



Welcome to the winter edition of our Newsletter – inside you will find commentary on the current marketplace and property issues.

Sustainability Round Up

CONSTRUCTION

As a 'green' outlook becomes increasingly important, and with the Government legislating to promote greener practices, "sustainability" is becoming a popular byword in the property sector.

Various pieces of legislation, guidance and recommended best practice can, if considered at the initial planning and design stages of a development, result in more marketable properties, both as investments and for occupation. The following are just some of the green requirements that should be covered in construction contracts, design documents and specifications relating to a project. This will help developers show that they are considering the adaptability of the property to future changes in environmental policy.

- **BREEAM** (Building Research Establishment Environmental Assessment Method) provides ratings of environmental impact, ranging from 'pass' to 'outstanding', calculated against various criteria. Although at present the ratings are merely for guidance, a low rating can affect a property's appeal and in the future mandatory rating of properties could grow out of BREEAM. Many developers are now stating a required BREEAM rating in construction contracts and should also consider the consequences of breach.
- **The Building Regulations 2000** detail minimum standards of energy performance for buildings. The bar created by the Regulations may gradually be raised to meet future CO2 reduction targets and to take account of future green policy in other areas. They are a good starting point for minimum standards of energy efficiency under construction contracts.
- In December 2007 the Government issued its **Planning Policy Statement on Planning and Climate Change** which clearly stated its aims

to combat climate change and to encourage environmentally responsible development. Applicants for planning permission must consider carbon neutrality and environmental adaptability in the future. Such policies will be material to planning decisions.



- **Site Waste Management Plans** are now required for many UK construction and/or demolition projects and they predict and deal with waste issues on site. To avoid breach and potentially hefty fines, the Regulations should be considered and complied with.
- There are numerous other pieces of legislation, for example those relating to renewable energy, recycling and re-use of materials and contamination, which overlap with those mentioned above.

COMMERCIAL PROPERTY

- **Energy Performance Certificates**
The deadline for obtaining an EPC has been extended so that commercial properties that were on the market before 1 October 2008 and remain on the market will not need an EPC until 4 January 2009. If the property is sold or let in the meantime then the owner must make reasonable efforts to obtain an EPC as soon as possible.
- Although a second edition of the government's EPC guidance ("Improving the energy efficiency of our buildings: A guide to energy

performance certificates for the construction, sale and let of non-dwellings") has been published there is still some confusion in relation to certain areas, for example whether EPCs are required on lease renewals or in relation to shell and core developments.

- **Carbon trading scheme for commercial property**
In November 2008 there is to be a further consultation on the detailed scheme design for the Carbon Reduction Commitment. The CRC will be a mandatory carbon emissions trading scheme for large commercial and public sector organisations, including supermarkets, hotel chains and large offices, and is due to start on 1 January 2010.
- **Green Leases**
There has been a lot of interest this year in green leases, they are leases which contain additional rights and responsibilities for landlords and tenants aimed at improving the energy efficiency (or other sustainability features) of a building. The BPF is working on a model form of a memorandum of understanding to sit along side the lease, which we assume will be non-binding.
- **Air-conditioning Inspections**
A reminder that air-conditioning system inspections begin on 4 January 2009 for systems with an output of at least 250kW. The Government has produced guidance: "Improving the energy efficiency of our buildings: A guide to air-conditioning inspections for buildings".

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Tenant Default

Administrations - Key issues to consider for the Landlord

The recent economic downturn has seen an increase in the number of tenants entering into administration.

Landlords may find themselves presented with a “pre-packaged” deal at short notice where a buyer has already been found for the tenant’s business. Administrators may contact a landlord to try and secure an assignment of the lease to the new potential tenant or to negotiate a surrender or rent reduction. Landlords should resist the pressure to respond hastily. Below are some of the key issues to consider:

Is the tenant actually in administration or is there only a possibility of an administration?

- Seek evidence that an Administrator has been appointed, (for example a notice of appointment in form 2.12B lodged at Companies House).
- If not, the landlord may still distrain for rent or forfeit the lease as no moratorium will have arisen.

What is the purpose of the administration?

- Is it to try to preserve the business of a company as a going concern or to enable a sale of the assets of the business, including the assignment of any leases?
- Ascertaining the commercial purpose of an administration at an early stage allows a landlord to make informed decisions.

Does the landlord wish to preserve its rental income or to recover possession of the premises?

- These objectives are mutually exclusive so early decisions are paramount.
- Steps to preserve the rental income might well waive any existing right to forfeit.
- This choice will be influenced by the ability to relet, the liability for vacant rates and whether or not there are previous tenants or guarantors whom the landlord could proceed against.

Who is in occupation of the premises and on what basis?

- Contact the Administrator to clarify who is in occupation and on what basis.

- Check what the lease permits by way of alienation. It is likely that sharing or parting with possession without consent is a forfeiture event.
- If the financial strength of any new occupier is satisfactory, ensure that a formal assignment is completed by the Administrator as soon as possible otherwise the tenant in administration can prevent the landlord from being able to claim rent from the new occupier.
- Consider whether it is appropriate to serve a notice on any occupier/sub tenant to divert rent from the Administrator to the landlord until a formal assignment is completed.

Is the landlord entitled to forfeit the lease?

- Check the forfeiture provisions of the lease. Usually a tenant entering administration or sharing or parting with possession without consent triggers such a right but the landlord may only forfeit with the Administrator’s consent or with the permission of the court.
- Be careful when dealing with the Administrator: any action which indicates an ongoing landlord and tenant relationship (such as considering an application for consent to assign) is likely to waive any existing right to forfeit.

Does the Administrator have to pay rent for the premises?

- If the Administrator/tenant is continuing to obtain benefit from the premises (by occupying/continuing to trade from it or by allowing a third party, such as the purchaser of the business, to occupy it pending a proposed assignment) then it can be argued that the Administrator should pay the rent in priority to his own fees and other creditors, as a “necessary disbursement” of the administration.

Is there a rent deposit?

- Rent deposits are not subject to a moratorium so landlords may be able to draw down on them.



Intra-Group Guarantees

When a bank lends to a company that is a member of a group, its security will often include a guarantee from another group company. However, a guarantee may not be enforceable unless the arrangements provide a commercial benefit for the guarantor and not just the borrower.

Unless they believe that there is a benefit for their company, the directors of the guarantor will be abusing their powers and in breach of their statutory duty to promote the success of their company. It is not enough for the directors to promote the success of the group as a whole.

This can adversely affect third parties. If the bank knows, or ought to have known, that the arrangement involves no benefit to the guarantor, because it is obvious or because of the bank's own knowledge of its customer's business, it is likely to find that the guarantee is not legally enforceable.

Where the guarantee is given by a parent company in relation to borrowings by its subsidiary, establishing commercial benefit does not normally present a problem. If the borrowing is to help the subsidiary's business, the directors of the parent company can usually anticipate a benefit in the form of an increase in the value of the parent's shares in its subsidiary and the prospect of increased dividends.

Where the guarantee is given by a subsidiary in relation to borrowings by its parent, or by a fellow subsidiary, the benefit to the guarantor is less obvious and there may not be any. In those circumstances, in order to ensure that the guarantee is enforceable, the bank will need the directors to identify the potential benefits to the guarantor and to spell them out in some detail in board minutes. They might include, for example, the continuation of financial or technical support from the parent, or trading co-operation from other group companies.

If the directors are unable to do this to the bank's satisfaction, it may be necessary for the guarantee to be ratified by a unanimous shareholder resolution.

Investment Value - Landlords can enhance the value of current leases by extending their terms - but beware of traps

In the current economic climate landlords can improve the value of their investments by negotiating extensions to the length of existing leases. For example, a tenant occupying a property under a lease due to expire in 2010 may agree to extend the term to 2015.

If the parties enter into a deed of variation to extend the term of the existing lease there will be a deemed surrender of that lease and an implied grant of a new lease. This has the effect of releasing any previous tenants or guarantors under the existing lease (unless they are parties to the deed of variation and give the relevant covenants). Tenants should also note that the new lease will also be liable to SDLT which would be payable by the tenant.

To avoid a deemed surrender and regrant of the existing lease the landlord can instead grant to the tenant a new lease which will only commence on the expiry of the current lease. So in the above example a new lease could be granted now for a term from 2010 until 2015. This type of lease is called a reversionary lease (RL). By law the term of the RL must start within 21 years of the date of grant of the RL.

Landlords should note the following points about reversionary leases:

- The term of the RL will start on the expiry of the current lease, so the rent under the RL will normally be the existing rent under the



current lease (assuming no further rent reviews remain under the existing lease) with a rent review on the first day of the term of the RL;

- The landlord will want the current lease and the RL to be vested in the same tenant at all times so if the current lease is assigned, the RL should also be assigned simultaneously to the same party;
- If the current lease is forfeited the landlord will want to be able to forfeit the RL;
- Reinstatement obligations from the existing lease will need to be carried forward into the RL;
- To tie the current lease and RL together to achieve the above concerns, there will need to be a variation of the current lease and this may be a variation that would release any existing guarantor or previous tenant under the current lease, so they need to be joined in if the landlord wants to retain their covenants; and
- The variations to the current lease above need to be disregarded on rent review under the current lease.

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News...

United States of America

We were delighted to act for the United States Government

on its acquisition of a 5 acre site at Nine Elms Lane in Wandsworth, London from Ballymore Properties. The US embassy will make a historic move from 20 Grosvenor Square, London to Nine Elms Lane, where it plans to build a new embassy building which will be modern, secure and environmentally sustainable.



Maples Teesdale...
"focuses purely on commercial property, impressing the market with its work in the area and its enormous amount of brain power and quick, effective service."

Chambers 2008/09

CHAMBERS
AND PARTNERS



Recovering Rent from Former Tenants -

End of Administrative Nightmare

As reported in our Spring 2007 Newsletter, as a result of the Court of Appeal's decision in the well publicised case of *Scottish & Newcastle v Raguz*, landlords (and their agents) faced an "administrative nightmare" when seeking to protect their right to recover from former tenants the balance of the rent due following an upwards rent review. Fortunately the House of Lords has just reversed that decision and thereby relieved landlords of the unnecessary burden of serving multiple and repeated section 17 notices.

If the current tenant fails to pay the rent (or other "fixed charges"), landlords can only enforce payment against former tenants or guarantors if they serve notice under s.17(2) of the Landlord and Tenant Covenants Act

1995 within 6 months of the sum falling due. If the fixed charge is subject to revision (e.g. provisional service charge) the landlord must serve a s.17 (4) notice within 3 months of the revision date.

Where a rent review is outstanding landlords had generally assumed, prior to the *Raguz* case, that they only needed to serve a s.17(2) notice on the former tenant/guarantor within 6 months of settling the review to protect their ability to recover the balance of rent due. However the Court of Appeal in *Raguz* had held that landlords must serve such notices on former tenants/guarantors within 6 months of each quarter pending the determination of an outstanding rent review, even if the current tenant had paid the passing rent in full. This presented landlords with large portfolios with a heavy administrative burden. On appeal, the House of Lords has reached the common sense view that it cannot have been Parliament's intention that s.17 notices should be served in such circumstances and has held that it is only necessary to serve such a notice within 6 months of the determination of the outstanding rent review.



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