

Seeing the complete picture

'Two for one' ticket promotions afforded the Saatchi Gallery no artistic licence to breach its covenant. **James Empson** looks at the court's holistic approach

- claiming relief from forfeiture
- the decision in *Shirayama Shokusan Co Ltd v Danovo Ltd*

The recent case of *Shirayama Shokusan Co Ltd v Danovo Ltd* [2005] EWHC 2589 (Ch) about the Saatchi Gallery on London's South Bank has received widespread press attention, partly because of the high-profile nature of the premises and the people involved. The case is a useful reminder to tenants that they ignore their lease covenants at their peril.

Case facts

The lease of the Saatchi Gallery was granted on 6 February 2003 and contained a number of unusual features:

- the rent was linked to the profit of the gallery; and
- there was a covenant to charge admission prices at or in excess of minimum amounts, which read:

"Save for old age pensioners, students, children or groups of more than 12 visitors (in respect of all such categories the tenant shall charge a reasonable and proper fee) the tenant shall charge an entrance fee of not less than £7.50 per person..."

In November 2003 the landlord found out that 'two for one' entrance offers were being made by the tenant in conjunction with *Time Out* magazine. Having received no response to a letter to the tenant requiring the promotion to be cancelled, on 28 November 2003 the landlord served a notice under the Law of Property Act 1925, s 146(1) specifying breach of the covenant to charge the minimum entrance price. In response to the notice, the tenant made no indication that it would remedy the breach; indeed it later transpired that it had entered into another 'two for one' promotion with *The Observer*. The landlord therefore commenced court proceedings to obtain an order for possession on 12 December 2003 at which the tenant subsequently counterclaimed for relief from forfeiture.

Grounds for relief from forfeiture

At trial numerous factors were put forward by the tenant as to why relief should be granted, including:

- the breach of covenant was not deliberate;
- the breach was not damaging to the landlord as it was likely that the promotions increased the tenant's turnover;
- the effect of the forfeiture would mean that an established and important gallery would have to close for up to two years;
- over 80 people employed at the gallery would potentially lose their jobs; and
- educational programmes, in the absence of relief, would need to be discontinued.

The court declined to grant relief from forfeiture, citing in particular:

- the continued and wilful breach of the admission price covenant even after service of s 146 notice;
- the serious allegations of misconduct made by Charles Saatchi against the landlord which were never substantiated or withdrawn—these included those made in a telephone conversation with pop impresario Pete Waterman, which Waterman described as the most chilling of his life; and
- the allegations of harassment—including that the behaviour of the landlord had made the gallery staff "despondent with an endless campaign of petty unpleasantness"—made in a press release by Charles Saatchi just days before the trial commenced.

Considering all the circumstances

Section 146(2) of LPA 1925 specifies that the court may grant or refuse relief as it thinks fit "having regard to the proceedings and conduct of the parties under [s 146(1) of LPA 1925], and to all other circumstances". Following case law which has interpreted these provisions, the courts should consider the conduct of the tenant, the nature and gravity of the breach, and its relation to the value of the property to be forfeited, ie whether the breach has occasioned lasting damage to the landlord. In this case it is arguable that on the latter two points the scales tilted in favour of the tenant.

However, the wilful behaviour of the tenant in perpetuating the breach of covenant and its other unfavourable dealings with the landlord—despite these not being directly related to the breach—proved decisive.

Law reform—a streamlined test?

In 2004 a Law Commission report—Law Commission Consultation Paper No 174, *Termination of Tenancies for Tenant Default*—suggested the abolition of forfeiture in favour of a statutory scheme. The principal means of termination would be by court order which would have the effect of terminating at a specified date the tenancy and all interests which derive from the tenancy. Before an order could be made, a pre-action notice would be served on the tenant and interested parties outlining the terms of the default. The report proposes a principal test as to whether a termination order should be made:

"Where the court is satisfied, by reason of the serious character of any [tenant default] occurring during the tenure of the present tenant, or by reason of their frequency, or by a combination of both factors, that he is so unsatisfactory a tenant that he ought not in all the circumstances remain tenant of the property" (*Termination of Tenancies for Tenant Default*, para 6.23).

One wonders whether the courts would have made a termination order if this test had been applied in the Saatchi case. The words at the outset of the test suggest that it is the "serious character" or "frequency" of the tenant default which are the decisive factors. However, the words which conclude the test—"that he ought not in all the circumstances remain tenant of the property"—certainly leave scope for other factors—such as the allegations of improper conduct made by Charles Saatchi against the landlord—to be brought into consideration.

The Saatchi Gallery case illustrates how under current law the court is able to take a holistic view of all of the circumstances of the case when deciding whether to grant relief. It also shows that no matter how high the profile of the tenant's business or its cultural aims the courts will not hesitate to deny relief from forfeiture if the tenant's breach of covenant has been wilful. In this case the breach was one which, at the very least, the tenant could have taken active steps to halt; it failed to do so and paid the price.

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