PROPERTY BRIEFING: ARTICLE 5

In this edition of 1 Chancery Lane's Property Briefing Nicola Atkins looks at a decision dealing with **leases and the Consumer Credit Act** and then considers **the effect of the Deregulation Act 1915 on s.21 notices.**

The Claimants in *Burrell and others v Helical (Bramshott Place) Limited [2015] EWHC 3727* (Ch) (current and former residents and lessees of a retirement village) alleged that their leases with the defendant freeholder were unenforceable consumer credit agreements under the Consumer Credit Act 1974.

The defendant applied for summary judgment on the claims, arguing that the leases did not make provision for "credit" within the meaning of the 1974 Act. The claimants position was that provisions for payment of assignment fees upon transfer, and the retention of sums upon termination ("the Transfer Fee Provisions") constituted payment obligations which were deferred until assignment or termination followed by sale, i.e. "credit" within the meaning of the 1974 Act.

The test adopted by the court to determine whether a lease constitutes a regulated consumer credit agreement was whether there existed a deferral of an obligation to pay that would otherwise have been due earlier pursuant to the express provisions.

In granting the defendant's application for summary judgment the court held that:

(1) The relevant provisions of the leases did not relate to any obligation of the claimant to make payment of money to the defendant.

(2) The claimants had failed to explain how those provisions provide for the contractual deferral of any payment that would otherwise have been due earlier.

(3) At the date of entry into the leases it was not certain that any payment obligation under the relevant provisions would be engaged at all.

On the basis of the above, payment under the Transfer Fee Provisions was a voluntary decision because it was a matter for the claimants whether or not they sought to assign/terminate. Although there would be no entitlement to assign without the provisos being complied with, this was not the same as an "obligation" to make payment. Further and in any event payment under the Transfer Fee Provisions was made by the incoming assignee and was not therefore an obligation imposed upon the claimants.

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On 1st October 2015 sweeping changes came into force in respect of s.21 notices under the provisions of the Deregulation Act 2015 (the "Act") and the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) (Amendment) Regulations 2015 (SI 2015/1725). The legislation applies only to ASTs granted for property in England, where the original fixed term tenancy was granted before 1 October 2015. Some of the key changes are summarised below:

(1) Date for service and expiry of a notice

s.35 of the Act removes the requirement that a s.21 notice must expire on the last day of a period of the tenancy for ASTs granted after 1 October 2015 (applying the case of *Spencer v Taylor* to periodic tenancies). The notice will, however, still need to state the date after which the tenancy will be come to an end in order to be valid.

The Act also prohibits a landlord from serving a s.21 notice upon a tenant who has resided in a property for under four months, meaning that it will be almost impossible for a landlord to obtain possession immediately upon expiry of the tenancy agreement in most cases (given that the two month notice period remains).

The common practice of landlords serving a s.21 notice upon the commencement of a tenancy will also end as a result of the Act. All notices served after 1 October 2015 will expire in 6 months beginning with the date on which the notice is "given" (it is unclear whether this refers to the date of issue or service), and a new notice is required every time a new fixed-term is agreed.

(2) Form of the notice

s.37 of the Act introduces a mandatory form (Form No. 6A) for s.21 notices in respect of ASTs created on or after 1 October 2015, although the 2015 Forms Regulations will validate notice that is in a form "substantially to the same effect".

(3) Retaliatory eviction

The Act has introduced provisions to prevent retaliatory eviction by landlords following a complaint (usually regarding the condition of a property) by a tenant. Service of a s.21 notice within six months of the date of service of a "relevant notice" by the local housing authority is now prohibited. A relevant notice is one provided under ss.11-12 and s.40 (7) of the Housing Act 2004 (improvement notices relating to category one and two hazards and emergency remedial action).

Perhaps the most significant change introduced by the Act is that the s.21 procedure will no longer be a mere box ticking exercise for landlords. Service of a relevant notice by a Local Housing Authority will now, under s.33(2) of the 2015 Act, be capable of invalidating a previously valid s.21 notice in circumstances where the landlord has failed to respond in time or adequately to a tenants complaint as to the condition of a property (or has subsequently served a s.21 notice following service of a relevant notice by the local housing authority). An obvious consequence of this is that a s.21 notice may now become invalid during the course of proceedings, in which case, pursuant to the 2015 Act, the court must strike it out the claim.

The legislation will be welcomed in varying degrees by landlords and tenants – although the validity requirements for a notice have been simplified, the s.21 procedure as a whole has undoubtedly been made more complex.

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