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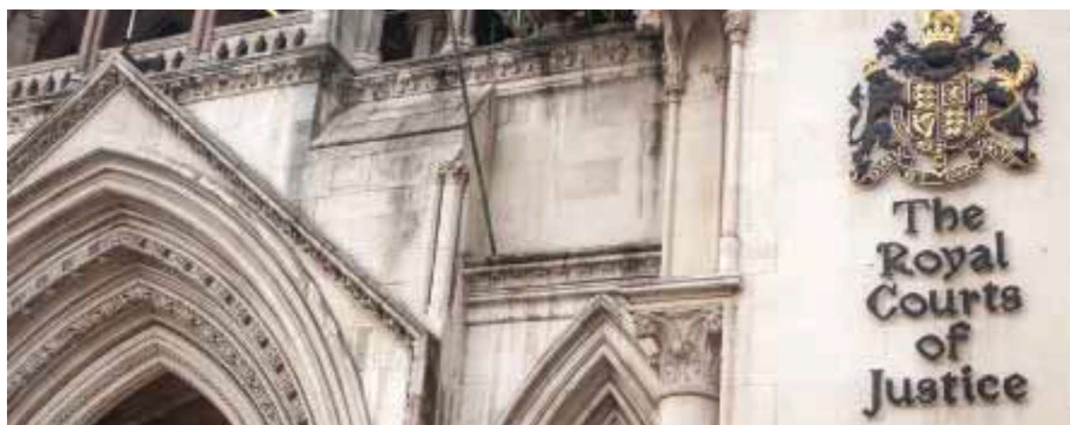
A testing year for property: the top legal cases of 2021

Experts choose the most significant cases from a turbulent year of pandemic-related property litigation

The courts were as busy as ever in 2021, with many property cases relating to rent arrears and the Covid-19 pandemic. Mathew Ditchburn, partner and head of the real estate disputes team at Hogan Lovells, Joseph Armstrong, associate in Hogan Lovells' real estate disputes team, and Paul Tomkins, partner and head of real estate litigation at Freeths, summarise the highlights from a particularly turbulent year.



Letter of the law: rulings on rent arrears, CVAs and dilapidations are among the annual highlights

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Tenant break conditions: Capitol Park Leeds v Global Radio Services
A tenant of commercial premises had the right to break its lease in November 2017, subject to giving vacant possession of the premises. The tenant served its break notice and started stripping out significant elements of the premises (including landlord's fixtures), in an attempt to minimise its dilapidations liability.

When it came to the crunch, its landlord argued that the tenant had not given vacant possession of the premises, having handed back "an empty shell of a building, which was dysfunctional and unoccupiable".

In July, the Court of Appeal found that the tenant had given vacant possession and provided clarity on interpreting a vacant possession condition, confining it to returning premises free of "the trilogy of people, chattels and interests", so not focusing on its physical condition.

Covid-19 and rent arrears: Commerz Real Investmentgesellschaft v TFS Stores
This case involved a tenant that amassed rent/service charge arrears totalling more than £166,000 when it was unable to trade due to various extensions of the coronavirus regulations. Its landlord issued proceedings to recover the sum and sought summary judgment. The tenant put forward several defences, such as its landlord exploiting what it called a 'loophole' in the Coronavirus Act, which imposed restrictions on certain landlord remedies. None of the defences succeeded.

Three other tenants (Cineworld, Mecca Bingo and Sports Direct) ran similar arguments in the High Court in April and were similarly unsuccessful (appeal pending) and last month, in London Trocadero (2015) v Picturehouse Cinemas, the High Court, again, found in favour of the landlord. It refused to imply terms into the lease that rent/service charges should be suspended during any periods when use of premises as a cinema was illegal.

Covid-19 and 1954 Act Renewals: WHSmith Retail Holdings v Commerz Real Investmentgesellschaft
As part of its retail offering, the tenant operated as a post office (classed as essential retail, so not affected by lockdown restrictions) from premises at the Westfield Centre in Shepherd's Bush. Lease renewal negotiations included agreement that the new lease should contain a "pandemic rent suspension clause".

The parties could not agree what the trigger point should be. The court decided it should be the closure of non-essential retailers. The new passing rent was also discounted by 54%, in part due to the effect of the Covid-19 pandemic.

A month later, in Poundland v Toplain, the tenant sought to rely on this decision. It unsuccessfully argued that a similar clause would "modernise" the lease in light of the lockdowns experienced during the pandemic. Unlike WHSmith, here the inclusion of the clause had not been agreed before the parties reached the doors of the court.

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Boating row: the Serpentine in Hyde Park was the focus of a legal case about fixtures earlier this year

was unsuccessful and the Joneses struggled to find a buyer, which they blamed on the noise of overflying aircraft. They claimed that the noise of the aircraft constituted a nuisance entitling them to compensation.

The court found that their business had likely suffered as a result of the noise, but the fact that the use of the land was particularly sensitive to that nuisance meant they were not entitled to damages. While a new owner can in principle bring a claim for a pre-existing nuisance, that principle may not apply where their use of the property was more sensitive to the nuisance.

Town or village greens (TVG): TW Logistics v Essex County Council and Tucker

An owner fenced off an area of its quayside because the Health and Safety Executive had raised concerns about people falling into the water. An area of land, including the quayside, was later registered as a TVG and the owner applied for de-registration.

The Supreme Court confirmed that the quayside had been properly registered as a TVG, highlighting the principle of "give and take".

Restrictive covenants and compensation: Father's Field Developments v Namulas Pension Trustees

A 2001 transfer saw the transferee covenanting, for a period of 30 years, that it would not carry out any residential development without first obtaining the transferor's consent.

The transferee applied to the Upper Tribunal for the covenant to be discharged, arguing that the covenant secured no practical benefit of substantial advantage or value to the transferor – the transferor had not retained any benefiting land, so its interest was purely financial.

The Upper Tribunal discharged the covenant and declined to award any compensation to the transferor. To secure a negotiated share of development value the transferor should have imposed an overage covenant.

Pandemic clauses in business interruption insurance: Financial Conduct Authority (FCA) v Arch Insurance

The Supreme Court decided in a test case that various commonly encountered business interruption insurance clauses did in principle cover losses caused by the Covid-19 pandemic. In particular, the court disagreed with the FCA that "notifiable disease clauses" did not apply because they only covered losses caused by the occurrence of a notifiable disease within a geographical radius of the premises, not national restrictions caused by the pandemic itself.

Company voluntary arrangements (CVAs): Lazari Properties 2 v New Look Retailers

A group of landlords challenged New Look's CVA on the basis that it unfairly prejudiced the interests of landlord creditors and that the approval process had been materially irregular. One legal ruling was that landlords were likely to be unfairly prejudiced where the CVA vote had been carried by comparatively unimpaired creditors "swamping" the votes of landlords whose interests would in fact be materially compromised by the CVA.

Fixtures: Royal Parks v Bluebird Boats

Bluebird Boats operated the boathouse on the Serpentine in Hyde Park under a concession agreement. At the end of the agreement, Bluebird argued that the boathouse was a chattel, ie its property rather than a fixture and it should therefore be entitled to remove it.

The landlord maintained that the boathouse was in fact now part of Hyde Park: it had been constructed on it and formed part of the land. The court held that the boathouse now formed part of Hyde Park and did not "belong" to the tenant as it was effectively immobile and permanently fixed to the land.

Commercial service charge: Criterion Buildings v McKinsey

The case concerned a dispute between McKinsey and its landlord, Criterion, in relation to £2.2m of unpaid service charge at its flagship commercial premises near Piccadilly Circus in London. The lease included a provision that McKinsey must pay a "fair" proportion of service costs, to be determined by the landlord. McKinsey argued the proportion charged was not fair. The court confirmed that what was "fair" in this context was a question for the landlord and the service charge was payable.

Nuisance: Jones & Jones v Ministry of Defence

The claimants bought an empty site one mile away from RAF Mona to operate a holiday park. The park

Landlord's repairing obligations: Stonecrest Marble v Shepherds Bush Housing Association

Stonecrest held a lease of part of a building from Shepherds Bush Housing Association. There was a leak from the retained property, rendering the tenant's premises unusable.

As there was no express landlord covenant to maintain the retained parts, the tenant argued that the landlord was liable for the damage either as a breach of quiet enjoyment or as a nuisance.

The court held in favour of the landlord, saying that the lease was intended to be a comprehensive scheme of repair for the premises and the efficacy of the scheme was irrelevant; it was not for the court to fill in the gaps where the lease was silent.

Mistakes in property documents: Ralph v Ralph

A father and son agreed they would both contribute to the purchase of a property but did not specify in the transfer whether the property was to be held by the father alone or also on trust for the son. The Court of Appeal found that the parties had not sufficiently agreed how the property was to be held and in the absence of evidence of an agreement, there was nothing for a rectification of the transfer to reflect. ■

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