



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

Green Leases New “Green Clauses” to become standard?

Hermes has launched what is believed to be the UK’s first “green lease” for commercial property.

There are several “green clauses” covering energy efficiency and cooperation with the landlord’s general environmental policies.

The leases do not set targets but require tenants to:

- Cooperate with the landlord’s energy saving initiatives.
- Provide information on energy and water use and waste management as required by the landlord.
- Do nothing that may harm the building’s energy performance certificate score or the sustainability characteristics of the building.



- Use sustainable materials when carrying out repairs or other works.

It will be interesting to see how these clauses develop and if they become standard across the sector.

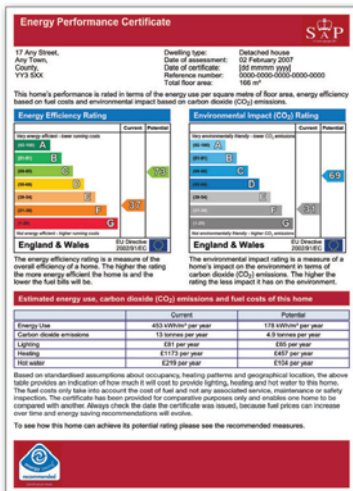
Some occupiers are reluctant to sign up. It is important from the landlord’s perspective that these clauses are not “too onerous” as otherwise they may have an adverse impact at rent review.

INSURANCE RISKS AND FLOODING

In our Autumn ‘07 Newsletter we highlighted the issues of flood insurance and the question of uninsurable risks hitting the commercial property sector. The BPF Insurance Group has again warned the Government that the property industry could face flooding difficulties if the Government does not shore up flood defences and insurance companies consequently withdraw cover for commercial properties in high risk areas.

It will be interesting to see the Government’s response to this latest BPF initiative.

Energy Performance Certificates Their Impact in Practice?



The Energy Performance Certificates (EPCs) are now a reality. From 6 April 2008 EPCs are required for the construction of all new dwellings and for the construction, sale or letting of commercial premises with a floor area greater than 10,000 square metres.

From 1 July EPCs will be required for the construction, sale or letting of commercial property with a total floor area in excess of 2,500 square metres.

From 1 October EPCs will be required for the

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construction, sale or letting of remaining buildings.

Currently the cost of commissioning EPCs seems to vary widely. No doubt costs will stabilise as market standards are set for different types and sizes of buildings.

Landlords are, in practice likely to charge the costs of the EPCs through the service charge on multi let buildings on the basis that this is a cost of complying with statutory requirements.

Landlords should check the terms of their service charge clauses to ensure that they are sufficiently widely drawn to include EPCs.

A central register of EPCs is to be maintained so that buildings can be checked by prospective tenants and purchasers. The impact of the potential rating system for EPCs will be interesting. Will a poor rating create a genuine incentive on landlords to improve the environmental efficiency of the building? Will it have an impact on rental levels and valuations?

Service charges

Landlords should note a recent case

The recent High Court case of *Leonora Investment Company Ltd v Mott Macdonald Ltd* is a reminder to landlords of the importance of following the correct procedures when it comes to the administration of service charges.

In this case the tenant occupied an office block under four separate leases and was liable to pay a fair proportion of the service costs to the landlord. The leases contained a standard provision requiring the tenant to make quarterly payments on account and, at the end of the service charge year, the landlord was required to prepare a statement of the actual service charge costs.

The tenant made its quarterly payments on account and the landlord issued an end of year statement. However, the landlord subsequently rendered an invoice for services which had erroneously been omitted from both the quarterly charges and the end of year statement.

The tenant argued that the landlord was only entitled to raise one end of year reconciliation

statement and could not issue any further invoices for that service charge year. In addition, the invoice did not comply with the terms of the service charge provisions in the leases as it failed to provide a revised summary of the total costs or a breakdown of the amount payable under each of the leases.

The Court held that the tenant was not liable to pay the invoice on the grounds that the prescribed procedure set out in the leases had not been followed. However, the judge did not accept that the terms of the lease limited the landlord to issuing just one end of year statement and held that, in this case, the landlord should be allowed to rectify its mistake by serving a correctly drafted invoice.

This case therefore highlights the importance for landlords and managing agents to consider carefully the service charge provisions in a lease. Demands for service charge payments will only be upheld if they follow the terms and procedures as set out in the lease.

“...the tenant argued that the landlord was only entitled to raise one end of year reconciliation statement...”

LEASE RENEWALS UNDER THE 1954 ACT

What rights are to be included in a renewal lease?

When a lease expires, if it is protected by the Landlord and Tenant Act 1954 then the tenant can apply for a new lease.

The question of the form of the new lease is often an issue between the landlord and the tenant. The Courts will allow the lease to be “modernised” – to take into account legislative changes. If the parties cannot agree on the principal terms, for example the term of the lease and rent, then the Court can determine these principal issues.

The recent case of *Picture Warehouse Limited v Cornhill Investments Limited* has shed some interesting light on how the Court will treat rights that were previously enjoyed by a tenant under the old lease.

In this case the tenant had a right to park in front of their building – but this right was not in the original lease, rather it was in a side letter.

The Court held that on a lease renewal under the 1954 Act, this right would not automatically become a term of the new lease. The court held that if rights were enjoyed by way of a separate licence and not under the original lease, then this right was separate to the tenant’s original lease – and the tenant had no automatic right to have that right incorporated in a new lease on renewal.

Telecoms Apparatus The Telecoms Code and Points for Landlords

Increasingly landlords are coming across issues surrounding the Telecoms Code and telecoms apparatus on buildings.

Landlords will be aware that the Telecoms Code provides certain special protections for telecoms operators. These are in addition to any security of tenure which may be offered to the operators under the Landlord and Tenant Act 1954.

It can therefore sometimes be difficult to force a telecoms operator to remove its equipment at lease expiry. There can also be difficulties in relocating telecoms apparatus to allow redevelopment.

The Telecoms Code is contained in Schedule 2 of the Telecommunications Act 1984 as amended by the Communications Act 2003. Its underlying policy objective is to maintain network coverage for the benefit of customers and businesses.

The Code provides certain protections for operators:

- It permits operators to remain in occupation after expiry or termination of a telecoms agreement.

- It allows the operators in certain situations to increase or add to the apparatus in place.

Paragraph 21 of the Code protects telecoms operators’ occupancy rights. It states that operators can remain in occupation even after expiry of their agreement. It is not possible for the parties to contract out of paragraph 21. If the landlord wants to obtain vacant possession the landlord must serve notice on the operator. The operator can then serve a counter notice and if it does so the landlord will only be able to force removal of the apparatus by obtaining a Court Order. In deciding whether to grant a Court Order, the Court will weigh up the prejudice to the landlord against the potential benefit to users of the operators’ network. The Court must do this in the context of the principal policy objective of providing network coverage to the users of the service.

In the case of redeveloping property landlords do have certain rights to “lift and shift” the apparatus. Landlords can serve notice on the operators requiring the relocation of apparatus. The operators can object and if so the landlord has to apply for a Court Order to allow the relocation. The Court will only make an order in favour of the landlord if it is satisfied that the alterations are necessary to permit development and will not interfere with the operators’ network services. The landlord will in any case pay the operators’ costs of the relocation of the equipment.

To date there has been little testing of the Code in Court. In practice landlords and operators have tended to negotiate an orderly relocation or termination as required. Landlords should however be aware of the Code and the fact that it operates in addition to any rights of the operator under the Landlord and Tenant Act 1954.



Issues...

CONTRACTS FOR THE SALE OF LAND

Make sure there is only one Contract

It is vital when contracting to sell land that all the terms expressly agreed between the parties are contained in one written document.

Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 provides that where this is not the case there will not be a valid enforceable agreement between the parties. Great care should therefore be taken when using side letters or collateral contracts in the context of contracting for the sale of land.



In the recent case of *Oun v Ahmad* it was decided that there was no valid contract as one of the terms expressly agreed between the parties had not been included in the contract document, but rather was recorded in a separate document drawn up at a later date. Neither document incorporated the other by reference, and so neither was a valid contract which satisfied the requirements of Section 2. The whole land contract was therefore unenforceable.

Care must be taken when amending or varying contracts for the sale of land. Any subsequent variations must incorporate the original contract by reference.



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Law Reform – Rights Affecting Property – Easements and Covenants

Rights of way, rights of light and so on (easements) and title restrictions such as positive obligations, or restrictions on certain uses (covenants) are of practical importance to landowners and developers.

The law relating to both easements and covenants has been criticised in the past as too complex and archaic. The Law Commission has published a consultation paper containing provisional proposals for wide-ranging changes to be made to the law in these areas and their application in relation to the ownership and use of land.

The stated aim of the project is to “modernise and simplify” the law, removing anomalies and unnecessary complications.

The main proposals of the Law Commission so far include:

- The abolition of the existing multiple methods of

acquiring easements by long use, in favour of a new single method;

- Giving the Lands Tribunal the same power to modify or extinguish an easement as they currently possess in relation to covenants;
- The creation of a new interest in land – “the Land Obligation” – to take the place of positive and restrictive covenants. Both the benefit and the burden of Land Obligations are to be registered against the titles of the appropriate properties, which should address the common problem of identifying the parties with the benefit of covenants.

Should these changes be implemented they will have a significant effect on land law and the methods by which landowners can control the use of and exercise rights over neighbouring land.

The consultation period closes on 30 June 2008.

Construction – the year ahead in brief

The amended Construction Act is expected to come into force later this year. Amongst other things it will extend the Act to cover unwritten contracts, and will further clarify the provisions as to payments and notices.

Parties will also be forbidden from agreeing that interim certificates (but not final payments) are final and conclusive (thus excluding adjudication). Also parties will be restricted from agreeing that the party referring a dispute to adjudication must pay both sides’ costs regardless of outcome. In practice and despite the changes, both parties should, as always, be fully aware of their obligations and agree all contract terms from the outset and should avoid the ‘unwritten contract’.

The past year has seen some interesting court decisions on the Construction Act 1996 relating to withholding of payments. It will be interesting to see how the Courts continue to interpret and enforce the Act, particularly after the amended Act comes into force. The Courts will in certain cases look beyond the simple issue of whether a withholding notice has been served and will also consider the validity of any payment-related counterclaims by an Employer when deciding whether a payee is entitled to be paid. The new Act however may well affect this

position, as it may tighten up the obligation to give payment/withholding notices (which are often not given at all).



Again on the legislative front, contractors and those in charge of developments should be aware of their obligations under the new Site Waste Management Plans Regulations 2008 (now in force). They should also be aware that, as the Corporate Manslaughter and Corporate Homicide Act 2007 is now in force, in the event of a site death, it is likely that the police and not the HSE will take the lead in any investigations and that penalties will be harsh.