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REAL ESTATE LAW SPECIALISTS

PROPERTY LAW UPDATE

JANUARY 2019

PROPERTY UPDATE

Barclays, Level 1, 3 Hardman Street, Manchester, M3 3AX

Speaker: Richard Snape

24th January 2019

3 CPD Points

DJB is a national law firm that specialises entirely in Real Estate. This ensures that all of our resources go towards solving the biggest Legal and Commercial issues in the market.

The firm is renowned for its high quality Legal work and service. We only recruit experienced Lawyers with excellent calibre. As a result, our Legal team of *circa* 40 Lawyers has an average post-qualification experience that exceeds 20 years. Most have joined us from other City firms, in-house departments and/or senior roles. Our Lawyers have advised some of the UK's most significant land owners including Barclays bank, HSBC, Credit Suisse, Rolls Royce, The Royal Parks, The Cabinet Office and The Crown Estate.

All of our Clients are provided with a dedicated Client Care professional at no extra charge, which ensures that they receive the highest standard of service at all times.

DJB is regularly selected to advise on high profile projects such as the hosting of the London 2012 Olympic Games by The Royal Parks and the first Sukuk Bond to be entered into by a Western Government on behalf of HM Treasury.

The firm enjoys top tier rankings in all of the main directories including Chambers and the Legal 500; it has recently been awarded Boutique Firm of the Year at the British Legal awards and has been shortlisted for the Estates Gazette Legal Team of the Year Award for the last two years.

OUR CREDENTIALS

LEGAL 500

- London: Real Estate: Corporate Occupiers; Investors; Property Litigation; Local Government
- North West: Commercial Property
- South West: Real Estate: Commercial Property, Planning, Property Litigation, Local Government

CHAMBERS UK

- London: Real Estate
- South West: Real Estate, Planning, Property Litigation

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- 2018 British Legal Awards – Winner – Boutique Firm of the Year
- 2018 Estates Gazette Awards – Finalists – Legal Team of the Year 2018
- 2017 Estates Gazette Awards – Finalists – Real Estate Law Firm of the Year
- 2016 Amercian Lawyer Legal Awards - Global Finance Deal of the Year – Honoree
- 2013 Lawyer Awards – Boutique Firm – National – Winner
- 2013 Lawyer Awards – Real Estate Team – 2nd

"Excellent niche property and planning firm"
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"Immense depth and knowledge enabling them to deal with anything that is thrown at them"
CHAMBERS 2019

"Extremely client focused and solutions driven"
LEGAL 500 2019

"'They're approachable and helpful". "
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Contents

RECENT COMMERCIAL PROPERTY CASE LAW UPDATE

Lease or Licence?

London College of Business v Tareen [2018] EWHC 437
In Street v Mountford [1985] UKHL 4 the Court held that the title of an agreement was irrelevant and if there was exclusive possession for a term then there would be a lease. In the current case the college had been in occupation under a series of agreements which were described as licences and stated that the licensor had an absolute right of entry at all reasonable times for the purpose of management and could terminate the agreement on 14 days notice. The Court held that there was a right of exclusive possession as the purpose of the agreement was to provide the college with premises from which it could run its business, the parties did not have equal bargaining strength and the college had fitted out the units it occupied and it was not realistic to suppose that T could interrupt the occupation by a right of entry. Damages of £25,000 were awarded.

Camelot Guardian Management Ltd v Khoo [2018] EWHC 2296 Here K entered into a licence with C to occupy property as a guardian. The property was designed as office space and owned by Westminster City Council. It was stated that K's obligation was to secure the premises against trespassers and to protect the premises from damage. This was held to be a genuine licence.

Consent to Change of Use

Rotrust Nominees v Hautford [2018] EWCA 765 Here consent to a change of use could not be unreasonably withheld and there was also provision that the tenant would not apply for planning permission without the prior written consent of the landlord, such consent not to be unreasonably withheld. The premises consisted of a six-storey building with 70 years remaining on the lease. The tenant ran an ironmongers business from the basement. He wished to obtain planning permission to let out the upper storeys as residential units. The landlord objected as if a tenant is not in occupation for business purposes they may be a qualifying tenant for the purpose of the Leasehold Reform Act 1967 and could apply for enfranchisement of the premises. In **Bickel v Duke of Westminster [1977] 1QB 517** it was held that the landlord's fear of enfranchisement was a reasonable ground for refusal of consent to assignment. However, as there were 70 years remaining on the lease, this would not apply and it was unreasonable to object to a planning application.

Assets of Community Value

Banner Homes Ltd (BHL) v St Albans District & City Council (1) & Verulam Residents Association (2) [2018] EWCA Civ 1187 This was the first Upper Tribunal decision on assets of community value. The local planning authority had acted reasonably in refusing planning permission for an asset of community value. This will usually prevent successful planning applications. Here the land consisted of a piece of open space and although there was no permission to be on the land it could still constitute such an asset. The Court of Appeal have now confirmed this decision.

Note: **The General Permitted Development (Amendment) (England) Order 2015** takes away permitted development in relation to change of use of drinking establishments which are assets of community value.

Note: **The Town and Country Planning (England) (Amendment) (No 2) Order 2017**. The provisions came into force on 23rd May 2017. Drinking establishments will no longer have permitted development for conversion to retail, restaurants, state funded schools, flexible use or demolition.

Admiralty Taverns v Cheshire West and Chester Council and Farndon Parish Council [2018] UKUT 15 (AAC) the Upper Tribunal accepted that a public house could further the recreational activities of the community although the large majority of customers were from outside the locality and were visiting the public house for meals. A small number of locals would visit the bar purely for drinking.

ELECTRONIC COMMUNICATIONS CODE

These provisions still apply to pre-December 28th 2017 agreements.

The Telecommunications Act 2003 and the Communications Code provide major security for the operators of telecommunications equipment. As most of such equipment is held under a lease there should be an exclusion of the 1954 Act by means of the service of a notice. It may still prove difficult however to remove the equipment.

Questions the property owner/occupier/surveyor should ask before agreeing to let equipment on to the property

1. Is the company a licensed operator?

   Not all operators have well known names such as O2, T-Mobile, Orange or Vodafone - many other operators exist and if in doubt you should check with Oftel (www.oftel.gov.uk). Only licensed operators may benefit from the Code.

2. What kind of property is involved?

   The effect on your other tenants should be taken into consideration.

3. Are you the occupier?

   An occupier is generally taken to mean someone who has sufficient degree of control and management over the property or activities of the persons on it. In practice freeholders who are approached need to check whether or not they have demised roof top space in which case it will be the roof top owner who is the occupier [query air space].

4. Are consents required?

   Where you are a tenant the landlords or mortgagees consent may well be required (see below). Similarly planning or conservation matters may be relevant.

5. Does the agreement allow for sharing between networks?

   If so, you may miss out on future revenues as a result of any new sharing agreement if the operators enters into them amongst themselves.

6. Is it the standard form of agreement that you have been asked to sign?

   If so, refuse! You are much better off entering into a document with independent advice. Similarly, it is worth excluding business security of tenure.

7. Other issues of access. Check if your rights of access are sufficient - do you want telecom engineers calling at the weekend or calling at your offices while you are having clients visiting?

8. What about the electricity supply - you may require a contribution towards your service charge if there is. Is there going to be significant increase?

9. Rent review - Rent review patterns tend to be three or five years and specialist advice should be obtained. It is worth noting the view put forward in one of the articles that this regard in relation to improvements ought not to apply. (see below)

10. Indemnities - if you are being offered any indemnities do they cover claims made by your landlord?

    Make sure that any indemnities are not so broad that they fall foul of the non-contracting out provisions of the Code.

11. Insurance cover - insurers should be consulted and an increase in insurance cover obtained if necessary given the electrical voltages, the equipment and personnel attending to check it.

12. What other health and safety issues are there?

    You should check as there is a possibility you may be somewhat liable if there should be any risks arising. To minimise the risk you should carry out an assessment and put in place appropriate protocols and establish safety barriers.

13. Who will control the management of the health and safety risk?

    This is really a development of the above question.

14. Are you being asked to sign an early access agreement?

    If so, do not sign. Do not be enticed into early access payments. The powers conferred on Code operators apply wherever there is a written agreement to install and keep apparatus on the land. It does not have to be a lease and an early access agreement (ostensibly entered into pending the finalisation of negotiations for a new lease) will confer rights under the Code. Note that at BT it was standard practice to send out an early access agreement with a first draft of a lease - the majority of these were signed and returned.

15. Even if the document is a wayleave or describes itself as a license it may still be a lease. The safest course is to contract it out of security of tenure.

16. If planning any redevelopment, build this in and take advantage of the paragraph 21 rights and ask the operator to confirm it will not exercise paragraph 21 counter notice rights.

17. Be careful about saying no. It may be that the operator uses paragraph 5 powers and you are saddled with an agreement foisted upon you by the courts which is less advantageous than that which would have been obtained by negotiation.

18. Who decides compensation if I am taken to court?

    The answer is the court will itself fix any rent you receive. Most operators may be very reluctant to give up their confidential information and reveal profits. They may be prepared to back down.

19. Will I actually get an advantage from the mast?

It may well be that there is an advantage if, for example, technology is installed in your premises that can help you if you are a retailer.

20. How will allowing the presence of the masts affect your relationship with others?

This question will have very different answers for the owner of a shopping centre (who can probably put whatever he likes on the roof without anyone noticing let alone objecting), the governors of a school, a body in charge of a church or a local authority running a nursing home.

21. To be able to update equipment, but not add to it or add extra cabins.

Note: In 2016 the government announced a major review of the Code, however, as this is based on a proposed EU Directive, the detail remains to be seen.

THE DIGITAL ECONOMY ACT 2017

The Government explanatory notes states that this intends to achieve the following:

- reform the Electronic Communications Code, to deliver better coverage in rural areas through greater investment and faster rollout of mobile and broadband infrastructure
- make it easier for communications providers to have access to land - moving to a “no scheme” valuation system more akin the regime enjoyed by utility providers
- protect landowners by strengthening the “access principle” and requiring communication providers to pass a public interest test
- clarify roles and responsibilities for all parties that use the Code, helping commercial agreements to be reached more easily and disputes to be resolved more quickly
- make it easier for digital communications companies to upgrade and share their equipment and get faster access to maintain sites
- work with industry and Ofcom to develop a Code of Practice to ensure effective implementation of new rights.
- powers for Ofcom to use new technologies to better manage spectrum and make it easier for different users to share spectrum
- make it easier to install broadband cabinets, overhead lines and poles in all areas except Sites of Special Scientific Interest (SSSIs) by making regulations introduced in 2013 for a period of five years to be made permanent.

The provisions will not be retrospective except the provisions in relation to notices terminating the agreement. The new code states that the Landlord & Tenant Act 1954 will not apply and that there can be no contracting out. A land owner may be able to obtain possession on persistent rent arrears or other significant breaches by the operator. They may also serve at least 18 months notice, terminating no earlier than the end of the fixed term, that they intend to develop the site and that they cannot do so without possession.

Any equipment which comes within the code will give rise to an overriding interest which will bind purchasers of the land. This will include under ground equipment.

The code makes clear that the Landlord and Tenant Act 1954 will not apply to the relevant equipment. Terminating no earlier than the end of the agreement, the land owner may serve at least 18 months notice to leave. If this is counter noticed then the land owner must apply to courts

and show that there has either been persistent rent arrears, breach of other terms of the agreements, or that they have no intention to demolish and reconstruct the site.

Any equipment within the code will give rise to an overriding interest which will bind purchasers, regardless of registration at HMLR. This will include underground equipment.

The provisions came into force on 28th December 2017.

Cases have now been heard on the 2017 Code. In **Cornerstone Telecommunications Infrastructure Ltd v University of London [2018] UKUT 356 (LC)** the university refused to allow Cornerstone on to the premises to carry out a survey to decide on the suitability of the site. The act allows this where reasonable. The Upper Tribunal decided that there was not a strong burden and access was ordered. The tribunal also stated that the public interest in having better communications was of major factor to take into account. Likewise, in **EE Ltd and Hutchison 3G UK v London Borough of Islington [2018] UKUT 0361 (LC)** the Islington Borough Council access for inspection was allowed. There were currently masts nearby on an office building which was going to be sold for residential development. This would be subject to a provision that if planning permission was not granted the access would be withdrawn. Again, public policy was a major consideration.

Valuation

Virgin Media have settled with **Durham County Council** whereby they will be allowed to run cables under public highways throughout the county in consideration of £1. There have also been examples of greenfield sites where previously a rental for communications masts amounted to £5,000 per annum and on renewal under the new Code it is now £3 per annum. One one site Virgin Media are paying £50 per annum for a mast on a building under the new Code whereas on the same building for an older agreement EE are paying £12,000.

TERMINATION AND RENEWAL OF BUSINESS LEASES

Business Tenancies: S.23

The first requirement for the Act to apply is that there must be occupation under a lease which is at least partly for business purposes and not excluded. In particular, remember that mixed business/residential use comes within the 1954 Act: S.24(3) see **Cheryl Investment v Saldhana [1978] 1WLR1329 Cricket v Shaftesbury Ltd [1999] AllER 283**

S43(3) LTA 1954 expressly excludes short term leases 6 or less months duration from its scope. However, if the total duration of occupation under a series of leases exceeds 12 months the exclusions will not apply.

Here the occupier was given two purported licenses for 5 months each followed by a tenancy at will. The total time in occupation was for over 12 months. The landlord claimed that even if the tenant had leases they were short-term and within the S.43(3) exclusion. The Court held that as a tenancy at will does not attract business security (**Wheeler v Mercer [1956] 3 AllER 631**) the total term was less than 12 months and the tenant was excluded. A periodic tenancy implication on payment of rent can be rebutted in the circumstances: see **Javad v Aqil [1990] 2ELGR 82**, and more recently, **London Baggage Co. v Railtrack [2000] EGCS 57** where there was a tenancy at will on the tenant holding over and paying rent, pending negotiations for a new lease.

To be sure, an express tenancy at will may be agreed. The above presents a convenient way of allowing a tenant in occupation, and allowing the landlord a rental pending negotiation for a lease.

Note: Be sure of having exclusion notices available at the end of the fixed term and enter into a tenancy at will if there is a gap whilst a new lease is negotiated – be careful also with implied surrender and re-grant by adding to the term or duration as this would require new exclusion notices.

Erimus Housing Limited v Barclays Wealth Trustees (Jersey) Ltd [2014] EWCA Civ 303

In this case, the landlord had granted to the tenant a lease which was contracted out of the protection of the Landlord and Tenant Act 1954. The contracted-out lease came to an end, and although at first there were some attempts to negotiate a new lease, it was eventually accepted that the tenant was holding over on the terms of the expired lease. Heads of terms for a new contracted-out lease were later agreed, but no new lease was ever completed. Nearly two years after the original lease had expired, the tenant suggested that it should continue to hold over for another six months or so, and the landlord made no objection to this.

In fact, the tenant vacated in September 2012, almost three years after the original lease had expired. The tenant argued that it had validly given three months' notice to quit ending on 28 September 2012, but the landlord argued, successfully, that there was a yearly periodic tenancy, so that the tenant was required to give at least six months' notice, expiring on the anniversary of the

term (so that the lease could not be brought to an end before 31 October 2013).

The judge concluded that it was accepted on both sides that the landlord would have to give notice to terminate the tenant's occupation, and that the landlord had been content to allow that situation to develop, with the tenant having the protection of the 1954 Act. A yearly periodic tenancy had arisen, and the tenant was liable for the rent up to 31 October 2013.

On appeal, the Court of Appeal unanimously allowed the appeal. Although the progress of negotiations had been slow and lacking any urgency, there was no evidence that the negotiations had ever ceased or been abandoned by the parties because of an inability to agree terms.

Flairline Properties v Hassan [1998] EGCS 169

The tenant vacated the property after a serious fire and re-located. However, he kept the keys used the premises for storage and notified the managing agent of his intention: he remained in occupation and was able to claim a new lease.

Contrast, in relation to compensation.

Sight and Sound Education v Books [1999] 43 EG 161

Where the tenant who vacated premises weeks before end of the termination of the S.25 Notice and had been in occupation for the previous 14 years lost his right to double compensation for disturbance under S.37 LTA 1954 at the end of the lease and the landlord uses S.30(I) (e), (f) or (g) for opposition to a new tenancy.

Parks v Esso [1999] 77 P&CR D20, CA in a licence to occupy a petrol station. The licensee could not claim that the 1954 Act applies. See also **National Car Parks v Trinity Developments [2001] September 29, CA** – Occupation of a car park over which the owner retained a large degree of control and where a certain number of spaces had to be kept open for the owner's employees gave rise to a licence.

Wroe Ltd v Exmos Cover Ltd [2000] EGCS 22 Here, the occupier held a licence agreement. The 'licensor' served a S.25 notice and argued possession on ground (g). It was held that there was not sufficient reliance on this representation to create a tenancy by estoppel and there remained a licence. The 'licensor' won, but a better course of action would be to deny the existence of a lease and decide this as a preliminary issue. The message is to serve a S.25 notice without prejudice to the existence of the lease.

Smith v Titanate [2005] 20EG 262

Following **Graysim v P & O [1996] 03 EG 124** where there is a sublease the subtenants will usually be in occupation thus a landlord who sublet residential flats could not claim the benefit of the Act. If there is a mixed business / residential property then there is still a resident requirement to enfranchise under the Leasehold Reform Act 1967. As a company cannot be residents the fact that the tenancy was outside the Act allowed the company to enfranchise.

According to **Land Reclamation v Basildon District Council [1979] 1 WLR 767** there cannot be occupation of an easement. However, in **Pointon v Paulton** occupation of an easement to park cars near the tenanted property was accepted and this could be included within the lease renewal.

In **Clear Channel UK v Manchester City Council [2005] EWCA 1304** an agreement to occupy a site for the purpose of placing advertising hoardings was described as a licence. The hoardings themselves were held under licence but the site was under a lease. Moreover, at the time of entry on to the site there was no clear intention to exclude the 1954 Act, therefore, a tenancy at will could not be inferred.

Note: For many years there was a discussion as to whether electronic communications equipment was held under a lease or a licence as if there was a lease, the 1954 Act might apply. The Digital Economy Act 2017 came into force on 28th December 2017 and now makes clear that the Act does not apply to license communications equipment. Security will be under the 2017 Act and Code.

Implied Surrender

If there is an implied surrender and re-grant where the new lease needs to be excluded on the Act then notices must be served prior to surrender.

Beegas Nominees v BHP Petroleum [1999] 77 P & CR 14

Where the assignee agreed a stepped rent which was outside the scope of the original lease, this did not bind the original tenant: following Friends Provident v BRB [1996] 1AllER 336. This is now enshrined in s.18 LT(c)A 1995. However, the original lease was not impliedly surrendered by the variation. For there to be such a surrender there must be a change in the demised premises or the term of the lease. In these situations, landlords' advisers should ensure that, e.g. a separate lease is granted if the demise is increased, or a reversionary lease is used to increase the term, otherwise the landlord may find that he has lost his sureties.

Termination of the Lease and S24: The Continuation Tenancy

The main principle governing security of business tenants is that once it has been ascertained that the 1954 Act applies, the tenancy cannot come to an end unless terminated in accordance with the provisions of the Act: s24. So:

- a fixed term tenancy continues after its date of termination; and
- a periodic tenancy cannot be brought to an end by notice to quit.

The tenancy automatically continues and the tenant is said to enjoy a continuation tenancy.

In **City of London Corporation v Fell [1993] 3WLR1164** the House of Lords made clear that any original tenant's liability under privity, of contract, will not extend into the continuation tenancy where the lease had been assigned. Nor, according to **Willison v Cheverall Estates Ltd [1996] 26EG133** can a landlord exercise a rent review clause during the continuation tenancy, unless he has expressly reserved the right to do this.

Acceleration of continuation

Although a tenancy cannot be brought to an end save in accordance with the Act (subject to exceptions, below), some forms of common law notice may have the effect of bringing forward the landlord's right to terminate. For instance, a break clause, entitling the termination of the lease in

the seventh year of a 21-year lease will, if exercised, accelerate the coming into existence of the continuation tenancy.

Once a landlord has served a notice pursuant to such a break clause he is free to serve notice of termination under s25 below. This was first accepted in **Re Bleacher's Association Ltd's Leases [1958] Ch437**. This concept of accelerating the coming into existence of the continuation tenancy has been expanded upon in **Scholl Manufacturing Co v Clifton (Slim Line) Ltd [1967] Ch 41** where a break clause in the correct form and complying with the s25 requirements (see below) was held to be sufficient for both the purposes of bringing into effect s24 and a continuation tenancy and s25 notice to terminate the tenancy.

Similarly, a condition of the lease may accelerate the time at which a tenant can apply for a new tenancy under s26 (below).

In **Morrison Holdings Ltd v Manders Property Ltd [1976] 2 AllER205** the tenancy was expressed to terminate in the event of premises being destroyed by fire or other insured risks. The ensuing fire did not so terminate the tenancy which was automatically continued. It did, however, bring forward the time at which the tenant could exercise his rights under s26.

Subsisting common law rights to terminate

By s24(2), outside the statutory machinery for termination discussed below, some common law methods are expressly reserved. These should never be forgotten.

Tenant's Notice to Quit: S24(2)(A)

A tenant is not automatically bound by the lease against will. He may terminate the continuation tenancy by giving the usual contractual notice to quit (in the case of a periodic tenancy) or, in the case of a tenancy for a fixed term, by giving written notice to his immediate landlord not later than three months before the contractual expiry date, terminating on that date. After the date for giving such notice has passed he can give three months' notice to terminate. This need not expire on a quarter day.

Notice to quit can only be given by the tenant under s24(2) if he has been in occupation for at least a month.

In **Esselte v Pearl Assurance plc [1997] 1 AllER 41** it was made clear that if the tenant ceases to occupy the premises for business purposes prior to the continuation tenancy, then the tenancy will not automatically continue after the initial fixed term has come to an end. In these circumstances, no notice to quit need be given.

The Request: S26(2)

The request must be for a tenancy commencing not more than 12, nor less than 6 months after making the said request and not earlier than the expiry of the current tenancy. Moreover, such a request cannot be made after either:

The landlord has served a notice to quit under s25.

The tenant has given notice to quit under s27 above.

Effect of a valid tenant's request: s26(6)

A request gives the landlord two months to oppose an application for a renewed tenancy and so to specify his grounds of opposition. If the landlord does not serve a counter-notice within the prescribed period, the new tenancy must be granted.

Grounds of Opposition

The most important and most litigated grounds are (f) and (g).

S Franses Ltd v Cavendish Hotel (London) Ltd [2017] EWHC 1670 (QB) [2017] WLR (D) 503 [2018] UKSC 62 Here the court accepted that ground (f) could be used even though the work of reconstruction was specifically planned in order to terminate the lease. However, as the work would not commence for 12 months then the intention was not sufficiently immediate.

The Supreme Court decided the case in December 2018 and reversed the first instance decision. In deciding whether ground (f) may be used the question is whether the landlord would have done the work regardless of any intention to repossess.

Intention to demolish or reconstruct: ground (f): s30(1) (f)

……that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding.

A consideration of s30(1)(f) involves several factors which are discussed below.

First, the landlord must prove an intention to demolish and reconstruct etc. This he must do at the date of the hearing and not at the time of the service of the notice. This was settled in **Betty's Café Ltd v Phillips Furnishing Stores Ltd [1959] AC20.** The landlords gave notice of opposition to a s26 request relying on ground (f). At the date of this notice, there was no clear intention to demolish and reconstruct. However, during the Court hearing the board of directors passed a resolution stating that, if vacant possession of the demised premises was obtained, specified works would begin immediately. Money was set aside to carry out these works. The House of Lords refused to renew the tenancy. Although there was no clear intention to demolish and reconstruct at the date of the counter-notice there was such an intention at the date of the hearing. This was sufficient. This is an interpretation which works liberally in favour of the landlord.

Somerfield Stores v Spring (Sutton Coldfield) Limited [2010 EWHC 2084]

In the case of **Betty's Cafe v Phillips Furnishing Stores (1959)** the House of Lords held that for Ground (f), intention to demolish or reconstruct, to apply, the landlord had to have a well defined intention by the time of any court hearing. This case has now settled but the actual date is that of the full trial and not any summary judgment hearing.

In **Coppin v Bruce-Smith [1998]** the landlord intended to sell off the land (a tennis club) with planning permission. As the landlord's plans had already been rejected once there was little such prospect of sale and a new lease was ordered.

Quite frequently, as above, planning permission may constitute a major stumbling block to redevelopment. In **Gatwick Parking Service v Sargent [2000]**, the Court of Appeal held that the landlord did not have to show that planning permission would be obtained. All he had to do was show a real prospect of obtaining such permission.

Although the intention to demolish must exist only at the date of the hearing, this intention must be sufficiently planned out and certain. In Betty's Café above, architect's estimates had been drawn up and money set aside. However, if, for instance, there is a genuine intention to reconstruct but planning permission has not yet been obtained, renewal will be ordered by the Court. In **Edwards v Thompson [1990] 60 P&CR44** the landlord had obtained planning permission and had plans for the development. He could not, however, find a developer for the premises. The Court of Appeal granted the tenant a renewal. The landlord must usually show an intention to commence the redevelopment immediately on termination of the tenancy. However, he may not be sure when the tenancy will end. The tenant may, for instance, appeal against the first instance judgment. For this reason, the landlord may succeed if he intends to commence the works within a year of the termination. He will not, however, be allowed into possession before commencement. In Livestock Underwriting **Agency v Corbett & Newton [1955] 15EG469** the landlord planned to start work within three months of termination. This was a sufficient intention.

Once the premises have been reconstructed they may be occupied by the landlord. This was allowed by the Court of Appeal in **Fisher v Taylor's Furnishing Stores Ltd [1956] 2QB78** all the landlord need do is show a genuine and immediate intention to demolish, notwithstanding that on reconstruction he intends to go into occupation himself.

In deciding whether there is a genuine intention to reconstruct with respect to a corporate landlord, a resolution of the board of directors to this effect is highly desirable: **Espresso Coffee Machine Co v Guardian Assurance Co Ltd [1958] 2 AllER692** However, the intention of three main directors, in affirming the intention outside a board meeting, was held sufficient in **Bolton Engineering Co Ltd v T G Graham & Sons Ltd [1957] 1QB159**

Any reconstruction etc. must be carried out by the landlord or his agent. In **Turner v Wandsworth London Borough Council [1994] 25EG148** the landlord intended to grant a four-year lease on the premises to a school once vacant possession had been obtained. The school would then be responsible for converting the land into a car park. On termination of the four-year lease, the landlord would then sell the whole site for redevelopment.

It was held that in view of the short-term nature of the lease given to the school, the school was acting as agent for the landlord in carrying out the works. Possession was therefore ordered.

The meaning of demolition and reconstruction

This is an area which causes much difficulty and more than a small amount of litigation. It is apparent, however, that the amount of work needed to satisfy ground (f) is a question of fact and degree, dependent on the amount of construction in comparison with the amount of building on the demised premises as a whole. In **Housleys Ltd v Bloomer-Holt Ltd [1966] 1WLR1244** the landlord had a genuine intention to demolish a garage and wall and concrete the site (this being required before they could obtain planning permission for work on their own adjacent land). The garage and wall were the only structures on the premises, although the works still came within ground (f) being substantial in comparison with the number of structures on the premises. This was therefore held to amount to reconstruction. On the other hand, in **Barth v Prichard [1990] 20EG65** blocking up a

passageway, providing sanitary facilities, a new boiler and rewiring did not amount to reconstruction as a whole as none of the above could be said to amount separately to such construction. Even, if these works came within the definition of reconstruction they were not, the Court said, substantial enough to fall within s30(1)(f). Therefore one cannot look at a group of works and say that they amount to a reconstruction if none of the works do so separately.

Wessex Reserve Forces v White [2005] 22 EG 132

Demolition and reconstruction could not be argued as a ground of opposition where the only substantial premises on the site were huts, which were tenants fixtures and the tenant intended to remove.

Landlord's intention to occupy: ground (g): s30(1)(g)

Subject as hereinafter provided that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence.

If the landlord wishes to occupy the premises himself for business or residential purposes, a new tenancy may not be granted. This, once more, is an important ground. As with s30(1)(f), this provision causes much litigation but some things at least appear certain.

Gulf Agencies Ltd v Ahmed [2016] EWCA Civ 44 The landlord was a solicitor and a notary public. The property was a ground floor and basement let out to the tenant. The landlord and tenant had poor relations ever since the landlord required the freehold in 2007.

The landlord served a s25 notice to obtain possession to which the tenant objected. The landlord opposed this on ground (g) i.e. occupation for his own purposes. He intended to occupy the premises as a solicitor's practice and minicab business which he also owned. The first instance judge rejected the claim and accordingly to the Court of Appeal, showed bias against the landlord.

The Court of Appeal stated that for ground (g) to apply the landlord must show:

(a) A fixed and settled desire to do what he says he intends to do, *'out of the zone of contemplation and in to the valley of decision'* to quote from the case **of Cunliffe v Goodman [1950] 2 KB 237**

(b) There was a reasonable prospect of being able to bring about the desired effect including a real chance or reasonable prospect for planning permission for the proposed change of use.

The Court of Appeal decided that the landlord had a clear intention to occupy. This is subjective and the first instance judge had erred. The second test was objective but there was a real prospect of occupation which was not illusory or short term as under current planning legislation there was a possibility of the landlord occupying under Class A2. The case was sent back to be heard by a different trial judge.

All a landlord need do is to show a genuine intention to occupy, whatever the reasons. See also **Dolgellau Golf Club v Hett (1999),** the landlord may succeed even if his intended plans are doomed to failure.

The meaning of occupation and the people qualified to occupy causes some little confusion. In **Re Crowhurst Park, Sims Hilditch v Simmons [1974] 1WLR583** it was held that ground (g) was satisfied where the landlord intended to use the premises for partnership purposes.

Patel v Keles [2009] EWCA

The Landlord must have a clear and genuine intention to occupy the premises, but this does not preclude a potential sale at a later date. However, if as here there is a likelihood of sale within a short period then Ground (g) cannot be used.

STAMP DUTY LAND TAX & RENT

A Land Transaction Return will not be required if the lease is for less than 7 years duration and there is no tax to be paid. Nor in the future will a Return in the be required if the lease is for 7 or more years and the chargeable consideration is less than £40,000 or the annual rent less than a £1,000 pounds. The expected announcements on how to fill in returns where there is an abnormal rent increase after five years never materialised in the Finance Bill 2009.

Instead of assessing the duty on the basis of one year's rent, if the net present value of the rent exceeds £150,000 for non-residential property, the original Act stipulates that SDLT is paid at 1% on the whole. The net present value (NPV) is the total amount of rent paid during the lease discounted by 3.5% on a compound basis.

It is calculated by the equation:

$$NPV = \sum_{i=1}^{n} \frac{r_i}{(1+T)^i}$$

where: ri is the rent payable in year i, *n* is the term of the lease and *T* is the temporal discount rate.

Note: SDLT on rent only attracts to the grant of leases. However, if an assignment is taken from an assignor who is subject to relief with the exception of disadvantage areas relief, this is treated as a new lease and SDLT is payable on the remainder of the term. Examples will include assignments from a charity, other leaseback, and from a company which claimed group relief. This is now a CPSE enquiry.

The Finance Act 2003 provides that if the threshold is exceeded, albeit by £1, then the whole of the net present value is taxed at 1%. This would result in some tenants, who complete on or after 1 December, paying several times more Stamp Duty than if they complete prior to this day.

A major amendment, of great benefit to small-scale commercial tenants or those on short term leases, is that no SDLT will be paid on any amount below £150,000. The tenant has a tax free initial amount of £150,000. However, those entering into long leases or on high NPV's will nevertheless pay substantially more SDLT than Stamp Duty.

Rent increases must be estimated if they occur within four years and nine months of the effective date of the transaction.

After five years (or the end of the lease, if shorter) the tenant must fill in a further tax return and pay an extra charge if the rent has been increased by virtue of the rent review or stepped rent. The rent for the remainder of the lease will then be taken to be the highest yearly rent within the previous five years. Whether this is workable in practice is debatable but clients should be told to revisit their agents after five years to fill in their new return and sign for it!

If the lease has been assigned within the five year period, the assignee is liable to pay any extra tax. This is now a CPSE enquiry.

The client, presumably through an accountant, must make a reasonable estimate of the likely turnover rent at the beginning and pay SDLT accordingly. Again, they then fill in a further return after five years with a balancing payment or requiring a refund (hopefully with interest) where appropriate. The highest yearly rent from the previous five years is then, once more, deemed to be the rent for the remainder of the lease.

Again, how workable this provision is in practice, is debatable, but agents, to avoid possibly implication in tax evasion, should advise clients as to this from the very beginning.

In deciding the duration of the lease, break clauses, forfeiture clauses and options to renew are ignored.

Note: The Revenue considers exercising an option to be a linked transaction. But there seems to be no statutory basis to this.

If a tenant holds over after the end of the initial lease, he will now be deemed to have a further one year lease which will be linked to the original transaction. A year later, a further one year lease will be deemed and so on, but once the total amount of rent exceeds the threshold or the total duration of the leases exceed seven years, a SDLT1 form must be filled in and, where appropriate, tax paid. The idea of an assured shorthold residential tenant on a short term lease, who holds over eventually having to pay the tax seems a little bizarre but is required! Presumably the same would apply to a business tenant who holds over under a 1954 Act continuation tenancy.

The latter point brings us on to linked transactions. A tenant with a short-term lease might escape any tax liability. Should they exercise an option to renew, which the landlord cannot oppose, then presumably this is a linked transaction which may result in the need for a return to be filed and tax to be paid.

What is extremely unclear, but very important, is the effect of a renewal under the Landlord and Tenant Act 1954. Is this linked? An argument might be put that it is not as there is no obligation to renew on the landlord's part. If this is so, then a protected lease of comparatively short term might be the most tax efficient device for many tenants. Note, however, that landlords are becoming increasingly unwilling to create 1954 protected leases, not least because any renewal will be on the same terms and they do not wish to see tenants having such beneficial terms on any renewal as they are currently able to obtain: **O'May v City of London Real Property Company (1994).**

Note: Goodwill

If there is a sale of business then a SDLT4 must be filed and a reasonable estimate of stock chattels and goodwill included. The Revenue are investigating goodwill on a regular basis and if the goodwill is embedded in the land will treat it as taxable. Examples where this may be the case include sale of pubs, hotels, restaurants, nursing homes, pharmacies, petrol stations. It is suggested that a valuation be obtained and not to merely rely on accounts.

Consideration

Chargeable consideration means consideration in money or money's worth (in line with SDRT). This is wider than the categories of chargeable consideration for stamp duty. Where the consideration takes a form other than money or debt, it is generally taken to be its market value at the effective date of the transaction.

Where consideration is attributable partly to a UK land transaction and partly to another matter, it must be apportioned on a just and reasonable basis, as SDLT only applies to transactions relating to UK land. Just and reasonable apportionment will also be required where the consideration is attributable to more than one land transaction, or partly to chargeable consideration and partly to other matters.

The chargeable consideration for a transaction will be taken to include any value added tax chargeable in respect of the transaction. However, as mentioned above, in calculating SDLT on rents, VAT will only be taken into account if the lessor has already made an election to waive the VAT exemption with regard to the relevant property.

CPSE Enquiries and SDLT

1. If the grant of the lease or any event since the grant of the lease was a land transaction for Stamp Duty Land Tax purposes:

   (a) what was the date of the grant of the lease for Stamp Duty Land Tax purposes?

   (b) was the transaction notifiable?

   (c) if the transaction was notifiable, please provide a copy of each land transaction return made to HM Revenue & Customs and copy of each certificate issued by HM Revenue & Customs certifying that the transaction was notified to them

   (d) if the transaction was not notifiable, please provide a copy of any self-certification certificate made on the grant of the lease or otherwise certify the effective date of the grant of the lease

2. Is there a potential or outstanding obligation to make an additional land transaction return to HM Revenue & Customs as a result of any of the following occurring during the first five years from the date given in answer to enquiry 1(a) above:

   (a) the settlement or determination of any rent reviews or any other provision for varying the rent or

   (b) the settlement or determination of any contingent, uncertain or unascertained rents?

   If there is, please provide a full schedule of the rents payable and paid in each quarter since the date given in the answer to enquiry 1(a)

3. If a premium was paid for the grant of the lease or any assignment of the lease to you:

   (a) was the whole or any part of that premium contingent, uncertain or unascertained

   (b) if it was, does the whole or any part of that premium remain contingent, uncertain or unascertained; and

   (c) have you made any application to HM Revenue & Customs to defer payment of Stamp Duty Land Tax on that contingent, uncertain or unascertained consideration?

4. Were any Stamp Duty Land Tax reliefs claimed on the grant of the lease and, if applicable, on the assignment of the lease to you, that would result in the assignment of the lease by you being deemed to be the grant of a new lease?

ALTERATION AND USER COVENANT

The landlord may consider placing an absolute bar on alterations where the lease is for a short term only. Even where the lease is for a longer term, the landlord may wish to prohibit external or structural alterations.

However, an absolute prohibition does not necessarily mean that the tenant will be unable to carry out any alterations, since:

- the landlord may be prepared to give his consent despite the prohibition;
- the works may not amount to "alterations";
- some statutes permit the tenant to apply to court to vary the terms of an absolute prohibition to enable works required by a public body to be effected (e.g. Fire Precautions Act 1971);
- if the works amount to "improvements" part I of the Landlord and Tenant Act 1927 provides a mechanism whereby the tenant may obtain permission even in the face of an absolute prohibition.

Qualified Restrictions

Where the covenant is qualified, to the extent that the works constitute "improvements", section 19(2) Landlord and Tenant Act 1927 implies a proviso that the landlord's consent is not to be unreasonably withheld.

Whilst a landlord will still be able to unreasonably withhold his consent to alterations which are not improvements, there will be very few occasions when the landlord will be able to show that he is being reasonable in withholding his consent. This is because reasons relating to the financial impact of the "improvements" upon the value of the landlord's reversion do not constitute reasonable grounds for withholding consent. The correct approach for the landlord in such circumstances is to require payment of reasonable compensation to cover the fall in value (as is provided for in s19(2)0. See **Lambert v F W Woolworth & Co Ltd [1938] 2 All ER 664**.

The landlord may reserve the right to impose certain conditions on giving consent. Where the landlord's conditions are unreasonable conditions, and the alteration amounts to an improvement (within the meaning of S19(2)), the landlord will be unreasonably withholding his consent. However, if the intended alteration is not an "improvement", it seems that the landlord's wishes will prevail.

Fully Qualified Restrictions

To avoid any argument that the tenant's works are not improvements (and thus outside s19(2), most tenants normally insist upon a fully qualified covenant (at least to the extent of internal alterations).

There is no implied obligation by the landlord not to delay. Although delay might, in some

circumstances, be such as to be tantamount to "unreasonably withholding consent", it is prudent for a tenant to expressly provide that the consent is not to be unreasonably withheld *or delayed*. The tenant should further consider whether the landlord should have to give reasons for refusal of consent, since no requirement would be implied by law.

Often the landlord will impose an obligation to reinstate altered premises at the end of the term. The tenant will often try to resist this, or at least qualify the obligation so that the tenant only has to reinstate where he is quitting the premises. However, an obligation to reinstate may, in some circumstances, be viewed as an onerous obligation which has a detrimental effect on rental value at review.

User Covenants

With user covenants the Courts are willing to award damages for breach against a tenant who ceases to carry on his trade (see, for example, **Transworld Land Co Ltd v J Sainsbury plc [1990] 2 EGLR 255**). However, the Courts are not prepared to grant mandatory injunctions forcing the tenant to stay open for business. (See **Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1997] 23 EG 141**). Consider the use of the **Contracts (Rights of Third Parties) Act 1999** to increase a tenant's exposure to damages (e.g. by requiring the tenant to covenant not just with his landlord but also with the other tenants in the centre).

If the covenant is positive:

- The tenant should try to qualify the obligation to allow closure for normal business reasons, for example, for repair, or refurbishment and perhaps an assignment.

- Consideration needs to be given to what amount to the normal business hours of the shopping parade

Change of Use

Absolute Restrictions

With an absolute covenant, the tenant will be at the mercy of his landlord should he seek a change of use. Thus, the tenant should be confident that the permitted user at the outset is wide enough for his (and any assignee's) immediate and foreseeable needs.

From the landlord's point of view, may demand a consideration (or lease variation) should he be prepared to permit a change of use.

Qualified Restrictions

With simple qualified covenants, there is no statutorily implied proviso that the landlord's consent is not to be unreasonably withheld. The tenant is, therefore, in no better position than if the covenant were absolute.

The only positive benefit of this kind of restriction is that, if the landlord is prepared to grant consent, he cannot, as a general rule, require a fine or an increased rent in return for giving that

consent (s19(3) Landlord and Tenant Act 1927).

Fully Qualified Restrictions

In view of the limited effect of the Landlord and Tenant Act 1927, the tenant should ensure that the lease contains an express proviso that the landlord's consent to a change of use shall not be unreasonably withheld.

However, there is no positive statutory duty on the landlord to give consent, and nor is there a duty to act without unreasonable delay. Therefore, from the tenant's point of view, the restriction should refer to the landlord's consent not being unreasonably withheld *or delayed*.
Whilst this sort of clause gives the tenant a considerable degree of freedom, the tenant should look out for other lease clauses (e.g. alterations, applications for planning permission) which might have the effect of blocking what might otherwise be a reasonable change of use.

Effect on Rental Values

The parties should be aware of the potential effect of the permitted use upon rental value at review. It is firmly established that a court cannot assume that consent may be given under a qualified covenant where there is no proviso for the landlord to act reasonably, and the landlord cannot unilaterally vary the user covenant; (see **Plinth Property Investments Ltd v Mott, Hay & Anderson (1978) 249 EG 1167** and **C & A Pension Trustees v British Vita Investments Ltd (1984) 272 EG 63).**

The landlord may seek to provide a narrow actual user clause but provide that for the purposes of rent review the permitted user is, for example, any retail [or office] use except those likely to reduce market rents. This is clearly unfair to the tenant, and may be an onerous covenant and therefore adverse to the landlord on review.

Quiet Enjoyment

This is implied if not expressed. It requires the landlord to ensure that the tenant is free from interference by himself and, in so far as is reasonable, from other tenants.
In **Century Projects v Almacantar (Centre Point) Ltd [2014] 394 (Ch)** the landlord had reserved the right to carry out external works on the building. It was held that the works could still be done but only in a reasonable fashion so as to cause minimal interference to the tenant.
In **Timothy Taylor v Mayfair House Corporation [2016] EWHC 1075 (Ch)** the tenant occupied the basement and ground floor premises. The lease allowed the landlords to carry out work on the upper floors. It was held that any work must be carried out in a reasonable fashion. As the scaffolding was placed in an area detrimental to the tenant's business and as the landlord had not adequately discussed how to conduct the works, then the tenant could claim damages. Moreover, the landlord had not adequately included rights of access to the tenant's property and this was also actionable.

INSURANCE ISSUES

The 2007 Code states that where the landlord is responsible for insuring the property:

- The policy terms should be fair, reasonable and value for money.
- The policy should be placed with reputable insurers.
- Any commission received by the landlord should be disclosed to the tenant. A landlord may find it difficult to comply with this requirement if the property is insured as part of a block policy, as any commission may not be allocated to individual properties.
- The landlord must provide full insurance details on request. This recommendation is not limited to providing the insurance details a specified number of times in each year.
- The landlord should provide appropriate terrorism cover, if practicable.

If the premises are damaged by an insured risk or an uninsured risk then rent suspension should apply, unless the damage was caused by a deliberate act of the tenant. It is unlikely that any loss of rent insurance would cover damage by an uninsured risk. In these circumstances, the 2007 Code appears to require the landlord to operate the rent suspension and bear the loss of rent itself.

If the rent suspension is limited to the period of loss of rent insurance cover, either party should be able to terminate the lease if reinstatement is not completed within that period.

If the property is so damaged by an uninsured risk as to prevent occupation, the tenant should be allowed to terminate the lease unless the landlord agrees to rebuild at its own cost.

The Occupiers Guide suggests that the tenant should:

- Request a copy of the landlord's insurance policy before entering into the lease.
- Check with alternative insurers that the landlord's insurance policy gives value for money and that the policy is with a reputable insurance company.
- Ask the landlord to confirm that it does not intend to change the scope of the insurance cover and that the landlord will consult with the tenant over any changes to the policy.
- Ensure that the lease requires the landlord to use the insurance money to repair or rebuild the property unless the insurance is invalidated by the tenant.
- Inform the landlord of any proposed alterations to the premises and check that the alterations would be covered by the insurance policy.
- Let the landlord know if the tenant intends to store hazardous chemicals at the property.
- Let the landlord know if the tenant intends to leave the property vacant at any time.

Risks Covered

The tenant must ensure that the "Insured Risks" are adequately defined, since damage by an insured risk will usually trigger:

- Exemption from repairing responsibility for the tenant;
- A landlord's re-instatement obligation; and
- Suspension of rent pending re-instatement.
- Care should be taken with the definition of insured risks.

In particular:

The tenant should analyse the range of risks covered. Whilst a fully comprehensive range of risks is, of course, desirable, it should be remembered that it is the tenant who is bearing the cost. The greater the range of risks, the higher the premium.

Once the range of risks is fixed, the landlord should covenant to provide insurance against those risks. The landlord should note that the obligation is absolute, and if a risk is not insurable, a breach of covenant will still occur. Accordingly, qualifications should be made to the insured risks. It may be appropriate to qualify the range of insured risks so that they include only those which are "readily insurable on reasonable terms and at reasonable rates in the insurance market". This means that if cover is either unavailable or available, but only on prohibitive terms, it ceases to be an insured risk.

Excesses. If the policy (or certain risks) carry excesses, who is to foot the bill for the shortfall in insurance proceeds – landlord or tenant? The landlord will usually oblige the tenant to pay the excess on any claim.

Sweeper-up clauses. The risks may also include "such other risks against which the Landlord may from time to time decide to insure".

The Sum Insured

The full cost of reinstatement is sufficient in most cases. The cover should also expressly include demolition and site clearance, recovery of professional fees and other expenses incidental to the rebuilding.

Since the tenant is likely to get the benefit of a rent suspension pending re-instatement, the landlord will want to insure (at the tenant's expense) against loss of rent. Such insurance should cover no longer than the period for which rent can be suspended, but should take into account the possibility of the suspended rent being increased by rent reviews which are programmed to arrive during the suspension period.

What if the Premises are Damaged?

The consequences to consider (which are dealt with more fully below) are:

- The tenant may be obliged to repair the damage;
- Without contrary provision, rent continues to be payable;

- The premises will need to be rebuilt or re-instated;
- One (or both) of the parties may want to end the lease.

Repairing the damage

Since the tenant is paying the landlord for the cost of insurance, the tenant must ensure that damage caused by any of the insured risks is expressly excluded from any repairing obligation otherwise borne by the tenant (provided the insurance has not been vitiated by the acts or omissions of the tenant). The exclusion should apply to insured risks whether the landlord has insured or not.

Will the tenant still be liable for the rent?

Rent continues to be payable despite damage. The tenant must ensure that the lease contains the usual proviso for suspension or rent in the event of damage or destruction by an insured risk which renders the premises unfit for occupation or use, or incapable of access (provided, again, the insurance has not been vitiated by the tenant).

The proportion of rent suspended usually depends upon the extent of damage (i.e. whether full or partial). The parties should consider whether the proviso for rent suspension should extend to other payments too, such as service charge, and insurance rent.

Consideration should be given to the period of suspension. It should run from when the premises are unfit for "occupation *and* use". If, as is possible, the re-instatement could take some time, the landlord will seek to limit the suspension to the maximum period for which loss of rent has been insured (e.g. three years).

Who will reinstate?

The landlord should be required to give an express covenant to reinstate the premises. In giving such a covenant, the landlord may wish to ensure:

- That the covenant does not require money received for loss of rent to be laid out in reinstatement;
- That the obligation does not apply where circumstances beyond his control prevent reinstatement (e.g. unavailability of planning permission);
- That the obligation permits reinstatement with modifications. Reinstatement does not require precise replication, but the premises have to be fit for the equivalent purpose to those used before the damage (see **Vural Ltd v Security Archives Ltd (1990) 60 P&CR 258**);
- That the landlord has sufficient access rights to effect the works of reinstatement (since, of course, the tenant retains the right to exclusive possession).

The tenant should carefully examine the extent of the obligation. Does it only require the landlord to "lay out the net proceeds received"? If so, the tenant would want the lease to contain a provision for the landlord to make up any shortfall. Ideally, the tenant would prefer a covenant to reinstate regardless of the availability of insurance proceeds (unless the tenant himself had vitiated the policy).

Other issues to be considered include:

- Dealing with the situation when reinstatement becomes impossible, impractical or where the parties agree not to reinstate. After a reasonable period, either party may wish to terminate (the period should not exceed the period for which loss of rent is insured). This can be achieved by an option to break given to either or both parties. In addition to the break notice, the landlord may have to end the tenancy under Pt. II Landlord and Tenant Act 1954 [Note: **Morrison Holdings Ltd v Manders Property (Wolverhampton) Ltd [1976] 1 WLR 533** and **Fairline Properties Ltd v Hassan [1998] EGCS 169**];
- In the event of termination, who is entitled to the insurance proceeds?

Double Insurance

The Standard Conditions of Sale fifth edition and also the Standard Commercial Property Conditions third edition makes it clear that the risk passes to the buyer at the moment of exchange of contracts. The same applies, indirectly, in relation to the standard Commercial Property Conditions unless the seller is bound to insure in which case the risk is retained by the seller. It is essential that the buyer is told to take out insurance from the moment of exchange. However, the seller will also have to insure and will be in breach of any mortgage if they cancel their insurance. This may give rise to double insurance and dependent on the terms of the policy an insurer could refuse a claim in full: See **NFU v HSBC [2010] EWHC 773**.

If there is to be an extended completion date then it is suggested that the Standard Conditions are modified to prevent the risk passing on exchange.

SERVICE CHARGE LIABILITY IN RELATION TO BOTH COMMERCIAL AND RESIDENTIAL LEASES

SERVICE CHARGE CONSULTATION

Ss18-30 Landlord and Tenant Act 1985

(a) Definition and Reasonableness of service charges: s18.

Historically, **s18** of the Act defined a service charge as:

…. an amount payable by the tenant of a dwelling as part of or in addition to the rent:

(i) which is payable, directly or indirectly, for services, repairs, maintenance, improvements, insurance or the landlord's costs of management; and

(ii) the whole or part of which varies or may vary according to the relevant costs; and the relevant costs are the costs or estimated costs (including overheads) incurred or to be incurred in any period …. By or on behalf of the landlord or a superior landlord in connection with matters for which the service charge is payable.

Mixed Use Developments

Oakfern Properties Ltd v Ruddy [2006] EWCA Civ 1389 (2007) 3 WLR 524 here the Court of Appeal held that consultation would apply to mixed commercial / residential developments if they were held under the same demise. This is particularly likely where a head lease has granted residential and commercial sub-leases

Which Landlord does the Work?

Leaseholders of Foundling Court & O'Donnell Court v London Borough of Camden & Ors [2016] UKUT 0366 (LC) the head and intermediate landlords were in dispute as to who should consult. The Upper Tribunal held that the obligation was on the landlord doing the work, here both the head landlord. The head landlord had objected on the basis that he did not know the names of the sub-tenant and the legislation does not require the intermediate landlord to give such information. The tribunal stated that notices of consultation could be served on a generic title 'such as the

leaseholders'. He might also wish to cooperate with the intermediate landlord in finding out the names. He could also apply to the tribunal for exemption.

Reasonableness of service charges: s19.

The costs of the service charge must be:

- reasonably incurred; and
- the services or works must be of a reasonable standard.

If works or services are not of a reasonable standard, there may be a proportionate deduction.

A charge may be recovered before the costs are incurred as long as the amount is reasonable. This is subject to a requirement for adjustment after the expenditure has been incurred.

An application may be made to a First Tier Tribunal or a court as to whether the charge is reasonable.

Likewise, there may be an application for a determination as to whether future costs would be reasonable if incurred, or whether future works or services would be of a reasonable standard, or what amount payable before costs are incurred would be reasonable.

The Commonhold and Leasehold Act made a number of changes to provisions relating to leasehold management under the Landlord and Tenant Act 1985 ('the 1985 Act'). It extended the definition of 'service charge' above for the purposes of the 1985 Act to include any charge which is required to be paid under the terms of the lease to cover the costs of improvements. The effect of this change is that leaseholders' existing rights in relation to service charges under the 1985 Act (e.g. a requirement of reasonableness and the right to challenge reasonableness at a LVT) are extended to cover improvements. Note, however, that improvements cannot be charged for unless the service charge allows this: see **Mullaney v Maybourne Grange [1986] 1 EGLR 53 –** where replacement of wooden window frames by UPVC double glazing was held an improvement, and **Rapid Results College v Angell [1986] 1 EGLR 70.** It also includes a power further to extend the definition by secondary legislation.

Craighead v Homes for Islington Ltd [2010] UKUT 47

Where windows were not replaced like for like, due to intervening changes in Part L of the Building Regulations, it was implied that the landlord could improve the windows to modern standards under the repairing obligation and add the cost to the service charge. This in spite of the fact that the building was listed and potentially exempt from Part L. Contrast this with **Mullaney v Maybourne Grange Ltd [1982]** where service charges which allowed repairs, but not improvements, to be charged for did not cover replacement of wooden single glazed window frames with UPVC double glazing. The difference between the two cases seems to be due to the intervening statutory provisions. If correct, this may be an extremely useful argument for landlords, e.g. in relation to increased energy performance of buildings.

Note: that the service charge must relate to the actual work done

Russell v Liamond Properties Ltd [1983] 269 EG 947

Costs might include interest paid or a reasonable return on capital employed.

Note: that the lease itself must allow recoupment through a service charge. This will not be the automatic effect of **s.18**

Boldmark Ltd v Cohen [1985] Sol Jo 356

Interest on money loaned to make emergency repairs can only be recovered if the charge allows this.

Reston Ltd v Hudson [1990] 2 EGLR 51

External windows were not a part of the demise. A service charge could not apply to them.

Jollybird Ltd v Fairzone Ltd [1990] 1 EGLR 253

A clause cannot be used to recover costs outside the contemplation of the parties. A power to increase heating costs did not include installation of anew central heating system

s20B a service charge cannot be claimed for a period more than 18 months prior to the demand unless the landlord notified the tenant in writing within this 18 month period that he would be charged. By **s20C** application may be made to a First Tier Tribunal that court costs are not relevant costs to be added to a service charge.

Sinclair Garden Investments (Kensington) v Avon Estates (London) [2016] UKUT 317 (LC) there must be clear words to permit recovery of costs incurred in litigation. Even if such words exist the tenant can apply to the tribunal for such costs not to be included in the service charge.

By **s21** the tenant may ask for a summary of relevant costs for the previous one or two months or the previous accounting period. The landlord must comply with the request within one month or within six months of the end of the accounting period, whichever is later.

Under **s21(6)** if the lease consists of more than four flats, the summary must be certified by a qualified surveyor as being fair and sufficiently supported by accounts, receipts and other documents.

By **s22** the tenant may ask to inspect supporting accounts within six months of the summary and be allowed reasonable facilities to inspect and to take copies. The accounts must be made available for a two-month period not later than one month after the request.

A failure to comply with **Ss.21** to **22** is a criminal offence (level 4 fine).

The Act also extends the jurisdiction of LVTs so that they can determine whether nor not leaseholders are liable to pay service charges as well as the reasonableness of such charges.

The Act makes a number of changes to the existing requirements in the 1985 and 1987 Acts covering the accounting and safeguarding of service charge monies. Revised statements of account makes it easier for leaseholders to see where their money has gone. In particular, the onus is on the landlord

to give details of service charges without request, these must be certified by a qualified accountant. Service charge funds have to be held in a separate designated trust account for each property or group of service charge payers. Leaseholders will have a new right to withhold payment of further service charges if key requirements are not met.

SERVICE CHARGE LIABILITY

A consultation paper has now been produced as a consequence of the Hackett Enquiry on building regulations and fire safety in the light of the Grenfell Tower disaster. It looks at possible changes to construction, conversion and ongoing management of buildings and possbile changes to enforcement. In the light of this, fire safety risk assessments in particular may be changed in the future.

Both residential and commercial service charges are likely to be greatly effected, especially, where is usually the case, service charge allows recovery of payments for improvements and statutory works. In **Finchbourne v Rodrigues [1976] All E.R 581** it was held that there would be an implied term that the work must be reasonably incurred. In council house right to buys, the purchaser will be given an estimate of future works within the next five years from purchase but after this time the service charge may increase greatly. Due to the so called 'Florries Law', the liability of former council tenants cannot exceed £10,000 in any five year period. However, this will only apply in relation to works funded by Central Government.

Under the Service Charge Consultation Requirements (England) Regulations 2003 and the Service Charge Consultation Requirements (Wales) Regulations 2004, which came into force on 31 October 2003 and 1 March 2004 respectively, then if consultation does not occur between landlord and tenants in relation to service charges and dwellings, there will be a statutory cap of £250 for the works. Therefore, it is suggested that a management enquiry is made to the effect of, whether there has been any major works within the meaning of the Regulations and if so did consultation occur.

FirstPort Property Services Ltd v various long leaseholders of Citiscape LON/00AH/LSC/2017/0435

In March 2018 First Port obtained the tribunal rulings to the effect that tenants would be responsible for the replacement of aluminium cladding in a block of flats in Croydon. The cost is currently assessed at £2m including a bill of £4,000 per week to employ fire wardens. The maximum individual liability is £31,300.

In April 2018, the developer, Barratts, announced that they would voluntarily pay for the works.

SERVICE CHARGE CONSULTATION CASE LAW

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works. Therefore, it is suggested that a management enquiry is made to the effect of, whether there has been any major works within the meaning of the Regulations and if so did consultation occur.

Note: **Daejan v Benson [2013] UKSC 14**. Where the landlord missed a stage of consultation the Supreme Court held that the discretion to waive consultation may be exercised, in particular, because of the large loss which would have otherwise been incurred. The landlord had carried out £270,000 worth of works for which the five tenants were refusing to pay more than £1,250. Also relevant was the fact that if consultation had occurred, it would probably not have changed the decision as to who did the works. See also **Philips v Francis [2012] EWHC 3650**. What amounts to qualifying works can be viewed on an accounting year basis. If all the works within that year come to a combined value of more than £250 per tenant and consultation did not go through then the tenants are limited to the above amount.

In October 2014, the Court of Appeal reversed the first instance decision. As to whether consultation is required will depend on a step-by-step approach as this must have been what was intended by Parliament.

Qdime v Bath Buildings (Swindon) Ltd [2014] UKUT 261 In this case the upper tribunal allowed the landlord to charge the tenants for terrorism insurance. Surprisingly, the tribunal decided that this was required as the leases and the CML Handbook require insurance in relation to explosions. Terrorism insurance, which can be very expensive, would be included in the definition of explosions.

Windermere Marina Village v Wild [2014] UKUT 163 It was held that a provision whereby the service charge decided by a third party was conclusive was void. Likewise, in **Gater v Wellington Real Estate [2014] UKUT 561** a provision whereby sub-tenants paid a proportion of the service charge owed by the head tenant was also void.

In **Burr v OM [2013] EWCA 479** an energy oil bill was not presented to the landlord until six years after the oil had been provided. The tenants still had to pay the service charge as the relevant date the liability crystallises is not until the bill is presented.

In **Westmark v Peddle [2017] UKUT 449 (LC)** There was a mixed use development with superior landlords being obliged to ensure, keep the premises in good repair and maintain. The service charge was paid to the management company. The relevant date for the 18 month rule to apply was when the management company received the bill and not when the work was incurred by the superior landlord.

Apportionment of Service Charge

Norwich City Council v Redford [2015] UK UT 30 here liability for maintenance of lighting was expressed to be apportioned throughout the estate. The Council had contracted out maintenance for the whole of their property portfolio and attempted to bill by reference to all of their premises. As this did not conform with the service charge provisions, the tenants were not liable to pay anything.

Admiralty Park Management Co Ltd v Ojo [2016] UKUT 421 (LC) Here, the landlord had been incorrectly billing for service charge for 4 years. It had been calculated by reference to the whole of the estate manager's portfolio and not to the individual block. This came to light when the landlord took the tenant to court to recover unpaid service charge. The court transferred the case to the tribunal. It was held that as the tenant had not objected the mistake of 4 years he was estopped from claiming that he did not have to pay. This, in spite of the fact that he genuinely did not realise that there was a mistake. He could have looked at documents and easily found out about the mistake.

The need to re-consult

Reedbase v Fattal [2018] EWCA 840 Here a roof terrace needed to be replaced. After consultation it was realised that the original planned works would invalidate a warranty and add an additional 6% costs to the works. The Court of Appeal held that there was no need to re-consult as the tenants knew the nature of the work involved and 6% addition was comparatively small. Moreover, it would be unreasonable to expect contractors to re-tender in these circumstances and time would be lost in a new consultation process.

In **Dollis Avenue v Vejdani [2016] UKUT 365** The landlord obtained estimates for work beyond that in the original consultation. In these circumstances the landlord should have re-consulted. However, they could make a demand for the work in advance of consultation and also apply to the tribunal for dispensation in consultation.

ESTATES RENTCHARGES

Enforceability of Positive Covenants

1. Positive Covenants and Restrictions

The problem here is that in freehold land a positive covenant will not burden third party purchasers. See **Austerberry v Oldham Corporation [1885]** - this was confirmed by the House Lords in **Rhone v Stephens [1994] 2 All ER 65** where maintenance of a flying freehold roof could not be required against third party purchasers. Mortgage companies may be required to be told about flying freeholds and insurance may be available. It is suggested that the best manner of enforcement would be to include direct covenants and restrictions on the register. There are many ways of circumventing this, e.g. estate rentcharges and the doctrine of mutual benefit and burden, i.e. if a right is claimed, a corresponding obligation must be taken on. The classic example of this is in relation to maintenance of private roads and drains in small estates. This is not suitable however in relation to overage.

Direct covenants and restrictions

Here each new purchaser enters into a direct covenant with the original seller or their successor. They are therefore contractually bound. A restriction should be placed on the

register (in registered land) to the extent that no disposition is to be registered unless the transferee produces to the Land Registry a deed of covenant in that form.

Stamp Duty Land Tax

SDLT will attach to positive overage but not to negative. A best estimate of the total consideration based on the contingent event occurring, no matter how remote, must be made and the tax calculated accordingly, e.g., ransom strips and restrictive covenants. When the triggering event actually occurs a further return must then be made. Developers should accommodate any extra SDLT liability in their tendering process.

A deferral form may be obtained from the Birmingham Stamping Office. How any estimate of final liability may be made is debatable but note that the client must be made aware that if a trigger event occurs, they will have to fill in a new return with a balancing payment. If the estimate were to tip the SDLT liability from one band to another, the higher payment must be paid initially.

On subsequent transfers where there is clawback post 1 December 2003, enquiry must be made as to whether a deferral was requested. If this has occurred then the subsequent purchaser will have a further tax bill on the trigger event occurring. The CPSE Enquiries envisage that a request to see the Land Transaction Return must be made.

2. Section 33 Local Government (Miscellaneous Provisions Act) 1982

As above, Local Authorities may enforce positive covenants if they invoke their powers under the Act and the transfer refers to the 1982 Act, or its predecessor, the Housing Act 1974.

3. Estate Rentcharges

Estate Rentcharges can still be created post the Rentcharges Act 1977, which prohibited new annuity rentcharges. The rentcharges will reflect maintenance costs, and will have a right of re-entry if the payment is not made.

Note: HSBC appear not to give mortgages where the estate rent charge has right of entry.

Smith Brothers Farms Ltd v Canwell Estate Company Ltd [2012] EWCA 237. An Estate Rentcharge, to be valid, needs to reflect maintenance costs and cannot have a profit element – S.2(5) Rentcharges Act 1977. Here, the Estate Rentcharge covered maintenance for the whole of an estate including roads which would not be used by the covenantor. It was still valid as maintenance need not be in relation to the particular piece of land of the covenantor.

The Problem

S1 of the Rentcharges Act 1977 provides that a rentcharge created since implementation is void if it has any profit elements. The rentcharge must collect purely from maintenance.

However, administration charges can be expensive and clients should be warned of this. Unlike leasehold flats and administration charges there is no statutory ability to question the reasonableness of administration charges. It must be made clear in the provisions that charges must be reasonable. Even then application through the Courts, and not Tribunals, to question reasonableness may be difficult.

Note: Currently there is no obligation that the estate rent charge administration costs are reasonably incurred. Even if such an obligation existed, there is no ability to question the estate rent charge in the tribunals and there would have to be much more costly court proceedings.

Note: **Roberts v Lawton [2016] UKUT 396 (TCC)** s121 of the Law and Property Act 1925 allows the holder of a rentcharge to appoint trustees who will be tenants under a 99 year lease if a rentcharge is not paid within 40 days of being due. This will be the case whether the charge is formally demanded or not. Here the arrears amounted to between £6 and £15. This was held to be a lease which can be registered at HMLR. The lease will continue even if the arrears are paid. In the present case, the holder of the rentcharge used this fact to hold home owners to a ransom in order for them to pay administration charges. S121 will apply equally to estate rentcharges. The provision can be excluded but only in the document that creates the rentcharge.

4. Mutual Benefits and Burden: The rule in Halsall v Brizell (1957)

If a landowner wants to obtain a benefit, then it must submit to any corresponding burden. This may be by way of enforcing obligations in relation to private roads in smaller developments. However, the **Thamesmead Town v Allotey (1999)**, payments for maintenance of private roads and drains was able to be collected, but not for gardening and landscaping if the owner does not wish to avail themselves of such rights.

Note: Post the above case, a mortgage company may well require direct covenants and restrictions on the register in relation to maintenance of private roads and drains. This will often be the case in anything but the smallest of developments.

Wilkinson v Kerdene Ltd [2013] EWCA 44. Here, the doctrine of mutual benefit and burden was held to apply to the whole of a holiday village in Cornwall. This included maintenance of roads, car parks, footpaths and other recreational facilities and also maintenance to the outside of bungalows and the foul sewer system.

5. Long Leases

If the lease was created pre 1 January 1996, both positive and negative covenants will pass with the land if they touch and concern the land, i.e. they are leasehold covenants.

Note: **Woodall v Clifton (1909)** Options to purchase, as opposed to options to renew the lease, will not pass with the land. If the lease was created from 1 January 1996

onwards, then all covenants will pass unless expressed to be personal under Sections 2 and 3 of the Landlord and Tenant (Covenants) Act 1995. On enlargement of a long lease without a rent and without forfeiture provisions, positive covenants will pass onto the freeholds under Section 153 of the Law of Property Act 1925.

6. Commonhold

Under Part 1 of the Commonhold and Leasehold Reform Act 2002, a Commonhold Association may be set up, and the various freeholders will become members. They will agree to be bound by positive and restrictive covenants via the Memorandum and Articles of Association. Since September 2004, very few commonholds have been set up, mainly as there is no right to sublet in relation to a dwelling for more than seven years and thus affordable housing cannot be built into the developments via shared ownership leases. Moreover, as the mortgage companies are concerned at the Commonhold Association being struck off, thus giving rise to a series of flying freeholds, many are reluctant to give mortgages.

THE LANDLORD & TENANT ACT 1987 AND FIRST REFUSAL

Part I: Rights of First Refusal

Part 1 provides that where the landlord proposes to make a relevant disposal and its terms.

Relevant Disposal: s.l

This concept causes major problems. It consists of a disposal of any estate or interest, whether legal or equitable including a disposal of an estate or interest in the common parts.

Specifically included are contracts for sale whether conditional or unconditional, disposals by way exchange, sale by auction, options and rights of pre-emption.

Excluded are grants of a tenancy of a single flat, interests under a mortgage, sale of incorporeal hereditament, assignments by a trustee in bankruptcy or under matrimonial law, compulsory purchase orders, gifts to the landlord's family or to a charity, transfers by will or on intestacy, disposals to The Crown, disposals to an associated employer.

Note: Grant of a single flat lease to a tenant is excluded; however, grant of two or more flat leases to the same tenant would constitute a relevant disposal.

Mainwaring v Henry Smiths Charity Trustees [1996] 2 EGLR 267 made clear that the landlord's duty arises as soon as, or soon after, he proposes to dispose: not on actual disposal. Making the disposal conditional on the proposed purchaser serving s.18 notices (see below) will not exonerate him.

Kay-Green v Twinsectra [1996] 2 EGLR 258

Here, there were three buildings held under two separate registered titles. Part I applied on a building by building basis, i.e. even though there were not the requisite majority of qualifying tenants in one of the buildings, the other two were still subject to the rights. Moreover, mistakes in the tenants request under s.l2, see below, including the third building did not prevent them exercising their rights.

Sale also included appurtenances land, e.g. gardens, and the parts of the buildings not occupied by qualifying tenants.

"Qualifying Tenants": s.4

Part I will not apply where more than 50% of the floor area is occupied for non-residential purposes, excluding common parts.

The Offer Notice

Where the above conditions are satisfied, s.5 requires the landlord to serve an "offer notice" on qualifying tenants. This must contain particulars of the principal terms of the proposed disposal including the price, and must state that it constitutes an offer to sell the interest of a majority of qualifying tenants wish to purchase. Such majority is determined on the basis of one vote per flat let to qualifying tenants. The notice must also specify a period of at least two months in which the offer can be accepted and a further period of not less than two months in which one or more persons may be nominated to take the disposal and deal with the landlord. The landlord is deemed to have complied with his obligations if he serves the notice on not less than 90% of the qualifying tenants or all but one of them where there are less than ten such tenants.

Criminal Sanctions

A most important change to Part I in introduced by s.91 HA 1996. A landlord commits an offence if, without reasonable excuse, he fails to serve a s.5 notice or contravenes any of the restrictions or requirements in sections 6 to 10. The maximum fine is level 5 on the standard scale. Directors of a company may also be guilty if the company committed the offence with their consent of connivance or owing to their neglect.

The Acceptance Notice

Within the first period specified in the offer notice the requisite majority of qualifying tenants may serve an "acceptance notice" under s.6, to the effect that they wish to acquire the landlord's interest. Thereafter, the landlord must not dispose of his interest before the expiration of the second period specified in the offer notice plus a further three months if purchaser(s) are duly nominated by the qualifying tenants.

If there is an acceptance by the tenants but no nomination, the landlord may proceed to dispose of his interest within a period of 12 months from the end of the second period specified in the notice, but not at a lower price or on different terms. The landlord has the same powers of disposal where there is no acceptance over a 12 month period from the end of the first period specified in the notice.

If the sale is to be by auction, one month is allowed to appoint a nominated purchaser. The tenants may elect to be notified of the sale price within 7 days of the auction, after which they have 28 days to decide whether to buy at this price.

Instead of service of an acceptance notice in reply to the landlord's offer notice, the qualifying tenants may serve a counter -offer under s. 7. This must specify their proposed terms and can be accepted by the landlord, or it may be the subject of a fresh offer substituted for that contained in the original offer notice. If the fresh offer is not accepted, the landlord is free to dispose of his interests within twelve months of the end of the period allowed for acceptance of the fresh offer.

NB by s.9 either party can withdraw from the proposed transaction within one month of the end of the second period stated in the offer notice without liability for costs to the other side. Withdrawal later may result in such liability.

If the reversion is sold without an offer notice being served then the tenants may require the purchaser to transfer to them at the purchase price (s.12).

As a consequence of the above, the reversioner would be well advised to serve a notice under s.18 of the proposed sale.

The tenants have 4 months from being notified of the disposal to request information as to its terms from the purchaser. The purchaser must reply within one month and the tenants may then purchase from him on the same terms within 6 months.

By s.93, Housing Act 1996 if the landlord does dispose of his interest to a purchaser, that purchaser is guilty of an offence carrying a fine not exceeding level 4 on the standard scale, if he fails to serve notice on the qualifying tenants informing them of the disposal, and that they may have the right to obtain information about it and to acquire the landlord's interest. This notice is usually required by s.3A LTA 1985 and must be given either on the next rent day after sale or within 2 months whichever is the greater.

s.18 LTA 1987, has been amended by the Tenants Rights of First Refusal (Amendment) Regulations 1996. As an alternative to a s.5 notice prospective purchasers can serve a notice on at least 80% of tenants of flats affected asking them if they will exercise their rights. Now, 50% or more of the tenants served must respond positively within two months (and not as previously, 28 days). This amendment is designed to prevent the s.18 notice as an easier alternative to the landlord’s s.5 notice.

Artist Court Collective Ltd v Khan [2016] EWHC 2453 (Ch)

The provisions apply to mixed business residential premises if the floor area of business use doesn’t exceed 50%.

Here the premises comprised three shops with eight flats above. The landlord transferred his interest to a company which he wholly owned. The consideration was £225k. The tenants served a notice on the company wishing to purchase at the same price. Wishing to undo the wrong, the company transferred back to the original landlord with zero consideration. The High Court decided that the tenants were able to acquire the property at no cost. This decision was subsequently reversed by the Court of Appeal. The provisions do not apply to the unravelling of a previous transaction.

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