Brethertons LLP
SOLICITORS

IRPM Legal Update December 2022

Roger Hardwick

Emma Bush

Introduction

Roger Hardwick
Partner
Brethertons LLP
rogerhardwick@brethertons.co.uk

Emma Bush
Associate
Brethertons LLP
emmabush@brethertons.co.uk

Disclaimer

Brethertons LLP
SOLICITORS

Please treat the contents of this presentation as food for thought, ***but*** don't take any action based on its contents unless you have taken legal advice.

I cannot accept responsibility for any errors or inaccuracies, loss or damage unless we have given you, personally, specific advice relating to a matter about which you have given us full background details.

You must also bear in mind that the contents of this presentation are based on English Law, and because it contains archival material, that material is bound to go out of date. Please also remember that the law **may** be different in Wales.

Contents

- COVID-19 update
- Leasehold Reform (Ground Rent) Bill
- Building Safety Act 2022
- Case Law
    - RTM and "appurtenant property"
    - access to neighbouring land
    - dispensation from s.20 consultation
    - covenants not to cause an "annoyance"

COVID-19 Update

- **Coronavirus Act 2020, s.82**: moratorium on forfeiture of business tenancies ended on 25 March 2022
- **Corporate Insolvency and Governance Act 2020**: from 31 March 2022, no more restrictions on stat demands or the presentation of winding up petitions in respect of commercial rent arrears that are unpaid due to the financial effect of COVID
- **Taking Control of Goods (Amendment) (Coronavirus) Regs 2021**: restrictions on CRAR ended on 25 March 2022

Commercial Rent (Coronavirus) Act 2022

- Came into force on 25.03.2022
- Moratorium on enforcement of “protected rent”
- Applies to “business tenancies” with some exclusions
- Arbitration

Leasehold Reform (Ground Rent) Act 2022

Brethertons LLP SOLICITORS

- Applies to:
  - long lease of a single dwelling
  - granted for a premium
  - granted on or after commencement
  - not an "excepted lease"

- "Excepted lease"
  - lease permits business use (no consent), use of lease as dwelling significantly contributes to business use & each party gives notice of use
  - statutory lease extensions
  - community housing leases
  - home finance plan leases

Leasehold Reform (Ground Rent) Act 2022

Brethertons LLP SOLICITORS

- L must not require T to pay "prohibited rent"
- Prohibited rent means anything exceeding a rent of one peppercorn
- Shared ownership leases
- Leases replacing pre-commencement leases
- Enforcement
    - financial penalty
    - recovery of prohibited rent by enforcement authority or T

Building Safety Act 2022: Recovery of Remediation Costs

Brethertons LLP SOLICITORS

Recovery of Remediation Costs from Leaseholders

- Still dependent on terms of lease … implied term that costs of "building safety measure" recoverable as a service charge (no more "building safety charge"), but that does not include remediation works
- Newly inserted s.20D, LTA 1985: L obliged to obtain grant or obtain monies from third party (including insurance, guarantee, developer etc.) where reasonably possible, failing which T can apply for order that remediation cost not recoverable as a service charge
- Some very significant limitations on remediation of historic defects, set out in one of the Schedules

Building Safety Act 2022: Limitations on Recovery of Remediation Costs for Historic Defects

Brethertons LLP SOLICITORS

CONDITIONS / DEFINITIONS:

- **"relevant building"**
  - self-contained building or part of a building containing at least two dwellings (similar to existing enfranchisement criteria)
  - at least 11 meters or 5 storeys
  - excludes buildings which have been acquired by collective enfranchisement or the right of first refusal, or which are leaseholder owned, and commonhold

Building Safety Act 2022: Limitations on Recovery of Remediation Costs for Historic Defects

- **"Relevant measure"**: remedy by preventing building safety risk from materialising or reducing severity of risk

- **"Relevant defect"**
  - arises from anything done (or not done) or anything used (or not used) in connection with **"relevant works"** (conversion / construction works or works undertaken by L / RMC within 30 years of BSA 2022 coming into force, or anything done afterwards to correct relevant defect); and
  - causes a **"building safety risk"**, i.e. risk to safety of people in or about building arising from (a) spread of fire, or (b) collapse of building / part of building

Building Safety Act 2022: Limitations on Recovery of Remediation Costs for Historic Defects

- **"Qualifying Lease"** (does not apply to all limitations)
  - Long lease of a single dwelling in a relevant building
  - T liable to pay service charge
  - Lease granted before 14.02.2022
  - At beginning of 14.02.2022 ("the relevant time") , dwelling was only or principle home of the "relevant tenant" (the tenant on 14.02.2022, or one of them) OR relevant tenant did not own any other dwelling OR relevant tenant owned no more than two additional dwellings in UK
  - head leases excluded

Building Safety Act 2022: Limitations on Recovery of Remediation Costs for Historic Defects

Brethertons LLP SOLICITORS

LIMITATIONS:

(1) No service charge payable in relation to a lease of any premises in a relevant building (NB not limited to qualifying leases) in respect of any "relevant measure" relating to a "relevant defect" which L or an "associate" is responsible for

Building Safety Act 2022: Limitations on Recovery of Remediation Costs for Historic Defects

(2) No service charge payable in respect of a relevant measure relating to a relevant defect if L meets contribution condition on 14.02.2022

- contribution condition is that landlord group's net worth on 14.02.2022 was more than N x £2m
- N is the number of relevant buildings in respect of which L was a landlord under a lease of the relevant building or any part of it
- "net worth" to be defined by regulations
- does not apply to private registered provider of social housing, local authority or some other "prescribed person"

Building Safety Act 2022: Limitations on Recovery of Remediation Costs for Historic Defects

Brethertons LLP SOLICITORS

(3) No service charge payable under a qualifying lease in respect of a relevant measure relating to a relevant defect if value of lease on 14.02.2022 was lease than £325,000 in Greater London & £175,000 elsewhere

Building Safety Act 2022: Limitations on Recovery of Remediation Costs for Historic Defects

(4) Service charge which would otherwise be payable under a qualifying lease in respect of a relevant measure relating to any relevant defect payable only if (and in so far as) the service charge does not exceed £15,000 in Greater London & £10,000 elsewhere

- Includes service charges which fell due up to 5 years prior to the commencement of the BSA 2022

Building Safety Act 2022: Limitations on Recovery of Remediation Costs for Historic Defects

(4) (Florries law cap, cont.)

- If shared ownership lease where T's share less than 100%, multiply cap by T's %
- Where value of qualifying lease on 14.02.2022 exceeded £1m but not £2m, cap is £50,000
- Where value of qualifying lease on 14.02.2022 exceeded £2m, cap is £100,000
- Limited to 1/10th of the permitted maximum annually

Building Safety Act 2022: Limitations on Recovery of Remediation Costs for Historic Defects

Brethertons LLP SOLICITORS

(5) No service charge payable under a qualifying lease in respect of cladding remediation (i.e. the removal or replacement of any part of a cladding system which forms part of the external wall system and is unsafe)

(6) No service charge payable for legal or other professional services relating to liability (or potential liability) of any person incurred as a result of a relevant defect

(7) No increase in service charge for other leaseholders

Building Safety Act 2022: Remedies Against Those Responsible for Defects

Brethertons LLP
SOLICITORS

- Enforcement by Regulator
- Prohibition on development / building control prohibition
- Remediation orders
- Remediation contribution orders
- Meeting remediation costs of insolvent L
- Liability relating to construction products
- DPA 1972 & s.38, BA 1938
    - extended / retrospective limitation periods
    - DPA extended to all works to dwelling
    - building liability orders

Building Safety Act 2022: Miscellaneous

Brethertons LLP SOLICITORS

- Beyond the scope of this presentation, but ensure that you familiarise yourselves with the duties of the AP in the case of higher risk buildings!
- Rights of access: ss.94 - 96
- No criminal liability for RMC, RTM Co or CA directors who are not entitled to remuneration
- Demands for rent & service charge to contain building safety information & L must give notice of building safety information: inserting of new s.47A & 49 LTA 1987

FirstPort v Settlers Court RTM Co Ltd [2022] UKSC 1

- RTM acquired in 2014
- Extensive shared communal areas
- Dispute over extent of RTM Co's functions – entitled to manage all communal areas and facilities & provide estate services?

FirstPort v Settlers Court RTM Co Ltd [2022] UKSC 1

- Section 72(1), C&LRA 2002: "premises" to which RTM applies comprise "self-contained building or part of a building *with or without appurtenant property*"
- *Gala Unity v Ariadne Road RTM Co Ltd* [2012] EWCA Civ 1372
- Problems
- UT Decision

FirstPort v Settlers Court RTM Co Ltd [2022] UKSC 1

- Supreme Court

> "62. I consider that the right to manage scheme in Chapter 1 of Part 2 of the 2002 Act makes no provision within the statutory right to manage for management by the RTM company of shared estate facilities. It is concerned only with management of the relevant premises, that is the relevant building or part of a building, together with appurtenant property (if any) which means nearby physical property over which the occupants of the relevant building (or part) have exclusive rights."

FirstPort v Settlers Court RTM Co Ltd [2022] UKSC 1

- Where there are shared communal areas, L / RMC will continue to manage these
- Implications for existing blocks with RTM companies & shared estates?

Prime London Holdings 11 Limited -v- Thurloe Lodge Limited [2022] EWHC 303 (Ch)

- PLH11L ("Prime") owned Amberwood House & in process of converting to "super prime" property
- TLL owned adjacent property, Thurloe Lodge
- Prime & TLL fell out in 2019.
- Prime requested access to TLL's land in order to carry out works to north wall (re-rendering & painting)
- Access to north wall could only be obtained via narrow passage between two buildings. TLL refused access

Prime London Holdings 11 Limited -v- Thurloe Lodge Limited [2022] EWHC 303 (Ch)

- Access to Neighbouring Land Act 1992
- Court can make an access order if
    - works reasonably necessary for preservation of dominant land
    - they cannot be carried out, or would be substantially more difficult to carry out, without access

Prime London Holdings 11 Limited -v- Thurloe Lodge Limited [2022] EWHC 303 (Ch)

- However, Court may not make an access order if
  - R or any other person would suffer interference / disturbance with his use & enjoyment of servient land OR
  - R or any other person in occupation would suffer hardship

  to such a degree that it would be unreasonable to make the order

Prime London Holdings 11 Limited -v- Thurloe Lodge Limited [2022] EWHC 303 (Ch)

- "Basic preservation works" … maintenance, repair or renewal included re-rendering
- Aesthetic element to the work reasonably necessary
- "Use or enjoyment" … interpreted broadly
- "Hardship"?
- Prime had offered reasonable alternatives methods to minimise disruption
- Detailed discussion of compensation payable
- Consideration (akin to a "licence fee") may be payable if land is non-residential

Marshall v Northumberland & Durham Property Trust Limited [2022] UKUT 92 (LC)

- Concerned dispensation from s.20 consultation in the case of emergency works concerning Kelvin Court
- Jan 2019 – failure of heating and hot water system –engineering consultants (IDA) recommended urgent replacement of all 3 boilers in 2 Phases
- Phase 1 works completed in 2019. Installation of one new boiler.
- Mr Marshall (M) purchases flat in December 2019, but not added to leaseholder circulation list until April 2020

Marshall v Northumberland & Durham Property Trust Limited [2022] UKUT 92 (LC)

- Began consultation for Phase 2 works: Stage 1 notice dated 19.02.2020
- 2 original boilers fail on 20.02.2020 leading to emergency repairs and installation of new boiler in April 2020
- M did not receive any correspondence or the Stage 1 notice. Asks for a copy of L's heating engineer advice, but only provided after several requests during FTT proceedings.

Marshall v Northumberland & Durham Property Trust Limited [2022] UKUT 92 (LC)

"9. The explanation given by the respondent for its lack of transparency when asked to disclose documents was that the statutory consultation requirements did not require the disclosure of advice from professional consultants. That rather misses the point. The work had been carried out without the statutory consultation procedure having been complied with; the respondent was therefore in the position of a party claiming an indulgence, as Lord Neuberger put it in Daejan, and a more cooperative approach was called for."

Marshall v Northumberland & Durham Property Trust Limited **[2022] UKUT 92 (LC)**

- L applied for dispensation
- L argued that M had failed to identify any prejudice
- M produced additional evidence exhibiting advice received on 26.1.2021 from Green Flame London (firm of heating engineers) who said that they could have undertaken the work for £8,760 plus VAT

Marshall v Northumberland & Durham Property Trust Limited [2022] UKUT 92 (LC)

- FTT granted unconditional dispensation, focusing on the urgency of the works
- UT overturned the FTT's decision
  - FTT should have focused on prejudice to leaseholders rather than reasonableness of L's actions due to urgency of situation.
  - FTT wrong to say that failure to consult one leaseholder insufficient reason for refusing unconditional dispensation.
  - FTT should have been sympathetic to leaseholders, as Lord Neuberger indicated in Daejan

Marshall v Northumberland & Durham Property Trust Limited [2022] UKUT 92 (LC)

- Dispensation granted on conditions
  - recoverable costs limited to £13,300 plus VAT (UT accepted that Green Flame would not have been appointed but their quote would have put L in a stronger bargaining position)
  - L should reimburse Mr Marshall for legal & professional costs
  - L should reimburse fees paid to FTT to tribunal

Further Questions?

Roger Hardwick
Partner
Brethertons LLP
rogerhardwick@brethertons.co.uk

Emma Bush
Associate
Brethertons LLP
emmabush@brethertons.co.uk

The Knowledge Hub

- Sign up to receive:
  - Webinars
  - White Papers
  - Infographics

Say hello:

/Brethertonsllp

@brethertonsllp

/brethertons-solicitors-llp

Brethertons LLP
SOLICITORS

Thank you for listening!