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PROPERTY LITIGATION – ROUNDUP MAY 2014

John Abbott brings together a number of recent and significant developments affecting both Landlords and Tenants.

Commercial Rent Arrears Recovery (CRAR)

CRAR is now upon on us, it came into force on 6 April 2014.

Distress, a remedy much loved by commercial landlords' is no more it has now been replaced by the Commercial Rent Arrears Recovery Procedure, which procedure must now be followed if a commercial landlord wishes to use a certificated bailiff to recover commercial rent arrears.

- Tenancy must be in writing
- Pure Rent plus VAT and interest. Not service charges even if reserved as rent.
- Pure commercial premises – not mixed
- 7 "clear" days' notice to tenant
- Must use enforcement agent (certificated bailiff)

Will this promote greater use of forfeiture, where no notice requirement for rent arrears and can forfeit for service charges reserved as rent? On an application for relief from forfeiture the tenant will have to pay the lot.

Energy Efficiency

Commercial and domestic landlords will not be happy to see the **Energy Act 2011** coming into force.

Since 6 April 2014, property owners must display energy certificates in all advertisements for the sale or letting of premises. £500 is the penalty for failing to do this.

From 1 April 2016 tenants of residential properties will be able to require their landlords to make reasonable efficiency improvements to their properties.

And from 1 April 2018 Landlords of either residential or commercial premises will not be able to let their premises unless a specific level of energy efficiency has been achieved. It is thought this will be an "E" rating but this is yet to be confirmed. If this is correct then landlords of properties with an "F" and "G" rating will not be able to let their premises.

Top tip to landlords, start to review the energy efficiency of your portfolios while time is on your side.

Break Clauses

Break clauses in leases continue to cause problems as two recent Court of Appeal judgments demonstrate:

In ***Friends Life –v- Siemens [2014] EWCA Civ 382*** the tenant did not follow the precise requirements of the break clause in its lease. Though it was clear that the tenant intended to bring the lease to an end the Court of Appeal took the view that exact compliance was required and the break notice served by the tenant was ineffective. The lease will now continue until 2023.

Tenants must pay particular attention to the specific requirements of a break provision when serving a notice, and should be careful when negotiating a lease not to accept pre-conditions to a break provision that may make it difficult for them to comply precisely when serving a notice to break.

As one judge observed, if the provision requires notice to be given on pink paper do not use blue paper.

Marks & Spencer plc –v- PNB Paribas Securities Services Trust Co (Jersey) Ltd [2014] EWCA Civ 603

M&S occupied premises under four separate leases each with a break clause. Condition of the break clauses, all rent had to be paid and a hefty premium on exercising the right to break. M&S served notice to determine the lease, complied with the provisions of the break clauses and the notices were valid.

The leases came to an end midway through a rent period. M&S requested a rebate of rent for the period from the break date to the end of the next quarter. The landlord refused and contended it was entitled to retain all of that quarter's rent even though it represented a windfall to the landlord.

The Court of Appeal agreed with the landlord. There was nothing in the leases that provided the landlord would have to make such a refund.

The lessons from this; try and serve the break notices so that they end on a quarter day (if possible) and if you are a tenant and you have negotiated a break provision negotiate within in it a provision for the refund of rent for the period after the break date to the end of the quarter.

Tenants at Will

A common problem for landlords of commercial premises; what is the status of a tenant who remains in occupation at the end of a lease from which Part II of the Landlord and Tenant Act 1954 has been excluded? Is the tenant a tenant at will or has a periodic tenancy been created? The distinction is important because if it is a periodic tenancy, the 1954 Act would apply providing security to tenure to the tenant, where none existed in the original lease.

It is not uncommon for landlords to allow their commercial tenants to remain in occupation after a contracted out lease has come to an end, especially if they are negotiating the terms of a new lease.

The Court of Appeal considered such a scenario in ***Barclays Wealth Trustees (Jersey) Limited –v- Erimus Housing Limited [2014] EWCA Civ303***. In this particular case the Court took the view that the tenant holding over was a tenant at will, the fact that rent was being paid did not in the particular circumstances create a periodic tenancy.

It meant that the tenant had gained no security of tenure and it also meant that 6 months' notice to end the tenancy was not required.

It is better not to leave this question to chance because the Barclays Wealth case turned on its particular facts. If you are a landlord of a lease from which the 1954 Act had been excluded and if you are content to leave the tenant in occupation while negotiating a new lease, it would be advisable to create a tenancy at will to exist during the course of the negotiations. Otherwise the hapless landlord may find itself being forced to grant a lease under the 1954 Act on terms it may not like.

For further advice on any of the issues in this round-up or any other residential of commercial landlord and tenant issue please contact John Abbott:

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