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Newsletter

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Good Harvest time for landlords

Tindall Cobham 1 Ltd v Adda Hotels {2014} EWCA Civ 1215

The landlord in this case had granted leases of 10 hotels, each to a subsidiary company in the Hilton Group. The Hilton parent company was a party to each lease, as guarantor.

Each lease contained the usual provision that the tenant could assign the lease with the landlord's consent. However, each lease also said that the tenant was free to assign to an associated company without landlord's consent, provided that the existing guarantor (i.e. the parent company) entered into a fresh guarantee of the assignee.

Unfortunately, the leases were entered into before the Good Harvest/House of Fraser series of cases, which held that such repeat guarantees are void because they breach the anti-avoidance provisions of the Landlord and Tenant (Covenants) Act 1995.

The question for the Court of Appeal in Tindall was, given that the guarantees would be void, could an assignment to an associated company still take place without landlord's consent and without any kind of guarantee?

Fortunately for the landlord, the Court of Appeal recognised that such an outcome would have a disastrous effect on the value of the landlord's reversion. It therefore decided that there remained a conventional requirement not to assign to an associated company without the landlord's consent (such consent not to be unreasonably withheld).

The Court of Appeal also made the point that an assignment of any of the leases to an associated company without landlord's consent (which did in fact occur in this case) would be unlawful.

In UK Leasing Brighton (and others including Hilton) v Topland the parties went back to court to establish the best way of unravelling

Minimum Energy Efficiency Standards (MEES) for lettings

Under the Energy Act 2011, the government has made regulations requiring properties to be of a certain standard of energy efficiency before a landlord can grant (or renew) a lease.

The regulations are expected to come into force on:

- 1 April 2018 for new lettings or renewals granted on or after that date;
- 1 April 2020 for all private rack rent residential tenancies then existing; and
- 1 April 2023 for all other lettings then existing.
- Commercial lettings for 6 months or less and Commercial lettings for 99 years or more are excluded.

The regulations will not apply to any building that is exempt from the requirement to obtain an energy performance certificate (e.g, a listed building, or a building that's about to be demolished).

The minimum energy-efficiency standard is to be an E rating, as shown on the energy performance certificate for the relevant property.

There are civil penalties for non-compliance of up to £150,000 for commercial lettings.

Exemptions may be relied on only if the landlord has registered the relevant information on the PRS Exemptions Register set up by the Department for Energy and Climate Change.

Law Commission reports on rights to light

The Law Commision has published its report on rights to light.

The Law Commission key recommendations are as follows:

- A new statutory test, based on proportionality and public interest, to address whether damages should be awarded instead of an injunction.
- The Upper Tribunal to have the

power to modify or discharge rights to light (in limited circumstances).

- A "Notice of Proposed Obstruction" procedure. The purpose of this is to flush out any claims to an injunction that an adjoining owner may have at an early stage. Unless the adjoining owner responds to such a notice within eight months by applying for an injunction, it will not subsequently be entitled to an injunction. Instead, the adjoining owner's remedy will lie solely in damages.
- An easement of light will be considered to be abandoned if the light is not enjoyed for five years. For example, the bricking up of a window for five years would be sufficient to demonstrate an intention to abandon the right.

Insurance cover against flooding - update

The government has been consulting on the detailed rules for the flood reinsurance scheme (Flood Re) to be brought in under the Water Act 2014.

Under a June 2008 agreement between the Association of British Insurers and the government, UK insurers agreed (in return for government investment in flood defences) to provide flood cover for domestic and small business policyholders.

That 2008 agreement is due to expire and the government is aiming to replace it with a new scheme, known as Flood Re, by July 2015.

Flood Re will only benefit domestic property and is to be funded by a levy on domestic insurance companies. The cost of the levy will be passed by insurers through to policyholders (roughly £10.50 per household), spreading the cost equally among lower and higher risk households.

Under the scheme, flood insurance premiums will be capped and Flood Re will reimburse insurers for any claims made. Flood insurance will therefore remain affordable and available for domestic properties in high risk areas.

The Flood Re scheme will NOT extend to the following:

- business premises; and
- houses built after 1 January 2009.

Planning Update

Permitted Development Rights

The biggest reform is the publication of the new Town and Country Planning (General Permitted Development) Order 2015, which came into force on 15 April 2015.

Change of use

The Order introduces new permitted development rights for the following changes of use:

- Class A1 (retail) or A2 (financial and professional services) to class A3 (restaurants and cafes) – limited to 150 sqm and subject to a prior approval process
- Class A1 (retail) to class A2 (financial and professional services)
- Class A1 (retail) or A2 (financial and professional services) to class D2 (assembly and leisure) – limited to 200 sqm and subject to a prior approval process
- Use as a casino or amusement arcade to class C3 (dwellinghouse) – limited to 150 sqm and subject to a prior approval process
- Class B8 (storage and distribution) to class C3 (dwellinghouse) – limited to 500 sqm and subject to a prior approval process and the property must have been in B8 use for 4 years

Betting offices and payday loan shops

Betting offices and payday loan shops have now been removed from use class A2 (financial and professional services) and are now considered to be sui generis (i.e. use classes of their own).

Drinking establishments

From 6 April 2015, where a drinking establishment has been nominated as an asset of community value, permitted development rights are no longer available to change to an A1 (retail) use or to demolish the property. This has recently seen a lot of developers and landowners taking practical steps to ensure a retail use has commenced at their properties before this reform came into force.

Changes to planning conditions

There is a new Town and Country Planning (Development Management Procedure) Order 2015 which came into force on 15 April 2015.

The most beneficial changes for developers under this Order relate to the use of planning conditions by Local Planning Authorities (LPAs).

The Order provides that if the LPA fails to determine an application to discharge a planning condition within 6 weeks the developer can serve a notice on the LPA and if a further period of 2 weeks elapses without a determination then the applicant can rely on a deemed discharge of the condition (unless it is an exempted condition).

The Order also provides that LPAs must now provide full reasons for imposing any planning conditions which require matters to be complied with prior to commencing development.

Sections 106 contributions

Regulation 123(3) of the Community Infrastructure Levy Regulations 2010 (as amended) contains a restriction on LPAs imposing pooled financial contributions under Section 106 agreements, which took effect from 6th April 2015.

Careful consideration by developers should now be given to any proposed development where a LPA is seeking to impose such contributions, as to whether in fact the LPA is complying with the restriction in Regulation 123(3).

Liability for empty property rates where property is being redeveloped

If a property becomes unoccupied, the owner is entitled to 100% relief from business rates for a period of three months in the case of shops and offices, or six months in the case of industrial or warehouse premises.

Subject to various exceptions, full rates again become payable at the end of the relevant period, whether or not the property remains unoccupied. One of those exceptions is where the property has become unfit for occupation.

However, to qualify as unfit for occupation, the property has to be beyond economic repair.

Newbigin (Valuation Officer) v S J & J Monk [2015] EWCA Civ 78

This case is a reminder of the point that, to qualify as unfit for occupation, a property has to be beyond economic repair.

In this case, the property owner claimed exemption from empty rates because it had stripped out the air conditioning system, wiring, sanitary fittings and ceiling tiles, in preparation for redeveloping the property as three separate units.

The Court of Appeal held that each of the stripped-out items was a subsidiary part of the premises as a whole. Replacing each of those items would therefore count as an economic repair.

The ratepayer's intention to redevelop the property was irrelevant and empty rates were payable.

Green Bureaucracy - billing tenants for heating

The Heat Network (Metering and Billing) Regulations 2014

The Heat Network (Metering and Billing) Regulations 2014 came into force at the end of last year.

Any landlord of a commercial or residential multi-occupied building who supplies (and charges for) what is known as "communal heating", that is heating, cooling or hot water from a central source to tenants, is caught by these regulations.

If cost effective and technically feasible to do so, the landlord (known as a "heat supplier" under the regulations) must ensure that meters (or, in certain circumstances, "heat cost allocators" and "thermostatic radiator valves") are installed to measure the consumption of heating, cooling and hot water by each tenant.

The deadline for installing the meters is 31 December 2016.

Landlords are under a duty to notify the National Measurement Office of the communal heating system and provide details of its location, type of building and the number of tenants, plus estimates for the yearly heating capacity, heat generated and heat supplied.

The regulations impose civil penalties and criminal offences to ensure compliance.

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