coronavirus" if, for any "relevant period", either the whole or part of the business carried on by the tenant at or from the premises, or the whole or part of those premises, was subject to a "closure requirement" (section 4(1), CRCA 2022).

# What is the “Relevant Period”

- This means a period beginning at or after 2.00 pm on 21 March 2020 and ending at or before:
  - 11.55 pm on 18 July 2021, in England.
  - 6.00 am on 7 August 2021, in Wales.

# What is the “Relevant Period”

- "Closure requirement" means a requirement imposed by coronavirus regulations (made under section 45C of the Public Health (Control of Disease) Act 1984 in response to the threat to public health posed by coronavirus) which is expressed as an obligation to close businesses or parts of a business, of premises or parts of premises, of a specified description (section 4(2)(a), CRCA 2022).
- "Protected period" means the period beginning on 21 March 2020 and ending on 18 July 2021 in England or 7 August 2021 in Wales, or the last day on which the business or premises or part thereof was of a description subject either to a closure requirement or a specific coronavirus restriction (being a regulation that regulated any aspect of the way a business of any specified description was to be carried on, or the way any premises were to be used) (section 5, CRCA 2022).

# What does 'Rent' include

- i. An amount payable by the tenant to the landlord (including any person acting for the landlord) under the tenancy for possession and use of the premises (whether described as rent or otherwise), including any VAT chargeable on that amount.
- ii. An amount payable under the tenancy as a service charge, including any VAT chargeable on that amount.
- iii. Interest on any unpaid amount within either or both of the above.

(Section 2(1), CRCA 2022)

# Unprotected Rents

- In relation to unprotected rents, landlords will be able to exercise their usual remedies because they will not fall within the scope of the CRCA.
- Rent that has been paid (tenants cannot use the new arbitration scheme to ask the arbitrator to review, revise or restructure historic rental payments).
- Rent arrears incurred before 21 March 2020 and after 18 July 2021 in England and 7 August 2021 in Wales (or from the last day of the end of the ringfenced period, if earlier).
- Rent arrears incurred by tenants whose businesses were not forced to close or fall outside the scope.
- Rent arrears included in any existing agreement.
- Rent arrears due under licences and tenancies that are not business tenancies.

# Relief from Payment of Protect Rent Debts

Where the parties cannot resolve disputes about protected rent arrears by agreement, either party can refer the following matters to the new statutory arbitration scheme:

- i. Whether there is a protected rent debt of any amount; and
- ii. Whether the tenant should be given relief from payment of a protected rent debt and, if so, what relief.

(Section 6(1), CRCA 2022.)

# Relief from Payment of Protect Rent Debts

- The arbitrator will be able to make an award that does one or more of the following in relation to the protected rent debt:
  - Writes off the whole or any part of the debt.
  - Gives time to pay the whole or any part of the debt, including by allowing the whole or any part of the debt to be paid by instalments.
  - Reduces (including to zero) any interest otherwise payable by the tenant under the terms of the tenancy in relation to the whole or any part of the debt.
- (Section 6(2), CRCA 2022)
- Where an award gives the tenant time to pay an amount (including an instalment), the dates for payment must be within the period of 24 months beginning with the day after the day on which the award is made (section 14(7)).

# The main stages of the Arbitration Scheme

1. Pre-arbitration stage.
2. The Arbitrator's assessment of eligibility.
3. The Arbitrator's assessment of relief from payment.



# Arbitrators Principles : Section 15

- The arbitrator must have regard to the following two principles when assessing the final proposals put forward by the parties or, if the arbitrator considers that neither party has put forward a final proposal that is consistent with these principles, when making such award as they consider appropriate:
  - Where the tenant's business is viable or would become viable if the tenant were to be given relief from payment of any kind, any award should be aimed at preserving, or restoring and preserving, the viability of the tenant's business, so far as that is consistent with preserving the landlord's solvency.
  - So far as it is consistent with the first principle, tenants should be required to pay protected rent in full and without delay.

(Section 15(1), CRCA 2022)

# How quickly with the Arbitrator make an Award

- Where there is no oral hearing, the arbitrator must make an award as soon as reasonably practicable after either of the following:
  - i. The day on which the latest final proposal is received, where both parties have put forward a final proposal.
  - ii. Otherwise, the last day on which a party may put forward a revised formal proposal.

(Section 17(1), CRCA 2022)

- However, where an oral hearing is held, the arbitrator must make an award within 14 days beginning with the day on which the hearing concludes (section 17(2)), although this period may be extended by agreement or by the arbitrator where the arbitrator considers that it would be reasonable in the circumstances to do so (section 17(3)).

# Questions



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# Thank You

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