SLAUGHTER AND MAY/

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REAL ESTATE NEWSLETTER

NEWS

Coda

RICS launches new lease Code

The RICS Code for Leasing Business Premises came into force on 1 September 2020. A lot has happened since the original Code of Practice for Commercial Leases was launched in 1995. Although the original Lease Code and subsequent versions have had a significant effect on commercial lettings, in many respects it has been market conditions, notably as a result of the financial crisis and the result of the EU referendum, which have pushed landlords towards fairer and more flexible lease negotiations. Similarly, the 2020 Code's launch has coincided with considerable market uncertainty brought about by the global COVID pandemic and Brexit. Nonetheless, the Code's status as a RICS professional statement will help ensure that it becomes an important part of the lease negotiation process. In contrast with previous versions, the new Code's status as a professional statement means that RICS members must comply with the mandatory requirements and should comply with the remaining provisions detailing best practice.

The new Code applies to business lettings in England and Wales. There are a limited number of exceptions, including agricultural lettings, tenancies of six months or less, premises only housing plant and equipment and those that are intended to be sublet. The provision of heads of terms on a letting with vacant possession is mandatory. The Code includes a template heads of terms and sets the minimum requirements that must be dealt with. Although there is nothing new in the Code, it does set out a useful starting point and should help the parties, with the assistance of their professional advisers, to reach a fair and balanced outcome. However, its impact on commercial lettings will, at least initially, be overshadowed by market conditions as tenants across a range of sectors reassess their property requirements.

Safe from harm

Government extends protection for tenants

The measures protecting tenants from forfeiture and the exercise of the commercial rent arrears recovery procedure (CRAR) for non-payment of rent have once again been extended. Subject to any further extension, the relevant period will now last until 31 December 2020, shortly after the final quarter day of the year. This means that a landlord cannot forfeit a lease for non-payment of rent until next year, similarly a landlord cannot seize a tenant's goods from the property until at least 276 days' principal rent is in arrears. In response to growing concern from the property industry that some tenants are taking advantage of the measures not to pay rent, the government has reiterated that the measures do not amount to a rent holiday.

Landlords and tenants are expected to follow the principles set out in the government's code of practice for commercial property relationships during the COVID-19 pandemic and should continue to work together to agree a shared recovery plan to support businesses struggling as a result of the crisis. Although the government's approach initially received the united support of the property industry a divide has opened up between the interests of landlords and tenants. The British Property Federation had campaigned against a further extension whereas the British Retail Consortium

broadly welcomed the move while acknowledging that the issue will re-emerge at Christmas when the protection comes to an end. In addition, there is likely to be an economic crunch point when the rent deferred under existing rent payment plans starts to become payable.

CASES ROUND UP

Pretty vacant

Tenant failed to provide vacant possession

Capital Park Leeds Plc v Global Radio Services Limited: [2020] EWHC 2750 (Ch)

The tenant had acquired a lease of a modern commercial unit in Leeds. The premises became surplus to requirements and the tenant exercised its right to break the lease. The right to break was conditional on all rent and other payments being up-to-date and also on the tenant giving vacant possession of the premises to the landlord on the break date. The premises were defined to include all fixtures and fittings whenever fixed. Prior to the break date, the tenant had stripped out most of the landlord's fixtures and fittings, including ceilings, radiators, lighting systems, cabling and floor boxes. The landlord argued that by returning just the shell of the property, the tenant had failed to comply with the obligation to give vacant possession of the premises. The tenant accepted that it remained liable for dilapidations but argued that it had given vacant possession. It also claimed that the landlord was estopped from relying on a breach of the condition by reason of discussions at a meeting between the parties before the break date.

The Judge did not accept that the tenant had given vacant possession of the premises simply by leaving them empty of people and chattels. The tenant had not yielded up "the Premises" as defined in the lease. The property should have been yielded up complete with the landlord's fixtures and fittings. By failing to replace the fixtures and fittings which formed part of the premises, the tenant had left an "empty shell of a building which was dysfunctional and unoccupiable". In addition, he held that the tenant had failed to demonstrate that the landlord was estopped from relying on breach of the yielding up condition. By failing to give back to the landlord the property it was entitled to, the tenant had failed to determine the lease and its liabilities under the lease continued. The case serves as another reminder to comply strictly with any conditions to the exercise of a break. Ideally, any conditions should not be more onerous than those suggested in the new RICS Code for Leasing Business Premises referred to above.

Give it up

Tenant required to remove asbestos

Pullman Foods Ltd v The Welsh Ministers and another: [2020] EWHC 2521 (TCC)

The Welsh Government served a notice on the tenant of one of its sites opposing the grant of a new tenancy under S25 of the Landlord and Tenant Act 1954. In accordance with the yielding up provisions, the landlord also required the removal of any buildings on the site by the end of the term. The tenant vacated the site but the issue was whether it had failed to comply with its obligation to yield up the premises in good and substantial repair and condition to the satisfaction of the landlord. Asbestos was present on the site and the landlord argued that the tenant had been required to remove the buildings containing asbestos. The tenant sought compensation under the Act for the termination of its tenancy and the landlord counterclaimed seeking damages for breach of the yielding up obligation.

The High Court confirmed that the tenant was liable for the removal of the asbestos. The use of the word "condition" meant that the yielding up covenant went beyond repair. However, the landlord did not have absolute discretion in approving the state of repair and condition of the premises and was required to act reasonably. The tenant's parent company was also liable under the provisions of licences granted to it by the landlord to enter the site to carry out remediation works on the tenant's behalf. The case is a reminder of the importance of ascertaining the extent of any potential environmental liabilities before taking a lease.

No excuses

Illegality was not a defence to negligence claim

Stoffel & Co. v Grondona: [2020] UKSC 42

The Supreme Court has confirmed that solicitors who failed to register a transfer to the respondent remained liable for damages despite the fact that the transfer was

part of a mortgage fraud. The respondent knew the owner of the property but represented that it was an arm's-length sale in order to obtain a mortgage from Birmingham Midshires. The solicitors had applied to register the transfer of the property to the respondent and the new charge in favour of the lender but the application was cancelled by the Land Registry. Although negligence was admitted, the solicitors relied on the defence of illegality and denied liability for damages. The Court of Appeal applied the principles in *Patel v Mirza* and held that the solicitors were liable.

The Supreme Court considered the test in *Patel v Mirza* and dismissed the solicitors' appeal. Title to property passes even if the underlying contract has an illegal purpose. Accordingly, the respondent would have been able to enforce her legal rights arising under the transfer and her claim for losses arising from the solicitors' negligence was not a claim to recover a profit. Further, if the illegality defence was available it would detract from a solicitor's duty to act diligently and the risk of not being entitled to recover damages for negligence was unlikely to deter those prepared to engage in mortgage fraud. Irrespective of the fraudulent nature of the underlying transaction, the solicitors were liable in negligence for failing to ensure the registration of their client's title.

You've got my number (why don't you use it)

University resists Telecoms Code agreement

Cornerstone Telecommunications Infrastructure Ltd v University of the Arts: [2020] UKUT 248 (LC)

As part of a wider development scheme, the University had agreed to move into a new building and to sell its existing campus to the developer. The University was to be granted a leaseback of its existing building to give it time to move into the new premises. The leaseback was for 3 years with an initial 18-months' rent free and then a substantial rent of £3 million per annum. The University also had a right to break the lease at any time conditional upon yielding up with vacant possession. The telecoms operator applied for a Code agreement in respect of a site on the roof of the existing premises. The University objected on the ground that if the operator failed to vacate it would not be able to satisfy the vacant possession condition to its break right and would remain liable to pay the rent on a property it no longer needed.

The Tribunal decided that the potential prejudice to the University if a Code agreement was granted would be substantial. The University could not be adequately compensated by money and the potential prejudice outweighed the public benefit that would be conferred by a new electronic communications site at that location. The Tribunal also commented with disapproval on the acrimonious manner in which the case had been handled by the parties.

I'm free

Restrictive covenant and restraint of trade

Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd: [2020] UKSC 36

In this Northern Irish case, the Supreme Court has held that a restrictive covenant given by a developer in favour of the anchor tenant of a shopping centre did not engage the common law doctrine of restraint of trade. The original developer of the shopping centre site had granted a long lease to Dunnes for a premium. In the lease, the landlord covenanted not to build a competing store over a certain size. Peninsula acquired the centre and sought a declaration that the landlord's restrictive covenant was in restraint of trade and unenforceable at common law.

The Supreme Court departed from the "pre-existing freedom test" established by the majority of the House of Lords in *Esso Petroleum v Harper's Garage (Stourport)* and followed the "trading society" test favoured by Lord Wilberforce in that judgement. The lease was not in essence an agreement between traders but a transaction in land that did not engage the doctrine of restraint of trade. However it remained open to Peninsula to apply for the modification or discharge of the restrictive covenant under the Northern Irish equivalent of section 84 of the Law of Property Act 1925.

Stuck on you

Defendants' land benefitted from restrictive covenant

Bath Rugby Limited v Greenwood and others: [2020] EWHC 2662 (Ch)

The Rugby Club sought a declaration that a restrictive covenant affecting its ground, known as 'the Rec', was not enforceable. The Club held a long lease of the Rec which was subject to a restrictive covenant contained in a 1922 conveyance of land in Bath forming part of the Bathwick Estate. The covenant prevented the erection of commercial premises which might cause "a nuisance and annoyance or disturbance or otherwise prejudicially affect the adjoining premises or the neighbourhood". If enforceable, the covenant would restrict the Club's ability to redevelop the Rec as it intended, with improved facilities and new commercial space. The defendants opposed the project and the issue was whether they were entitled to enforce the covenant as the owners of land benefitting from the 1922 conveyance. Despite extensive research, it was not possible to identify the exact extent of the land retained by the Estate in 1922.

The High Court considered the law in relation to the annexation of the benefit of a restrictive covenant to land. It found that by using the phrase "successors in title", there had been an intention to annex the benefit of the covenant to the land of the original covenantee and it was not personal. The Court then had to consider the identity of the land with the benefit of the covenant. The covenant was clearly intended to benefit the "adjoining premises or the neighbourhood" and this was sufficient to identify the benefitted land. The defendants owning land that formed part of the Bathwick Estate adjoining or near to the Rec in 1922 were entitled to enforce the covenant and it did not matter that the extent of this land was no longer easily identifiable. The Case serves as a reminder of the potential problems associated with identifying both the location and extent of land referred to in historical deeds.

Dedicated follower of fashion

Restrictive covenant and aesthetics

89 Holland Park Management Limited v Hicks: [2020] EWCA Civ 758

The Court of Appeal has confirmed that consent for a proposed development could be reasonably withheld for reasons connected with the appearance of the proposed development. In addition, where a restrictive covenant had been entered into for the benefit of the covenantee's land, that covenant could be enforced by the covenantees's successors in title and those deriving title under him. The defendant had acquired the development site subject to a restrictive covenant given for the benefit of the claimant's predecessor in title. The covenant required consent to any development, both before a planning application was made and also before works commenced. The claimant was the freeholder of the residential block with the benefit of the covenant and its shareholders were the tenants of the flats.

It had already been decided that the restrictive covenant was implicitly qualified and the necessary consents could not be unreasonably withheld. At a further hearing, the High Court decided that the tenants were not able to enforce the covenant and, because it was only the freehold reversioner, the claimant was not entitled to refuse consent on aesthetic or environmental grounds. The Court of Appeal confirmed that the tenants could also enforce the covenant. Accordingly, the claimant could take into account the tenants' concerns about the appearance of the proposed development as well as their legitimate interest in protecting the amenity value of the block and their enjoyment of it.

OUR RECENT TRANSACTIONS

We advised The Restaurant Group in relation to a CVA in respect of the Group's leisure estate.

We advised Walmart on the proposed sale of Asda.

We advised the Wellcome Trust on the acquisition of Urban&Civic, a developer and investment company delivering large scale, residential led, strategic developments in the Midlands and South East England.

AND FINALLY

Foul mouthed

Five parrots at a Lincolnshire zoo have been separated after they began encouraging each other to swear.

Un-masked

A passenger on a Manchester bus was spotted with a face mask formed by a python coiled round his neck.

Un-marked

A German football team lost 37-0 after its seven players observed social distancing in order to complete a fixture amid COVID concerns.

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