Update: Landlord and tenant

Milton McIntosh reviews cases defining the expiration of leases, what landlords can recoup under service charges, tenants keeping properties in good repair and freehold options

Lease/licence
In Cameron v Rolls-Royce [2007] EWHC 546 (Ch), Rolls-Royce occupied a property under two contracted-out leases. When the leases expired, Rolls-Royce remained in occupation, while negotiations took place for the grant of new contracted-out leases. During that period, no rent was paid. When the negotiations concluded, agreements for lease were entered into that were conditional on the obtaining of a court order sanctioning contracting out and on obtaining consent from the superior landlord.

Cameron and Rolls-Royce also entered into "licences" to cover the period from expiry of the old leases up to the conditions in the agreements being satisfied and new leases being granted. Licence fees were paid by Rolls-Royce, back-dated to the expiry of the old leases. However, following the obtaining of a contracting-out order and superior landlord's consent, Rolls-Royce refused to enter into the new leases.

It claimed that the licences were, in fact, leases in accordance with the tests set down in Street v Mountford [1985] 1 AC 809 which leases, it said, had the protection of the landlord and Tenant Act 1954. Rolls-Royce also said that it was not obliged to enter into the new leases, as to do so would affect a surrender by operation of law of the leases created by the licences with such surrender agreements being void under the 1954 Act.

The court rejected these arguments. It said that, although Street v Mountford did make clear that what mattered was the legal interest the parties had managed to create, rather than the interest they thought they had created, in deciding what had been created, reference could be had to the surrounding circumstances. Those circumstances could include whether the transaction was a stand-alone one or part of a bigger deal. If part of a bigger transaction, then a document might be consistent with a licence – and only a licence.

The court was of the view that the situation was plainly a case of the licence being granted in the context of an acquisition of a larger interest and, as such, the nature of the interest granted was that of a licence only. Rolls-Royce was therefore obliged to take the new leases.

Service charges
In Ashley Gardens Freeholds v Colw [2007] EWHC 130/206, the leases of a block imposed obligations on the tenants to keep their properties in repair, including the wooden window frames. The landlord had an obligation to paint the whole of the outside of the block (including the wooden windows) wherever necessary. The leases also contained "sweeper clauses" which provided that the landlord should "do or cause to be done all such works, installation acts, matters and things as in the absolute discretion of the landlord be necessary or advisable for the proper maintenance safety and administration of the [block]". The landlord was entitled to recover its proper expenditure on the block from the tenants through the service charge.

Prior to painting the wooden windows, the landlord applied a proprietary pre-paint repair system. One of the tenants objected to paying through the service charge for the cost of these proprietary works, arguing that it amounted to repair that was outside the scope of the landlord's obligations. The landlord, for its part, argued that the proprietary work was not repair and that, in any event, it could recover the cost under the sweeper clause. The LVT held that the proprietary works were repairs and also that the sweeper clause did not apply. The landlord did not appeal against the issue of repair, but sought to overturn the LVT's decision regarding the application of the sweeper clause.

The Lands Tribunal agreed with the landlord that the sweeper clause did apply. It said that, in undertaking its obligation to repaint the windows, the landlord was obliged to carry out necessary preparatory works. It said that, while the use of the proprietary pre-paint repair system included works of repair rather than pure preparation and painting, it was "necessary or advisable", and so fell within the scope of the sweeper clause. Therefore, the landlord was entitled to recover its costs under the service charge.

Repairs
In Patrick v Marley Estates Management [2007] EWCA Civ 1176, Marley owned an estate which included a grade II* listed mansion house, along with cloisters under a chapel. The estate was converted into 17 separate dwellings and let on 999-year leases. Part of the conversion work involved the demolition of the chapel's upper structures which, left its non-waterproofed floor slab as the roof of the cloisters. One of the leases was taken by Mr Patrick. The lease demised to Mr Patrick part of the mansion house and the upper and lower terraces of the cloisters, but excluded from the demise "the main structural parts of the building of which the demised premises form part, including the roof and foundations thereof". The lease required Mr Patrick to keep the demised premises in good and tenantable repair and condition, but that obligation excluded those parts which Marley covenanted to repair. Marley covenanted to repair "the main structure (including the roof chimney stacks, gutters, rainwater pipes and foundations) of the houses and the buildings". It further covenanted to "so often as [was] reasonably required, decorate the exterior, including the wood and ironwork of the houses and buildings in such manner as it shall think fit".

An issue arose as to: (1) whether the floor of the former chapel/roof of the cloisters was part of a "building" that fell to be repaired by the Marley; and (2) Marley's liability to repair and decorate the windows of the mansion house.
On (1), the court said that it was an issue of construction to be resolved as at the date of the lease. The fact that the chapel had previously been demolished was irrelevant. It was of the view that the cloisters were a “building” that Marley was obliged to repair. As for (2), the court said Marley was obliged to decorate the windows, as they were part of the “exterior”. However, it was not obliged to repair the windows, as they were not part of the “main structure”.

In Jackson v H Watson Property Investment [2008] EWHC 14 (Ch), defective works of alterations were undertaken by the owner of a property. The property was then let on various leases. The defects were within the common parts retained by the owner, but did not represent a breach of the owner’s repairing covenant. The owner then sold its interest to the property to a new landlord. Subsequently, one of the tenants began to suffer water ingress into his property as a consequence of the defects. He brought an action against the new landlord in tort for nuisance.

The court reviewed the leading authorities in this area of nuisance, including the recent decision of Baxter v Camden LBC (No. 2) [2001] QB 1 and held that, in the absence of an effective covenant to repair in the lease, the tenant could not rely on the law of nuisance to impose what was, in effect, an obligation to put right faulty construction work by the new landlord’s predecessor in title. The cases relied upon by the tenant, the court said, were ones in which the nuisance had been created after the commencement of the tenancy with result that the principle of “caveat lessee” did not apply.

In Racegates Estates v Horizon Housing Group [2008] 01 EG 135 (CS), on expiry of a lease, the demised premises were left by the tenant in a dilapidated condition, in breach of its lease covenants. The landlord, on recovering vacant possession of the property, obtained planning consent to redevelop, which included building into airspace over the property. The landlord brought a £290,000 damages claim against the tenant for the cost of putting the property back in repair. The tenant sought to defend the claim on the basis that, in view of the redevelopment proposed by the landlord, the cost of repair works exceeded the damage suffered by the landlord to its reversion and that, pursuant to s 18(1) of the Landlord and Tenant Act 1927, the landlord’s damages claim should be capped at £50,000, the level of the diminution in the value of its reversion.

The landlord responded by saying that the airspace was outside the former demise of the tenant and that s 18(1) was referable only to the reversion of the demised premises that excluded the airspace, and so development of the airspace could not be taken into account when assessing damages.

The court said that, on a true construction of the lease, the airspace had been included within the demise. The premises were ripe for development and any potential purchaser would give effect to that development. That development would render obsolete the carrying out of most of the repairs claimed by the landlord. The only items that would make a difference to a developer would be items that survived development and they would require a deduction for those. The court held that the damages due to the landlord were to be assessed by reference, not to the cost of repair, but to the work that would survive redevelopment, and limited the landlord’s recovery to £50,000.

**Option agreements**

In Coles v Samuel Smith Old Brewery (Tadcaster) [2007] All ER (D) 473 (Nov), the tenants of a property had an option in their lease to purchase their landlord’s freehold interest. However, the option was not registered under the Land Charges Acts 1972, which was required to make the option binding on third-party purchasers of the freehold. The landlord wished to avoid the option. It therefore sold its interest in the property to a wholly owned, long-established subsidiary company at a low price. The tenants sought to exercise the option. When the subsidiary denied that it was bound by the option, the tenant brought proceedings against its former landlord and the subsidiary for specific performance.

The court refused to make a ruling against the subsidiary, as it said the transaction was not a sham and there were no grounds for seeking to “pierce the corporate veil”.

However, it said that an order could be made against the former landlord requiring that it direct its subsidiary to transfer the property to the tenant. If the directors of the subsidiary refused, they could be changed.

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