Commercial Property Information

Commercial Property Information

Commercial Property Information

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Case Law Update

INSOLVENCY

Rent as an administration expense

THE HIGH COURT CONFIRMS THAT RENT CAN, IN CERTAIN CIRCUMSTANCES, BE PAYABLE AS AN EXPENSE OF AN ADMINISTRATION.

The case of **Goldacre (Offices) Limited v Nortel Networks UK Limited (in administration)** is the first case that has positively decided that rent can, in the right circumstances, be viewed as an expense of an administration. In this case, the tenant's administrators had paid rent falling due in September, albeit late. The landlord wanted confirmation that rent falling due in December was payable as an administration expense. The court agreed.

Practical points:

- **This case draws comparisons with liquidation cases. We know that, in certain circumstances, rent can become payable as an expense of a liquidation. In Re Toshoku Finance UK plc [2002] 1 WLR 671 Lord Hoffmann said that: "The court will … interpret rule 4.218 [Insolvency Rules 1986] to include debts which, under the Lundy Granite Co principle, are deemed to be expenses of the liquidation. Ordinarily this means that debts such as rents under a lease will be treated as coming within paragraph (a) [expenses properly chargeable or incurred by the official receiver or the liquidator in preserving, realising or getting in any of the assets of the company], but the principle may possibly enlarge the scope of other paragraphs as well." The Lundy Granite Co principle is derived from In Re Lundy Granite Co., ex p. Heavan (1871) 6 Ch App 462. Under that principle, liquidators are held liable to pay rent as a liquidation expense where the liquidators make use of or retain, for the benefit of the liquidation, possession of leasehold premises Hence, if a liquidator is actively using the premises for the purposes of the liquidation (e.g. to trade; to sell?), rent should be recoverable with a degree of priority.**

- **The equivalent rule for administrators is rule 2.67(1). Administration expenses include, at paragraph (a), "expenses properly incurred by the administrator in performing his functions in the administration of the company"; and, at (f), "any necessary disbursements by the administrator in the course of the administration …" The judge, whilst not expressing a final view, held that if rent did not fall within (a) it certainly fell within (f). He said, however, that he inclined towards paragraph (a).**

- **Where the administrator makes use of the tenant's premises during the period of administration (e.g. to continue trading, or, perhaps, to grant licence to occupy to a buyer of the tenant's business under a pre-pack), rent falling due for the period of use will become an expense of the administration. This**

Commercial Property Information

does not necessarily mean that the rent is paid on time: the administrator will have to weigh up other competing priority claims. However, it does take the landlord ahead of the vast bulk of unsecured creditors lacking such priority.

- **In this case, the administrators were only occupying part of the property – other parts having been sub-let. Nevertheless, the whole of the rent was viewed as an administration expense, there being no realistic possibility of the landlord making any other return from those parts not occupied by the administrators.**

- **It should also be noted that business rates are payable as an expense of an administration. In Exeter City Council v Bairstow [2007] EWHC 400 (Ch), the court held that business rates were to be treated as an expense of an administration, and were therefore to be paid by the administrator.**

Ref: Goldacre (Offices) Limited v Nortel Networks UK Limited (in administration) [2009] EWHC 3389 (Ch).

LANDLORD AND TENANT

Licence to assign

A CHOICE OF ARBITRATION OVER COURT PROCEEDINGS SEES THE TENANT COME OFF SECOND BEST.

In **Lidl GMBH v Just Fitness Ltd**, the tenant might have regretted its approach to dealing with a seemingly unreasonable landlord on an application for licence to assign.

In July 2008, the tenant had applied for licence to assign. Eight weeks later, in mid-September, the landlord intimated through its solicitors that it was not prepared to consent to the assignment. In late November, the tenant asserted by letter that the landlord had been subject to a duty not unreasonably to refuse or delay consent, that the landlord had, by correspondence, indicated a refusal of consent, and that a dispute had therefore arisen between the parties. Rather than applying to court, the tenant suggested resolution of the dispute by way of arbitration. The arbitrator resolved the dispute by deciding that the landlord had not unreasonably refused consent. The reasons for his so deciding are not central to the key point in this case (and, indeed, are not recited by the judge). What was central to the case was that the arbitrator decided that he had not been asked by the parties to rule on whether the landlord had unreasonably delayed its decision. He said that if he had been asked to decide the point, he would have determined that the landlord's decision should have been communicated one month earlier than it was. But he re-iterated that, although he had considered the point, it was separate from the substantive issue that had been referred to him: namely, whether or not the landlord's decision was a reasonable one.

The tenant chose to assign without consent, but the landlord obtained an injunction to prevent it from doing so. The court was only prepared to lift the injunction if satisfied that the "delay point" had not been part of the dispute settled by the initial arbitration. The question for the court, therefore, was whether a fresh arbitration could be held to deal with the delay point, or whether that point had already been referred to the first arbitrator as part of the original dispute. If the latter was the case, the principle of res judicata applied.

The court held that the dispute referred to the arbitrator had embraced both reasons and delay. There was little evidence as to any precise agreement between the parties as to how the dispute was to be settled, which issues were to be decided by the arbitrator, whether issues were to be left over, and if so until when. The parties appeared to have acquiesced in the way in which the arbitrator chose to act – which involved settling the dispute by deciding whether or not the landlord had withheld consent unreasonably, but not deciding whether or not the landlord had been guilty of an unreasonable delay. The arbitrator had dealt with a two-component dispute by deciding one issue, and that was the end of the matter. The tenant was therefore estopped, per rem judicatam, from re-opening the dispute.

Practical point: Where an application for licence to assign is made, once a reasonable time has elapsed for a landlord, the landlord must consent, unless he communicates to the tenant, in writing, reasonable reasons for refusing consent. If no decision has been given by the end of the "reasonable period of time", the landlord cannot then refuse consent.

This is the effect of section 1 Landlord and Tenant Act 1988. Where the lease contains a fully qualified covenant against assigning (or sub-letting, charging or parting with possession), once the tenant has made written application for consent, the landlord owes a duty, within a reasonable time (a) to give consent, unless it is reasonable not to do so. For this purpose, the giving of consent subject to an unreasonable condition breaches the duty; and (b) to serve on the tenant written notice of his decision whether or not to give consent, specifying in addition, if the consent is given subject to conditions, the conditions, or, if the consent is withheld, the reasons for withholding it.

Once a landlord is guilty of an unreasonable delay, the tenant has a claim for breach of statutory duty, and may recover damages from the landlord for losses arising. Further, the tenant may seek a declaration from the court that the landlord has breached its duty to give consent within a reasonable time, and that the tenant may therefore assign without further delay.

In this case, the tenant chose to suggest arbitration to settle the dispute. Unfortunately, the arbitrator did not formally consider the issue of delay. Although it formed part of the dispute between the parties, he said that the parties had agreed that the question he was invited to answer was whether the landlord had unreasonably refused consent. His decision on that point was determinative of the dispute between the parties, and the door was therefore now closed on the tenant.

Ref: Lidl GMBH v Just Fitness Ltd [2010] EWHC 39 (Ch).

Commercial Property Information

CONTRACT FOR SALE

Void for uncertainty

A FAILURE TO ATTACH PLANS AND TO COMPLETE A SIGNIFICANT BLANK SPACE DID NOT RESULT IN AN AGREEMENT BECOMING VOID FOR UNCERTAINTY.

In **Westvilla Properties Ltd v Dow Properties Ltd**, Dow Properties agreed to buy property at auction for £850,000. The property acquired was freehold subject to a 15 year ground floor lease to Cheltenham & Gloucester plc, and subject also to the grant of a 999 year lease-back to the seller of the upper parts of the property at a peppercorn rent. A draft of the 999 year lease was attached to the sale and lease-back agreement. When papers arrived with the buyer's solicitors after the auction, it was noticed that the service charge arrangement in the building was unorthodox. Instead of the freeholder becoming responsible for services, and recovering its costs from the tenants, Westvilla, as long lessee of the upper parts was to be responsible for services, and was entitled to charge its landlord a service charge. However, the draft lease attached to the agreement was defective in that it had failed to specify a landlord's service charge percentage – the space had been left blank. In addition, the extent of property to be included in the lease-back was unclear since plans referred to in the auction pack had not been attached to the agreement.

The buyer argued that the agreement was void for uncertainty, but the court disagreed. The wording of the agreement, on its own, was not sufficiently clear to identify the property to be leased back. However, it was clear that the agreement included a mistake, through the omission of the contract plans, and it was clear what the correction of that mistake should be. Accordingly, the agreement should be construed as if the plans in the auction pack were included. As for the service charge percentage, again there had been a clear mistake in omitting a percentage share. The judge felt that it was clear that the mistake should be corrected by the insertion of a figure of 36% representing the percentage of service charge costs that the ground floor tenant, C&G, was obliged to bear. In this way, the freeholder would be left with no residual liability, merely passing on to Westvilla what was received from C&G.

Practical point: A contract exchange or completion checklist should always include the following question: "Have you completed all blank spaces in the agreement/lease/transfer and its duplicate or counterpart?" This case shows that the court may be prepared to fill in the blanks should we forget – but applying to court is a costly exercise.

Avoiding a contract for uncertainty is the last thing a court wants to do. If it is possible, the court will construe the agreement. The High Court held that "the question of what this draft Intended Lease means when it defines the Landlord's Share of service charges at "[ ] per cent" requires, again, the application of the principles summarised by Lord Hoffmann in Chartbrook Limited v Persimmon Homes Limited [2009] UKHL 38. The question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to have meant the percentage to be, judged from the language they used." Hoffmann's words in Chartbrook may save a lot of mistaken drafting. He said that "there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant."

A further issue arose in this case out of the validity of a notice to compete served by Dow Properties. Dow had served a notice to complete requiring completion of the "contract". This must be taken to mean the contract exchanged at the auction. Subsequent to the exchange, negotiations had taken place as to the terms of the sale, including the price to be paid, and the terms of the 999 year lease. The court found that Dow had made it clear in negotiations that there were only prepared to proceed at a lower price, and with a revised form of 999 year lease. Accordingly, Dow was not ready, able and, most importantly, willing to complete the contract that had been exchanged at the auction. Its notice was therefore invalid.

Ref: Westvilla Properties Ltd v Dow Properties Ltd [2010] EWHC 30 (Ch).

LAND REGISTRATION

Fraud and rectification

A PRE-COMPLETION SEARCH DID NOT PROVIDE A BUYER AGAINST AN APPLICATION TO RECTIFY THE REGISTER TO REMOVE A FRAUDULENT CHARGE.

In **Ijacic v Game Developments Ltd**, Ijacic was the executor of an estate. Title to property owned by the deceased was legally vested in the executor, although the deceased's name still appeared on the register. A fraudster, purporting to be the deceased, charged the property to to a lender for £400,000. The charge was registered at the Land Registry. Following default under the charge, the lender exercised its power of sale, and a sale in favour of Game was completed on 26 March 2008. Game had the benefit of a priority search of the same date giving it priority until 7 May 2008. On April 1, Game applied to be registered as proprietor.

Between completion and application for registration, Ijacic became aware of the fraud and wrote to the Land Registry on 28 March 2008. He followed up with an application to rectify the register to remove the charge, and an objection to the registration of Game. The Land Registry determined that the date of the application by Ijacic was 28 March 2008. Game claimed it was made much later, when a proper application had been filed, and by which time it had already lodged its application for registration. The Deputy Adjudicator decided that the timing of applications was not an issue over which he had jurisdiction. Since the Land Registry had determined the date of Ijacic's application as being 28 March 2008, and that decision had not been challenged by judicial review, the application was to be taken as

Commercial Property Information

having been made on that date, and was therefore earlier than Game's application for registration of the transfer. The charge was a mistake on the register. It was therefore ordered to be removed with effect from 28 March 2008. Accordingly, since there was no charge on the register at the date of Game's application for registration, that application should be refused. Game was left with a claim for an indemnity from the Land Registry for loss resulting from the rectification.

Practical points:

- **The Deputy Adjudicator held that section 72 of the LRA 2002, affording priority for official searches, only afforded protection by giving priority over other "interests" that had not been entered onto the register before the making of the official search. He drew a distinction between the making of an entry in the register and an alteration of the register. An official search afforded priority against entries, but did not afford priority over applications to alter the register for the purposes of correcting a mistake. If an application for rectification could be made after a transfer, there was no reason why it could not be made before.**

- **At first glance, therefore, this seems to be an alarming adjudication. Is a clear priority search not as clear as once we thought it was? It is fair to say that no registered land acquisition is sacrosanct. An innocent buyer may always be exposed to the twin-pronged risks of (a) an objection, under section 73 LRA 2002, before completion of registration; and (b) an alteration of the register (i.e. a rectification) under schedule 4.**

- **As far as rectification is concerned, paragraph 6(2) of Schedule 4, LRA 2002 provides that where an alteration affects the title of the "proprietor of a registered estate", no order can be made without the consent of the proprietor whose registered title is prejudicially affected, and who is in possession of the land unless (a) the proprietor has, by fraud or lack of proper care caused or substantially contributed to the mistake; or (b) it would for any other reason be unjust for the alteration not to be made.**

- **Why was that defence not available here? The Deputy Adjudicator said that the lender, Game's seller, could not avail itself of the defence to prevent the deletion of the charge since a charge was not within the definition of a "registered estate in land" for these purposes. Under section 132(1) LRA 2002, a registered charge was expressly excluded from that definition. The Deputy Adjudicator did not consider the extent to which a buyer could avail itself of the defence pending registration. Under section 131(1) LRA 2002, land is in the possession of the proprietor of a registered estate in land if it is physically in his possession, or in that of a person who is entitled to be registered as the proprietor of the registered estate. (We do not know from the reports of this case whether the buyer was in possession of the property, although, given the circumstances, we can assume that no-one else was). Does this afford protection to buyers who are in possession pending registration? The buyer was certainly a person who was entitled to be registered as proprietor, as it held a transfer executed by a chargee who, under section 58 LRA 2002, as registered proprietor of a registered charge, was conclusively presumed to have sufficient "owner's powers" to transfer title. Perhaps it does not. Section 131(1) might more appropriately be aimed at preserving the registered proprietor's right to oppose a rectification of the register where he/she has executed a transfer, gone out of possession, and the transferee has gone into possession. However, on this point, we must await a determination at a higher level on this point to see if a buyer has more protection than this decision appears to give.**

Ref: Ijacic v Game Developments Ltd [2010] PLSCS 15.

POSITIVE COVENANTS

Benefit and burden

THE PRINCIPLE OF MUTUAL BENEFIT AND BURDEN DID NOT IMPOSE A BURDEN ON AN ASSIGNEE OF THE BENEFIT OF A CONTRACT.

The moral in the case of **Davies v Jones** might be: do not forget to include a restriction on assigning the benefit of a contract. In this case, Jones was contracting to sell land to Lidl to form the site of a supermarket. To perfect the sale, Jones entered into contracts for back-to-back acquisitions of the site in two parcels. Jones was, in effect, in the position of a sub-vendor of the site. However, the transactions did not take place by way of a traditional sub-sale. Instead, Jones assigned the benefit of his two acquisition agreements, so that Lidl took direct transfers from the vendors in Jones' two acquisition agreements.

In one of the acquisition agreements, Jones had agreed his vendor, Davies, that on completion, £100,000 would be retained from the purchase price pending the carrying out by the purchaser of some ground clearance and site preparation works. The contract included an obligation by the purchaser to carry out the works, at the joint cost of the vendor and the purchaser, within three months of completion. Following completion of the works, the purchaser was entitled to take from the retention one half of the cost of the works, the remainder to be released to the vendor.

Of course, it was not Jones who completed the acquisition contracts, but Lidl. The benefit of the contract had been assigned. It was therefore Lidl who retained the £100,000, and Lidl who carried out the works. However. Lidl refused to release any part of the retention, claiming that it had spent in excess of £200,000 on the works. Davies claimed that the cost should have been nearer to £30,000, so that a balance remained payable.

A preliminary issue arose as to cause of action. Was Lidl, as an assignee, bound by the positive obligations of the Jones acquisition agreement? The trial judge had declared that Lidl was so bound: having taken the benefit of the acquisition agreement, Lidl must also

Commercial Property Information

have been subject to the burden of the obligation to deal with the £100,000 retention. The Court of Appeal, however, overturned that finding. In the absence of an express covenant binding on Lidl to perform Jones' obligations under the acquisition agreement, those obligations could not be imposed on Lidl, but remained obligations binding on Jones alone.

Practical points:

- **This case involved an application of the principle of mutual benefit and burden. The principle is also referred to as the rule in Halsall v Brizell (see Halsall v Brizell [1956] 1 Ch 169). Here, the owners of building plots on an estate, and successors in title, were held not to be entitled to enjoy the benefit of roads and sewers unless they also contributed to the cost of their upkeep. This ensured an indirect route to enforcement of positive contribution requirements. The principle was refined in the House of Lords decision in Rhone v Stephens [1994] 2 AC 310. Here, the Lords stated that, for the principle to apply, the benefit and burden must have been conferred in or by the same transaction, the enjoyment of the benefit had to be relevant to the imposition of the burden, and the person enjoying the benefit must have had the opportunity of rejecting the benefit so as to avoid the burden. Although, by assignment of the Jones acquisition agreement, Lidl had taken the benefit of the contract, the Court of Appeal held that there was no equivalent burden passed by the assignment. Lidl had not been placed under any obligation to carry out the works – either in the transfer to it, or in the deed of assignment of the agreement. Lidl did not therefore have a choice, in the same transaction, between accepting the benefit and burden, and rejecting the benefit and burden, since no burden had ever been placed on Lidl.**

- **As mentioned at the top of this item, the moral of the case, for a seller, is: do not forget to include a restriction on assigning the benefit of a contract. If Davies had had the benefit of a clause in the Jones acquisition agreement preventing the assignment of the benefit of the agreement, Davies would have been in a position to allow an assignment only on terms that Lidl accepted, by covenant, the burden of the retention obligations.**

- **For a buyer who is able and wishes to assign the benefit of a contract, the moral of this case is to seek an indemnity from the assignee. Where a contract is assigned, it is the benefit that is assigned, not the burden. Were Davies to pursue Jones for breach, Jones remains bound by its original contract, despite default being caused by his assignee, Lidl. NB. There is no indication in this case as to why proceedings against Jones were not pursued. However, financial considerations, and the ability of a defendant to satisfy a judgment, often come into play.**

Ref: Davies v Jones [2009] EWCA Civ 1164.

RESTRICTIVE COVENANTS

Annexation of benefit

A FAILURE OF ANNEXATION AND A LONG-STANDING OPEN BREACH OF COVENANT RESULTS IN UNENFORCEABILITY.

The case of **Southwark Roman Catholic Diocesan Corporation v South London Church Fund** was decided in May 2009, but a full report of it has only just become available. It can be dealt with very briefly.

The case concerned the enforceability of a stipulation (assumed, for the purposes of the case, to be a covenant), contained in an 1888 indenture, that property be used "as a place of Divine worship". Since 1968, the site had been used as a church hall and youth club, but also for other purposes that clearly went beyond "Divine worship". Southwark now wished to sell the site for development. Counsel for the claimant successfully argued that the stipulation was no longer enforceable on two counts: (1) the stipulation, as a covenant, had been imposed in 1888, but had not been annexed by the indenture to any land. Although section 78 LPA 1925 effects a statutory annexation of the benefit of covenants to land that has been identified as intended to be benefited, that section did not apply to covenant imposed before January 1, 1926; (2) the covenant had been openly breached since 1968. Any attempt now to enforce the covenant was destined to fail on the footing that delay had given rise to an implied release of the covenant. Accordingly, the court declared the covenant no longer enforceable.

Ref: Southwark Roman Catholic Diocesan Corporation v South London Church Fund [2009] EWHC 3368 (Ch).

A case reaching a broadly similar conclusion on annexation is **Seymour Road (Southampton) Ltd v Williams**. Here, covenants were entered into with the County of Hants Land Building Society in an indenture of 1896. The covenants had ceased to be enforceable after the Building Society ceased to exist. As there had been no clear identification in the indenture of any land intended to be benefited, so that there had been no annexation of benefits to retained land, there was no-one now able to enforce the covenants.

Ref: Seymour Road (Southampton) Ltd v Williams [2010] EWHC 111 (Ch).

EASEMENTS

Extent of rights

A RIGHT OF WAY TO OBTAIN ACCESS TO GARDEN LAND IS NOT LIMITED TO GARDEN USES.

In **Davill v Pull**, Davill enjoyed a right to use a track to access dominant land. The dominant land was referred to in the original grant as "garden land". The express grant was a right "for all reasonable and usual purposes". Davill wished to use the access for the purposes of residential development.

Pull sought a declaration, asserting that the proposed use of the track for the intended purposes would involve an excessive, and therefore unlawful, use of

Commercial Property Information

the right. The issue for the court, therefore, was whether, upon the true construction of the grant, the right of way could lawfully be used for residential purposes, or was limited to garden uses. The judge, having considered the factual circumstances in play when the grant had taken place, held that the grant of the right of way was limited to use of the land as garden ground, and made a declaration in those terms.

Davill appealed, claiming that the description of the plots as "garden ground" did no more than describe their then use, and that those words carried no implication that the parties had had in mind that the plots could not and would not lawfully be used for other purposes. The Court of Appeal agreed. On a proper construction, the grant had afforded access to garden plots with no limitation on their future use. They granted rights of access "for all reasonable and usual purposes" and these words were not linked to, or limited by, the then use of the plots as gardens. There was therefore no question that the use of the garden land for the building and occupation of a dwelling house in accordance with a planning permission was not a "reasonable and usual" use.

Practical point: The extent of a right of way is to be gauged by looking at the express words of the grant, and (if necessary) looking at the surrounding circumstances at the time of the grant.

The modern approach to interpretation involves applying Lord Hoffmann's five principles of interpretation in the case of Investors Compensation Scheme Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896. In particular, the court must ascertain the intention of the parties to the original grant from the words of the grants, read in the light of the background circumstances which would have been known to the parties. Hence, when ascertaining whether a right of way is exercisable at all times, for all purposes, and with or without cars and lorries, it is necessary to look at the words used, and the surrounding circumstances existing at the time of the grant. Full use of a way is normally implied into an express grant, provided the route of the way was sufficient to take vehicles. The extent of the way (or track) is governed by the express words of grant, and any attached plan, with ambiguities to be resolved by extrinsic evidence. For example, the width of the track may govern the nature of the vehicles to go upon it.

In this case, the phrase "for all reasonable and usual purposes", interpreted against the background in which the grants were executed, was not intended to limit the use of the track to the purposes of a garden. If that had been the intention of the parties, once all gardening activities came to an end, there would be no continuing right to access it. The easement would therefore have been tantamount to a restrictive covenant not to use the plot as anything other than a garden – yet the parties had inserted no such covenant in the original grant. Use of the way was therefore not restricted.

Ref: Davill v Pull [2009] EWCA Civ 1309.

INSOLVENCY

Transaction at an undervalue

A SALE AND LEASEBACK IS SUCCESSFULLY USED TO PLACE ASSETS BEYOND THE REACH OF CLAIMANTS.

In **Delaney v Chen**, a debtor sold property to Delaney for £210,000 – a price that was substantially below the unencumbered freehold value of £275,000. However, part of the transaction involved the seller/debtor being allowed to continue to live at the property by virtue of the grant back to the seller of a non-assignable 21 year lease of the property. The transaction was therefore one of sale and lease back. Chen, a creditor of the seller, challenged the sale alleging that it was at an undervalue, and that a substantial purpose of it was to put assets beyond the reach of creditors. The trial judge agreed, and declared that the transfer of the property to Delaney was to be set aside, pursuant to section 423 Insolvency Act 1986, and ordered the re-transfer of the property to the seller/debtor.

On appeal, Delaney submitted that he had not acquired an unencumbered freehold but a freehold subject to the lease-back. He argued that the judge should have focused upon the value of the freehold reversion acquired by him, as against the consideration of £210,000 provided to the seller (concluding that the considerations given and received were equal), rather than comparing the value of an unencumbered freehold as against what the £210,000 consideration the seller had received. As the freehold reversion was worth no more than £210,000, there was no transaction at an undervalue. The court agreed. A purchaser under a sale and lease back transaction acquired nothing more than the freehold reversion, and it was clear from the evidence of comparable transactions that the price paid for the freehold reversion was a fair one.

Practical points: Under section 423 of the Insolvency Act 1986, if a transaction is entered into at an undervalue, and the court is satisfied that the purpose of the transaction was to place assets beyond the reach of a potential claimant (actual or prospective), or was intended otherwise to prejudice the interests of such a claimant, the court can set the transaction aside. There is no time limit for applying to set aside such transactions although, clearly, the further back in time the transaction, the harder it will be to satisfy the court of its purposes.

The creditor in this case was challenging the transaction on the basis that the property could have been sold at a full open market vacant possession price, but that the debtor had deliberately chosen to sell at a lower price. The court acknowledged that the seller/debtor owned an unencumbered freehold down to the point of sale, and could have sold the property to anyone else at its full unencumbered value. The court also acknowledged that the underlying purpose of the sale was to place assets beyond the reach of creditors. The decision to sell to Delaney had had the result that the purchase price was lower than it needed to have been, and had resulted in a depletion of the seller's assets. However, that was not enough to classify the transaction as an undervalue. Had the

Commercial Property Information

seller sold the property for £275,000, and then taken a long lease at a low rent of a comparable property paying a market premium of £65,000, the payment of that premium could not have been classified as a transaction at an undervalue.

Ref: Delaney v Chen [2010] EWHC 6 (Ch).

Consultation Legislation Regulation

CARBON REDUCTION COMMITMENT
Draft regulations

Draft Carbon Reduction Commitment regulations - The CRC Energy Efficiency Scheme Order 2010 – have been laid before parliament. CRC is on course for an April 2010 commencement. The draft regulations can be seen at the website address below.

Once the regulations are approved, a final analysis of the scope of the scheme, and the drafting implications of the scheme, will be provided in these pages before the commencement date.

Ref:
http://www.opsi.gov.uk/si/si2010/draft/pdf/ukdsi_9780111491232_en.pdf

DEVELOPMENT
Town and village greens

The Department for Environment, Food and Rural Affairs (Defra) has published a 10 page guidance note on town and village greens "Management and protection of registered town and village greens - Frequently asked questions." This seeks to explain Defra's view on a number of key issues relating to the management and protection of town and village greens including a review of the statutory regime applicable to village greens, the sanctions for committing an offence in relation to the green, ownership and adverse possession of the green (although a separate paper exists for adverse possession issues), who has the right to enjoy lawful sports and pastimes on the green, what amount to lawful sports and pastimes, whether the green owner can charge for use, and whose permission is required to carry out works on a green.

Ref:
http://www.defra.gov.uk/rural/documents/protected/common-land/tvgprotect-faq.pdf

At the end of last year, Defra provided details of a final report on research conducted into the registration of new town or village greens. It is widely belived that the ability to register town or village greens under section 15 Commons Act 2006 is being abused by persons opposed to development in their locality – a blocking device employed by modern day NIMBYs.

The research, which was conducted by the Countryside and Community Research Institute, found that nearly half of applications for registrations of greens were linked to prospective development. A summary of the research can be seen at the website address below. As a result of this research, Defra states that it proposes consulting in the Spring of 2010 on whether there is a need for reform of the registration system, and the options for reform that exist.

Ref:
http://randd.defra.gov.uk/Default.aspx?Module=More&ProjectID=16581

MORTGAGES
Power of sale and residential property

The Ministry of Justice has announced a proposal to require mortgage lenders to obtain a court order or the consent of the borrower before repossessing and selling residential owner-occupied homes.

The case of **Horsham Properties Group Ltd v Clark** [2008] EWHC 2327 (Ch), reported in the November 2008 CPI Update (Issue 62), caused considerable concern given its finding that a sale by a mortgagee without first obtaining a court order for possession deprived the borrower of the protections of the Administration of Justice Act 1970. Section 36 of the Administration of Justice Act 1970 enables the court to adjourn proceedings, delay execution of a judgment, or postpone the date for delivery of possession of a property if it is satisfied that it is likely that the borrower will be able to repay any sums due under the mortgage or rectify any default within a reasonable period. However, section 36 applies only where lenders issue proceedings for possession, and does not apply if lenders proceed without the assistance of the court: **Ropaigealach v Barclays Bank plc** [1999] 4 All ER 235. Whilst most mortgagees would normally seek an order for possession in order to sell with vacant possession, others (particularly those in the buy-to-let sector, but possibly in other sectors too) may choose not to do so.

Subsequent to this case, the Council of Mortgage Lenders announced that its members, on a voluntary basis, would not take advantage of this decision in owner/occupied cases. It confirmed that: "In respect of mortgages secured against owner occupied residential properties CML members will not seek to sell a mortgaged property when the borrower is in default without first obtaining a court order for possession. In addition CML members will not appoint a receiver to sell a residential property without first obtaining a court order for possession."

The current consultation proposes changes that would put current lending practice into law, and ensure that borrowers will be able to access the AJA protections offered by the court. The proposals relate to residential owner-occupied properties and would not affect buy-to-let mortgages or other commercial

Commercial Property Information

loans, nor affect other remedies available to mortgage lenders where a borrower defaults on a mortgage. Consultation closes on 28 March 2010.

Ref:
http://www.justice.gov.uk/consultations/mortgages-power-sale.htm

PERPETUITIES AND ACCUMULATIONS
Perpetuities and Accumulations Act 2009

The December 2009 issue of the CPI Update reported on the passing of the Perpetuities and Accumulations Act 2009. This Act will now commence on April 6, 2010 by virtue of The Perpetuities and Accumulations Act 2009 (Commencement) Order 2010 (SI 2009/37) – see the website address below.

From commencement:

- the rule against perpetuities is restricted. It will only apply in the circumstances listed in section 1 of the Act, thereby restricting the long-standing rule against perpetuities to the trust cases specified in section 1.
- the new rules will simplify the law by introducing a single 125 year perpetuity period - whether specified or not.
- the Act will also allow the trustees of trusts created before commencement with an uncertain common law perpetuity period to opt into a fixed perpetuity period of 100 years.

As the rule against perpetuities will only apply in the specified trust cases, it will cease to apply to future rights over property such as options, rights of pre-emption, future easements and (if indeed it did) overage clauses.

At present, an option to purchase land is void if it is not exercised within 21 years of the date of the grant – see section 9 of the Perpetuities and Accumulations Act 1964. Also at present, an easement which takes effect from some uncertain date in the future (for example, a right to use a passageway or road to be constructed by the grantor at a later date – see **Dunn v Blackdown Properties Ltd** [1961] Ch 433) offends the rule against perpetuities unless it is expressed to vest within a stated perpetuity period – usually one of 80 years.

Once the new rules come into force, the rule against perpetuities will not apply to options, pre-emption rights and easements created thereafter. Options to purchase will therefore be capable of longer life, and the need to express perpetuity periods in deeds of grant and Forms TP1, will fall away. To this extent, the Act will simplify property drafting, and avoid potential, though rarely encountered, perpetuity traps.

Ref: http://www.opsi.gov.uk/si/si2010/uksi_20100037_en_1

Commercial Property Problems

LEASEHOLD ENFRANCHISEMENT
When is a house not a house?

This is the sort of question only a lawyer would ask, and it has been asked in these pages before. The question is, of course, relevant to leasehold enfranchisement claims under the Leasehold Reform Act 1967. Under that Act, a tenant of a long lease of a "house" enjoys a right to acquire the freehold. Under the Act as originally enacted, it was a qualifying condition for enfranchisement that the tenant had occupied the house as his/her only or main residence for a three year period. The effect of the condition ruled out claims to enfranchise by companies – since a company could not occupy premises as a residence. However, as a result of the Commonhold and Leasehold Reform Act 2002, in general the residence condition no longer applies. Now, all a claimant needs to do is to show that it owns a long lease of a house, and that it has been the tenant of the house for a minimum of two years prior to any claim. Where the lease is one to which Part II of the Landlord and Tenant Act 1954 applies, a modified residence condition still applies. But if the tenant has sub-let, so that the 1954 Act does not apply, the tenant is back to square one: has the claimant, for two years, been the tenant under a long lease of a house? The abolition of the residency condition has led to corporate tenants seeking to exercise the right to enfranchise. The key question now is whether the building is a "house"

An answer, of sorts, was given by the House of Lords in **Tandon v Trustees of Spurgeon Homes** [1982] AC 755 in which Lord Roskill said that "as long as a building of mixed use can reasonably be called a house, it is within the statutory meaning of "house" even though it may also reasonably be called something else." So, a house is a house if it is reasonable to call it a house even if it is reasonable to call it something else as well. Truly, a lawyer's answer. However, are tenants of mixed user buildings originally built as houses, but now converted to mixed use, or to purely commercial use, able to enfranchise?

Last month, a county court case considered the question and, with hindsight, the case deserved an airing in these pages, as it cast further light on the answer. **Hosebay Ltd v Day** [2009] PLSCS 318 is merely a county court case, so it does not have the status of a binding precedent. However, the arguments aired in this case can be played out in many other business properties up and down the country, and the considered opinion of HHJ Hazel Marshall QC is worth analysing. The case queries whether a building that was originally designed as a house, but which had been converted to business use – in this case, self–catering rooms to provide short–

Commercial Property Information

term accommodation for visitors to London - remained a house for the purposes of enfranchisement under the Leasehold Reform Act 1967. The court held that it did.

Much excitement had been caused by Lord Neuberger in **Boss Holdings Ltd v Grosvenor West End Properties Ltd** [2008] UKHL 5 who had surmised whether a building that started its life as a house, but which had now been adapted entirely for use as something else (e.g. office accommodation) remained a house for enfranchisement purposes. He said: "As a matter of literal language, such a property would be a house, because "designed" and "adapted" appear to be alternative qualifying requirements. At least at first sight, such a conclusion seems surprising, so there is obvious attraction in implying a qualification that, if a property has been, and remains adapted for a purpose other than living in, the tenant cannot rely upon the fact that it was originally designed for living in. However, a term is not easily implied into a statute, and further reflection suggests that the literal meaning of the words is not as surprising as it may first appear, particularly bearing in mind the existence of the [original] residence requirement in section 1(1) of the original Act. It is unnecessary to decide this point, and, particularly as it was only touched on in argument, I do not think we ought to do so."

This excitement was tempered a little by the Court of Appeal in **Grosvenor Estates Ltd v Prospect Estates Ltd** [2008] EWCA Civ 1281. In that case, only 11.5% of the floor area of a building was permitted by the lease to be used for residential purposes, while the remaining floors could only be used as business or professional offices. The Court of Appeal held that the question of whether a building was a house, reasonably so-called, depended upon a range of relevant circumstances, and in this case, giving due weight to the restrictions on use contained in the lease, the actual uses to which the building was put, and the relevant proportions of floor areas so used, the court felt it was no longer reasonable to call this building a house.

Comment was made in the CPI Update at the time of the Prospect case that, because amendments made to the Leasehold Reform Act 1967 in 2002 had not contemplated the possibility of corporate tenants not occupying their "houses", but sub-letting them for business purposes, a loophole had arisen. While a tenant, since 2002, no longer needs to occupy its leasehold "house" as a residence in order to qualify for enfranchisement, a tenant whose lease is caught by Part II of the LTA 1954 must: but a business tenant who has sub-let its "house" is no longer caught by Part II, and so all that is required is that the building qualifies as a house (reasonably so-called). In **Hosebay**, the loophole was deliberately and successfully exploited. The property, although used for business purposes, was adapted for living in, and could, in the particular circumstances of the building in question, reasonably be viewed as a house. The tenant was therefore entitled to enfranchise. This case is a well-balanced analysis of whether a building is a house, reasonably so-called. Other claimants would do well to read the case to inform their own analysis of similar claims.

LAND REGISTRY

Maintaining an address for service

As the Land Registry's recent "Protect your Property" campaign shows, maintaining a valid, current address for service is a vital part of the fight against property fraud. It also ensures that notices served by the Land Registry affecting a client's title are received and can be dealt with promptly. A significant number of notices may be served by the Land Registry under provisions of the Land Registration Act 2002 and the Land Registration Rules 2003.

Changes introduced by the Act and its rules enable registered proprietors and others to record on the register at the Land Registry up to three addresses for service. Under rule 198 LRR 2003, any person caught by the rule (which includes registered proprietors and registered chargees, but includes also, amongst others, beneficiaries of notices and restrictions) must give the registrar at least one address for service which is a postal address, whether or not in the United Kingdom. In addition, two further addresses may be given – whether postal (whether or not in the United Kingdom), DX, or e-mail address.

For a client, it is imperative that it is aware that its addresses for service are kept up-to-date, and that changes are notified. Care needs to be taken (a) with postal addresses, where clients move premises; (b) with non-UK postal addresses, which are perhaps not advisable, since valuable time to act in response to a notice served by the Land Registry may be eaten into by the time taken to deliver the notice; and (c) with email addresses, where a change at the service provider may affect the validity of the address.

From time to time a client will move head office. It is quite common for a fee earner to advise colleagues by circular email that a client's correspondence address has changed. The fee earner should also advise the client that an application may need to be made to the Land Registry to change an address for service. Sometimes a registered office relocates. Law firms may host registered office addresses for corporate clients. Where the firm relocates, changes of registered office addresses need to be notified to Companies House. If the registered office has also been used as an address for service, Land Registry needs to be notified of the change. On many occasions, the person upon whom a notice is served may only have a short period of time in which to respond. A failure to keep an address for service up-to-date can lead to important deadlines being overlooked.

Examples of missing an opportunity to respond to a notice are easy to contemplate. Consider the case of a non-occupying registered proprietor. His neighbour

Commercial Property Information

has encroached onto his land. An application is made by the neighbour for registration of the land on Form ADV1. Notice of this application will be served on the registered proprietor who will have 65 business days in which to lodge Form NAP – to oppose the registration and to require it to be dealt with in accordance with paragraph 5, Schedule 6, LRA 2002 (i.e. to force the claimant to establish one of the limited grounds under paragraph 5(4)). If the registered proprietor has not kept its address for service up-to-date, it will not receive notice of the Form ADV1 application, will be unable to serve Form NAP, and the claimant's application will therefore succeed. The same inability to respond may arise for a non-occupying tenant whose lease is wrongly being cleared off the register, or for a person with the benefit of a unilateral notice whose claim is being warned-off, or a person with the benefit of a caution against first registration where an application for registration has been lodged.

A person who wishes to notify a change of address, or to add an address, must do so on Form AP1. Provided the form is sent by a conveyancer, no identification requirements need to be complied with on Form AP1. However, where a client wishes to apply to the Land Registry direct in order to change an address for service, identification requirements will need to be met in accordance with Land Registry Public Guide 2. Proprietors with a large number of registered titles, and perhaps an uncertainty as to how many titles are held, may need to combine the application with a search of the index of proprietors names, or liaise with the commercial services department.

Practice Points

LAND REGISTRY
Protecting property against fraud

Land Registry has introduced a "Protect your Property" campaign for the general public in an effort to reduce property fraud, and to encourage property owners to keep their addresses for service up-to-date on the register. The Land Registry has published a leaflet – "Help protect your property – keep your contact details up to date" – which can be found at the link below.

Steps the Land Registry advises land owners to take include:

- Keeping addresses for service up-to-date;
- Ensuring unregistered title is better protected by being registered;
- Making thorough and regular checks on tenants;
- Visiting unoccupied properties.

These pages have also suggested in the past considering making use of standard from restriction LL in respect of properties an owner does not occupy. The text of a standard form LL restriction reads as follows:

"No disposition of the [*choose whichever bulleted clause is appropriate*]

- registered estate by the proprietor of the registered estate
- registered charge dated [*date*] referred to above by the proprietor of that registered charge

is to be registered without a certificate signed by a conveyancer that that conveyancer is satisfied that the person who executed the document submitted for registration as disponor is the same person as the proprietor."

In this past, some regarded this restriction as a necessary guard against fraud. It is now less of an imperative, now that Land Registry identification rules apply to the registration of transfers, leases and charges. However, the restriction goes one step further than the Land Registry identification rules in that it positively requires a conveyancer's certificate, rather than just the name, address and reference of an acting conveyancer, to facilitate a registration. The cynical amongst us will point out, or course, that either protection is easily side-stepped by the committed fraudster.

One further point of note: the FAQs section of the Protect your Property announcement asks: "Why can't you bring back land and charge certificates? These helped to prevent fraud." The answer given is: "The fact that someone held a land or charge certificate was not proof that they were the owner on the register. There were instances of fraud even when we had land and charge certificates." So, there is no intention of returning to land certificates for protection. (The cynical amongst us might ask: Q. Why don't you lock your door at night? It helps to keep out burglars. A. The fact that I lock my door is not a guarantee that I will not be burgled. There have been instances of burglary even where doors were locked.)

Ref:
http://www1.landregistry.gov.uk/propertyfraud/?WT.mc_id=PYPpr1jan11

CODE OF CONDUCT
Consultation on conflicts and confidentiality

You may have seen an article on the front page of the Law Society Gazette for 21 January 2010 entitled "SRA poised to relax conflict rules". The relevant consultation paper - "Amendments to rule 3 (conflict of interest) and rule 4 (duties of confidentiality and disclosure) of the Solicitors' Code of Conduct 2007" - can be seen at the website address below.

For property lawyers, it should be noted that these changes are aimed at the corporate sector and should not impact upon general conveyancing work. Whilst the proposal is to create a further relaxation of the

Commercial Property Information

general rule on conflicts, by introducing a further exception to the general rule to allow a firm to act in any conflict situation (other than one involving litigation) where "sophisticated" clients give informed consent, the special conveyancing rule (the old Rule 6/SRA Code rule 3.07) will continue to apply and is unaffected by this consultation.

The consultation period closes on 12 February 2010.

Ref:
http://www.sra.org.uk/sra/consultations/conflict-confidentiality-december-2009.page

CARBON REDUCTION COMMITMENT
User Guide

The Department of Energy and Climate Change has published a new 99 page user guide for CRC: "The CRC Energy Efficiency Scheme User Guide". This is a guide for clients "written as a practical tool for those people within these organisations who will be responsible for ensuring compliance with the scheme" (e.g. energy managers and financial managers).

Ref:
http://www.decc.gov.uk/en/content/cms/what_we_do/lc_uk/crc/user_guidance/user_guidance.aspx

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