



Welcome to this edition of our Newsletter – inside you will find commentary on property issues.

Sustainability News Round Up

CARBON TRADING SCHEME FOR COMMERCIAL PROPERTY?

Those likely to be affected by the Carbon Reduction Commitment, the compulsory tradable emissions allowance scheme for larger non-energy-intensive organisations, should already be making their preparations in readiness for commencement in April 2010.

The Environment Agency will soon be sending a registration pack to potential participants. There are likely to be about 5,000 organisations which will meet the participation threshold of 6,000MWh of electricity use on half hourly meters (equal to an annual spend of £500,000-plus). However, up to 15,000 additional organisations could also be affected by the



scheme and will therefore need to maintain energy use and emissions data and make disclosures to the Environment Agency.

Those affected should be gathering relevant data, establishing procedures and budgeting for the cash flow effects of buying emissions.

The scheme seems to be designed principally with owner-occupiers in mind. Significant additional complexity will arise when landlord-tenant relationships are taken into account.

Landlords beware of accidentally giving consent to Lease Assignments and Sublettings

When a tenant wishes to assign or sublet its lease, the lease will usually say that they can only do so with the consent of the landlord, not to be unreasonably withheld or delayed.

The tenant will provide information to the landlord and request consent in principle. A landlord should never refer to “consent in principle” in correspondence as this could grant consent to a tenant before the necessary licence has been put in place. Even including the words “subject to licence” in correspondence may not prevent consent being given prior to the licence being completed.

Leading Cases?

The leading authority is *Aubergine Enterprises v Lakewood International* (2002). The Court of Appeal decided that the landlord had granted consent when he gave consent in principle to the tenant. It was established in *Aubergine* that the fact that the correspondence was headed subject to licence and included conditions such as payment of the landlord’s reasonable expenses did not render the consent uncertain.

The more recent case of *Alchemy Estates Limited v Astor and Another* (2008) also highlighted this issue. In this case, the

continued overleaf...

In the first instance landlords/tenants should be approached to determine whether they will be participating and to clarify how the terms of existing leases will deal with the scheme. The British Property Federation and others have published a guide to the scheme showing how the costs and benefits might be allocated between landlords and tenants.

GREEN LEASES

Although still the exception rather than the norm, a number of our clients are beginning to use green lease provisions, aimed at encouraging landlords and tenants to reduce the environmental impact of their premises. Some of those provisions are based upon the Better Building Partnership’s green lease toolkit, published in April. The toolkit provides model lease clauses and a draft (non-binding) memorandum of understanding.



IN THIS ISSUE:

Sustainability

Assignments/Sublettings

When is a landlord acting unreasonably?

Construction Update

The Community Infrastructure Levy

Update on pre-packaged administrations

Views...

...continued. Landlords beware...

landlord's solicitor sent an email to the tenant granting consent in principle subject to payment of reasonable costs and documentation in a formal licence to assign. The email also stated that the "correspondence [did] not constitute the provision of consent...such consent will only be provided on the completion and delivery of a formal licence executed as a deed". The email went on to reserve the landlord's right to change the form of the draft licence and impose new conditions following receipt of information. Surprisingly, despite all the caveats, this was interpreted as a grant of consent.

Avoiding inadvertent consent?

In order to avoid granting consent inadvertently, a landlord and its agents should bear in mind the following points:

- A landlord and its agents and solicitors should avoid giving "consent in principle" altogether;
- Following *Alchemy*, correspondence granting consent in principle will still be deemed consent despite stating in the correspondence that completion of a licence executed as a deed is required for consent;
- When negotiating the terms of the lease, ensure that consent for a subletting or assignment will only be valid if granted in a formal deed

...and in respect of granting consent to a Lease Assignment or Underlease – when is a Landlord acting unreasonably?

Leases usually provide that a landlord's consent is not to be unreasonably withheld or delayed to an assignment or sub-underletting. What is reasonable can be a difficult question to answer and depends on the facts of the case.

This issue arose in the recent case of *Landlord Protect Ltd v St Anselm Development Company Ltd* (2009) where the landlord was only willing to give consent to an assignment if the sole director of the assignee offered a guarantee. This would only be released on an assignment if 'reasonable alternative security' was provided. The Court of Appeal decided that the landlord's condition was unreasonable because it meant there would be two requirements for the release of the guarantor, firstly a subsequent assignment and secondly provision of reasonable alternative security.

What is reasonable?

Case law has established several principles for deciding what is reasonable. A landlord should therefore consider the following general principles:

- The landlord should promptly ask for any information required in relation to the assignment or subletting;
- The landlord should always respond to an application within a reasonable period of time (3 weeks in a simple case);
- The purpose of a covenant restricting alienation is to protect the landlord from having his premises used in an undesirable way or by an undesirable tenant;
- The landlord should not refuse consent on grounds that have nothing to do with the relationship of landlord and tenant under the lease;
- It may be unreasonable to refuse consent if the detriment to the tenant is disproportionate to the benefit to the landlord;
- It is likely to be reasonable for a landlord to refuse consent where the landlord has genuine concerns about the proposed assignee/subtenant's covenant strength and ability to pay the rent and comply with its obligations under the lease.



Investment Value?

Case law is a little unclear on whether a reduction in the landlord's investment value in the premises is considered reasonable grounds for withholding consent. Cases in the 1980s suggested that this would not be reasonable if the landlord has no intention of selling the reversion. However the more recent Court of Appeal case of *NCR Ltd v Riverland Portfolio* (2005) would suggest that a valid concern about the diminution of capital value could amount to a fair reason as long as the landlord has genuine concerns about the strength of the assignee/subtenant covenant. Accordingly it seems that the courts are moving towards the principle that a concern about a diminution in value could be a valid reason for refusing consent even if a sale is not in prospect.

Construction Update

One rising concern in the current economic climate is the financial stability of the Building Contractor.

Employers should reassure themselves that their chosen Contractor is financially stable before awarding a contract and, must protect themselves against the possibility of the Contractor's future insolvency.

Before selection of a preferred Contractor, Employers should carry out extensive checks into the Contractor's financial position.

A number of provisions can be included in a building contract to help minimise the effects of a Contractor's insolvency:

1. Performance bonds and parent company guarantees are a common means of protection, and in today's economic climate it is perfectly reasonable to ask for both. In the event of a Contractor's insolvency there is a strong likelihood of its parent company also being in financial difficulties.
2. A retention is essential and should require final payment only after the certificate of making good (or equivalent) is issued. The amount of the retention must be carefully considered for every project and Employers should not shy away from demanding a higher retention than that suggested in industry standard forms. A retention can also be considered in lieu of a bond, but the contract must be carefully drafted in such a case to cover repayment of such a retention.
3. Payment provisions can be amended so that there is no obligation for further payments after the occurrence of any insolvency event. This will allow an Employer to negotiate with the Contractor and avoid having to pay money over to a Contractor which will potentially be lost and irrecoverable.
4. The insolvency provisions should be toughened up to widen the definition of insolvency and include a requirement for early warning of potential future insolvency.
5. Suspension, termination and/or assignment must be permitted, preferably with no notice period and without the Contractor's consent on the occurrence of any insolvency event.
6. The contract should allow Employers to recoup their additional costs incurred due to the insolvency and preferably should be linked to the provisions mentioned above allowing the Employer to cease payment on insolvency.
7. Ownership of materials must transfer to the Employer upon payment, whether or not the materials are placed on site at that point. All such materials and plant should be clearly marked as being the property of the Employer, wherever they are. Such provisions must be replicated in supply contracts and/or sub-contracts.
8. Sub-contractor warranties with step-in rights are important and the sub-contracts should mimic the step-in right. Early on, Employers must consider carefully the list of Sub-contractors from whom they may require warranties and should consider this on the assumption that the Contractor is insolvent. Also, when obtaining warranties, the warranty should be considered as if the Contractor is already insolvent and beware of subsequently accepting lower insurance cover level requirements from a Sub-contractor than the original requirement.
9. Product guarantees and/or warranties should be obtained as early as possible during a project. Supply contracts and/or

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Issues...

...continued. Construction Update

sub-contracts must allow for such and preferably should allow for step-in by the Employer in the event of Contractor problems. Such rights could allow the Employer to obtain part-paid materials by payment of outstanding amounts, post-insolvency of the Contractor and part way through a project.

At the beginning of a project when agreeing which Consultants' Appointments are to be novated, if any, consider this in light of the Contractor's possible insolvency. If concerned about a Contractor's financial stability, refuse to novate key Consultants' Appointments and instead, offer the Contractor a Warranty from those Consultants. This will avoid problems later requiring re-novation of such Appointments to the Employer and possible problems with non-payment of such Consultants by the Contractor post-insolvency of the Contractor.

Finally look for early warning signals, such as issues with sub-contractors not receiving payment or being paid late, delays on site or difficulties in obtaining materials, or information in industry press suggesting financial struggles, for example large LADs claims on another project. Remember also to consider these issues in relation to the parent company and/or related companies of the Contractor.

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The Community Infrastructure Levy

The Department for Communities and Local Government published detailed proposals and draft regulations on the Community Infrastructure Levy (CIL) on 30 July 2009. They give us some insight into how this charge will be determined.

The CIL is a new charge which Local Authorities in England and Wales will be empowered, but not required, to charge on most types of new developments. The proceeds of the levy will be spent on local and regional infrastructure to support the development of the surrounding area.

The CIL will be paid by the person who "assumes liability" to pay this charge, by submitting an "assumption of liability" notice to their local authority. If no person assumes liability, default liability lies with the landowner on commencement of development.

The calculation of the CIL is still a little vague. It will be determined by calculating

the number of chargeable units of the gross internal floorspace, as dictated by the relevant planning permission. This is then multiplied by the rate per square metre as shown by a charging schedule prepared by the local authority, and the effects of inflation then factored in. These charges will be calculated with reference to a construction costs index.

However, charging authorities must take into account the total cost of the infrastructure requiring funding from the CIL, any effect that CIL may have on the feasibility of developing an area and other sources of funding available to the authorities.

The CIL will take the place of the formerly proposed Planning Gain Supplement, but is intended to be used alongside rather than to replace Section 106 agreements and business rate supplements.

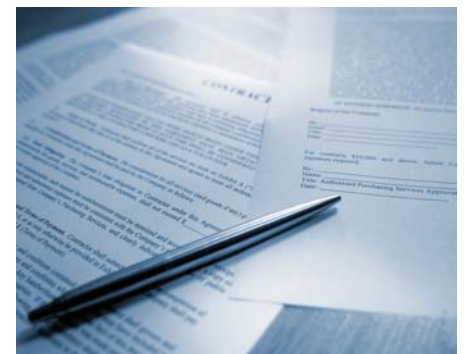
We will update you as we learn more about this new levy.

UPDATE ON PRE-PACKAGED ADMINISTRATIONS

Since our Legal Alert in March 2009, the British Property Federation (BPF) has offered further guidance to landlords.

As stated in our Legal Alert, the Statement of Insolvency Practice 16, which came into force in January 2009, was designed to ensure insolvency practitioners offered greater transparency to landlords/creditors in "pre-pack" administrations. The BPF have issued a template, which can be downloaded from the BPF website (www.bpf.org.uk), with a set of questions that landlords can send to the administrators of a tenant's business to get further information such as:

- The identity of the buyer
- Whether the lease has been assigned without consent
- The buyer's intentions for the property



Administrators have a duty to answer the questions and fully disclose any information requested or they could face disciplinary action including being struck off. This will enable a landlord to send a comprehensive set of questions to the insolvency practitioner and obtain information required to help protect its position. The intention is for landlords/creditors to establish the administration is bona fide, and the administrators have acted properly.