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In-House News

ARMA and Brethertons Join Forces

Brethertons is delighted to announce that in conjunction with ARMA, we will be providing ARMA members with access to a 2007 series of tailored legal webinars (seminars over the internet) that members can participate in and also use as a training opportunity.

David Hewett, ARMA's Executive Secretary said: *"These webinars are a further positive extension of the training resource we offer our members. Combined with the Open Learning Course, our one and two-day training courses and our self-learning bibliography, there are now learning opportunities to suit all grades of staff and fit in with their time constraints. It is good to be working with Brethertons on these webinars as they have a proven track record in this area and bring top legal expertise to the subjects we plan to cover at affordable prices. The initial intention is to broadcast every two months but there is the resource to increase the frequency if our members' demand is there."*

Caroline Lee the Head of Brethertons Property Management Department confirmed: *"We are well known for providing good quality advice and information via our webinars and are very pleased to be working closely with ARMA. Members should enjoy the exciting and interactive webinars and these will be promoted by ARMA in the normal way and via their website in due course at www.arma.org.uk."*

New Property Manager

We are pleased to announce the recruitment of Shanna Leask to our ever-expanding Property Management Team. Shanna has been involved in property management for 4 years having joined Brethertons from Hamptons International.

Caroline Lee the Head of the Property Management Division said *"We are delighted Shanna has joined Brethertons. Her background as a residential property manager who has actually worked at the coalface is invaluable to us as lawyers - we are now learning even more tricks of the trade!"*

Employment Lawyer on Legal TV

Natalie Roach the Head of our Employment Law unit has recently appeared on Legal TV in order to discuss live on air employment law issues. Legal TV can be watched on their new Sky Channel 215 or www.legaltv.co.uk.

Bwengu Village North Malawi

As many clients and contacts will know, our nominated charity for 2007 is the Bwengu Village Project North Malawi a very small project run by Tony and Sue Melia from Rugby. Tony and Sue are both retired but manage to spend huge amounts of their time and money helping poor people who live in impoverished villages in Malawi.

In December we sent out an e-mail Christmas card, the money, which we saved on postage, was donated to the project. Our donation has financed the completion of a teacher's house and two classroom blocks. Visit the website at www.bwenguprojects.co.uk

Resounding Success For Leaseholders In Court Of Appeal

A special report from Yashmin Mistry the head of Our Enfranchisement Department.

On 23rd January 2007, the Court of Appeal's decision in the case of Cawthorne & Others v Hardman was formally handed down. In this article, Yashmin Mistry, Solicitor in the Property

Management/Enfranchisement Department of Brethertons LLP, explains how the case questioned the Landlord's ability to claim a "leaseback" of a top floor freehold flat in a collective enfranchisement claim after he had served his Counter-Notice stating no such leaseback was to be made.

Introduction:

The case concerned the premises, 6 Palmeira Square, Hove, East Sussex, which comprised 6 flats. On 25th July 2001 the six flats were subject to different tenancies; five tenancies were such that the leaseholder was a "qualifying tenant"; the sixth was not.

Under Section 5 of the Leasehold Reform, Housing and Urban Development Act 1993 ('the 1993 Act'), subject to other provisions, a person is a "qualifying tenant" if he is tenant of a flat under a long lease. There are some exclusions from that, such as business tenancies, but there were none in this case. A long lease is defined by Section 7 of the 1993 Act and, in the main, is a lease granted for a term of years certain exceeding 21 years.

On 25th July 2001, four of the five qualifying tenants gave notice to the Landlord of their intention to exercise their right to purchase their freehold under the collective enfranchisement provisions of the 1993 Act. The fifth qualifying tenant did not participate in the process.

On 27th September 2001 the Landlord served a Counter-Notice under Section 21 of the 1993 Act. The Counter-Notice included a paragraph referring to additional leaseback proposals. The Landlord completed the Counter-Notice saying that there were no such proposals.

As negotiations ensued, it became clear the terms of the acquisition could not be agreed and the matter was referred to the Leasehold Valuation Tribunal (LVT) for a determination on the price payable. On 22nd July 2002 the LVT determined that the price payable was £182,190. A major element of this figure was the value of the sixth flat which was treated as being subject to an assured shorthold tenancy.

Despite the LVT's Determination, on 6th January 2003 Brighton County Court were forced to make an Order requiring the Landlord to transfer the freehold to the leaseholders involved in the collective enfranchisement process. The transfer had not yet happened as it had been discovered that the flat was subject

to an agreement between the Landlord and a Mr Lloyd dated 23rd March 2000 for the grant of a tenancy for 5 years with an option to renew for a further 10 years. This would have affected the price payable for the freehold.

The Landlord subsequently appealed this decision to the Lands Tribunal. On the 22nd February 2006, almost the eve of the Lands Tribunal Hearing, the Landlord then served a Leaseback Notice seeking a leaseback of the top flat. If the Leaseback Notice was held to be valid, the Landlord would have been entitled to a long lease at a peppercorn rent so that he would be in a position to obtain for himself whatever economic value the flat represented! Clearly this would have undermined the LVT's Determination as to price payable and moreover could cause serious inconvenience and practical problems as well as being potentially unfair to the acquiring leaseholders as it would result in substantial delay as the price would have to be re-determined by the LVT.

Arguments:

The relevant statutory provisions need to be considered in detail. Section 21(3) of the 1993 Act has a mandatory provision requiring that, if the Landlord wishes to put forward a leaseback proposal, he must identify it in the Counter-Notice. That suggests that, if he does not do so then and there, it is too late. However, in contrast, paragraph 5 of Schedule 9 provides for the Landlord "to serve a Leaseback Notice requiring the grant of a leaseback in relation to any flat which is not, immediately before the time when the nominee purchase acquired the freehold, a flat let to a person who is not a qualifying tenant". Arguably in this light it must be open to the landlord to serve such a notice at any time up to the moment before the nominee purchase acquires the freehold. A rather potentially unfair outcome for the acquiring tenants!

The leaseholders' solicitor before the Lands Tribunal did not argue that a Landlord could not serve a leaseback notice at all if he had not specified the proposal for such a leaseback in his Counter-Notice. Instead, it was their case that the Leaseback Notice was too late on the particular facts.

Held:

The Lands Tribunal decided the Landlord's Leaseback Notice was not valid and held that it was not sufficient to justify the reading of Section 9 Part III as conferring on the Landlord a right to serve a Leaseback Notice where no relevant proposals have been made in the Counter-Notice. They went on to rule that, it is all the more the case, if there has been no change in circumstances and the Landlord could perfectly well have mentioned that proposal in the Counter-Notice but merely omitted to do so.

Whilst the Landlord appealed that decision to the Court of Appeal, the Appeal Court however upheld the decision of the Lands Tribunal and concluded that the reference to the appropriate time and thereby to the moment before acquisition, does not show that a leaseback notice may be served at any time up to that moment. *"The consequences of such a reading would be extremely inconvenient in practical terms and would be likely to be unfair to the acquiring leaseholders leaving the process open to manipulation on the part of the Landlord."*

In conclusion, the Court of Appeal dismissed the Appeal and held that it is not possible for the Landlord to claim a leaseback unless it had first been claimed in the Counter-Notice - the leaseholders in this case can now finally proceed with the purchase of their freehold. Arguably, a resounding success for leaseholders involved albeit some 6 years later!

Acceptance of Payment Causes Loss of Rights

A recent case involving a tenant that became insolvent should sound a warning bell for landlords. In this instance the tenant, which was a company, entered into a company voluntary arrangement (CVA) and the landlord accepted payments of rent after the due dates.

The relevant lease contained a clause which allowed the landlord to repossess the property if the tenant became insolvent or fell into arrears of rent. The landlord, therefore, applied for forfeiture of the lease. He failed in the Court of Appeal, which ruled that because the landlord had accepted the late payments of rent, he had waived his right to forfeiture of the lease and that the tenant's debts for arrears of rent were compromised under the CVA.

"If your tenant falls into arrears of rent and/or service charges, take advice before you take action or even accept a late payment from the tenant," says Caroline Lee, Head of Property Management Division. "Hasty actions can have expensive unforeseen consequences."

Assessment of Damages Based on Rental Value

The Court of Appeal recently heard a case in which the question at issue was the correct basis for calculating the damages payable by a landlord to the tenant of a flat for the landlord's breach of the repairing covenant under the lease. The tenant occupied the flat as his home under a 99-year lease, paying only ground rent.

In this instance, the landlord had failed to keep the roof of the property in good repair, which resulted in water coming into the flat in substantial quantities. The tenant put up with this for nearly three years but was eventually compelled to vacate the flat for a period of 21 months.

The tenant sued the landlord. The judge awarded the tenant £20,000 by way of damages for his period of occupation and £10,000 for the period when he was forced to move out. The landlord appealed, arguing that the damages suffered were only in the region of £3,300 and that it was unfair for damages to be on a 'loss of rental value' basis, assessed on the deemed market rent, when the tenant was paying only a ground rent.

The Court of Appeal concluded that whilst there was no general 'tariff' which applied in such cases, the resulting assessment of damages payable to the tenant by the landlord should be made with reference to the reduction in the open-market rental value of the flat and the impact on that of the unrectified roof problem. The fact that the tenant was paying only ground rent was not in point.

The message for landlords is that failing to comply with repairing covenants in leases with tenants can cost more than just the cost of repair, even where the tenant is on a long-term lease paying only a ground rent.

Careful Drafting Pays Dividends

A landlord who failed to include an appropriate clause for subletting to a social tenant in his lease with a local authority recently had cause to regret the way in which the lease had been drafted. The case involved a flat which was intended to be let for temporary housing and which was eventually let to a sub-tenant of the local authority for several years. The lease, given to Haringey District Council, omitted a clause which prevented the tenant from acquiring full security of tenure. In order to prevent a tenant acquiring security of tenure, the head lease must contain a provision entitling the lessor to take possession of the premises on the expiry of a stated period or when required by the lessor, so as to comply with the Housing Act 1985.

When the sub-tenant fell into arrears, the Council sought repossession of the property. During the course of those proceedings, it was decided that she had acquired a secure tenancy because the clause in the Housing Act dealing with such leases specifies that a lease does not create a secure tenancy when the terms on which the property has been leased 'include provision for the lessor to obtain vacant possession ... on the expiry of a specified period or when required by the lessor'. The Court of Appeal decided this had to be construed strictly, meaning that the head lease must contain a break clause worded loosely enough to allow the landlord to obtain vacant possession either on the expiry of the lease or when required by him. In this case, the lessor could only require that the property was vacated at the end of the lease and the tenancy therefore qualified as a secure tenancy.

The landlord was therefore left with a sitting tenant - a most unfortunate result given that the property was only intended to be used for temporary housing.

Landlords Must Act Fairly and in Reasonable Time

A recent case involving the recovery of service charges has seen the court criticise the way that landlords and their agents often deal with service charges.

The case involved a property in Piccadilly, London, which is tenanted. The basement-level tenant is a casino (Distinctive Clubs Ltd.) and it

entered into its lease in 1998. The building was known to have structural problems with its roof, which needed substantial repair, and the lease signed by Distinctive Clubs contained a clause which limited its liability for repair works during the first five years of its lease. The estimated cost of repair in 2002 was £200,000.

In 2004 (after the limitation clause had expired), the landlord carried out roof repairs, which included building a new structure which benefited only the tenant occupying the top floor. The total bill amounted to over £2m and Distinctive Clubs' contribution to the repairs was assessed at £700,000. In court there were two main questions to address.

Firstly, was the basement tenant liable to pay for the works that benefited only the top floor tenant and which, in any event, were improvements to the property, rather than repairs?

Secondly, was the delay in carrying out the repairs reasonable?

In the view of the court, the repairs to the roof were justifiable repairs under the lease. However, the improvements which benefited only the rooftop tenant were not, so Distinctive Clubs would not be liable to contribute to those. However, in the view of the court, the landlord could, had it shown reasonable alacrity, have completed the repairs by 2003. Accordingly, Distinctive Clubs was not liable to contribute to any of the cost of the repairs.

The judge criticised the landlord and its agents for including in the landlord's claim sums which were not properly due and for not informing the tenants of the spiralling cost of the roof repairs. He also criticised the agents for their lack of independence, characterising their approach as seemingly being intent only on recovering as much as possible of the cost from the tenants.

The lesson for landlords and their agents is that attempts to collect 'full recovery service charges' in a way which does not properly balance the interests of tenants and landlords is likely to get short shrift in the courts.

Lands Tribunal - New Deferment Rate

The Leasehold Reform Act gives residential tenants who hold long leases the right to purchase an extension to their lease or to purchase the freehold reversion over the property they occupy. In order to set the price for the purchase, it is necessary to value the property based on what the owner of the freehold could expect to obtain for it should it be sold to a willing buyer.

This, in turn, requires a valuation to be made of the right to vacant possession of the property at the end of the tenant's lease. This is done by comparing the value of the property with vacant possession at the valuation date and discounting that valuation to take account of the period of time which will pass until vacant possession is available. This discount rate is known as the 'deferment rate'.

The normal deferment rate was, until recently, set at 4.75% for flats and 4.5% for houses. The Lands Tribunal has decided that the deferment rates should henceforth be set at 5% for flats and 4.75% for houses. This small change will increase the values of the vacant possession of such properties.

The Tribunal also considers that before a different deferment rate is considered as appropriate, the valuer needs to be satisfied that there are special circumstances that make a departure from the normal rate appropriate.

Controlled Access to UK Labour Market for New Accession Countries

Bulgaria and Romania joined the European Union (EU) on 1 January 2007. From that date Romanians and Bulgarians have the right to travel throughout the EU. However, employers should note that the Government has decided to limit access to the UK's labour market for citizens of both countries.

Low-skilled workers from Romania and Bulgaria are restricted to existing quota schemes to fill vacancies in the agricultural and food processing sectors. There is to be no net increase in these existing schemes and workers are required to have an authorisation document.

Skilled workers will continue to be allowed to work in the UK, along with their dependants, if they obtain a work permit or qualify under the Highly Skilled Migrant Programme.

Bulgarian and Romanian students will continue to be allowed to study in the UK and to seek part-time employment during their stay but need a work authorisation document to do so. Self-employed workers continue to be able to work here, but must be able to prove that they are genuinely self-employed.

These new arrangements will be reviewed within 12 months. The proposed new Migration Advisory Committee will assist in this process, taking account of the needs of the UK labour market, the impact of the migration of nationals of the central European countries which joined the EU in 2004 and the positions adopted by other EU countries.

Employers and employees have a duty to abide by the new rules and it is an offence, punishable by an on-the-spot fine of £1,000, for a Bulgarian or Romanian national to work in the UK illegally. Employers who do not comply with the rules can be subject to a fine of up to £5,000.

Other measures have also been announced. These are:

- an audit of local areas to monitor the effect of EU enlargement/migration on local services with a review led by the Department for Communities and Local Government
- a consultation process with industry on whether there is a need for similar arrangements in other sectors
- a review of the transitional controls to ensure future access to the labour market is gradual and controlled; and
- a new helpline for employers.

The Worker Registration Scheme (WRS) will continue to apply to nationals of the eight central European countries which joined the EU in 2004 but does not apply to Bulgarian and Romanian nationals.

The Control of Asbestos Regulations 2006

Owners and managers of commercial premises, employers whose workers use, install, remove, maintain or demolish premises that may contain asbestos and businesses providing construction or building services are all affected

by the Control of Asbestos Regulations 2006, which came into force on 13 November 2006. They consolidate three previous sets of regulations covering the prohibition of asbestos, the control of asbestos at work and asbestos licensing and strengthen the requirement to protect workers by minimising exposure to asbestos.

Employers using their own workers on their own premises are no longer exempt from the licensing requirements.

The Regulations require mandatory training for anyone liable to be exposed to asbestos fibres at work. This includes maintenance workers and others who may come into contact with or who may disturb asbestos, as well as those involved in asbestos removal work.

The Regulations introduce a single Control Limit for all types of asbestos of 0.1 fibres per cm³. A Control Limit is a maximum concentration of asbestos fibres in the air (measured over any continuous 4 hour period) that must not be exceeded.

In addition, short term exposures must be strictly controlled and worker exposure should not exceed 0.6 fibres per cm³ of air, averaged over any continuous 10 minute period. The employer must provide respiratory protective equipment if exposure cannot be reduced sufficiently using other means.

Most asbestos removal work must be undertaken by a licensed contractor but any decision on whether particular work is licensable is based on the risk involved. Work is only exempt from licensing if:

- the exposure of employees to asbestos fibres is sporadic and of low intensity; and
- it is clear from the risk assessment that the short-term exposure limit of any employee to asbestos will not be exceeded.

The Regulations also introduce less stringent controls on working with textured decorative coatings which contain asbestos as the risks these pose are considered to be much lower than previously thought.

Anyone carrying out work on asbestos insulation, asbestos coating or asbestos insulating board needs a licence issued by the Health and Safety Executive (HSE) unless one of the exemptions is met.

Further information can be found on the website of the Health and Safety Executive at www.hse.gov.uk/asbestos/index.htm.

Preparing for the Smoking Ban

Legislation enacted under the Health Act 2006 will ban smoking in most enclosed workplaces and public places with effect from 1 July 2007. The ban also extends to work vehicles not used exclusively by one person.

According to figures published by the TUC, around a quarter of all workers smoke, although many workplaces are already 'smoke free'. Approximately two million people in Great Britain work in establishments where smoking is still allowed throughout and another ten million in workplaces where smoking is allowed somewhere on the premises.

Whether starting from scratch in introducing a ban on smoking in the workplace or updating an existing 'no smoking' policy, employers are advised to begin preparing for the new legislation now in order to achieve a smooth implementation of the policy.

Employers should consult with staff on the best way of introducing the ban rather than just notifying them that one is being introduced to comply with the law. A negotiated policy is more likely to be acceptable to employees and there may be possibly contentious issues to determine, such as what time is to be allowed for smoking breaks for workers who will have to go outside to smoke and arrangements regarding any resulting litter.

The aims of smoking policies are to protect all staff from the harmful effects of second-hand tobacco smoke, to ensure that everyone has a clear understanding of their rights and responsibilities, in order to avoid problems arising, and to ensure compliance with the law. The policy should include details of any

support that is to be provided by the employer to those who wish to give up smoking, what action will be taken against anyone who does not comply with the ban and the procedures set up to resolve complaints and disputes. Once implemented, the policy should be monitored to ensure that it is working properly. All new employees should be provided with a copy.

Under the legislation, occupiers of substantially enclosed work premises will have to display prominent 'no smoking' signs (of at least A5 size) at all entrances to the premises and also place signs in company vehicles as appropriate. Employers will be liable to a fixed penalty of £200 (reduced to £150 if paid within 15 days) if they do not have the required signage. If a fixed penalty is not paid the employer could face a fine of up to £1,000 (and a criminal record). The penalty for failing to take reasonable steps to prevent smoking on the premises will be a fine of up to £2,500.

Employees and visitors will be subject to a fixed penalty of £50 (reduced to £30 if paid within 15 days) if found smoking in the workplace premises. If the fixed penalty is not paid, the offender could face a fine of up to £200, plus a criminal record.

Contact Natalie Roach, Lawyer on 01295 270999 or natalieroach@brethertons.co.uk for assistance with drawing up a smoking policy in good time to ensure that it is finalised and implemented ready for when the new law takes effect.

Managing Sickness Absence

The Chartered Institute of Personnel and Development (CIPD), working with the Health and Safety Executive and the Advisory, Conciliation and Arbitration Service, has launched a free online toolkit to assist in dealing with absence management.

The toolkit gives information on absence management practices and procedures and is split into four parts to help managers:

- identify an absence problem
- develop an absence strategy
- deal with short-term absence; and
- deal with long-term absence.

The toolkit can be found on the CIPD website at www.cipd.co.uk/subjects/hrpract/absence/absmantool?vanity=http://www.cipd.co.uk/absencemanagementtool.

New DTI Guide on Employee Rights and Responsibilities

The Department of Trade and Industry has published a 96-page guide entitled Individual Rights and Responsibilities of Employees.

The guidance provides a useful summary of the employment law rights of employees and the corresponding obligations for employers. It can be found at www.dti.gov.uk/files/file34565.pdf.

In a document as concise as PropertyManagerFILE it is impossible to give a complete answer to all facets of any legal problem. Treat PropertyManagerFILE as food for thought, but don't take any action based on its advice unless you have seen a solicitor. ©2007.

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