

Section 20B Incurs Further Debate

The recent decision of the Upper Tribunal (Lands Chamber) in *OM Property Management Ltd v Burr* [2012] UKUT 2 (LC) appears to re-open the vexed question of when costs are ‘incurred’ for the purposes of the time limit on recovery of expenditure through service charges set out in section 20B of the Landlord and Tenant Act 1985, which appeared to have been laid to rest last year.

In *Jean-Paul & Anr v London Borough of Southwark* [2011] UKUT 178 (LC), the President of the Upper Tribunal (Lands Chamber) had drawn a helpful distinction between the incurring of a liability (an obligation to make a payment) and incurring costs, the latter being the formulation in the statute. He concluded that costs were only ‘incurred’ for the purposes of section 20B when payment was made.

In *Burr*, His Honour Judge Mole QC considered the *Southwark* case but also referred to the decision in *Brent London Borough Council v Shulem B Association Ltd* [2011] EWHC 1663 (Ch), decided after *Southwark*. In that case, Morgan J had made an *obiter dicta* comment to the effect that the date on which a cost had been ‘incurred’ for the purposes of the section might depend on the terms of the contract out of which the liability arose, but was at pains to make clear that he did not consider it appropriate to discuss or express a view on the question, which it was not necessary for him to decide in the context of that case. Nonetheless, HHJ Mole QC took those comments as implicitly providing support for the approach of HHJ Baker QC in *Capital and Counties Freehold Equity Trust Ltd v BL PLC* [1987] 2 EGLR 49, to the effect that costs are ‘incurred’ when they are ‘...‘paid’ or ‘become payable’...’ He accordingly concluded that, ‘...the true answer is that as a matter of the interpretation of section 20B ‘costs’ are ‘incurred’ on the presentation of an invoice or on payment; but whether a particular cost is incurred on the presentation of an invoice or on payment may depend upon the facts of the particular case.’

No doubt landlords will be disappointed to see that this decision effectively re-starts a debate which appeared to have been settled, and once again leaves open to question what is the proper date to start time running for the 18-month time limit, though it is clearly arguable that the unequivocal formulation produced by the President in *Southwark* should be preferred. For tenants, however, this may represent a welcome opportunity to challenge demands, particularly in cases where, for instance, a landlord has delayed payment of an invoice without good reason in a way which has proved detrimental to them.

Competition Heats Up

In January the Court of Appeal handed down judgment in *Humber Oil Terminals Trustee Limited v Associated British Ports* [2012] EWCA Civ 36, a claim for a new tenancy under the Landlord and Tenant Act 1954, and the first case in which the application of competition law has been considered in the property arena since the exemption which protected ‘land agreements’ from the prohibition at section 2 of the Competition Act 1998 was lifted last year.

Although the circumstances in which competition law will actually bite are relatively unusual, and in *Humber Oil* its relevance came as a result of the unusually large market share held by the defendant landlord, practitioners would be wise to familiarise themselves with basic competition law principles. Whilst the cost of obtaining the necessary expert evidence to pursue a competition argument to trial might prove off-putting, raising one could prove a useful negotiating tool not only in renewal proceedings but more broadly in property practice.

An important review of the law concerning repudiatory breaches of contract

The current economic climate has seen a significant increase in the number of vendor and purchaser disputes reaching trial, and in *Samarenko v. Dawn Hill House Limited* [2011] EWCA 1445 the Court of Appeal (Rix, Etherton and Lewison LJ) carried out an important review of the law concerning repudiatory breaches of contracts for sale.

The specific issues which the court had to decide were (1) whether the buyer's failure to pay a deposit on time was necessarily a repudiatory breach of contract, so as to entitle the seller to terminate the contract, and (2) if not, whether a letter from the seller had successfully made time of the essence of payment. However, all three members of the court – and particularly Lewison LJ – took the opportunity to carry out a comprehensive review of the origins and basis of the law concerning repudiatory breaches of contract, and the law concerning making time of the essence, which makes *Samarenko* essential reading for anyone considering those issues.

The factual background was, in brief summary, as follows. On 18 June 2010, Mr Samarenko as vendor and Dawn Hill House Ltd as purchaser entered into a contract for the sale of a house for a price of £5m. The contract incorporated the Standard Conditions of Sale (4th edition), and contained various special conditions of sale. Clause 15 of the special conditions stated that the contract was conditional on the buyer obtaining a specific planning permission - as set out in planning applications attached to the contract - and on the buyer obtaining certain consents from an Estate Roads Committee. Clause 16 of the special conditions stated that the agreement would become unconditional upon the buyer obtaining the planning permission and the consent from the Roads Committee, and that within 60 working days from later of those events the buyer was required to pay a deposit of £500,000 to the seller's solicitors. Dawn Hill House Ltd subsequently obtained a different planning permission, and, following negotiations, on 22 December 2010, the parties entered into a supplemental agreement. The supplemental agreement provided that: the contract was now deemed to be unconditional; the purchase price was to be the reduced sum of £4,050,000, to be paid on 13 April 2011; and the deposit was to be the reduced sum of £450,000, "and is now due to be paid to the Seller's solicitors on 3rd March 2011 (being 60 working days after the grant of the Original Permission)".

Despite various reminders from the seller's solicitors, the buyer's solicitors failed to pay the deposit on 3 March 2011. The seller's solicitors therefore wrote a letter to the buyer's solicitors on 9 March 2010, stating: "Our client is prepared to allow you 5 working days from today within which the pay the deposit, failing which our client will treat the contract with you as repudiated. On behalf of our client we therefore demand payment of £450,000 to us in cleared funds by no later than 5 pm on Wednesday 16 March, 2011, as to which deadline time shall be of the essence." No payment was made; and on 21 March 2011, the seller's solicitors wrote to the buyer terminating the contract.

The purchaser had entered a notice in respect of the contract against the registered title, and Mr Samarenko brought proceedings for its vacation. On his application for summary judgment, the issues were (1) whether the buyer's failure to pay the deposit on time was necessarily a repudiatory breach of contract entitling the seller to terminate the contract; and (2) if not, whether the seller's letter of 9 March 2010, had successfully made time of the essence of payment so as to entitle seller to terminate the contract. The judge held that time was of the essence for payment of the deposit, and the seller had been entitled to terminate

the contract. The buyer appealed, contending: (1) that time was not of the essence of the contractual timetable for payment of the deposit, in particular because it was not required to be paid until some time after the contract had been entered into; and (2) that although the seller was entitled to serve notice making time of the essence of the revised deadline for payment of the deposit, a failure to comply with that deadline did not necessarily amount to a repudiatory breach of contract.

The Court of Appeal dismissed the appeal. They held in relation to issue (1) that whether a time limit is of the essence of a contractual provision is a question of interpretation. Although equity generally presumed that time stipulations were not of the essence of a contract, that presumption could be rebutted, either by express words or by necessary implication. The payment of a deposit at the executory stage of a contract for sale was an earnest or guarantee of further performance. Thus in the ordinary case (excluding some exceptional contractual context or term) the requirement to pay a deposit, including the time of payment, is a condition of the contract; that is, time is of the essence of the date for payment, and failure to make timely payment of a deposit amounts to a repudiatory breach of contract. The mere fact that a contract provides for the payment of the deposit at some point after the contract has been entered into will not in itself be sufficient to indicate that the time is of the essence for payment. To the extent that they had held otherwise, *Millichamp v Jones* [1982] 1 WLR 1422 and *John Willmott Homes Ltd v Read* (1985) 51 P & CR 90 were overruled. Thus by failing to pay the deposit on March 3, the buyer had committed a repudiatory breach of contract, entitling the purchaser to terminate the contract.

For completeness the Court went on to consider issue (2), given that it had been fully argued. They held that the theoretical basis on which time can be made of the essence of a contractual time limit is that (a) the time limit is regarded at common law as a condition of the contract, (b) in the event of delay in performance equity will intervene to prevent the injured party from treating the delay as a breach of condition, but (c) equity will cease to intervene once notice of a reasonable length has been served signalling that equity's intervention will cease. Once the notice has expired the position reverts to that at common law, viz. that time limits are regarded as conditions of the contract. Where the term in question is one that would have been regarded by the common law as a condition of the contract, then a failure to comply with a notice making time of the essence is tantamount to a refusal to perform that obligation, amounting to a repudiatory breach of contract. A term for the payment of a deposit would be such a term. Thus, even if time had not been of the essence for the payment of the deposit, it would have been open to the seller to make time of the essence; the five days notice given by the letter of March 9 would have been adequate; and the buyer's failure to pay the deposit within the time-scale would have been a repudiatory breach.

For anyone concerned with issues of repudiation, and making time of the essence, particularly in the context of sales of land, the judgments will repay careful reading, not least because the three members of the Court did not entirely agree on all aspects of the legal principles discussed (for instance, what the position would be in the case of a breach of an innominate term as opposed to a condition).

More boundary disputes

The steady flow of boundary disputes at appellate level continues unabated. *Dixon v. Hodgson* [2011] EWCA Civ 1612 contains a useful review of how the construction of a transfer should be approached, and in particular the relative weight which it is appropriate to give to a defective plan and to the surrounding topography when the extent of the land transferred has been defined by reference to the defective plan; *Cameron v Boggiano* [2012] EWCA Civ 157 considered similar issues, and also reviewed the circumstances in which a transfer can be rectified.

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