FREETHS

"THE MAGNIFICENT SEVEN"

The seven cases from 2020 that all landlords and tenants should know about

Paul Tomkins, Partner and National Head of Property Litigation, Freeths LLP

Thursday 22 April 2021

FREETHS

"A group of seven gunfighters are hired to protect a small village in Mexico from a group of marauding bandits."

The Magnificent Seven is a 1960 American re-make of which 1954 Japanese film?

FREETHS

Paul Tomkins
National Head of Property Litigation at Freeths LLP
1yr •

Introducing #TomkinsTalks. A new video series offering frequent, short, snappy property case law updates in which I will talk through a case looking at the backstory, the outcome and the "so what"? Keep an eye out next week for the first in the series of #TomkinsTalks!
#propertylitigation #propertylaw

Tomkins Talk Introduction
youtube.com

The Background

Paul Tomkins
National Head of Property Litigation at Freeths LLP
1yr •

Can overlooking of a property give rise to a cause of action in nuisance? This was considered by the #courtofappeal in the recent case of Fearn and Others v The Board of the Trustees of the Tate Gallery. It is time for another #TomkinsTalks. #propertylaw #propertylitigation #tatemodern

Tomkins Talks Fearn and Others v Trustees of the Tate Gallery
youtube.com

The Outcome

Paul Tomkins
National Head of Property Litigation at Freeths LLP
1yr • Edited •

Over the past week, I have received lots of questions from #landlords and #tenants on the impact of the #CoronavirusAct on commercial tenancies. I've answered some of them here in the latest #TomkinsTalks.
Please do get in touch if you have any other questions.
#CoronavirusAct #propertylaw #propertylitigation #forfeiture

For comprehensive guidance and FAQs on Coronavirus-related issues for businesses in a range of

Tomkins Talks - Coronavirus Act

The 'So What'

Number 1…

FREETHS

FREETHS

Case # 1

EMI Group Limited v The Prudential Assurance Company Limited

“The saga of AGAs and GAGAs continues….”

AGAs and GAGAs

EMI Group Limited v The Prudential Assurance Company Limited

- ***The Background***

- EMI was the original guarantor of a lease of premises granted to HMV
- HMV assigned the lease to Forever 21 with Forever 21's parent company acting as guarantor
- HMV guaranteed Forever 21's obligations under an AGA & EMI guaranteed HMV's obligations under that AGA by way of a GAGA
- Both HMV & Forever 21 entered into administration & HMV was dissolved
- PAC sought to recover approx. £5m in unpaid rent/other sums from EMI
- EMI argued the GAGA was void under the anti-avoidance provisions of ***LT(C)A 1995*** or that the GAGA had come to an end when HMV was dissolved
- PAC sought a declaration that the GAGA was enforceable

FREETHS

- ***The Outcome***
- **Held HC:** EMI was liable for the sums claimed under the GAGA - the wording of the original guarantee & the GAGA should not be construed as an embedded repeat guarantee that fell foul of ***LT(C)A 1995*** & the GAGA was valid
- Also, the dissolution of HMV did not affect the liabilities of EMI as guarantor
- ***The 'So What'***
  - **A tenant's guarantor (G) cannot be an authorised guarantor, either alone or jointly with T;**
  - **A "repeat" guarantee from G on assignment is not allowed - G cannot be the guarantor of A, even if G wants to be!;**
  - **G can guarantee T's liability under the AGA entered into on assignment (a GAGA);**
  - **An assignment from T to G is void.**

Number 2…

FREETHS

FREETHS

Case # 2

Capitol Park Leeds Plc v Global Radio Services

“When a tenant goes too far in trying to give vacant possession….”

Break Rights: Vacant Possession

Capitol Park Leeds Plc v Global Radio Services [2020] - HC

- ***The Background***
- G was tenant of a commercial unit in Leeds via a 24 year lease expiring in 2025
- The lease included a right for G to break in November 2017 but the exercise of the break right was subject to the satisfaction of various conditions - one condition required G to give “vacant possession of the Premises to the Landlord on the relevant Tenant’s Break Date”
- “[T]he Premises” was a defined term, including the original building on the property & landlord’s fixtures, whenever fixed
- To avoid or minimise a liability for terminal dilapidations G started work & stripped out significant elements of the base build & landlord’s fixtures including radiators, lighting & ceiling tiles & grids
- G stopped work in hope of negotiating a settlement & surrender with C but was unable to do so - G did not replace elements of building it had removed

FREETHS

- C alleged that, in returning the property on the break date without stripped-out items, G had not complied with the condition for vacant possession
- ***The Outcome***
- **Held HC:** Finding in favour of C - what G had delivered up on the break date was not "the Premises". On the facts G had also not established that C was estopped from relying on the failure to comply with the break condition
- ***The 'So What'***
  - **Vacant possession requires a tenant to make a property available in a state in which the landlord can both physically & legally occupy it;**
  - **Modern break clauses tend to avoid requirements for delivery of vacant possession but, where this type of condition is included, the wording in the lease must be closely scrutinised;**
  - **Permission to appeal to the Court of Appeal has been granted!**

Number 3…

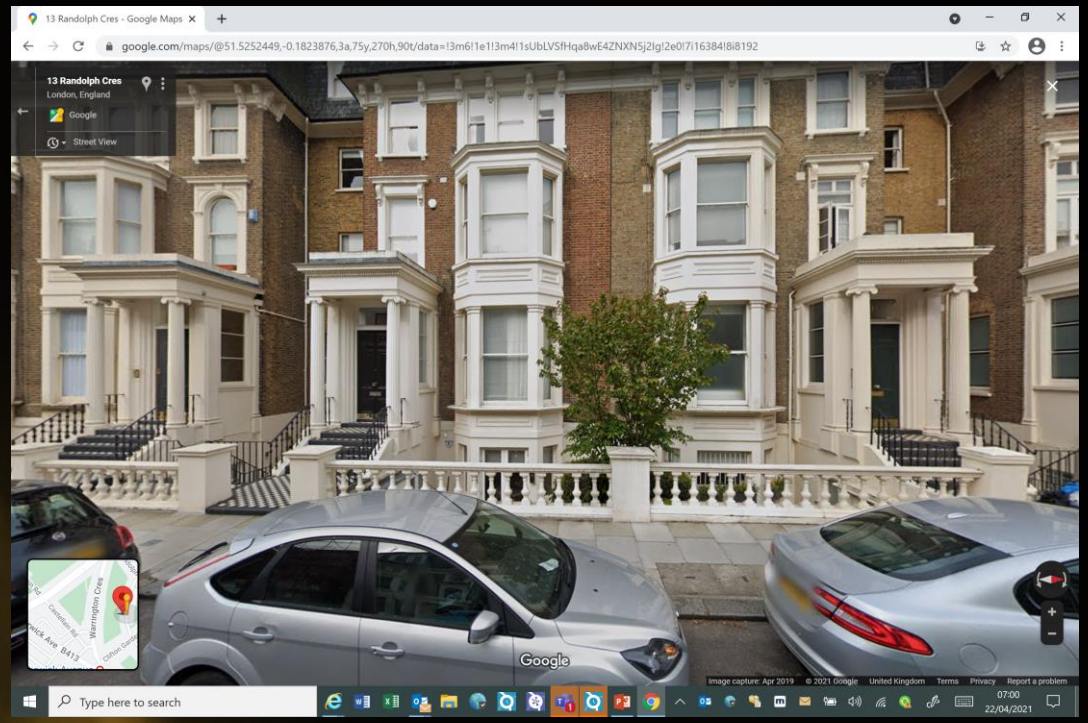
FREETHS

FREETHS

Case # 3

Duval v 11-13 Randolph Crescent Ltd

"Can a landlord permit a breach of an absolute covenant by one tenant which puts it in breach of a covenant to enforce obligations…?"



Consents/Enforcement of Covenants

Duval v 11-13 Randolph Crescent Ltd - SC

- ***The Background***
- W (lessee) wanted to carry out works to her flat, including the removal of about seven metres of loadbearing wall at basement level.
- Clause 2.7 of the lease contained an absolute covenant requiring each lessee not to cut any of the walls or ceilings.
- At clause 3.19, RCL (as landlord) covenanted to enforce any covenants entered into between it and a lessee at the request of any of the other lessees upon payment of the landlord's costs.
- RCL was willing to grant W a licence to carry out the works to avoid her being in breach of clause 2.7.
- D (another lessee) argued granting a licence would be a breach of clause 3.19.

FREETHS

- *The Outcome*
- Held CA: D's appeal against an earlier decision was successful.
- Held SC: Dismissed RCL's appeal – RCL did not have a right to unilaterally vary or modify clause 2.7 or to authorise what would otherwise be a breach of it.
- *The 'So What'*
  - Where a landlord grants a licence to a tenant to do something that would otherwise be a breach of its lease, the landlord will commit a breach of a covenant to enforce covenants;
  - SC's view was this is the case even if no leaseholder has requested enforcement and, where relevant, provided the required security;
  - So, a landlord should not licence works in breach of, or waive compliance with, an absolute covenant, without the agreement of all the other tenants in the building.

Number 4…

FREETHS

FREETHS

Case # 4

Faiz & Others v Burnley Borough Council

“When will a landlord waive its right to forfeit…?

Forfeiture - Waiver

Faiz & Others v Burnley Borough Council – HC (2020), CA (2021)

- ***The Background***
- Fs were tenants of a 10-year contracted-out lease (the Lease) that was due to expire on 25 February 2020 – it contained provisions restricting assignment and sub-letting and a forfeiture clause.
- Fs had breached the Lease by entering into a sub-lease of the property and, on 18 October 2019, they wrote to BBC (landlord) alerting it to the sub-lease and advising BBC that the sub-tenant had security of tenure.
- On 30 October 2019, BBC served a *s146* Notice on Fs in which they stated the breach (unlawful sub-letting) was incapable of remedy. BBC peaceably re-entered and forfeited the Lease on 22 November 2019.
- On 26 September 2019, BBC had invoiced Fs for insurance rent for the period until 25 February 2020, but on 4 November 2019, it issued a further (second) invoice for insurance rent, for the period until 18 October 2019, that Fs paid.

FREETHS

- *The Outcome*
- **Held HC:** Finding in favour of BBC – BBC did not have knowledge of the breach prior to 18 October and the second invoice, even if construed as a demand for insurance rent at a time when BBC had knowledge of the breach, was only for insurance rent for the period up to the point of knowledge of the breach, so again, would not be regarded as a waiver of BBC's right to forfeit.
- **Held CA:** Appeal dismissed. The 4 November invoice was not a fresh demand for payment of rent but was an indication by the council that it was willing to accept payment of a lower sum than under the 26 September invoice. Accordingly, there was no demand for payment of rent after the council knew of the sub-letting and so the council had not waived the right to forfeit.
- *The 'So What'*
  - A landlord loses its right to forfeit if, with knowledge of the breach, it acts in a way to communicate to the tenant an intention to keep the lease alive;
  - Even if a lease is contracted out of *Part II LTA 1954*, that does not mean that any sublease derived from it is also contracted out.

Number 5…

FREETHS

FREETHS

Case # 5

The Financial Conduct Authority v Arch Insurance (UK) Ltd & Others

"Business interruption insurance in a pandemic…"

FREETHS

Insurance - Business Interruption

The Financial Conduct Authority v Arch Insurance (UK) Ltd & O'rs [2021] - SC

- ***The Background***
- As a result of COVID-19, leading to widespread disruption & business closures, many businesses have sought to claim losses under their BI insurance policies
- FCA bought this test case seeking legal clarity on the meaning & effect of certain non-damage BI insurance policy wordings
- It selected a representative sample of policy wordings issued by eight insurers that agreed to be part of the test case
- The FCA contended that the relevant BI policies covered the events of COVID-19 & the Government action responding to the pandemic in the first half of 2020
- ***The Outcome***
- **Held SC:** SC substantially allowed the FCA's appeal on behalf of policyholders

FREETHS

The 'So What'

- For parties affected by this judgment, each policy needs to be considered against the detailed judgment to work out what it means for that policy;
- The FCA will publish a set of Q&As for policyholders to assist them & their advisers in understanding the test case;
- It will also publish a list of BI policy types that potentially respond to the pandemic based on data that it will be gathering from insurers;
- The FCA has already published draft guidance for policyholders on how to prove the presence of coronavirus, which is a condition in certain types of policy - FCA will issue finalised guidance as soon as possible;
- The FCA will continue to keep policyholders apprised of matters as they progress, through its dedicated webpage

Number 6…

FREETHS

FREETHS

Case # 6

Monsolar IQ Ltd v Woden Park Ltd

"The perils of an poorly drafted index linked rent review…"

"What I mean and what I say is two different things" the BFG announced rather grandly

Roald Dahl

Rent Review

Monsolar IQ Ltd v Woden Park Ltd [2020] - HC

- ***The Background***
- M had a lease of land for 25 years & six months to develop a solar energy farm
- The initial rent was £15k per annum & the lease had a tenant's break right at any time on giving six months' prior notice
- The rent payable under the lease was subject to annual reviews to reflect increases in the Retail Prices Index (RPI) - the relevant clause provided that the revised rent would be calculated according to the following formula:

$$\text{Rent payable prior to the Review Date} \times \frac{\text{Revised Index Figure (RIF)}}{\text{Base Index Figure (BIF)}}$$

- BIF = the RPI for the month two months before the start of the lease term
- RIF = the RPI for the month two months before the relevant review date

FREETHS

- M accepted that, read literally, the way the indexation clause was drafted meant that, on the first anniversary of the lease, the rent was to be increased by the RPI increase over the first year of the term
- But by defining the Base Index Figure as it did, the formula potentially created catastrophic rent increases for M
- M produced calculations based on an assumed RPI increase over the 25 year term of the lease equivalent to RPI increases over the previous 20 years which produced a rent in excess of **£76m** at the end of the term!
- WPL did not think there was a mistake in the drafting - the lease had been drafted by a director of WPL using precedents available on the internet!
- WPL argued the drafting was clear & unambiguous & the presence of a tenant's break right gave M protection against unfair workings of the clause

FREETHS

- ***The Outcome***
- **Held HC:** Finding in favour of M - HC's view was that "something had gone wrong" with the drafting & the lease was to be interpreted so as to remove its arbitrary & irrational effects
- ***The 'So What'***
  - **M was lucky here - the HC distinguished the SC decision in *Arnold v Britton [2015]* on the basis that the leases in that case had been granted at a time of high inflation;**
  - **For index-linked rent increases the most common methods are:**
    - **start each time with the initial rent payable & apply increases in the index since the start of the lease to that initial figure; or**
    - **start each time with the rent currently payable & apply increases in the index over the last year to that current figure.**

Number 7…

FREETHS

FREETHS

Case # 7

Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd

“Can a tenant challenge a landlord’s service charge certificate that is stated to be ‘conclusive’…?”

FREETHS

Service Charges

Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd [2020] - CA

- ***The Background***
- B was the tenant of retail premises in Liverpool pursuant to which, in terms of service charge, B was required to pay sums quarterly on account in accordance with written notifications given by S
- Following the end of each service charge year, S was required to furnish a certificate to B as to "the amount of the total cost" & the sum payable by B
- The lease provided that, "in the absence of manifest or mathematical error or fraud", the certificate furnished by S was "conclusive"
- In the year of the termination of its lease, B was charged more than £400k service charge (8x higher than the previous year!)
- B argued that some of the expenditure was not within the scope of the service charge

FREETHS

- There was no provision in lease to enable B to refer a dispute as to whether any of the costs incurred had been properly included in the service charge
- ***The Outcome***
- **Held HC:** Finding in favour of B. The certificate was conclusive as to the amount of the costs incurred, absent manifest or mathematical error, or fraud, but was not conclusive as to the question of whether those costs, as a matter of principle, fell within the scope of the service charge payable by B
- **Held CA:** S was entitled to summary judgment. S's certificate was conclusive in respect of two elements, namely (1) the amount of the total cost; & (2) the itemised sum payable by the tenant
- From CA's point of view, those two elements could not be separated & to find otherwise the lease should contain express words to that effect or a necessary implication
- ***The 'So What'***
- Tenants should beware any similar wording as it could make the landlord judge in its own cause

FREETHS

Time for a Brucie Bonus!

Claim For Non-Payment of Rent

Commerz Real Investmentgesellschaft mbh v TFS Stores Ltd [2021]

- ***The Background***
- The landlord sued TFS for non-payment of rent and service charge accruing during the period of lockdown in relation to its premises in the Westfield Shopping Centre.
- TFS' defence to the claim was threefold
  1. The claim was issued prematurely and contrary to the Code of Practice;
  2. The claim was a means of circumventing the measures put in place by the Government to protect commercial tenants; and
  3. The landlord was in breach of the insuring covenant as it had failed to insure against loss of rent due to forced closures/denial of access due to a notifiable disease and/or Government action.
- The landlord applied for summary judgment.

FREETHS

The Outcome. **Held HC:** Landlord was granted summary judgment.

1. The landlord was not in breach of the code of practice in issuing the claim as the code does not suspend the parties' obligations under the lease. The code is voluntary.
2. The issuing of a debt claim was not a "*loophole*". The Government restrictions did not prevent a landlord from issuing a claim.
3. The landlord was not required to insure against a notifiable disease or Government action under the terms of the lease. They were not defined as Insured Risks and the landlord was not obliged to insure against any other risks unless it chose to do so. The court also confirmed the rent cesser clause did not apply in these circumstances with the judge stating "*The lease apportions risk between the parties and the rent cesser provisions apply exceptionally in the limited circumstances they expressly contemplate, and no further*."

The 'So What'

- This judgment confirms what most practitioners thought; namely tenants will struggle to resist a claim for unpaid rent on these types of arguments.
- There are other arguments tenants are running, which as yet, no cases have determined.

FREETHS

FREETHS

Lease Renewals/Pandemic Rent Suspension Clause

W H Smith v Commerz – CC [2021]

- ***The Background***
- WHS had a lease of a unit in Westfield Shepherds Bush, which it was renewing. By the time the matter came to court, the majority of the terms were agreed including that the lease should include a pandemic rent suspension clause. However, the parties could not agree the trigger to the clause.
- L stated the trigger should be the tenant being required to cease trading, whereas WHS stated the trigger should be other non-essential retailers being required to close.
- The parties agreed the rent should be discounted by 20% due to the impact of the pandemic on the relevant rental marker. L also argued there should be a 10% uplift on the rent due to T having the benefit of the pandemic rent suspension clause.

FREETHS

- ***The Outcome.***
- **Held:** The CC judge found in favour of WHS on trigger as the basis that L's proposal was effectively empty as its trigger would likely never be activated (WHS had been open throughout the pandemic due to having a post office in store).
- On the rent, the judge held that there should be no uplift for the pandemic rent suspension clause as (1) the clause was trying to share the burden of loss caused by the pandemic and (2) this type of clause was something all tenants expected and the market had priced in.
- ***The 'So What'***
- Although only a County Court decision, this is a good case for tenants to present to support an argument they should have a pandemic rent suspension clause that should apply if non-essential retail is ordered to close, even if they can continue to trade.
- Tenants should not pay more for the benefit of having such a clause.