Falcon Chambers

In this series of articles, we aim to highlight 3 of the most interesting cases in our field decided in the past month. This month: costs of proceedings to determine breach of covenant; the limits of Upper Tribunal's jurisdiction under s.84, and the meaning of 'live/work'.

APRIL 2023

Avon Ground Rents Limited v Kirstie Ward [2023] UKUT 88 (LC)

Summary

The Upper Tribunal upheld a determination that a landlord would not be able to recover the costs of proceedings under s.168 Commonhold and Leasehold Reform Act 2002 through the service charge.

The respondent had instructed a plumber to do some works in her flat. The plumber fractured a pipe, causing a flood. In proceedings brought by the landlord under s.168, the First-tier Tribunal (FTT) found the respondent to be in breach of a covenant to keep the premises in repair, and a covenant to give notice of works. However, it also made an order under s.20C of the Landlord and Tenant Act 1985 that the landlord would not be able to recover its costs of the proceedings. The landlord appealed.

The Upper Tribunal upheld the FTT's order. The landlord had waived the right to forfeit for the breaches before the FTT proceedings were brought; the proceedings were therefore pointless as far as forfeiture was concerned. While a determination of breach may have assisted the freeholder in obtaining other remedies under the lease, that was not the purpose for which it had a contractual right to its costs. Further, the parties' conduct was relevant: the respondent had not been negligent, likely the outcome would have been unaltered had she notified the landlord, and the landlord had continued to threaten forfeiture proceedings even after having waived the right to forfeit.

Why it's important

As the Tribunal commented in its judgment, an order that a landlord cannot recover its costs of proceedings through the service charge is an interference with contractual rights; it ought therefore not to be granted without proper scrutiny. The unusual facts of this case, however, did justify the making of an order. Practitioners advising in related cases should not assume that a determination that a tenant is in breach of covenant will necessarily preclude the making of an order under s.20C.

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Young Cammiade [2023] UKUT 96 (LC)

Summary

The Upper Tribunal concluded that the power conferred by s.84(1) Law of Property Act 1925 to discharge or modify restrictions 'as to the user' of land did not provide jurisdiction for modifying or discharging a restriction on registration of a transfer of a long lease in breach of a restriction.

The applicant was the long leaseholder of an upstairs flat. A predecessor in title had entered into a deed of mutual covenant with the leaseholder of the downstairs flat, but the deed itself was not available. The downstairs flat's title had been closed and a new one opened. However, as a result of the deed, the applicant's leasehold title was subject to a restriction prohibiting registration of any transfer without the consent of the proprietor of the title number relating to the previous title for the downstairs flat. The applicant sought to discharge the restriction, which had created issues with selling the flat.

Martin Rodger KC, Deputy Chamber President, determined that the restriction in question was not a restriction 'as to the user' of land, and thus the Tribunal had no jurisdiction to make the order sought.

Why it's important

As was recognised in the Tribunal's judgment, this particular point of law was not the subject of any previous authority. This decision therefore helpfully establishes the limits of the Tribual's jurisdiction in the area.

The case also illustrates the importance of considering other avenues to practical relief: although the Tribunal could not grant the order sought, it did note the possibility that refusal to consent to the transfer might be found to have been unreasonably withheld, and that the address used for the owners of the downstairs flat (who had not responded to any communications) may not be current; it may therefore be possible for the applicant to find another route to facilitating a sale.

AHGR Limited v Kane-Laverack [2023] EWCA Civ 428

Summary

The Court of Appeal determined that a covenant in a long lease of a flat not to use it other than as a 'live/work unit' permitted the occupant to 'live and/or work' there, and did not mandate an element of work use.

The appellant freeholder, having been unsuccessful at first instance and on first appeal, contended that the covenant required the tenants both to live and work at the unit. The argument before the Court of Appeal focused on the significance of

supplementary planning guidance produced by the local planning authority about live/work units.

Dingemans LJ, with whom King and Snowden LJJ agreed, found that the clause meant 'live and/or work'. Although it was clear from the supplementary planning guidance that live/work use was envisaged to involve both living and working, that planning guidance envisaged delineation between working and living spaces, whereas the subject lease drew no such distinction. Accordingly, the reasonable reader would think that the tenant was able to choose only one of the two uses.

Why it's important

Text This case illustrates the importance of interpreting any contract against its own individual background. Although the words 'live/work' are used in many documents, in this lease their meaning was coloured by the plans showing how the flat was to be used, resulting in a construction which may not be the same in other leases of other live/work units.

Dingemans LJ's judgment also contains a useful summary of the law relating to the interpretation of planning permissions and the permissibility of having regard to documents not incorporated into the document being construed.

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