



Welcome to the spring edition of the Maples Teesdale newsletter – inside you will find Partners' opinions on current marketplace and property issues.

New Codes for Leases

Two new codes of practice have recently been issued. The first is the RICS Code of Practice for Service Charges in Commercial Property and the second is the New Commercial Lease Code.

The Codes are for guidance only, they are not legally enforceable. However, the RICS and many in the property industry are keen that they are adopted across the industry. They are intended to represent good practice and to represent a fair compromise between landlords and tenants.

"Service charges should be not for profit, not for loss."

The Service Charge Code

The main theme is "transparency and communication" between landlord and tenant. Service charges should be "not for profit, not for loss". The costs recovered should be sufficient only to cover the relevant costs incurred by the landlord. In particular:

- Landlords should not seek to recover the cost of refurbishment (as opposed to maintenance and repair) through the service charge;
- Management fees should be reasonable and transparent and should not automatically be linked to a percentage of total expenditure as has previously been common;
- Service charges should not include costs that are matters between the landlord and an individual occupier (such as the cost of lettings and rent reviews);
- Service charge payments should be kept in a separate identified account and interest earned allocated to that account.

The New Commercial Lease Code

- A tenant's break right should only be conditional on the basic rent being paid and vacant possession being provided;
- Rent reviews should be clear and should not aim to achieve a headline rent;
- Authorised Guarantee Agreements should only be required by a landlord if it is reasonably necessary;
- Subletting should be at the market rent and not at a higher passing rent under the headlease;

- Tenants' repairing obligations should be appropriate to the length of the term of the lease and the condition of the premises;



- Landlords control over alterations and changes of use should not be more restrictive than is necessary to protect the value of the landlord's property. Reinstatement at the end of the term should only be required where reasonable;
- If the property is destroyed by an uninsured risk, then rent suspension should apply and the tenant should be allowed to terminate the lease unless the landlord agrees to rebuild at its own cost.

Breakfast briefing from Targetfollow

We were delighted to co-sponsor a breakfast briefing from Ardeshir Naghshineh the Managing Director of Targetfollow. Ardeshir was addressing a gathering of the Cambridge University Land Society at Centre Point (one of Targetfollow's buildings). It was a very interesting and informative presentation in front of 100 invited guests and members of the Cambridge Society.



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Some trends in Property Joint Ventures

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Enforcement of rights of light

Rights of light can represent real obstacles to successful and profitable development. There have been two recent important cases.

In *Regan v Paul Properties and Others* [2006] the Court of Appeal reversed the recent tendency of Courts to grant damages instead of injunctions to neighbours complaining about interference to their rights to light. Instead the Court of Appeal granted an injunction, despite the fact that this meant that a substantial amount of a fourth floor penthouse flat in the new development would have to be demolished. It made clear that the judicial discretion to award damages instead of an injunction should only be exercised in exceptional circumstances. Relevant considerations include whether:

- The loss of light is small. In this case the Court did not consider that a reduction of light to circa 45% of the living room was small;
- The injury can be adequately compensated by a small money payment;

“...developers will now have to consider more carefully than ever how they should proceed...”

- It would be oppressive to the developer to grant an injunction;
- The conduct of the neighbour renders it unjust to grant an injunction (e.g. he has indicated he only wants money or has unreasonably delayed his complaint). In this case the Claimant had raised the concern about loss of light at an early stage and had made it clear he was not interested in damages.

The fact that the developer had chosen to take the risk of proceeding with the development despite the neighbour's complaint appears to have influenced the Court's decision to grant an injunction.

This decision re-addressed the balance following the high profile case of *Midtown Ltd v City of London Real Property Co Ltd* [2005] which had

encouraged developers to believe that injunctions would be less likely to be granted in built up areas.

The second recent case to cause concern for developers is *Tameres (Vincent Square) Limited v Fairpoint Properties (Vincent Square) Ltd* [2007]. In that case the High Court decided not to grant an injunction to restrain an infringement of a right to light as the developer was able to demonstrate exceptional circumstances. In particular the loss of light was to a stairwell which was generally artificially lit and was not habitable.

However the Court awarded substantial damages (despite the very limited loss of amenity) based on one third of the profit generated by that part of the development built in breach of the Claimant's right to light. The Court accepted that the reasonable starting point was one third of the profit generated by that part of the development built in breach of the Claimant's right to light. As the infringement of the Claimant's right to light was relatively minor the Court made a modest reduction in the level of damages to reach a result that satisfied the final check of “does the deal feel right”.

In the light of this recent case law developers will now have to consider more carefully than ever how they should proceed. Simply proceeding with the development in the hope that a Court will only award damages rather than an injunction is likely to be risky.



...and NEWS

Property joint ventures

Property development transactions often take the form of joint ventures.

Joint ventures can be purely contractual arrangements, but frequently they involve the formation of a new vehicle to acquire the site and enter into financing and building contracts. Increasingly, limited liability partnerships formed under the Limited Liability Partnerships Act 2000 are being used as joint venture vehicles. They combine the advantages of limited liability and separate legal identity, like a company, but also with tax transparency, like a traditional partnership or a simple contractual arrangement. In contrast, limited partnerships formed under the Limited Partnerships Act 1907, although they too confer limited liability on their limited partners and are tax transparent, are not separate legal entities and are more complicated than LLPs, requiring one or more general partners in addition to the limited partners.

When lawyers draft joint venture agreements, they tend to focus on the default clause, which deals with what happens if one party is in breach or becomes insolvent, and the deadlock clause, which deals with what happens if the parties fall out. These clauses normally set out complicated procedures that ultimately result in one party taking over the other's interest in the venture. What they ignore is that developments are usually financed largely by secured bank debt. In a default or deadlock situation, the chances are that the bank will be legally entitled to enforce its security and that any change in control or early repayment of the parties' own finance will be prohibited. So it is probably more important for the joint venture agreement to focus on trying to prevent defaults and deadlocks by defining in advance, and in as much detail as possible, what the project will involve, how it will be financed and what each party's role will be.

Section 17 notices: An extra burden for landlords

The Court of Appeal decision in *Scottish & Newcastle plc -v- Raguz* [2007] has major consequences for landlords seeking to recover from former tenants the balance of the rent due following an upwards rent review.

If the current tenants fail to pay 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 future revision (e.g. provisional service charge) the landlord must proceed to serve a s.17(4) notice within 3 months of the revision date.

"In order to be fully protected Landlords could choose to serve blanket s. 17(2) notices..."

Where a rent review is outstanding, landlords had generally assumed they only needed to serve a s.17(2) notice on a former tenant/guarantor within 6 months of settling the review to protect their ability to recover the balance of the rent due following an upwards review.

However *Scottish & Newcastle* confirms that once a rent review date has passed, landlords must serve s.17(2) notices on former tenants/guarantors within 6 months of each quarter to protect their position. Even if the tenant has paid the passing rent, the s.17(2) notice should specify that the sum owing is "nil" but is subject to revision. On settling the review, landlords must serve a s.17(4) notice within 3 months to confirm the amount owing.

In order to be fully protected landlords could choose to serve blanket s.17(2)

notices on former tenants/guarantors whenever a rent review date passes, and continue doing so every quarter until settling the review. However this would create a heavy administrative burden on landlords (and their agents) with large portfolios.

It might therefore be more commercial and practical for landlords (or their agents) to limit the service of section 17 notices to cases where they have concerns about the financial ability of the current tenant to pay the balance of the rent due following an upwards review of the rent. This will require the landlord or their agents to consider the following whenever a rent review date arises:

- the covenant strength of the current tenant;
- whether there is a substantial previous tenant/guarantor available;
- how long the rent review process will take and the likely increase in quarterly rent.

Having considered those points landlords may limit the service of protective s.17 notices to a relatively few number of cases.



In brief...

mipim
The world's property market

MIPIM 2007

We were again at MIPIM in March. This year's participants were Roger Thornton, Ewen Cameron and Declan Power from the Commercial Property team and David Stevens, Head of Property Litigation.

We hosted two very successful lunches at the Auberge Provencale, Cannes' oldest and reputedly one of its best restaurants.

The lunches were well attended by a good mixture of clients, agents, funders and other market contacts. Our aim was very much to bring clients and contacts together providing valuable opportunities for further deals in the future.



Maples Teesdale
solicitors

21 Lincoln's Inn Fields
London WC2A 3DU
DX 192 London
t: 020 7831 6501
f: 020 7405 3867
enq@maplesteesdale.co.uk

Construction (*Design and Management*) Regulations 2007

The Construction (*Design and Management*) Regulations 2007 came into force on 6 April 2007. It is hoped that the New Regulations will simplify and clarify the responsibilities of "duty holders" in the management of health and safety risks across the construction industry.

The New Regulations will apply to projects commenced after 6 April 2007 and also (subject to various transitional provisions) projects commenced and not completed prior to that date.

The New Regulations impose greater obligations on Clients as they are seen as the duty holder best able to influence the construction team's approach to health and safety. Clients will no longer have the ability to appoint an agent on their behalf but in situations where a number of Clients are involved in one project any one of them can still assume, by agreement, the majority of the obligations as the only Client for the purposes of the New Regulations.

A new duty holder the "CDM Co-ordinator" has been created and replaces the Planning Supervisor. The role of the Principal Contractor remains but it has changed and amongst other duties now includes the obligation to prepare and update "a construction phase plan".

A breach of the New Regulations may give rise to both criminal and civil liability. Anyone involved in procuring construction works along with those involved in design, construction or construction management should pay close attention to these significant changes.



Environmental Issues

Sustainability and environmental efficiency have become increasingly hot topics over the last few months. Government proposals such as the draft Climate Change Bill are forcing us to think about carbon emissions and the impact our businesses have on the environment as a whole. It is not just our carbon emissions that are being tackled. Sustainability and the amount of waste we produce are also hot topics.

This is a key issue for the property industry. Figures suggest buildings produce approximately half of all the UK's carbon and it has been suggested that the construction industry accounts for a third of this country's waste.

The introduction of initiatives such as Energy Saving Certificates are forcing both owners and occupiers to consider the environmental status of buildings. From 1 January 2008 an Energy Performance Certificate will be required prior to the construction, sale or rental of commercial property larger than 1,000 sq m (and shortly after for smaller buildings).

As well as new builds action will also be proposed to improve the energy efficiency of existing buildings.

Although it is not clear exactly what impact the recent proposals will have we can be sure there will be plenty more to follow. The draft Climate Change Bill includes new powers for the Government to implement new policies to cut carbon emissions and similar proposals for waste reduction are sure to follow.