Quarterly Real Estate Disputes Update

BRIEFCASE

December 2024

BCLP


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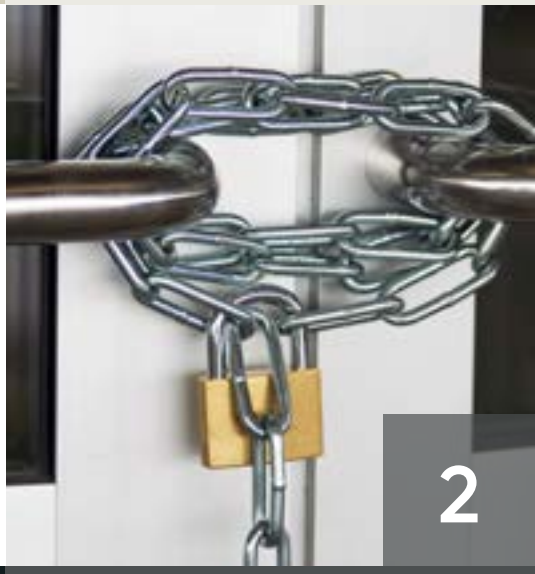
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OFFICES
TO LET
940 sq ft
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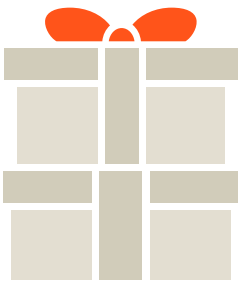


Case 1: AP Wireless II (UK) Ltd v On Tower UK Ltd

In a landmark judgment, the Upper Tribunal considers the lease/licence distinction, clarifying exclusive possession, term certain and contractual interpretation in the context of Code agreements.

What was it about?

- The case concerned two agreements to install and operate telecoms equipment on an area of land.
- The telecoms operator – On Tower – asserted that the agreements were **licences** that could be terminated and replaced with new agreements under the Electronic Communications Code.
- The landowner – AP Wireless – claimed that the existing agreements were **leases** that should be renewed under the Landlord and Tenant Act 1954.
- This mattered because the terms of a new agreement under the Code would be more favourable to the operator, whereas the terms of a lease renewal under the 1954 Act would be more favourable to the landowner.

What did the court say?

- There are three key requirements for a lease: (1) exclusive possession; (2) for a term certain; (3) at a rent.
- The First Tier Tribunal ("FTT") decided that both the agreements were licences on the basis that the operators did not have exclusive possession of the land upon which the telecoms apparatus was located.
- The landowner appealed.
- Unlike the FTT, the Upper Tribunal ("UT") found that the operator **did** have exclusive possession of the relevant sites, but only partially reversed the FTT decision because of the lack of a term certain under one of the agreements that was expressed to be for a "minimum term", terminable at any time thereafter on one year's notice.
- The UT therefore decided that one agreement was a lease and the

Akhil Markanday
Partner and Global Practice Group Leader - Arbitration, Real Estate and Construction Disputes (ARC)
London
akhil.markanday@bclplaw.com
T: +44 (0)20 3400 4344

other (lacking the term certain) a licence.

Why is it important?

- The detailed judgment provides a thorough and useful analysis of some fundamental legal concepts:
  - → the characteristics and distinctions between a lease and a licence (including in the telecoms context)

In the present case, if the totality of the rights and obligations in each Agreement had the effect of a grant… of exclusive possession of the relevant Site for a term at a rent, the result will be that each Agreement took effect as a lease, even though each Agreement was not described as a lease and notwithstanding that each Agreement may not have contained the conventional language of a lease.
[2024] UKUT 263 (LC) [82]

Case 2: Sunnymeads Motor Company v Tolfree-Cross & Another

A business tenant, whose lease renewal claim was issued more than a week after the statutory deadline, is thrown a lifeline by the High Court.

What was it about?

- Sunnymeads was the tenant under a Landlord and Tenant Act 1954 business lease. In early 2024, its landlord served a notice terminating Sunnymeads' lease on **3 September 2024**.
- To protect its position, on **2 September 2024** Sunnymeads hand delivered an application to renew its lease to the court with a covering letter providing a telephone number for the court to call to take payment of the court fee (a common payment method, permitted by the Civil Procedure Rules).
- On **3 September**, when the court was unable to confirm receipt of the 2 September application, Sunnymeads delivered a second lease renewal application to the court, this time with an unsigned cheque for the court fee.
- The court, confused by the two claim forms that appeared to be "for the same purpose", returned both claim forms, unissued, to Sunnymeads, who then sent a third claim to the court on **9 September**, which was duly issued.
- In the meantime, on **11 September**, the landlord took back possession of the premises, claiming that Sunnymeads' lease had ended on 3 September as it had failed to make the requisite court application for a new lease by the statutory deadline of 3 September.
- In response, Sunnymeads obtained an urgent court injunction permitting it to re-enter the premises, and the issue before the court was whether that injunction should be extended or discharged.

Cassandra Fleming
Senior Associate
Manchester/London
cassandra.fleming@bclplaw.com
T: +44 (0)20 3400 3783

If the court officer fails to take the action within the relevant time, does that mean that the application was not made in time?

[2024] EWCH 2822 (KB) [28]

What did the court say?

- The court had to determine whether Sunnymeads could show a serious issue to be tried in respect of its 1954 Act rights. This turned on whether it was likely to have made a valid lease renewal application before the expiry of the 3 September 2024 statutory deadline.
- The court applied the liberal approach adopted in previous cases where a technicality about payment of the court fee (that had delayed the issue of a claim that had been submitted in time) was found not to be fatal. In this case, the making of the second application enclosing an unsigned cheque caused confusion in the court office, which likely led the court to not call Sunnymeads to take the payment which they probably otherwise would have done. On the facts, the court found that it was therefore likely that Sunnymeads would be found to have made the lease renewal claim in time, and there was thus a serious issue to be tried.
- Further, the court considered that damages (instead of an injunction) would not be an adequate remedy if Sunnymeads was excluded from the premises.
- And finally, even though the landlord had raised some serious matters that could sway the balance of convenience in favour of discharging rather than extending the injunction, these matters had only been raised a day before the hearing which led the court to exercise its discretion in favour of Sunnymeads, and continue the injunction.

Why is it important?

- This case highlights the importance of strictly complying with the hard deadlines imposed by the 1954 Act, and indeed, any limitation date.
- For now, it appears that as long as the claim form and a valid means of payment for the court fee is delivered to the court by the relevant deadline, then even if there is a delay in issuing the claim due to a technical or court delay, it is likely to be considered to have been properly made.
- But as always, the outcome of each case will be highly fact sensitive, and this case is stark reminder that claims should always be issued in a timely manner, enclosing the correct court fee, to avoid any last minute rush that leads to mistakes, confusion and expensive/uncertain litigation.

Case 3: Nicholas Alexander Blomfield and others v Monier Road Limited

The First-Tier Tribunal considered that a roof garden was a "storey" when assessing whether a building is higher-risk under the BSA, which apparently contradicts Government-issued guidance.

Jessica Hopewell
Senior Associate
London
jessica.hopewell@bclplaw.com
T: +44 (0)20 3400 3732

What was it about?

- In an application for a remediation order, the First-Tier Tribunal raised a concern about whether the subject building was higher-risk for the purpose of the Building Safety Act 2022 ("**BSA**"). The building comprises commercial premises on the ground floor, residential flats over five storeys and a roof terrace containing a garden and plant/machinery.
- The BSA defines a "higher-risk building" as a building of at least 18 metres in height or at least seven storeys, with at least two residential units.
- Although neither the BSA nor the regulations define "storey", the regulations provide that a rooftop can be a storey except where it contains exclusively plant/machinery. So, a rooftop comprising a mix of roof garden and plant/machinery (as in this case) would be a storey. That would make the building in this case seven storeys - a higher-risk building.
- However, the Government-issued guidance on the question of whether a building is higher risk goes further than the regulations, stipulating additional exceptions that would exclude the rooftop in the case from the definition of "storey", producing a different result.

What did the court say?

- There is a question over the status of Government guidance, which does not constitute a reliable method of interpretation of law.
- One of the concerns behind the definition of "storey" for fire safety considerations must be where people might be in the event of a fire. As well as in their flats, where there is a roof garden, people might be there. Therefore the level of the roof garden will be significant in determining height.
- On considering the BSA and secondary legislative requirements, the Tribunal considered that the building had seven storeys and so was higher-risk.
- The Tribunal reiterated that it is a fundamental rule that definitions in the BSA and secondary legislation cannot be interchanged, supplemented or interpreted using other sources without just reason.

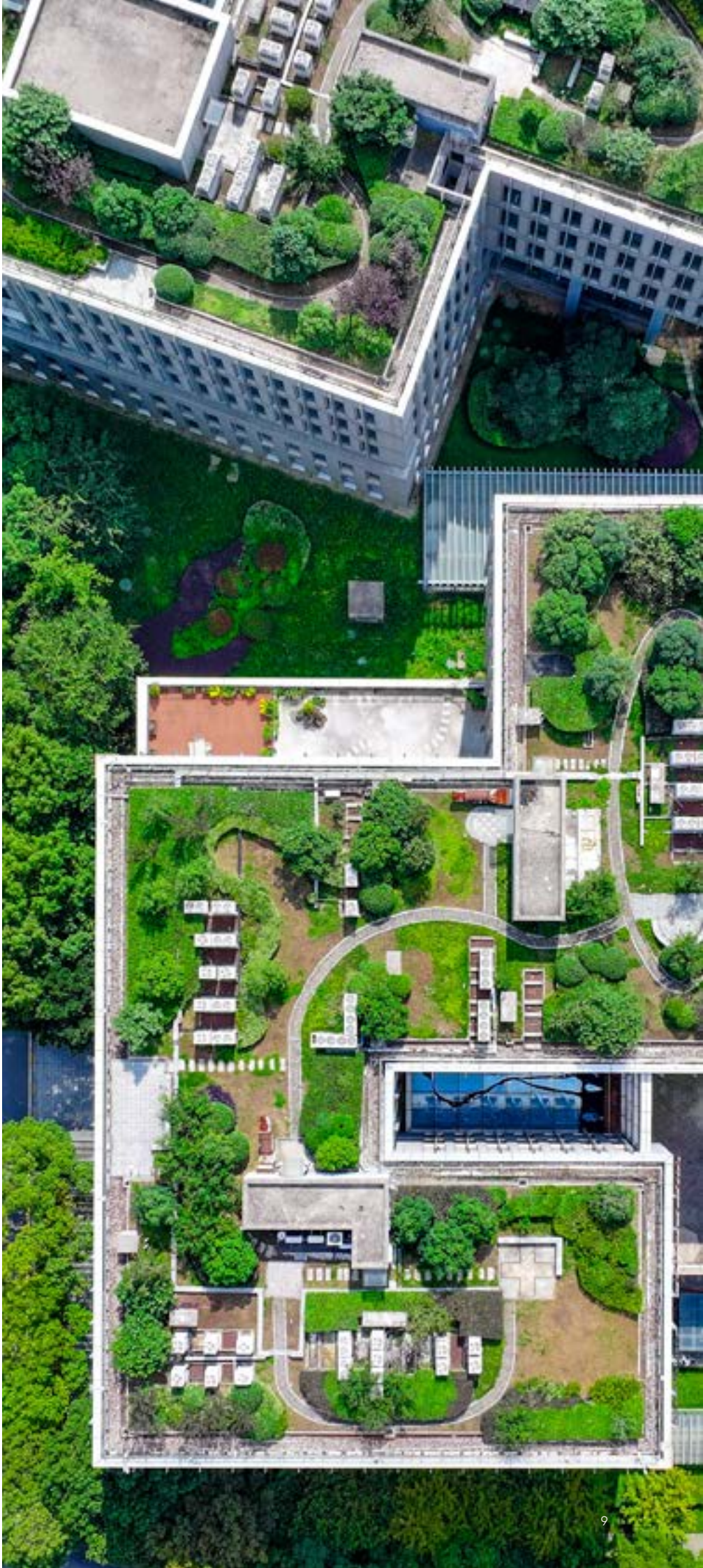
It is… essential to use the correct interpretation, guidance, law or statute relevant to the issue being determined.

LON/00BG/HYI/2023/0024 [87]

Why is it important?

- In an area of law which is still relatively new and rapidly evolving, building owners may well have followed the Government guidance and not included certain roof areas when assessing whether a building is higher-risk.
- It is vital to know whether a building is higher-risk to ensure the correct fire safety regime can be implemented to best protect the occupiers.

*Since this decision, the Government has noted on the web page containing the relevant guidance that the Ministry of Housing, Communities and Local Government and the Building Safety Regulator are currently considering the views expressed by the Tribunal in this decision and that, until stated otherwise, the sector and regulatory bodies should continue to refer to existing Government guidance.



Case 4: The Pentagon Food Group & Ors v B Cadman Ltd

Can a party enforce or challenge the terms of a settlement agreement where the counterparty allegedly misrepresented its ability to bring the settlement into effect during without prejudice negotiations?

What was it about?

- The parties held a "without prejudice" mediation to settle a long-running dispute between them.
- One of the documented settlement terms required a Claimant group company to enter into a contract to purchase a property from the Defendant "as soon as reasonably practicable".
- It transpired that the relevant property was not actually owned by the Defendant. It was instead owned by the trustees of the Defendant's (separate) pension fund company. Whilst the Defendant's director and main controlling force treated the companies as the same business, that did not reflect the legal reality of the property ownership. The Defendant was therefore unable to comply with the settlement agreement by selling the property.
- The Claimant brought a claim for damages, alleging misrepresentation and breach of both express and implied terms of the settlement agreement.
- The relevant alleged misrepresentations made during the without prejudice mediation were that the Defendant was the property owner, and/or could obtain rights to sell the property if not, and/or would cause the property to be sold. The alleged implied terms were said to be similar.

Phil Spencer
Senior Associate
London
phil.spencer@bclplaw.com
T: +44 (0)20 3400 3119

...whilst I accept that the...exception to the without prejudice rule literally only applies to interpretation not implication, actually it would only be a very modest extension indeed to extend it to implication.

[2024] EWHC 2513 (Comm) [82]

What did the court say?

- HHJ Tindal (sitting as a Judge of the High Court) gave a succinct and useful round-up of the authorities on contract interpretation (to determine breach of an express term) and term implication, and considered the admissibility of evidence of the without prejudice discussions held during the mediation which led to the settlement agreement itself.
- Although the Defendant had also expressly misrepresented ownership of the property in previous legal proceedings between the parties, this could not give rise to any misrepresentation claim due to "judicial proceedings immunity". This is the principle that "persons who may be witnesses in other cases in future will not be deterred from giving evidence [including in statements of case] by fear of being sued for what they say in court."
- However, the Judge did conclude that there was a simple breach of an express term of the settlement agreement (based on the Defendant's inability to sell the property). Further, if he was wrong on that point, he found that there were terms implied into the settlement agreement to the effect that (and also that the Defendant had impliedly misrepresented the fact that) the Defendant would obtain rights and/or cause the sale of the property.
- In addition, representations made at the without prejudice mediation were held to be relevant to both the issue of term implication and misrepresentation.

Why is it important?

- To encourage parties to speak freely in order to facilitate reaching a settlement, discussions at mediations are usually protected by "without prejudice privilege". This prevents any statements made during a mediation being put before the court as evidence of admissions against the interest of the party that made them. But this case demonstrates that in cases of alleged misrepresentation, and also for the purpose of determining whether the court should imply a term into an agreement that was concluded following a without prejudice mediation, the court will lift the without prejudice veil that would otherwise mean that those discussions cannot be disclosed.

Legal Update: The Landlord and Tenant Act 1954

In its 70th anniversary year, the Landlord and Tenant Act 1954 is under full scrutiny, as the Law Commission seeks views on the appropriate model and scope of security of tenure.

Lauren King
Senior Knowledge Lawyer
London
lauren.king@bclplaw.com
T: +44 (0)20 3400 3197

Background to the Act

- The Landlord and Tenant Act 1954 was enacted after World War II, when the revival of trade and commerce combined with a shortage of commercial properties led to increased competition for premises and the need to protect sitting tenants.
- Unless a landlord and tenant agree otherwise, the 1954 Act gives business tenants 'security of tenure' - the right to renew their lease on terms agreed by the court or with the landlord, unless the landlord has a statutory ground for opposing renewal. Tenants are compensated if they are required to vacate the premises through no fault of their own.
- Overall, with a few tweaks in 1969 and 2003, the 1954 Act has stood the test of time. But as market practices evolve and develop over the years, and the economic landscape changes, it is appropriate to review the statutory framework to ensure that it is still fulfilling its intended purpose.
- Which begs the question… what purpose does the 1954 Act serve in 2024, and is security of tenure still needed? In the first stage of its latest consultation on the 1954 Act, the Law Commission is canvassing views on this fundamental question.

The Law Commission's consultation

- In the first stage of its two-stage consultation, the Law Commission is standing back and asking the fundamental question whether business tenants should still have security of tenure and if so, how it should operate. It has proposed four different "models" of security of tenure:
  - → Mandatory security of tenure
  - → Abolishing security of tenure entirely
  - → A "contracting in" regime
  - → A "contracting out" regime (the status quo)
- The Law Commission is also canvassing views on the appropriate scope of security of tenure (assuming we keep it), to explore whether it would be more suitable for certain types or sizes of business; and/or to properties in certain locations, and/or to leases of certain lengths or minimum rents.

BCLP view

- It would be an incredibly bold move to abolish security of tenure altogether, and we would be surprised if that was the Law Commission's recommendation following this consultation.
- Whilst we appreciate that in many cases, the parties choose to "contract out", security of tenure is firmly embedded in the commercial property market; it assists to redress imbalances in landlord/tenant negotiating strength and generally facilitates the renewal of business leases on reasonable terms.
- We are also concerned that changing the scope of the application of security of tenure – making it more granular - would likely cause complexity, uncertainty and no doubt lead to unintended consequences.
- But the Act could certainly benefit from some keyhole surgery (stage two of the consultation) to address some issues, such as:
  - → The contracting out process is unduly burdensome, creating fertile ground for litigation.
  - → The interim rent regime is unnecessarily complex, imposing an impossible task on valuers in certain circumstances.
  - → The disregard of the tenant's occupation of the premises for the purpose of determining the "market rent" under the renewal lease arguably creates a windfall for sitting tenants by the arbitrary inclusion of a fitting-out rent free period in the renewal lease - although tenants would argue that the landlord is in no worse position that an open market letting situation. It can also act as a jurisdictional barrier to the court imposing a turnover rent in a lease renewal.
  - → The strict statutory notice provisions create registration gap problems and traps for the unwary with serious consequences, and facilitate a gaming of the system.
  - → The Act ought to cater and provide flexibility for developments in the law such as minimum energy efficiency standards, where existing lease terms often do not help landlords to fulfil their statutory obligations.

  … to name a few.

The devil is always in the detail and we echo the Law Commission's concern in its 1989 paper on the 1954 Act that:

> **Part II of the Act represents a closely-woven piece of legislation and any amendments to it have to be considered most carefully so as not to disturb its interlocking pattern. It is also a statute which affects a wide section of the public and their legal advisers, for whom clarity and ease of access are of paramount importance.**

Getting in touch

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

Lauren King
lauren.king@bclplaw.com
T: +44 (0)20 3400 3197

Akhil Markanday
akhil.markanday@bclplaw.com
T: +44 (0)20 3400 4344

Cassandra Fleming
cassandra.fleming@bclplaw.com
T: +44 (0)20 3400 3783

Jessica Hopewell
jessica.hopewell@bclplaw.com
T: +44 (0)20 3400 3732

Phil Spencer
phil.spencer@bclplaw.com
T: +44 (0)20 3400 3119

bclplaw.com

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