LONDON
Level 24 The Shard,
32 London Bridge Street
London SE1 9SG
Tel: 020 7870 7500

MANCHESTER
Floor 2, 3 Hardman Square,
Manchester
M3 3EB
Tel: 0161 669 4800

BIRMINGHAM
2 Snow Hill,
Birmingham
B4 6GA
Tel: 0121 227 9600

TAUNTON
12-14 The Crescent,
Taunton, TA1 4EB
DX 32129 Taunton
Tel: 01823 279 279

DAVITT JONES BOULD
REAL ESTATE LAW SPECIALISTS

PROPERTY LAW UPDATE
MARCH 2019

PROPERTY UPDATE
12-14 The Crescent, Taunton, TA1 4EB

Speaker: Richard Snape
8th March 2019
3 CPD Points

ABOUT DJB

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 a finalist for the Estates Gazette Legal Team of the Year Award for the last two years (see page 39 for more information).

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RECENT COMMERCIAL LEASE CASE LAW

Landlord & Tenant Act 1954

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.

The Supreme Court decision is obviously welcome to tenants. However, landlords will have to ensure that they can prove that they would still do the proposed works if the property was vacant. The issue of whether the works need to be done soon after possession is obtained was not addressed by the Supreme Court.

Santander Plc v LCP [2018] EWHC 2193 (Ch) to use ground f the landlord must do the work and not a subsequent purchaser. This case confirmed that the landlord could create a building lease in favour of the developer and still use ground f as the developer would be the landlord's agent. See also **Spook Erection Ltd v British Railways Board [1988] EGLR 76, CA**.

Frustration and Brexit

A contract will be terminated by frustration if there is an unforeseen intervening act which renders substantial performance of the contract impossible. In **National Carriers v Panalpina (Northern) Ltd [1981] AC 675** the court recognised that frustration might apply very rarely to leases. However, this was not the case here even though for the majority of the 10 year lease the local authority had closed the access road to the premises. In **Canary Wharf v European Medicines Agency [2019] EWHC 335 (Ch)** the tenants had a 25 year lease of premises in London paying £14m per annum in rent. They were relocating to Amsterdam after Brexit. The court accepted that this was an unforeseen intervening event but decided that the lease was not frustrated. Most notably as they should have negotiated a break clause.

Dilapidations & Service Charge

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.

Blue Manchester Ltd v North West Ground Rents Ltd [2019] EWHC 142 (TCC) the case involves the Beetham Tower in Manchester. The tower consists of an hotel with residential properties above. It was found that the cladding was not sufficiently bound with the glasswork. The landlords were a ground rent management company with a 999 year lease. They originally proposed *stitch plate* repairs but the tribunal held this as not satisfactory. The damage constituted disrepair and was thus within the landlords' liability and it seems that some of the cost can not be recouped by service charge. It is unlikely that any of the parties forsaw such major works in the early years of the building.

RECENT COMMERCIAL PROPERTY CASE LAW

EASEMENTS

An easement cannot **exist** unless the essentials laid down at law are present.

Danckwerts J laid down the following **four** essential characteristics of an easement in the leading case **Re Ellenborough Park [1956] ch 131.**

The Four essentials of an easement are:

(1) There must be a dominant and servient tenement.

(2) The easement must accommodate the dominant tenement.

(3) The dominant and servient tenements must be owned or occupied by different persons.

(4) The right claimed must be capable of forming the subject matter of a grant.

On the requirement for benefit see **Jobson v Record and Record [1998] 75 P&CR 375.** Land was sold subject to a right of way "for all purposes connected with these and enjoyment of the property hereby conveyed being used as agricultural land".

The dominant owner wished to use the right to drive timber lorries which would pick up timber stored on the land and cut from a plantation on neighbouring land, owned by him, but not subject to the easement. The court refused this use:-

(a) use as agricultural land included timber production but not the storage of timber which had been felled elsewhere;

and

(b) the right claimed was not for the land which had the benefit of the easement but for neighbouring land.

Likewise in **Peacock v Custins [2001] 13EG 152**, there could be no use of a right over the dominant in order to cultivate adjacent land.

Pharbu Das v Linden Mews [2002] P & CR D28.

Here, the dominant land was purchased at the back of the owner's house for car parking. This did not allow him to drive through a hole in his wall and park at the back of his house. Nor could he walk out of the back of his house and then drive down the access.

In **Gore v Naheed & Anor [2017] EWCA Civ 369** it was held that on the express wording of a easement, the dominant owner was able to access a garage on land at the back of the dominant land. Use of the garage was ancillary to the use of the land. A tenant of the garage land could not however use the right.

Parker v Roberts [2019] EWCA Civ121 here the court refused to accept an easement benefitting the residential house could also benefit a proposed house which was to be built on a piece of land acquired by the dominant owner at the back of their house in a different transfer.

Re Ellenborough Park concerned used of communal gardens which could constitute an easement although the court stated there could be no easement to wander at will. In **Regency Villas Title Ltd v Diamond Resorts Ltd [2018] UKSC 57** the appellants owned a mansion and estate and the respondents owned villas on timeshares in the estate. In 1981 they were granted the right to use the gardens, outdoor swimming pool, golf course, squash and tennis courts and ground and basement floors of the mansion. The swimming pool was subsequently filled in and the respondents claimed that they had an easement and this constituted a nuisance. The Court of Appeal decided that in this day and age it would be right to accept the existence of an easement for recreational and sporting activities.

There is also the question of the extent of the easement.

This case has now been confirmed by the Supreme Court.

FENCING EASEMENTS

Usually, an easement cannot involve positive expenditure on the part of the servient owner. See **Regis Properties v Redmon [1956] 2 QB 612**. However, in **Crow v Wood [1971] 1QB77**, a customary obligation to fence was recognised as an easement.

Churston Golf Club v Haddock [2018] EWHC 347 (Ch) here a fencing easement has held to exist even though it was referred to in the deeds as a fencing covenant. The word easement does not have to be specifically used. This case is extremely important and will apply to large numbers of properties.

In particular, an easement was held to exist as the covenant was expressed to be forever hereafter. The case in being heard by the Court of Appeal.

RECENT CASES ON OVERAGE

Sparks v Biden [2017] EWHC 1994 Ch, here there were no express provisions as to the time in which properties would be sold to trigger the overage payments. The courts implied that the person subject to the overage would endeavour to sell within a reasonable time.

London & Ilford Ltd v Sovereign Property Holdings Ltd [2018] EWCA Civ 1618 overage was triggered on prior approval of permitted development. Prior approval was given for conversion of an office block into 16 flats. The overage was payable even though the development was impossible as building regulations approval was not given.

RESTRICTIVE COVENANTS

Restrictive covenants are of dubious value for various reasons. Long term in particular they may be discharged under section 84 Law of Property Act 1925, for instance if obsolete or if they prevent reasonable use and enjoyment of land. In event of discharge by the Lands Chamber damages may be awarded but may be limited. Moreover in any court proceedings an injunction will not necessarily be awarded to prevent breach and again damages will be limited to the loss of value to neighbouring land. If there is little or no loss in value there will be no enforceability.

Alexander Devine Children's Cancer Trust v (1) Millgate Development Ltd and (2) Housing Solutions Ltd [2018] EWCA Civ 2679 here, 13 units of social housing were built upon land which was subject to covenants not to use other than for car parking. The Court of Appeal have now reversed the Upper Tribunal decision and held that public interest in additional housing did not prevail over contractual provisions and an injunction was awarded. Contrast this with **George Wimpey (Bristol) Ltd v Gloucester Housing Association [2011] UKUT 91 (LC)** the developer blatantly disregarded restrictive covenants in the expectation that they would be discharged under s84. This, together with the fact that loss of views could not be compensated, was held to be sufficient not to discharge the covenants.

In **Re Holden** it was held that a deliberate breach of a covenant against running a trade or business was a factor in awarding an injunction. Moreover, although various people and businesses from the estate there had been no clear change in the estate since the covenants were imposed.

See **Wrotham Park Estates v Parkside Homes [1973]**. Here 5% of enhanced value was awarded in damages, i.e. how much was reasonably expected to be paid for relaxing the covenants. See also **Stockport Borough Council v Alwiyah [1983] 52 P & CR 278**. Lost value was calculated in relation to the fact that neighbouring houses on the benefited land would lose their view of open farm land. This was further reduced as the local authorities tenants had the Right to Buy. Damages for a breach of covenant and the building of 42 houses were limited to £2,250.

In **Jaggard v Sawyer [1995] 1 WLR 269** the owner of land entitled to the benefit of a covenant against building a private dwellinghouse was not able to obtain an injunction when the building was already substantially completed. Damages for loss of value were limited to £699.

School Sites Act 1841

The provision of the Act deals with donations by benefactors for the purpose of building schools on land whereby if a land ceases to be used for the purpose of a school it will revert back to the original donor or their successors.

Ritson-Thomas & Others v Oxfordshire County Council [2018] EWHC 455 (Ch) here the council wish to close down a school and sell the site and then use the proceeds for the purpose of buying land and building a school on this newly bought land. The court held that even though a school was to be built on another piece of land, the Act would apply as it would be uncertain as to how the proceeds have actually been used.

MISREPRESENTATION & THE CPSE ENQUIRIES

MISREPRESENTATION GENERALLY

Misrepresentation is a false statement of fact which at least in part induces another to enter into a contract. Silence, save in exceptional circumstances, such as insurance contracts, will not constitute a misrepresentation but a half-truth will. See e.g. **Nottingham Patent Brick Company v Butler [1889]** where a solicitor stated that he was not aware of any restrictive covenants not having attempted to find out.

More recently, **Cottingham v Attey Bower Jones [2000]** found that a solicitor who had allowed a seller to respond to an enquiry about Building Regulations by saying not available was in breach of contract for not checking why the Regulations were not available.

If circumstances change, there will be a duty to notify parties of the change without request. See e.g. **With v O'Flanagan [1939]** where a dental practice had been profitable was no longer so by the time of sale. A genuine statement of law or opinion as opposed to fact will not be a misrepresentation but the opinion must be genuinely held. See e.g. **Bissett v Wilkinson [1927]** where an opinion as to the sheep holding capacity of a farm was made. The seller had no previous experience of sheep farming and this was held to be a statement of opinion. Contrast **Smith v Land and House Property Company [1889]** where a tenant was described as being most desirable even though he was one quarter in arrears of rent. This constituted a misrepresentation. More recently, see **McMeekin v Long [2003]** where a enquiry about neighbour disputes was answered by the word "none". In fact there had been a ongoing parking dispute. This was actionable. If the buyer has the opportunity to discover the truth, this does not prevent a misrepresentation; see **Redgrave v Hurd (1881) 20 Ch 1**

Negligent mis-statements

As well as inducing a contract a negligent mis-statement may give rise to liability in tort and a claim may be made by anyone who reasonably relies on the statement.

Normally, liability in tort only arises for physical loss or financial injury which is associated with such loss. There will be no claim for pure economic loss. See e.g. **Murphy v Brentwood District Council [1991]** where a local authority negligently failed to check plans and an architect negligently designed a property with infill. A subsequent purchaser who did not have a contract with either and where the builder had become insolvent could not claim as the only loss suffered was economic, i.e. he had a less valuable building. See also **Department of Environment v Thomas Bates [1991]** where a building could not achieve its design load. The architect could not be sued as once more the loss was merely economic. For this reason collateral contracts may be desirable between purchaser and design team.

The exception to the above is where the loss is caused by a negligent mis-statement. See, e.g. **Hedley Byrne v Heller [1963]** where negligent references were held to be actionable. If someone holds themselves out as having specialist knowledge such that is reasonable to expect others to rely on that representation, and they do so rely and loss is caused, there will be a claim available. This will usually occur in the course of a business but see, e.g. **Chaudrey v Prabhakar [1987]** where a friend of the claimants held themselves out as being an expert in cars and purchased an insurance write-off for the claimant. This was actionable.

There must also be a degree of proximity in that it must be reasonable for the claimant to rely on the representation. See, e.g. **Caparro v Dickman [1988]** where yearly accounts were relied on during the course of a takeover. There was no claim here. Contrast **Morgan Crucible v Hill Samuel [1989]** where accounts were produced when there was already an identifiable bidder for the business.

ENQUIRIES GENERALLY

Clinicare Limited v Orchard Homes [2004]

This case, at first glance, seems to drive a veritable coach and horses through the concept of caveat emptor "let the buyer beware". It is of fundamental importance to both solicitors and surveyors alike and it is one in a line of recent cases which increase the potential for claims of misrepresentation against both the agent and the client.

In response to an enquiry about dry rot, the solicitor replied that he was not aware of any but that the buyer should rely on their own inspection or survey. The buyer then arranged for a survey which revealed major problems in relation to damp, advised that this might have given rise to dry rot and that a further survey was therefore recommended. The buyer went ahead without having had a further survey. The dry rot was subsequently discovered and the seller's solicitor was successfully sued.

The court held that knowingly failing to disclose the existence of the dry rot, presumably on instruction from the client, amounted to an actionable misrepresentation. The burden cannot merely be passed on to the buyer and their solicitor by stating that they must rely on their own survey or, presumably, on their own skill and judgment. Where to draw the line is very unclear and this decision may present major difficulties for both solicitors and surveyors and, indeed, their clients. The only thing which may not be construed as a misrepresentation is silence and the buyer's solicitor cannot not accept this. An impasse between the parties will soon be reached. Furthermore, what does a solicitor do if a seller requires him not to disclose the existence of dry rot, for instance? Will he have to refuse to act as otherwise he may be faced with a conflict of interest? In following instructions the solicitor may be opening himself to a damages claim. There is, finally, less incentive for the buyer to employ his or her own specialists in the knowledge that they might have a cause of action against the seller in any case. This is indeed regrettable.

The case is based on **Sindall v Cambridge County Council** whereby a local authority selling land for development was asked questions about drains under the land and replied that they were not aware of any. If they had looked at their records they would have found that drains have been laid under the

land some 60 years previously. This was found to be a misrepresentation. In responding to enquiries about public drains, do not state that the seller is not aware of any.

See also **Morris v Jones [2002]** - here a response to an enquiry about damp stated that other than work carried on by a guarantee there was none to the vendor's knowledge but the buyer should rely on his own survey. The survey found damp but the seller was still liable as he failed to disclose more severe damp which was in his knowledge.

In **McMeekin v Long [2008]** a misrepresentation occurred when neighbour a dispute was not disclosed on request damages were assessed at £67,000.

In the American case of **Stambovsky v Ackley 1991**, a seller was held to be liable in misrepresentation when they responded to an enquiry about hauntings that they were not aware of any. In fact they had recently written an article in the Readers Digest about the haunted house.

More importantly, in **Sykes v Taylor-Rose [2004] EWCA 296** the standard enquiry of the time as to whether there were any other factors which might influence the purchaser's decision was answered in the negative. To the seller's knowledge there had been a murder committed in the premises previously which they did not disclose. It was held as the question is subjective and it could not be proven that the seller's thought this important, there was no liability.

Thorp v Abbotts [2015] EWHC 2142, a couple agreed to purchase a house for £625,000. The seller completed the 2007 edition of the TA6 which had the question:

3.1 Has the seller either sent or received any communication or notices which in any way affect the property, for example from or to neighbours, the council or a government department?

3.2 Has the seller had any negotiations or discussions with any neighbour, local or other authority affecting the property in any way?

Soon after completion the purchaser became aware of planning applications made a month after completion for 740 dwellings in the nearby green belt. Some months later another application was made for 800 houses in the flood plain nearby. Planning permission was eventually granted.

The purchaser sued the seller for misrepresentation. It transpired that the seller had been aware of the possible planning applications and had attended meetings in which they were discussed. At the meeting a planning officer had stated that permission would almost certainly not be granted. It was held that there was no misrepresentation as the seller genuinely believed that there would be no planning permission and therefore that the response was not material. Note that the 3rd edition of a TA6 now deals with this issue and a decision may be different.

First Tower Trustees v CDS (Superstores International) Limited [2018] EWCA Civ 1396 here the tenant raised enquiry as to whether there were any breaches of environmental law in the premises. The landlord responded in the negative. Subsequently, just before completion the landlord was served with notices in relation to asbestos on the premises. The landlord did not notify the tenant of the change of circumstance. The tenant was faced with nearly £500,000 worth of remediation work

and sued the landlord in misrepresentation. The landlord relied on a non-reliance clause whereby the tenant was deemed was not to have relied on any misrepresentations. Exclusion of liability from misrepresentation must be reasonable under s3 Misrepresentation Act 1967. The non-reliance clause was held to be unreasonable.

The Court of Appeal has now confirmed this decision.

CPSE ENQUIRIES

The New CPSE 7 Enquiries

These were introduced in July 2015 and are a much abbreviated version of the CPSE 1's. At first glance they are very welcome as a more appropriate form of enquiries for small businesses and the high street. However, consider some of the questions in the light of the above as they seem to require an objective response. For instance, questions as to whether asbestos has been used in the premises and also questions as to physical condition in relation to matters such as Japanese knotweed, infestation, structural stability and subsidence.

Note: The CPSE 1s and the CPSE 7s were amended in July 2016. We now have CPSE 1 version 3.6 and CPSE 7 version 2. The main changes relate to SDLT and deal with the fact that the rules in relation to substantial performance of a contract changed in 2013. The reference to abnormal rent increases was also deleted as these provisions also changed in 2013.

The CPSE Enquiries changed in March 2018. The following changes were made:-

Changes to CPSE.1 (now version 3.7)

- Enquiry 8.1 deals with the physical condition of the property. It has been amended to add reference to Japanese knotweed.
- Enquiry 14 considers statutory and other requirements. A new enquiry 14.8 has been added for grade F or G properties, asking for any information that has been or could be used to support a registration in the "*PRS Exemptions Register*" (that is, the exemptions register for MEES – the minimum energy efficiency standard). The existing enquiry 14.8 has been renumbered 14.9.

Changes to CPSE.5 (now version 3.2)

- Enquiries 1.5, 2.1 and 2.5: these questions have been slightly amended to make it clear that they refer to the lease that is to be surrendered, rather than the property.
- Enquiry 2.1: a new guidance note now reminds all parties to check that the landlord has power to accept the surrender, for example if the landlord's interest is charged.
- Enquiry 8.2: the guidance note has been updated by deleting reference to transitional amendments to empty rate relief that have now expired.

Changes to CPSE.7 (now version 1.2)

- Enquiry 10.4 has been amended by adding a definition of EPC.
- A new enquiry 10.5 has been added for grade F or G properties, asking for any information that has been or could be used to support a registration in the PRS Exemptions Register (as above). Existing enquiries 10.5 and 10.6 have been renumbered 10.6 and 10.7.

Amendments to introductory wording

- The introductory wording to CPSE.1, CPSE.5 and CPSE.7 has been amended to expand the exclusion of liability to partners, consultants or other staff.
- The introductory wording to CPSE.1 and CPSE.5 has been amended to make clear that where the property is in Wales, references to Stamp Duty Land Tax include the new Land Transaction Tax.
- Introductory note 2 of STER has been amended to refer to the Standard Commercial Property Conditions (Second **or Third** Edition).

Sources

CPSE.1 (version 3.7) General pre-contract enquiries for all commercial property transactions.

CPSE.5 (version 3.2) Enquiries before surrender of a rack rent commercial lease.

CPSE.7 (version 1.2) General short form pre-contract enquiries for all property transactions.

STER (version 3.1) Solicitor's title and exchange requirements.

JAPANESE KNOTWEED

Japanese knotweed is a notifiable substance. It is illegal to cause it to be propagated in the wild under the Wildlife and Countryside Act 1981. The Local Authority can issue remediation notices and charge for its removal. The new residential enquiries, TA6 (3rd Edition), raise an enquiry as to whether the property is affected by Japanese knotweed. It allows the responses of yes, no or don't know. No would be a statement of fact and potentially actionable. Don't know may be a representation that attempts have been made to investigate. Moreover, the property may be affected by Japanese knotweed if it is within the neighbourhood. It is suggested that responses should make clear that there has been no attempt to find out. The presence of knotweed is also required in response to the CPSE enquiries sections 8 and 15 as it constitutes a contaminated substance and an infestation.

The mortgagee must be told of the existence of knotweed, although valuation reports may pick this up. The mortgage offer may be withdrawn unless the knotweed can be controlled by experts before reaching any building.

Note: Under the Anti-social Behaviour Crime and Policing Act 2014 local authorities may serve community protection notices on property owners who fail to control their knotweed.

Williams & Waistell v Rail Infrastructure Ltd [2018] EWCA Civ 1514 here Rail Infrastructure Ltd were successfully sued in nuisance for not removing knotweed growing on neighbouring land to dwellings owned by Williams & Waistell. Damages were assessed at £10,000 plus £5,000 towards remedial costs.

The Court of Appeal have now confirmed the first instance decision but on different grounds. Loss of value cannot be claimed as this is pure economic loss. However, damages were available for lost development potential and possible future damage to property.

ENERGY ACT 2011

Minimum Energy Performance of Buildings Standard

Energy Efficiency Regulations 2015 - Minimum Energy Performance of Buildings Standard

S49 of the Energy Act 2011 required the Secretary of State to introduce legislation on minimum energy performance standards by 1st April 2018 for rented property at the latest.

Firstly, the minimum standard will be an E rated building. It is estimated that around 20% of buildings of rented property will fail on this. Secondly, the legislation will apply to all new leases (with exceptions below), as long as a Green Deal assessment would allow for a Green Deal loan within the Golden Formula, i.e. the savings to energy bills would at least meet the cost of work. Thirdly, for existing lettings there will be a backstop of 1st April 2023 when they will come within the legislation. Fourthly, if leases of such a duration that it will expire after green deal loans are no longer available, the legislation will not apply.

Exclusions are as follows:

1. The regulations will only apply to buildings where there is an EPC. There may be lettings in place before the introduction of EPCs in 2007 which therefore escape the regulations.

2. Where EPC regulations exempt landlords from providing an EPC, the minimum efficiency regulations will contain the same exemptions, e.g. a short term letting of a building prior to its demolition.

3. Lettings under 6 months subject to a maximum of two such lettings to the same tenant.

4. Leases where the length is more than 99 years.

5. Lettings where the landlord cannot obtain the necessary consents for the efficiency works. Necessary consents can include:

    - Planning or buildings regulation approval

- Consents from lenders or superior landlords
- Consent from a sitting tenant to allow the landlord access to do the works.

6. Where the works cause a material net decrease in the property's capital value.

7. Where the property does not qualify for any works which satisfy the Golden Rule under the Green Deal. This is subject to the landlord obtaining three Green Deal assessments which show this.

There are still some major issues to be determined, for instance whether any non-compliant leases will be illegal and thus unenforceable. There will also be major issues in relation to post 2018 rent reviews and dilapidations claims. In relation to the latter s18 Landlord & Tenant Act 1927 might limit the tenant's liability if the landlord has to bring the building up to minimum energy standards in order to re-let it. The tenant may also possibly find themselves liable, especially for leases terminating post April 2023 and April 2020 for residential properties, due to the statutory compliance provisions within the lease.

The energy efficiency of buildings (private rented property) (England & Wales) regulation has now been produced. They will apply to any commercial lease of more than 6 months and less than 99 years duration and to residential assured, assured shorthold and protected tenancies and to any other tenancy designated by the Secretary of State. Any exemption in relation to detracting from value will have to be confirmed by an independent surveyor and will only last for 5 years. The penalties will be a maximum fine of £5,000 or 5% of rateable value for commercial property where the breach has occurred for less than 3 months and a maximum £2,000 fine for residential property. The fine will be doubled after 3 months.

Note: Guidance suggests that the reduction in capital value referred to above should be at least 5%. Any exemption will only last for 5 years and any reduction must be confirmed by an independent surveyor.

Note: Because of changes to building regulations in April 2014 premises which obtain a new EPC may find that they have a lower rating than previously.

Note: The provisions will apply to lease renewals.

Note: On 23rd February 2017 the Government produced guidance on minimum energy Efficiency standards for non-domestic premises. In particular, an exemption must be specifically applied for and will only last for 5 years. If the landlord can not obtain necessary consents for the work they must show that they have taken all reasonable steps to obtain such consent. There will be a register of exempt premises. The landlord may also be able to show that he has taken all steps that can be expected and cannot make the property E rated. There will also be an exemption if the landlord can show that the proposed work would not be paid for by the energy savings within 7 years.

If a property continues to be let after 1st April 2023 with a F or G rated EPC then they may be faced with enforcement action and the leasing out of the premises will be unlawful. It is unclear how this affects the landlord and tenant relationship.

If a listed building exemption is being claimed then the landlord must show that any EPC recommendation report would unacceptably alter the appearance of the building.

Any exemptions is personal and will not benefit a purchaser of the reversion who must apply for a new exemption. If they are an unexpected landlord, e.g. an inheritance or disclaimer, they have 6 months to apply for the exemption.

Energy Performance of Buildings

As of 9 January 2013 the Energy Performance of Building (Amendment) Regulations 2012 state that a listed building will not need an EPC if any proposed work would unacceptably alter the appearance.

From 9 January 2013 any commercial property which is frequently visited by the public must have an Energy Performance Certificate displayed in a prominent place if such a certificate exists. Public bodies with premises where there is a surface area of more than 500 square metres must have a Display Energy Certificate. By 9 July 2015 this will go down to 250 square metres.

By April 2018 at the latest, the Energy Act 2011 will require an EPC of at least an E-rating before a property can be let out. This will not apply if the recommendation report does not enable it to go beyond an F-rating. A Green Deal loan will be expected to be taken out if the landlord cannot pay for any improvements.

Note: How this consultation will deal with the demise of the Green Deal loan is yet to be seen.

PUBLIC SECTOR PROCUREMENT

Jean Auroux v Roanne

Development schemes are perhaps the most complex area under the EU public procurement regime. This is because the commercial arrangements are often undertaken in 'partnership' and there are no clearly specified requirements that can be procured without developer involvement. In addition, land ownership is largely a matter for national rather than EU law and the success or otherwise of a development scheme normally depends on the precise pattern of land/property ownership in the relevant area.

There has been a lot of interest and concern in the development/regeneration market recently caused by the judgment in the case of Jean Auroux v Roanne1. In the Auroux case, a local authority development company sought to develop a private sector leisure centre, which included a multiplex cinema and possibly a hotel as well as a public car park.

There were very few public aspects to the scheme. Despite this, the court accepted that, in a wide-ranging development scheme, the specified requirements that needed to be considered when deciding if the public procurement directive requirements and thresholds were met were not only the public sector elements of the development. It determined that even the private/commercial elements should be considered to fall within the definition of an indirect procurement of works. These elements were to be 'regarded as corresponding to the requirements specified by the municipality of Roanne'.

Purchase of land and existing buildings

As with all contracts let by contracting authorities, the first step is to consider what, if anything, the authority is procuring. Authorities do not need to follow procurement rules for the purchase of land or existing buildings. An exclusion 2 applies to contracts:

'for the acquisition of land, including existing buildings and other structures, land covered with water and any estate, interest, easement servitude or other right in or over land'.

Similarly, a disposal of land without any linked obligations will not trigger a public procurement requirement – it is a sale not a purchase.

The situation needs to be considered more carefully when the authority is receiving works, services or supplies alongside a land transaction. Works are the most problematic as there is a specific definition that includes the concept of indirect procurement of works.

Many land development agreements entered into by authorities may now inadvertently trigger the rules by indirectly procuring works if the authority specifies its requirements for the development

(whether or not it is the ultimate beneficiary) through, for example, a development agreement or s106 agreement.

What can be classified as public works?

A 'works contract' is defined in the 2006 regulations as:

'a contract, in writing, for consideration (whatever the nature of the consideration)

(a) for the carrying out of a work or works for a contracting authority; or

(b) under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements'.

Works falling under (a) are usually obvious; the authority is requiring certain works directly.

Works falling under (b) are commonly referred to as 'indirect procurement'. This provision is intended to regulate situations where a contractor agrees to complete works on its own land (or land belonging to a third party) to the specified design of the authority and then transfer it (by means of leasehold or freehold transfer) to the authority. An indirect procurement brings within its scope matters that might otherwise be excluded under the exclusion relating to the procurement of existing land and/or buildings.

There is no further definition of the phrase 'specified requirements' but, if the authority details or influences the requirements for the works, it is probably a matter of degree.

Detailed provisions as to, for example, floor plans or internal layout are very likely to be considered specified requirements. At the other end of the scale, the authority may merely state the need for some public space or a public waiting facility and the contractor may make the decision as to the scale, content and style. It is very much a question of degree and reviewing the facts.

What about s106/planning obligations?

In recent years, planning authorities have used s106 agreements to go further in supporting authorities' general aims for an area. Section 106 agreements now commonly include green travel requirements and public art. Section 106 obligations have generally been considered by authorities to be outside of the public procurement regime and they have predominantly been well below the threshold for public works procurement compliance3. The situation becomes more involved as s106 obligations become greater on large regeneration and redevelopment schemes.

In the case of La Scala4, the City of Milan gave development permission for housing and, as part of the agreement, the developer contracted to build the exterior of a public opera house, valued in excess of the public procurement threshold, on its own land.

The European Court of Justice (ECJ) held that the obligation to construct the public works should have been advertised publicly in a competition compliant with the public procurement regime through the

Official Journal of the European Union. The ECJ indicated, however, that the procurement could have been undertaken by the developer as agent for the local authority.

Many authorities in similar situations have chosen to use this agency route to ensure that any public works element is procured by the developer in accordance with public procurement obligations as agent for the authority. The detail of the arrangements for the commercial elements are left to the developer.

In the Auroux case, the Advocate General gave some importance to the fact that in La Scala, the agency route was mentioned in the context of the relevant landowner itself and there was no choice over the developer.

Conclusion

Given the importance of regeneration and redevelopment schemes in the UK market and the emergence of new structures in the market, it will be interesting to see if any cases follow or distinguish Auroux and particularly if any case law is heard based upon the UK market.

In the meantime, every development scheme does need to be considered on the facts to decide whether or not a public procurement obligation is triggered. However, the Auroux case has certainly restricted the ability of authorities to choose developers without procurement compliance. There is no quick fix answer and this is definitely an area to pay close attention to and take advice upon.

Helmut Müller GmBh v Bundesanstalt für Immobilienaufgaben

This recent European Court of Justice Decision has provided some useful guidance on when a development agreement can fall within the definition of public works contract for the purposes of the public procurement rules.

This is important for any organisation that deals with development agreements, but particularly public authorities.

The Facts

The German federal agency with responsibility for administering public property published an intention to sell land in the local authority area of Wildeshausen. The notice of sale stated that the authorised use of land would be agreed with the Municipality of Wildeshausen. The land had been valued at €2.33 million.

Shortly after the notice of intention to sell was published, Helmut Muller made an offer for the land of €4 million but subject to a condition that the urban planning permission was granted. The offer was rejected. A couple of months later the federal agency administering the sale requested offers to the land without pre-agreed planning permission. Helmut Muller offered €1 million. Another company (GSSI) made an offer of €2.5 million.

The Municipality of Wildeshausen asked the bidders to present their plans for use of the land and declared its preference for GSSI's scheme and announced its readiness to begin proceedings to

establish an urban development plan based on that scheme. Importantly however it stated that its decision in relation to planning issues was not binding. The land was then sold to GSSI. The sale agreement contained no reference to the future use of the land and contained no obligations on GSSI to do anything with the land and contained no commitments on behalf of either of the public bodies in relation to planning. Helmut Muller challenged the sale saying that the process should have complied with the public procurement rules.

Questions answered

For there to be a public works contract is it necessary that the works are physically carried out for the public authority and bring to it an immediate economic benefit, or is it sufficient if the works fulfil a public purpose, ie redevelopment of part of a town?

There needs to be a direct economic benefit and a direct economic benefit will be established where:

- the public authority is to become the owner of the works, or
- the public authority will have a right to use the works so that they are available to the public, or
- the public authority is going to derive advantage from the future use or transfer to it of the work, or
- where the public authority has contributed financially to the carrying out of the work or if the public authority has assumed a risk for the work.

There will be no direct economic benefit where a public authority is merely exercising urban planning powers which are intended to look after the public interest.

For there to be a public works contract does there have to be an enforceable obligation on the other party to carry out the works?

Yes (but the contractor can sub-contract the works).

If a public authority is exercising its planning control powers, is it specifying requirements for the purposes of the definition of a public works contract?

For a public authority to have specified requirements it has to have defined the type of work or at least had a decisive influence on the design of the work.

Could there be circumstances where a sale of land and a subsequent contract for works could be regarded as a single procurement?

Yes, there can be a single requirement even if there are two separate contracts and two different public authorities involved.

The decision has also clarified that it is not possible to class something as a public works concession contract where the work is to be carried out on land already owned by the other contracting party and nor can you have a concession contract for an indefinite period.

Conclusion

Although the case does provide some clarity there are some important questions left unanswered. The language used by the court in its test for determining whether work is done according to the specific requirements of the public authority is quite imprecise and open to interpretation.

The guidance on what can amount to direct economic benefit is helpful but it is wide and the examples of where direct economic benefit will be found are not exhaustive.

As this was a German case there was no direct comment on s.106 agreements and their relationship with EU procurement rules. Further guidance on this may be forthcoming in the future.

Faraday Development Ltd v West Berkshire Council [2018] EWCA Civ 2532 in 2013 WBD submitted a bid for the regeneration of industrial land. The council entered into an agreement with Saint Modwen instead with estimated value of £135m. Saint Modwen was to use all reasonable endeavours to obtain planning approval for the work covered by each development strategy and each plot. Once a plot appraisal has been approved they could chose to enter into obligations to acquire and redevelop the land but were not legally obliged to do so. F, who were in a joint venture with WBD challenged this decision on the 3 grounds as follows:

1. the council failed to comply with its duty not to dispose of land for less than the best price reasonably obtainable.

2. the development agreement amounted to a public contract which had not complied with procurement legislation.

3. to avoid following procurement legislation, the council did not look to impose enforceable obligations on Saint Modwen.

The High Courts found against F on all grounds. The Court of Appeal agreed on the following points:-

1. the development agreement did not constitute a public works contract at the time it was entered into because it did not impose enforceable obligations.

2. It was not a public services contract because the main object of the agreement was carrying out works.

3. The council did not adopt the structure to avoid legislation.

However, the transaction should be looked into in its entirety at the date it was entered into and establish whether at that date it embodied defined obligations that will, once they take effect, compose a public works contract.

On entering into the agreement, the council had made a legally enforceable decision to commit itself to the arrangement.

The courts, however, decided that once Saint ~Modwen had proceeded to draw down the land within the terms of the agreement there had been a procurement of development work which had reached the regulations. The council had affectively agreed to act unlawfully in the future.

Conclusion

Public bodies need to consider whether an agreement may trigger public procurement regulations at any stage of the agreement.

If publishing a transparency notice the possibility of the regulations applying should be included.

GROUND RENT ISSUES AND ESTATES RENTCHARGES

GROUND RENT ISSUES

Arnold v Britton [2015] UKSC 36 here 99 year leases of holiday chalets required a service charge to be paid based on the work which was done on the premises plus a yearly sum of £90 which rose by 10% compound interest each year. The consequence of this was that by 2072 the liability would be £554,000 per annum. The Supreme Court confirmed that as this was the clear meaning of the provision they would not be prepared to re-write it.

The topic of escalating ground rents, in particular in relation to the leasehold houses, has been in the media of late and some mortgage companies are beginning to refuse mortgage offers in certain circumstances.

There is also a debate as to whether, if the ground rent exceeds £250 per annum or £1,000 per annum in Greater London, it will create a possible assured tenancy . If this was the case then forefeiture provisions would be inapplicable and if the rent was to fall 2 months in arrears there would be a mandatory ground 8 for possession.

In late June 2017 the CML produced guidance on Newbuild Leasehold Properties. It states that it may also apply to existing leaseholds dependent on the term. Although merely guidance, and the mortgage companies do not need to change their individual instructions, they are advised to take this into account. The overriding principle is that the borrower should be able to afford the loan. This is also a FCA requirement. If need be, professional advice should be sought from a valuer. A major factor may include the lease term.

County Personnel (Employment Agency) Ltd v Alan R Pulver & Co [1987] 1 WLR 916 here, in relation to a commercial sub-lease, the solicitors were held to be negligent for not pointing out to a client that the sub-lease rent increased in accordance with the increases in the head rent and for not telling the client that they should refer the rent to a valuer.

General Points

The CML guidance states the following:

- “Given that lenders must consider both affordability of the borrower, and the sustainability of the value of the property, lease terms which involve obligations for future payment, such as ground rents, are more likely to be considered acceptable for lending purposes if they are set

at levels that will not materially change mortgage affordability in the future, or impact on the value of the property; and that the lease length is suitably long (i.e. is granted for hundreds, rather than tens of years). ·

- Lenders may query why a property is offered as leasehold. This is particularly so for leasehold houses.

- It is important that lease information for new homes is made available as early in the home buying process as possible, so that conveyancers and valuers can provide advice and lenders can make appropriate lending decisions. New build leasehold properties ·

- In relation to ground rents, lenders would expect to see nominal ground rents, reflecting the origins of the ground rent being 'peppercorn' in nature. ·

- Under current leasehold legislation, there are certain provisions which present a risk that the lease may be terminated or forfeited by the landlord (freeholder), leaving the property owner without a leasehold interest, and the lender mortgagee without a security. Therefore, lenders will expect that a conveyancer acting on their behalf advises on such risks and how they might be mitigated. An example is the relevant provisions of the Housing Act 1988 in relation to the creation of an Assured Tenancy where the ground rent exceeds £250 per annum or £1000 in Greater London.

Lenders will expect professional advisers such as conveyancers and valuers to consider: ·

- The length of the initial lease term granted. As a general principle, longer lease terms will help sustain the property's value for longer, as there should not be a need to seek an extension of the lease in the medium term (i.e. over the term of the mortgage). Lenders using the CML Lenders' Handbook already stipulate a minimum lease residue requirement (see s 5.14.1 of the CML Lenders' Handbook). o Lenders recognise that there may be different lease lengths for houses and flats. ·

- The mortgage term in relation to the lease term, with particular regard to a likely review of the lease once 80 years or less are remaining. ·

- The initial annual ground rent figure. Professional advisers should take into consideration: o the level of the ground rent in relation to the property's market value, o the type of property (e.g. a flat or a house) o whether the ground rent is fixed or rises periodically, o If the ground rent does rise periodically, the formula by which it rises. o Where the property value is below £100,000, some lenders may wish to see a de minimis maximum initial ground rent figure (e.g. £100) is applied.

- Whether the ground rent figure is at a level which triggers legislative provisions (such as under Part 1 of the Housing Act 1988), potentially creating a risk for the lender's security. ·

- The ground rent review formula (if not a fixed figure). Professional advisers should take into consideration: o The CML Lenders' Handbook at s 5.14.9, which provides that lenders will

accept a periodic increase in ground rent, provided that the amount of the increased ground rent is fixed or can be readily established and is reasonable. o Where the formula is one which uses increases in line with an index, whether the index is a recognised UK index and is appropriate and/or acceptable to them. Some lenders may also expect a cap on the maximum ground rent amount, to guard against the ground rent reaching an unreasonably high sum, which could impact on the property's value, the continued affordability of the mortgage and the future saleability of the property. o Some lenders may be concerned to see the use of compounding formulas, or the use of minimum increases, in conjunction with an index-linked formula. o Where the formula does not link with a recognised index, and instead uses a multiplier (e.g. doubles) at set intervals, the frequency of the rent review intervals. There is no single industry view on a minimum acceptable frequency, as it may depend on other factors such as the initial amount of the ground rent, and whether there is a cap on the number of times the rent is reviewed. ·

- Other fees charged under the lease o Where other fees are charged under the lease (for example, on a transfer of equity) lenders will expect that these are set at reasonable levels. Where the fees follow the ground rent formula (for example, if they are set at 50% of the prevailing ground rent), lenders will have similar expectations as set out above for ground rent formulas".

On 25th July 2017 the Government produced a consultation paper on ground rents in leasehold houses. Possible changes include:

- banning newbuild leasehold houses, with some exceptions
- Banning increases of ground rent at lease than 21 year intervals
- Preventing ground rents of more than £250 per annum giving rise to assured tenancies
- Allowing tenants of leasehold houses to have the same rights as those in flats to question the reasonableness of administration charges.

The Government also intends to ban help to buy leasehold houses.

On 21st December 2017 a housing White paper was produced.

Further consultation was announced in October 2018 whereby ground rent would be no more than £10 per annum. Consider this in the light of Barclay's requirements below. None of the provisions are intended to be retrospective apart from leasehold houses being banned as of 21st December 2017. There was no mention of the ground rent in excess of £250 per annum issue.

Legislation will be introduced for new build properties only:

- Banning leasehold houses, save in exceptional circumstances, e.g. shared ownership
- All new long leasehold dwellings to be at a peppercorn rent

- Allowing those in leasehold houses to question the reasonableness of administration charges as well as service charges in the same manner as currently available for flats.
- Allowing freeholders to question the reasonableness of service charges as currently available for leaseholds. The White paper refers the service charge but presumably means such things as estate rentcharges
- Speeding up the process of leasehold extensions and enfranchisement

The Government intends to produce draft legislation by the end of the Parliamentary year of 2018 and then they will introduce legislation into Parliament when time permits. The legislation will not help previous purchasers that the Government thinks that there may be possible action under the Unfair Terms in Consumer Contracts Regulations 1999.

Mortgage Instructions

Mortgage companies are changing their part 2's rapidly. In particular, Barclays seem to be very proactive. Here are the requirements as of 21st January 2019:

Usually there must be adequate ground rent to ensure that the lessor has continuing interest in the property:

Peppercorn or low ground rent may be accepted in the following circumstances:

- If the lessor is a Management Company and all the leaseholders are obliged to be members so there is no merit in paying themselves a ground rent. Check that there are adequate provisions for repairs, maintenance, insurance, etc and an adequate maintenance charge.
- If the lessor covenants do no require any positive action, e.g. in the case of maisonettes.
- If the lessor is the Local Authority.
- If the lessor is a long established shed company and adequate repairing and other arrangements together with a maintenance charge are contained in the lease.
- If the lessor is a Housing Association or Local Authority under shared ownership arrangements.
- The lease has been extended under the Leasehold Reform Housing and Urban Development Act 1993 (as amended) which gives an additional 90 years at a peppercorn ground rent.
- Escalating ground rents are acceptable provided the amounts and terms are clearly stated and they comply with the following requirements

RPI linked Ground rents

- Ground rent is indexed to RPI no more frequently than every 5 years

- Ground rent up to 0.1% of the current market value is acceptable.
- We may accept Ground rent up to 0.2% of the current market value subject to review.

Doubling ground rents:

- Should not double more frequently than every 20 years
- Should not continue to double after 125 years
- Ground rent up to 0.1% of the current market value is acceptable
- We may accept Ground rent up to 0.2% of the current market value subject to review.

Leasehold Houses

Newbuild leasehold houses were built in large numbers between 2010 and 2016. There is a right to purchase the freehold under the Leasehold Reform Act 1967 (see later). Unless the ground rent is very low the cost can be prohibitively expensive, especially where the ground rent doubles at less than 21 year intervals. Furthermore, there is no statutory control in relation to administration charges as opposed to service charges. On one occasion I came across a charge of £8,500 to consent to the building of a single storey extension that was within permitted development.

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.

Fencing Covenants

Usually, an easement cannot involve positive expenditure on the part of the servient owner. See **Regis Properties v Redmon [1956] 2 QB 612**. However, in **Crow v Wood [1971] 1QB77**, a customary obligation to fence was recognised as an easement.

Churston Golf Club v Haddock [2018] EWHC 347 (Ch) here a fencing easement has held to exist even though it was referred to in the deeds as a fencing covenant. The word easement does not have to be specifically used. This case is extremely important and will apply to large numbers of properties.

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

In some parts of the country freehold properties are subject to fixed sum rentcharges, a sum of money is paid per annum to the rent owner. In such rentcharges cannot be created since 21st July 1977 when the Rentcharges Act of that year came into force. Existing fixed sum rentcharges will come to an end on 21st July 2037 or within 60 days of first becoming payable whichever is the latter. However, rentcharges which reasonably reflect maintenance costs can be created. The relevant provisions as thus:

Rentcharges Act 1977 s2

(1) Subject to this section, no rentcharge may be created whether at law or in equity after the coming into force of this section.

(2) Any instrument made after the coming into force of this section shall, to the extent that it purports to create a rentcharge the creation of which is prohibited by this section, be void.

(3) This section does not prohibit the creation of a rentcharge—

(a) in the case of which paragraph 3 of Schedule 1 to the Trusts of Land and Appointment of Trustees Act 1996 (trust in case of family charge) applies to the land on which the rent is charged;

(b) in the case of which paragraph (a) above would have effect but for the fact that the land on which the rent is charged is settled land or subject to a trust of land;

(c) which is an estate rentcharge;

(d) under any Act of Parliament providing for the creation of rentcharges in connection with the execution of works on land (whether by way of improvements, repairs or otherwise) or the commutation of any obligation to do any such work; or

(e) by, or in accordance with the requirements of, any order of a court.

(4) For the purposes of this section "estate rentcharge" means (subject to subsection (5) below) a rentcharge created for the purpose—

(a) of making covenants to be performed by the owner of the land affected by the rentcharge enforceable by the rent owner against the owner for the time being of the land; or

(b) of meeting, or contributing towards, the cost of the performance by the rent owner of covenants for the provision of services, the carrying out of maintenance or repairs, the effecting of insurance or the making of any payment by him for the benefit of the land affected by the rentcharge or for the benefit of that and other land.

(5) A rentcharge of more than a nominal amount shall not be treated as an estate rentcharge for the purposes of this section unless it represents a payment for the performance by the rent owner of any such covenant as is mentioned in subsection (4)(b) above which is reasonable in relation to that covenant.

Note: HSBC appear not to give mortgages where the estate rentcharge 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 estate rentcharge was still reasonable even though it referred to maintenance of the estate and a private road that the property owner would never use. It seems to be very difficult to question apportionments of rent charges.

Extinguishment of Rentcharges

Fixed sum rentcharges can be extinguished under s8-10 of the Rentcharges Act 1977. This is done by application to the Department of Housing, Communities and Local Government. There is a statutory formula as to the amount which is usually around 16 times the annual rentcharge. A certificate of redemption will be obtained which can be used to notify HMLR. This can only be done if the rent owner is known. Otherwise, insurance may be appropriate. However, make sure that the policy covers not just debt but other remedies (see later).

The Tribunals, Courts & Enforcement Act 2007 treats rentcharges as normal rent in relation to remedies. If there has been no collection of the rentcharge for more than six years, it is statute barred from that moment onwards.

If the rentcharge applies to land which is then sub-divided then each plot will have joint and several liability. For a fixed sum, rentcharge application may be made under s4 of the Act for an apportionment. This does not apply to estate rentcharges.

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

Note: **Roberts v Lawton [2016] UKUT 396 (TCC)** s121 (4) 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 (4) will apply equally to estate rentcharges. The provision can be excluded but only in the document that creates the rentcharge.

Note also s121 (3) allows possession of the land by the rent owner under similar circumstances. These provisions only apply if the rentcharge was created from 1st January 1881 onwards when the Conveyancing Act of that year came into force.

Any possession or long lease would bind a mortgage company if the rentcharge was created before the mortgage and not if the lease was created before the mortgage.

Some estate rentcharges include an express right of entry but the effect of s121 (3) is to have a statutory right anyway. It is suggested that there should be a clause whereby the mortgagee is given at least 28 days notice by the rent owner prior to proceedings being brought. This may cause problems with newbuild Help to Buys for reasons we have seen in relation to ground rents.

Some mortgagees e.g. Barclays are requiring such a mortgagee protection clause and exclusion of s121, especially where the residents are not members of the management company.

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 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.

In **EE v Islington [2019] UKUT 53** now decided that they can order Islington to grant a lease of the premises. Such a lease will come into existence through the Court Order and will not require any other documents to be executed. **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.

ASSETS OF COMMUNITY VALUE

RECENT CASE LAW

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.

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Contacts

Main Contacts

Madeleine F Davitt, Managing Director
Central Government and Property Companies
T: 0203 026 8295
M:07904 677 739
E: madeleine.davitt@djblaw.co.uk

Sophie Davies, Account Manager
Property Companies
T: 0203 026 8307
M:07812 677 645
E: sophie.davies@djblaw.co.uk

Sue McCormick, Account Manager
Local Authorities
T: 01823 328 084
M: 07535 655 060
E: sue.mccormick@djblaw.co.uk

Peter Allinson, Chief Executive
T: 0161 669 4800
M: 07904 677 773
E: peter.allinson@djblaw.co.uk

Geoffrey Lander, Non-Executive Director
T: 020 7870 7500
M: 0777 617 2000
E: Geoffrey.lander@djblaw.co.uk

Offices

London
Level 24, The Shard,
London
SE1 9SG

Birmingham
2 Snow Hill,
Birmingham,
B4 6GA

Manchester
2nd Floor, 3 Hardman Square
Manchester
M3 3EB

Taunton
12-14 The Crescent,
Taunton
TA1 4EB