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COMMERCIAL PROPERTY LAW UPDATE 23 OCTOBER 2019

LEVEL 24, THE SHARD
32 LONDON BRIDGE STREET
LONDON, SE1 9SG

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Peter Bryant, Head of Democratic and Legal Services at Woking Borough Council

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"After too many years in the legal rat-race, life at DJB is a great comfort. Fantastic work, great clients, flexible working routine, the ability to work from home, 100% support from the firm, a great all in one package for any lawyer seeking autonomy with a top firm and top work"
DJB Lawyer

CONTENTS

RECENT COMMERCIAL PROPERTY CASE LAW

Landlord and Tenant Act 1954

Contracting Out

TFS Shops v Designer Retail Outlet Centre [2019] EWHC 1274. Here the Court accepted that the tenants solicitor could receive the exclusion notice as agent for the tenant as his agency did not nearly extend to negotiating the lease. A retail manager for TFS could sign the declaration as he was sufficiently senior to act as agent. Also there was no need for a specific date to be included in the notice. Generic reference to the term commencement was sufficient.

COMPANY VOLUNTARY ARRANGEMENTS

What is a CVA?

A company voluntary arrangement (CVA) is a mechanism that allows a company:

- To settle its unsecured debts by paying only a proportion of the amount that it owes to its creditors.
- To come to an arrangement with its creditors over the payment of its debts

(*Section 1, Insolvency Act 1986* (1986 Act).)

A professional (usually an insolvency practitioner) oversees the CVA to ensure that the company complies with its terms. The professional appointed to this role is called the **supervisor** of the CVA (*section 7(2), 1986 Act*). The party proposing a CVA nominates a professional to be supervisor, called the **nominee**.

The company's creditors must approve the terms of a CVA. If the requisite majority of creditors approves a CVA, the terms of the CVA **bind all** the company's creditors. For more details on the majorities required at creditor meetings.

If the CVA proposal is approved, a CVA binds:

- Creditors that **voted against** the CVA.
- Creditors that attended the creditors' meeting called to consider the CVA proposal, but who **did not vote**.
- Creditors that **did not attend the creditor's meeting** called to consider the CVA proposal.
  The CVA will bind a creditor who did not know of the meeting because it did not receive notice, even though the creditor was entitled to receive notice.

Any of the following parties may propose a CVA:

- The directors of a the company in question (unless the company is in administration or liquidation).
- The administrator of a company in administration.
- The liquidator of a company in liquidation.
  (*Section 1(3), 1986 Act*.)

Why are CVAs particularly relevant to landlords?

If a company in financial difficulties is the tenant of a number of leasehold properties, a CVA offers a mechanism which allows the company (with the consent of its creditors) to restructure its leasehold portfolio and thereby improve its financial position.

A CVA allows the company flexibility in the terms that it offers to creditors to settle its debts. In contrast, a distribution of assets in a liquidation (or an administration, where the administrator has authority to distribute assets to unsecured creditors) is strictly on a ***pari passu*** basis.

How will a landlord know if its tenant proposes a CVA?

In most cases, the party proposing the CVA for the tenant will notify the landlord of the CVA proposal.

The party proposing the CVA must give at least 14 days' notice of the meeting of creditors at which the creditors will consider the CVA proposal. The party proposing the CVA must notify all the creditors of the company that it knows about. However, the CVA will still bind a creditor which should have received notice of the meeting, but did not).

(*Rule 1.9(2), Insolvency Rules 1986* (the 1986 Rules) for a CVA proposed by the company's directors; *rule 1.11(1), 1986 Rules* for a CVA proposed by the company's administrator or liquidator.)

The notice will comprise:

- A copy of the proposal.
- A copy of a statement of affairs, setting out the assets and liabilities of the company.
- For a CVA proposed by the directors of the company, a report by the proposed supervisor of the CVA, setting out any comments that he has on the CVA proposal.

(*Rule 1.9(3), 1986 Rules* for a CVA proposal by the directors of a company; *rule 1.11(2), 1986 Rules* for a proposal by the company's administrator or liquidator).

There is no register of CVA proposals, nor does the party proposing the CVA need to advertise the proposal or the creditors' meeting called to consider the proposal. (However, if the tenant obtains a moratorium, it must advertise it.

A landlord who does not receive notice is essentially limited to finding out what it can from other creditors and the local press. If the landlord learns of a CVA proposal, it needs to contact the company to request a copy of the proposals and notice of the creditors' meeting called to consider them.

How will a CVA affect a landlord?

A moratorium may apply
Where an administrator of a company proposes a CVA, the company retains the protection of the moratorium on creditor action that applies in administration. For a guide to the effect of the moratorium that applies to a company in administration.

Where a CVA proposal is made in respect of a small company, the company can obtain a moratorium. This prevents creditors from taking steps to enforce their claims against the company until the creditors have had the opportunity to consider a CVA proposal.

The moratorium has the same scope as the moratorium that comes into effect when a company enters administration. From the point of view of a landlord, a CVA moratorium prevents:

- The forfeiture of the lease by peaceable re-entry.
- The levying of distress against any of the company's assets.
- Any other proceedings, execution or legal process to recover debts due without the leave of the court.

(*Paragraphs 12(f) and (h), schedule A1, 1986 Act*.)

In practice, a landlord is unlikely to know that a tenant has the benefit of a moratorium until the moratorium has come into effect.

The moratorium comes into effect when the directors file a copy of the CVA proposal (and certain other prescribed documents) at court (*paragraph 8, schedule A1, 1986 Act*). The proposed supervisor of the CVA must place a notice in the London Gazette to say that the company has the benefit of a moratorium and may advertise the fact of the moratorium more widely if he chooses (*paragraph 10, Schedule A1, 1986 Act* and *rule 1.40, 1986 Rules*).

The moratorium lasts for 28 days from the date on which the directors file the CVA proposal (and the other prescribed documents) at court or, if earlier, the date on which the last meeting called to consider the CVA proposal is held (*paragraph 8(2) and (3), Schedule A1, 1986 Act*). If the meetings called to consider the CVA resolve to adjourn, they can also resolve to extend the moratorium for the period of the adjournment. However, the moratorium cannot be extended for more than two months from the date of the meetings in question (*paragraph 32, Schedule A1, 1986 Act*).

What debts are compromised by a tenant's CVA?

A CVA takes effect between a company and its unsecured creditors (*section 1(1), 1986 Act*). A creditor, for this purpose, would appear to mean a party to whom the company actually owes money, as opposed to someone with a prospective or wholly contingent claim against the company. Neither the 1986 Act or the 1986 Rules define "creditor" or "debt" for the purposes of a CVA. Rule 13.13 of the 1986 Rules defines a "debt" to include contingent or prospective liabilities, but this definition **only** applies in the context of administration and liquidation.

Where a landlord is bound by the CVA, all rent arrears will be caught by the terms of the CVA, as well as the tenant's liability for all other sums that are due that will become due under the lease, **including future rent** (*Re Cancol [1995] BCC 1133*), **unless** the terms of the CVA exclude those claims from its scope (*Burford Midland Properties Limited v Marley Extrusions Limited [1994] BCC 604*).

The landlord's ability to claim in the CVA may be restricted by agreement between the parties, either before or after the commencement of the CVA (*Re Cotswold Company Limited [2009] (not yet reported)*). However, in that case a deed of surrender made between the landlord and tenant was

found to preserve the landlord's right to claim future rent in the CVA, in the absence of explicit exclusion of those rights.

The landlord's rights against a tenant subject to a CVA

The CVA binds all unsecured creditors entitled to notice of the meetings called to consider it to the terms of the CVA from date that the CVA comes into effect (*section 5(2)(b), 1986 Act*). A CVA comes into effect from the date that the company's creditors approve the proposal (*section 5(2)(a), 1986 Act*).

Once bound by a CVA, a creditor cannot take any step against the company to recover any debt that falls within the scope of the CVA, or to enforce rights against the company that arise from the company's failure to pay the debt in question in full.

The supervisor of the CVA must monitor the company's compliance with the CVA, and take appropriate further action against the company if it fails to comply with the CVA.
A CVA supervisor **cannot disclaim** any leasehold property. (Only a liquidator can disclaim a tenant's interest in a lease: for more information on disclaimer.

The landlord's rights against third parties where a tenant is subject to a CVA

As long as the terms of a guarantee provide that the guarantor's liability is unaffected by the compromise of the principal debt (as in most commercial guarantees and authorised guarantee agreements), a tenant's CVA will not release the guarantor from its liability (*Lombard Natwest Factors Limited v Koutrouzas [2002] EWHC 1084*).

If the guarantee does not provide that it is unaffected by the compromise of the principle debt, a tenant's CVA could automatically release the guarantor from its obligations if the terms of the CVA amount to an accord and satisfaction of the debts due to the landlord (*Johnson v Davies [1999] Ch 117*). However, as the judgment in *Johnson v Davies* illustrates, the courts will not find readily that a CVA releases a guarantor.

A term in a tenant's CVA that purports to release the tenant's guarantors from liability to the tenant's landlord is ineffective. However, a term where a landlord covenants with a tenant not to pursue third party guarantors is effective in principle. A CVA cannot directly curb the rights of a creditor of the company against a third party, but it can legitimately bind a landlord to a covenant with the tenant not to enforce claims against third parties.

In practice, a CVA that seeks to prohibit the landlord from calling on a third party guarantee may be unfairly prejudicial to the interest of the landlord, unless the overall scheme of the CVA adequately compensates the landlord for the loss of the right to pursue the guarantor (*Prudential Assurance Company Ltd & Ors v PRG Powerhouse Ltd. & Ors [2007] EWHC 1002*.

Can a landlord block or challenge a CVA?

Approval of a CVA: voting rights and majorities

The CVA proposals are put before meetings of the company's shareholders and creditors (*section 3, 1986 Act*). Each meeting can approve, reject or modify the proposals (*section 4(1), 1986 Act*). The CVA takes effect if either both meetings approve it, or just the creditors' meeting approves it (*section 4(2)(A), 1986 Act*), although, in the latter case, any shareholder can apply to court to challenge the creditors' decision within 28 days (*section 4A(3), 1986 Act*). The creditors' meeting is held first, with the shareholders' meeting following within seven days (*rule 1.13, 1986 Rules*). The meetings are often held on the same day, with the shareholders' meeting convening immediately after the creditors' meeting has finished.

Creditors vote at the creditors' meeting according to the value of the unsecured debt that the company owes them (*rule 1.17(2), 1986 Act*). Where some or all of a creditor's claim against the company is unliquidated or unascertained (which may be the case where a landlord submits a claim for future rent, and the true value of this will not be known until the premises are re-let), the unliquidated element carries a value of £1 for voting purposes, unless the chairman of the creditors' meeting agrees to place a higher value on it (*rule 1.17(3), 1986 Rules*). The chairman's decision is open to appeal (*rule 1.17A(3), 1986 Rules*).

A creditor cannot vote for a debt (or any element of a debt) for which he has security (*rule 1.19(3)(c), 1986 Rules*). A third party guarantee of the tenant's obligations under a lease is not security and nor is a rent deposit, if the tenant does not hold the beneficial interest in the deposit funds (*section 248, 1986 Act*).

The approval of a CVA (or any modification to the CVA proposal) by a creditors' meeting requires a majority of over 75% (by value) of the creditors attending the meeting (in person or by proxy) to vote in favour of it (*rule 1.19(1), 1986 Rules*). In the case of a meeting of the members of the company, a majority of more than 50% (by shareholding) of those attending the meeting is required (*rule 1.20(1), 1986 Rules*).

The creditors attending the creditors' meeting can block the CVA if 25% (by value) of them vote against the CVA proposals. The members' meeting cannot override that decision (*section 4A(2), 1986 Act*).

In practice, preparation and co-operation between creditors before the meeting is needed to achieve any certainty of outcome, because the precise attendance at a creditors' meeting is often unknown until the day. The terms of a CVA proposal may be open to negotiation before the creditors' meeting, as the party proposing the CVA tries to secure blocks of votes in favour of the proposals.
Any creditor can propose modifications to the CVA proposals, with the modification agreed if a majority of over 75% (by value) of the creditors at the meeting vote for it (*rule 1.19(1), 1986 Rules*).

Challenging the approval of a CVA

A creditor who was entitled to notice of the CVA proposals, and feels unfairly prejudiced by the CVA, can apply to court for an order revoking the CVA, or convening more meetings to consider a revised CVA (*section 6, 1986 Act*).

The concepts of prejudice and unfairness are questions of fact and are distinct considerations. A CVA to implement a reduction in the tenant's leasehold portfolio, under which the landlords of retained premises would receive full payment of future rent, but those of discarded premises would receive only partial payment of future rent, was held to be prejudicial to the landlords of the discarded premises, though not unfairly so (*Re Cancol*).

The question of fairness turns on whether the CVA offers compensation for the prejudice suffered. Where a CVA bound the tenant's landlords not to pursue the tenant's guarantor, and offered no compensation for the loss of recourse under the guarantee, it was held to be unfairly prejudicial to the landlords (*Prudential Assurance Company Ltd & Others v PRG Powerhouse Ltd. & Others*.

A CVA can also be challenged on the grounds that there was a material irregularity in the conduct of the meetings called to consider the CVA proposals (*section 6(1)(b), 1986 Act*).

What happens if the tenant does not comply with the terms of the CVA?

In practice, the CVA proposals set out what happens if the debtor company does not comply with its terms.

It is possible for a CVA to terminate automatically upon the debtor company's failure to comply with its terms (*Re Maple Environmental Services Limited [2000] BCC 93*). However, the CVA usually defines events of default and requires or allows the supervisor to take further action if those events of default occur (*Welsby v Brelec Installations Limited [2000] 2 BCLC 576*).

In many cases, the CVA will provide that, on the debtor company's default:

- The supervisor must notify all creditors of the company's failure to comply with the CVA.
- The supervisor must distribute any assets that he holds in partial satisfaction of the company's debts.
- The creditors of the debtor company cease to be bound by the CVA, allowing them to pursue the debtor company for the balance of the debt due.

Other common provisions provide for:

- The supervisor to call a creditors' meeting to decide if the debtor company's default should lead to the termination of the CVA.
- The commercial return to the debtor company's creditors may be greater if they waive the default, and the debtor company complies with the terms of the CVA in future, than if the debtor company is forced into administration or liquidation.
- The supervisor to petition for the liquidation of the debtor company if it defaults.

SHB Realisations v Prudential 2018 [EWHC 402 here a CVA was agreed between BHS and its landlords whereby the rent on two of its stores would be reduced by 25% but if the new rent was not paid then the CVA could be terminated. On liquidation of BHS it was held that all the rent could be recovered as an expense of the liquidation. This would have priority over other creditors

STAMP DUTY LAND TAX AND ADDITIONAL DWELLINGS

Definition of a dwelling

Regulation 17 of the Finance Act sets out the rules for determining what defines a dwelling:

- A building or part of a building counts as a dwelling if:

  (a) it is used or suitable for use as a single dwelling, or

  (b) it is in the process of being constructed or adapted for such use.

- Land that is, or is to be, occupied or enjoyed with a dwelling as a garden or grounds (including any building or structure on that land) is taken to be part of that dwelling.

- Land that subsists, or is to subsist, for the benefit of a dwelling is taken to be part of that dwelling.

- The main subject matter of a transaction is also taken to consist of or include an interest in a dwelling if:

  (a) substantial performance of a contract constitutes the effective date of that transaction by virtue of a relevant deeming provision

  (b) the main subject-matter of the transaction consists of or includes an interest in a building, or a part of a building, that is to be constructed or adapted under the contract for use as a single dwelling, and

  (c) construction or adaptation of the building, or part of a building, has not begun by the time the contract is substantially performed.

The Guidance states that buying off plan will trigger the higher rates. There is no mention of a plot purchase with planning permission but presumably this will not. The guidance also recognises that in certain circumstances it may be difficult to decide whether one or two dwellings are being purchased. This will be a question of fact. Consider, for instance, the purchase of a house with an annexe or a granny flat.

The Government have now announced that they will change the Finance Act to make clear that the existence of a residential annexe or granny flat will not give rise to two separate dwellings.

In **P N Bewley Ltd v HMRC [2019] UKFTT 65 (TC)** the tribunal decided that an unhabitable former house with no floorboards or services and with the need to remove asbestos did not constitute a

dwelling. The test is what the premises are at the time and not what they may be in the past or future.

Hyman v HMRC 2019 first tier Tribunal

Here a house and barn together with 3.5 acres of land on part of which chickens were kept was held to be a dwelling and not of mixed use. A factor in this was that the estate agent had advertised the land as being a home.

RESTRICTIVE COVENANTS

Shaviram Normandy v Basingstoke and Deane Borough Council [2019] UKUT 256 Here a long lease stated that the premises could only be used for commercial purposes. Conversion into residential flats was possible through permitted development however, the Landlord refused to surrender the covenants. A Tenant can apply to the Lands Chamber to discharge covenants under **S 84 (12) Law of Property Act 1925** if the Lease is for a term of 40 years or more and at least 25 years is unexpired. Here the Upper Tribunal held that rentals would not be affected by a change from commercial to residential use and the covenants did not secure any practicable benefits and were contrary to public policy as there was a need for housing.

A requirement the Landlord give their licence for underletting was not discharged as the head rent was dependent on the underletting rents and the Landlord had an interest in who the underlessees were.

ELECTRONICS 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 ECOMONY 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 underground 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.

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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.

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. On 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.

In the case of **Evolution (Shinfield) v British Telecom [2019] UKUT** 127 developers were building a 1500 house estate and wished to remove and relocate mobile phone equipment. Paragraph 20 of the new Code gives the operator Code rights to acquire land but these will not apply if the land is to be developed. Under the old Code then relocation would be at the cost of the landowner. This is not the case under the new Code if development was planned prior to asserting paragraph 20. Here the developers needed to relocate the equipment as it was on a proposed access way. The developers were required to pay for relocation as there was no specific access way at the time of the appropriation by the operator.

Cornerstone v Keast [2019] UKUT 116 here the following was decided

The Tribunal doubted whether it was unlikely that a discrepancy between a paragraph 20 notice and what was claimed, where what was claimed was less than what was in that notice, would invalidate the process (see paragraph [29])

EE v Chichester [2019] UKUT 164. Paragraph 38 of the code allows removal of equipement where the landlord intends to demolish and reconstruct the site. This case has held that the burden is similar to ground (f) of the Landlord and Tenant Act 1954 in that there must be a real chance of the development going ahead.

The Tribunal found that code rights could not be asserted purely against electronic communications apparatus within paragraph 5, as those rights could only be asserted against land, and land excludes electronic communications apparatus (see paragraph 108). However, if rights were sought to keep apparatus on land, then (even if the apparatus was vested in a different operator who had agreed to

transfer ownership), then that was permissible under the code as the code rights in such a case related to the land and not the apparatus. The Tribunal helpfully clarified the effect of paragraph 101 of the Code and made clear that conventional common law annexation principles were not relevant in cases falling within that paragraph (see paragraphs [44] - [49]).

The Tribunal found that policing the terms sought under a code agreement was a matter of discretion not jurisdiction under paragraph 23 of the Code. It was in principle open to grant any terms, but the discretion to grant was naturally ringfenced by the principles in paragraph 23. The Tribunal doubted that the inclusion of a term which the Tribunal could not grant would invalidate the whole process (paragraphs [56] - [61]).

RECENT CASE LAW ON VILLAGE GREENS

In **R (Newhaven Port & Properties Ltd) v East Sussex County Council [2015] UKSC 7.** The Newhaven Harbour Improvements Act 1847 gave the port authority power to maintain and improve the harbour. In addition, the Harbour's Docks and Piers Clauses Act 1847 allowed bye-laws to be passed in relation to the harbour. The authority had passed byelaws allowing access to various parts of the port with conditions, e.g. dogs to be kept on a lead.

The locals had for many years been bathing off a beach within the harbour land and claimed that this gave rise to a village green.

The Supreme Court has now reversed the court of appeal and held that this was not a village green. Although a beach may be a village green, the bye-laws meant that the user was not as of right but under a licence, see Barkas above. Moreover if a village green claim was allowed then the improvements of the harbour under legislation would not be possible as the surface of the village green cannot be changed and this would be contrary to the 1847 Act, see also BDW v Spooner above. It was also stated that similar arguments may be made in relation to prescriptive rights generally, see Mills v Silver 1977.

The concept of an overriding statutory obligation as recognised in the East Sussex and Barkas cases has now started to cause its own problems. In **Lancashire County Council v The Secretary of State for the Environment, Food and Rural Affairs and Another [2016] EWHC 1238 (Admin)** the court accepted that where the land was owned by a Central Government body which was subject to its own legislation a village green claim could not be made. The court also decided that the need for a specific locality was not satisfied as the people using the land must be spread throughout the whole of the locality. Furthermore, the locality had changed over the 20 year period required for a village green claim. In **R (NHS Property Services Ltd) v Surrey County Council [2016] EWHC 1715 (Admin)** a similar argument was accepted by the judge in that there was overriding statutory obligation in relation to NHS land.

Timothy Jones v NHS Property Services Ltd & R(Lancashire County Council) v Secretary of State for Environment, Food and Rural Affairs [2018] EWCA Civ 721

(i) There must be "specific" statutory purposes or provisions attaching to [the] particular land [subject to the application]".

(ii) Parliament must have conferred on the landowner powers to use the "… particular land for specific statutory purposes with which its registration as a town or village green would be incompatible".

(iii) So as to "clearly impede", or "prevent" or "restrict" the exercise of any statutory power, or the discharge of any statutory duty, relating specifically to that particular land".

These cases are being heard by the Supreme Court on July 15th 2019.

TW Logistics v Essex County Council [2018] EWCA2172

Here a privately-owned port was registered as a village green as there had been no problems in the past with both the owners and locals sharing use of the land. It is illegal to drive vehicles on a village green but this would not prevent registration. In any case if the driving of the vehicles did not impact upon the use of the land by the locals it would not be an illegal act.

TERMINATION OF COMMERCIAL LEASES BY THE TENANT INCLUDING VACANT PROPERTY ISSUES

KEEP OPEN CLAUSES

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

SHB v Cribbs Mall April 17th 2019
SHB are in liquidation and are successors to BHS. They occupied a prime site at Cribbs Causeway in Bristol and held a 125 year lease. The landlord wanted to effect forfeiture for breach of a keep open clause. The tenant argued that they should be entitled to release as the loss involved would be so great and they should be given a substantial time in which to be given the opportunity to assign the lease. The Court decided that three months delay in order to attempt an assignment should be sufficient.

BREAK CLAUSES

Conditions to Exercising the Clause

Conditions precedent

If conditions precedent are prescribed the tenant must fulfil them strictly. It is common for an option to provide that the tenant must have paid all the rent and performed all the covenants. If this form is chosen even a trivial breach of covenant will defeat the tenant's option (**West Country Cleaners (Falmouth) Ltd v Saly [1966] 3 All ER 210**; **Bairstow Eves (Securities) Ltd v Ripley (1992) 65 P & CR 220**). However, a breach for this purpose means a subsisting breach, not a 'spent' breach in respect of which the landlord no longer has a cause of action (**Bass Holdings Ltd v Morton Music Ltd [1987] 2 All ER 1001**). The strict approach was questioned but nevertheless applied in **Kitney v Greater London Properties (1984) 272 EG 786**. In almost all cases an obstructive landlord will be able to find some subsisting beach of covenant on the tenant's part and thereby defeat the option. This form may, therefore, work hardship to tenants, particularly where there is a genuine dispute as to liability. The tenant's adviser should, therefore, insist that the requirement be that the tenant shall have reasonably performed his covenants. In such a case the exercise of the option will be good if the tenant has performed his covenants to the extent that a reasonably minded tenant would have done (**Gardner v Blaxill [1960] 2 All ER 457**). The inclusion of the word 'reasonably' gives the court a discretion which will be exercised in the tenant's favour where for example he has made one or two late payments of rent, but not where he has been persistently in arrear throughout the term (**Bassett v Whiteley (1982) 54 P & CR 87**).

In one case, a tenant who had decorated using two coats of paint instead of the three coats required by the lease lost its right to break as a result (**Osbourne Assets v Britannia Life (1997)**).

The draftsman should next consider whether the conditions are to be fulfilled at the time of the service of the notice or at the end of the term. If they are to be fulfilled at the time of the service of the notice then, for example, the landlord may not be able to rely on a breach of covenant to decorate 'in the last year of the term' since no breach of that covenant can be positively asserted until the expiry of the complete year. On the other hand, if the conditions are to be fulfilled at the expiry of the term, the tenant will have the opportunity to remedy any breach of covenant between the service of the notice and its expiry (**Simons v Associated Furnishers Ltd [1931] 1 Ch 379)**. This latter form is fairer to both parties.

If there are joint tenants, both must exercise the clause: **Re: Viola [1909] 1 Ch 244.** In **Prudential Assuance v Excel [2010] L&TR 7** the solicitor served notice stating that one of two joint tenants, Excel, intended to break the lease. It was held that as both joint tenants were associated companies the solicitor had authority to act on behalf of both. However, it would not have been clear to a reasonable recipient landlord that both tenants were taking part and the break was void. It would have been better not to state the tenant by name.

Reed Personnel Services Plc v American Express Ltd [1997] 1 EGLR 229

Reasonable performance of the terms of a repairing covenant as a condition precedent to the exercise of a break clause might include, e.g. applying one coat of paint instead of two, or retaining a good carpet where there is an obligation to replace. The cost of repair was not a factor to be taken directly into account.

Commercial Union v Label Ink [2001] L&TR 29 where a rent cheque was in the post but not received until after the break date, there was held to be non-compliance with a condition precedent.

Fitzroy House, Epworth Street v The Financial Times [2006] EWCA Civ 329 31 March Court of Appeal.

This is the latest in a long line of cases on conditions precedent prior to exercising a break and, indeed, an option to renew. If a lease contains an absolute condition of compliance with terms of the lease before the break can be exercised then no solicitor may allow this to be accepted as any landlord will be able to find a minor breach, usually in relation to dilapidations which allows the tenant to be held to the lease. More commonly, therefore, a lease will require material, or substantial, or reasonable compliance with the terms of the lease. This was the case in the present scenario. The question for the court was what does material compliance actually mean?

This case involved a very valuable site on the outskirts of the City of London. The cost of failure for the tenant if he was held to the lease and had to pay the remaining rental was in the region of £3.5 million.

A break clause was dependent on material compliance with the terms of the lease. The court stated that not every defect had to be remedied. Regard should be had to the age, type, location, and use of the premises in determining what was expected.

The landlord could only refuse consent if it was fair and reasonable to do so and the purpose of limiting the right to break was to enable a landlord to preserve its legitimate interest in being able to re-let speedily thus maintaining the value of the reversion.

The Court of Appeal has now partly reversed this decision. There is a difference between reasonable compliance, where a reasonably competent surveyor's report may be relied upon and material or substantial compliance where this is not so. Here the test as to whether the landlord loses rental is the appropriate one.

A better solution, it is suggested, and one which is becoming increasingly acceptable to landlords, is to allow the tenant to break the lease without conditions. If needs be, the tenant may still be sued for antecedent breaches. Some landlords put forward a defence to this line of reasoning that the tenant may not be worth suing. This rather begs the question: if the tenant were not worth suing, why would the landlord wish to keep him? The Court of Appeal partly reversed this decision. If reasonable compliance is required then a report from a reasonable surveyor is satisfactory but for material compliance the test is whether the landlord is losing rent.

William Page v BNP Paribas (2008) 4 September (unreported) - As a condition precedent to exercising the break, the tenant had to comply with repairing obligations. The tenant was a dormant company and the obligations were carried out by an associated company. The break was still valid.

Note: It is also suggested that a tenant intending to break the lease should make sure that they have fire asbestos risk assessments under the Regulatory Reform (Fire Safety) Order 2005, and Control of Asbestos Regulations 2012 in order to comply with the lease terms.

In **Avocet Industrial Estates LLP v Merol Ltd and another company [2011] EWHC 3422** a condition precedent to exercise the break clause was that the rent had to be up to date. Over the previous six years the tenant had on a few occasions been late in payment of the rent and interest had accumulated, although the landlord had not demanded this. As the interest had not been paid at the break date the tenant had not effectively brought the lease to an end. Here the tenant's interest

amounted to £130, the cost of the tenant in extra rent was £300,000. On occasion the landlord had demanded rent but not always. The landlord held £20,000 of rent deposit but this was irrelevant as was the fact that the tenant had asked the landlord to confirm that no other money was owed. The landlord's agents did this but there was no estoppel as they themselves did not realise that the £130 was owed.

Note: Leave to appeal to the Court of Appeal was given, however, the case now seems to have been settled.

In **Quirkco Investments Ltd v Aspray Transport Ltd [2011] EWHC 3060 (Ch)** it was stated that dependent on the terms of the lease any insurance premium which was reserved as rent may have to be paid for the whole year if the payment date fell before the break day. In **PCE Investors Ltd v Cancer Research UK, [2012] EWHC 884 (Ch)** the Court of Appeal held that a break could not be exercised when the break day fell between rent days and the whole quarter in advance had not been paid. It is essential in these circumstances that the tenant is only responsible for basic rent, or as a lesser alternative, the lease deals with apportionments after the break date.

In **Canonical UK Ltd v TST Millbank** [2012] EWHC 3710 (Ch) the tenant had to pay the rent quarterly in advance and also had to pay a one month penalty in order to exercise the break. They paid two months rent and claimed that the third month could be offset against the penalty. It was held that on an interpretation of the clause this was not so and the break was not successfully exercised.

Marks & Spencer v BNP Paribas [2015] UKSC 72 - The Supreme Court has now heard this case. The tenant, Marks & Spencer, had to pay rent quarterly in advance and also insurance charge and a car parking licence in advance. They also had to pay monetary payments owed to the landlord as a condition precedent for exercising their break clause. There was also a premium payable in relation to exercise of the break. The break did not correspond with a quarter day. The tenant paid the rent and other monetary payments in advance and then claimed that it must be implied that they could recover back money relating to the period beyond the break date.

The High Court agreed with this but on appeal the Court of Appeal disagreed. The Supreme Court has now agreed with the Court of Appeal. There is no scope for implication of such a term, especially as the parties had agreed in great detail the terms of the lease and not expressly included anything. Lord Neuberger also confirmed that the case of **Ellis v Rowbottom [1900] 2QB 740**. was correct in that the Apportionment Act 1870 applied to rent payments in arrears but not in advance.

Gemini Press v Cheryl Lindsay Parsons [2012] EWHC 1608

Where a break clause could be exercised by a named tenant, a successor was not entitled to exercise the break.

Fully Vacant

Another common condition is that the tenant must give vacant possession. This point arose in the case of **JIS (1974) v MCP Investment Nominees**. The original deal required the landlord to take a leaseback of shop units in a mixed-use development, but the landlord successfully argued that the sublet units meant that the vacant possession requirement had not been satisfied.

Although the exercise of a right to break will determine any sublease, the subtenant may have security of tenure under the Landlord and Tenant Act 1954.

Mourant Property Trust Ltd v Fusion Electronics Ltd [2009] EWHC 3659.

A break clause contained conditions precedent requiring that the tenant would give up vacant possession, pay the rent due and not be in other material breach. On the termination date the tenant had retained keys in order for contractors to access and finish repair works. The break was void.

In NYK Logistics (UK) Ltd v Ibrend Estates [2011] EWCA 683,

The break clause required vacant possession. The tenants gave notice and cleared the premises. Arrangements were made to surrender keys and the tenant agreed to carry out some repairs. The landlord did not collect the keys on the date and the contractors did not complete the repairs until six days afterwards. The tenant had not given up occupation and could not break the lease.

See the Code for Leasing Business Premises. The Code suggests that conditions precedent should not be used with the exception of the basic rent being up to date, the tenant giving up occupation, and any subleases ending.

Riverside Park Ltd v NHS Property Services [2016] EWHC 1313 The tenant was required to give up vacant possession as a condition of exercising the break clause. The premises contained a large number of partitions, floor coverings and kitchen fittings which were not removed. The court decided that as they were not substantially attached and could readily have been removed they were fittings belonging to the tenant who had therefore failed to vacate and could not exercise the break. The court went on to say that even if they had been fixtures there was no provision in the lease whereby they had been part of the demise. They were therefore tenant's fixtures which should have been removed.

Goldman Sachs International v (1) Procession House Trustee Ltd and (2) Procession House Trustee 2 Ltd (2018) to constitute a condition precedent to exercise a break the provision must be clear. Here, vacant possession was required to exercise the break but not reinstatement at the end of the lease.

In **Sirhowy Investments v Henderson [2014] EWHC 3562** planning permission for a second hand car business was granted subject to conditions that a scheme would be agreed with the local authority in relation to turning facilities to enable car transporters to unload cars without causing obstruction to the highway. Three years after the lease had been granted the council served notice for a breach of a planning condition. On this happening, the tenant was entitled to serve a break notice if they could show that they had acted reasonably in procuring the scheme. However, the tenants had breached a condition as to exercising the break in that they had to keep the premises in good and substantial repair and as part of a fence had fallen down exercise the break.

Time for Exercising the Clause

Trane (UK) Ltd v Provident Mutual Life Assurance Association [1994] EGCS 121

A lease was expressed to commence on 28 August 1981. It was executed on 6 January 1982. There was a break clause exercisable after 10 years on giving six months' notice.

The tenant was assured by the managing agent of the landlord that the notice must expire in January 1992. The tenant served notice but the landlord refused to accept it. The judge agreed that the notice should have been given to expire in August 1991, i.e. the tenth anniversary of the date of commencement. However, the landlord was estopped from denying his managing agent's representation even though given 'without prejudice'.

The tenant would thus have won but for the fact that there was minor disrepair at the date of exercise of the break clause.

Micrografix v Woking 8 Ltd [1995] 37 EG 179

The break clause to determine lease was exercisable on 23 June 1995. The tenants erroneously stated in the notice that the lease would determine on 23 March 1994 and referred to the relevant clause in the lease.

Held : the mistake was obvious to someone with the landlord's knowledge. The landlord would not be misled by the wrong date. The notice was valid.

Mannai Investment Co v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945, HL

The tenant entered into a ten year lease of office premises subject to a right to exercise a break clause terminating on the third anniversary of the commencement date.

The commencement date was 13 January. The notice to break was expressed to terminate on 12 January. The House of Lords reversed the decision of the Court of Appeal by a 3:2 majority. Break clauses should be treated no differently from notices to quit periodic tenancies.

As long as a reasonable receipt of the notice made clear what was intended, the notice was valid. It was sufficiently clear that the tenant intended to exercise the option to break.

Reference to the clause allowing the break would presumably be sufficient, at least in the case where the lease contains only 1 break. Mistakes are still made, however, e.g., where breaks are served in the name of the wrong tenant, in particular where there is an associated company in occupation.

MW Trustees Ltd and others v Telular Corporation [2011] EWHC 104

A lease provided for a tenant to terminate it by giving six months' written notice by hand or special delivery to the landlord. The tenant served an invalid break notice as it was addressed and sent to the former landlord.

The tenant subsequently emailed the new landlord attaching a copy of the original notice. The landlord forwarded the email to its managing agents, who confirmed to the tenant that they accepted the notice and were happy for the tenant to terminate the lease. However, they asked the tenant to re-address the notice to the landlord.

The tenant prepared a replacement notice but it was not received by the landlord. The landlord argued that no effective break notice had been served. The High Court held that:

- Applying the principles in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] UKHL 19, a reasonable recipient would not have been misled as to the tenant's intention to terminate the lease even though the notice was addressed to the wrong person. On the court's construction of the lease, although notice had to be given to the landlord, it did not need to be addressed to the landlord.

- Although the lease did not permit service by email, the landlord was estopped from challenging the validity of the notice.

Hotgroup plc v Royal Bank of Scotland [2010] EWHC 1241. In the absence of an estoppel it is essential to give the break notice to the correct person. Here the terms of the break required notice to be served on the landlord's management company. The notice was served on the landlord and was invalid.

Siemens Hearing Instruments v Friends Life [2014] EWCA Civ 382. Here a break notice had to be served in accordance with S42 of the Landlord & Tenant Act 154. The notice did not refer to the section and was held to be void.

Baker Tilly Management Ltd v Computer Associates UK Ltd (2009) 11 December

In this case, the claimant was tenant under an underlease. The lease had originally been granted to Baker Tilly Services Ltd. The lease included a break clause allowing the tenant to determine it by service of a notice on its landlord. The tenant served a notice which complied, in all material respects with the requirements of the underlease. However, in between the grant of the lease and the exercise of the break right, the tenant had changed its name to Baker Tilly Management Ltd. The break notice was served in the original name of Baker Tilly Services Ltd. Was the notice valid? Applying the 'reasonable recipient' test, the court held that it was.

Dun & Bradstreet Ltd v Provident Mutual Life Assurance [1998] E EGLR 175

The tenant had become a wholly owned subsidiary of another company. The break was served by the head company. The notice was void as there was no clear agency. Moreover, as a rent penalty had not been paid, there had also been a failure to comply with a condition precedent.

Orchard (Developments) Holdings plc v Reuters Ltd [2009] EWCA Civ 6

The lease set out provisions as to the service of a break notice whereby if recorded delivery was used the notice would be served on receipt by the landlord. However, if any other form of notice was used then the receipt had to be acknowledged. The break was received but receipt never acknowledged and the service was therefore invalid.

BREAK CLAUSES AND OPTIONS TO RENEW: STAMP DUTY LAND TAX

The introduction of Stamp Duty Land Tax in particular has had major effects on the duration of leases as tax is determined by net present rental value, the shorter the lease the less tax to be paid. In determining the duration the following applies:-

Duration

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

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.

Linked Transactions

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 HMRC consider this to be a linked transaction which may result in the need for a return to be filed and tax to be paid. The Revenue interpretation is possibly not the correct interpretation within the Finance Act 2003 however.

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.

SUBLETTING AND TERMINATION OF THE HEAD LEASE

In **Pennell v Payne [1995] QB 192**, it was accepted that on termination of the head lease by notice, the sublease will also end. The House of Lords in **Barrett v Morgan [2000] 1 All ER 1**, followed this decision even though the head tenant and landlord had colluded in giving notice so as to terminate an undesirable subletting. The head tenant may be faced with a claim for non derogation from grant, however. In relation to a business lease within the Landlord and Tenant Act 1954, termination of any head lease will merely accelerate a statutory continuation.
In **PW and Co Ltd v Milton Gate (2004)**, termination of the head lease by means of a break clause was expressed to be subject to the continuation of any subsisting subleases (these being outside the 1954 Act). Nevertheless, the subleases came to an end and the tenant was successfully sued for not breaking the lease with a certain amount of floor space let.

PERSONAL BREAKS

Linpac Mouldings Ltd v Aviva Life [2010] EWCA 395
Release is subject to a qualified covenant against assignments and the original tenant had a personal break clause. The original tenant assigned the lease and now wanted an assignment back to themselves. The landlord refused on the grounds that they might exercise the break.
Contrast **Harbour Estates v HSBC (2005)** where, on the facts, a personal break was held to be assignable.

Following **Oil Property v Olympia & York 1994**, and **Max Factor v The Wesleyan Society [1995]**, this was a good reason for refusing consent. In any case it will require clear wording for the break to be exercised after a re-assignment.

Tenants who have personal break clauses may consider subletting instead of assignment.

Note: **Brown & Root v Sun Alliance [1997]**. Where the lease was of sufficient duration to require substantive registration by an assignee, the tenant was still the legal tenant of the lease for the purpose of exercising a personal break until the assignee applied for registration. It is submitted that the tenant would still be legal tenant for all purposes until the assignee had applied for registration. It is, therefore, essential that both landlord and tenant police the fact that the assignee has applied for registration.

INADVERTENTLY ALLOWING A BREAK

Forfeiture

B&Q v G S Fashions Estates [1993]. The tenant openly parted with possession and the landlord served a Section 146 notice and commenced forfeiture proceedings. The tenant did not claim relief and the court held the lease to be forfeited once the notice had been served.

This constitutes a highly effective means of breaking a lease if the landlord is off his guard.

Members Voluntary Winding Up

Re Paramount Airways Limited No. 3 [1994]. Where a tenant voluntarily winds up a business even though credit worthy, the landlord will have a claim as a creditor. However, damages will be limited to lost rent for the remainder of the term. Moreover, the landlord will have to mitigate his loss by attempting to find another tenant and any gains in terms of reduced management costs will also be taken into account. A sum of money will also be reduced from damages based on the possibility of the business having been wound up without sufficient funds to pay the rent. In the present case the level of damages was substantially less than half of the actual rent forgone. Once more this constitutes an effective way of terminating a lease early.

REMOVING ENTRIES ON THE REGISTER

Substantively registered leases will be noted against the landlord's title, and leases for more than 3 or 7 or less years, may also be noted in order to protect easements. These should be removed by the tenant.
If the tenant leaves without serving a break, then an attorney clause may be used in order to clear title. Alternatively, if nobody is in occupation, the Land Registry may accept peaceable re-entry for non-payment of rent. It may be difficult to re-let for a further 6 months however, as a tenant may seek relief from forfeiture.

RESCISSION

Rescission, i.e., claiming a fundamental breach whereby the tenant can refuse to be bound by the contract is a highly effective way of terminating the lease early. For an early example see **Smith v Marrable [1843]**. There is an implied term that a leasehold dwelling is fit for human habitation at the beginning of the lease. Where this was not the case the contract was rescinded.

Nynehead v N.H. Fibreboard [1999] EGLR 7

Here rescission was unsuccessfully claimed where the landlord allowed other tenants to block loading bays on an occasional basis. The breach of quiet enjoyment was transient and amounted to a minor nuisance only. This was not a sufficiently fundamental breach.

Hussain v Mehlman [1992] 2 EGLR 287

The Tenant was able to rescind a short term residential lease due to the landlord's breach of repairing covenants.

OTHER METHODS OF TERMINATION OF THE TENANCY

Expiry of Term

1. A lease for a fixed period determines automatically when the fixed period expires. In such circumstances there is no need for the landlord to serve a notice to quit.

2. The tenant may have an option to renew the lease provided he complies with the terms of the option, e.g., to observe and fulfil the covenants in the lease. The tenant may also lawfully remain in possession where he is:

    a. A tenant of business premises protected by the **Landlord and Tenant Act 1954 Part II**; or

    b. A tenant of a dwellinghouse protected by the **Rent Act 1977** or by the **Housing Act 1988**.

Notice to Quit

1. A lease for a fixed period need not be determined by a notice to quit unless the lease expressly so provides. In all cases a notice to quit is required for the determination of periodic tenancies, e.g., yearly, monthly or weekly tenancies. At common law the notice to quit need not be in writing: **Timmins v Rowlinson (1765)**, though this is subject to statutory qualifications.

2. The length of the notice required is dependent upon the express terms of the periodic tenancy or those implied by the general law in the absence of express terms. The following length of notice is appropriate in these particular periodic tenancies:

    a. Six months' notice must be given to terminate a yearly tenancy;

    b. One quarters' notice must be given to terminate a quarterly tenancy;

c. One months' notice must be given to terminate a monthly tenancy;

d. One week's notice must be given to terminate a weekly tenancy.

Statutory provisions must be taken into account in determining the notice to be given. As will be seen below, this depends on the purpose of the tenancy.

Note: The notice must expire on a period of the tenancy.

The general law rules have been amended greatly by statute, the main amendments being:

1. Business Tenancies

The **Landlord and Tenant Act 1954 Part II** does not allow leases of business premises to be determined by a notice to quit. A tenancy of business premises can only be brought to an end by the procedure in the 1954 Act, and the tenant is entitle to not less than six but not more than twelve months' notice.

2. **Residential Tenancies**

The **Rent Act 1977** provides for a continuation of a tenancy after its fixed period by a statutory tenancy. **The Housing Act 1988** provides for the continuation of certain residential tenancies granted on or after 15 January 1989 by an assured statutory periodic tenancy. In addition, the **Protection from Eviction Act 1977** has amended the general law in several ways, in particular:

a. By providing for a minimum for weeks' notice to quit: s5(1);

b. By stipulated that the notice to quit a dwellinghouse must be in writing: s5(1).

Note: Termination by the tenant, **s27 Landlord and Tenant Act 1954**, a tenant who does not wish to be bound by a new lease may give at least three months' notice to leave terminating no earlier than the end of the fixed term of the tenancy. Alternatively, he may merely vacate by the end of the fixed term and not be bound by any notice: **Esselte v Pearl Assurance (1997)**, in this circumstance he should be careful not to lose any compensation for disturbance which requires occupation until the end of any s.25 notice.

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

Where the tenant who vacated premises weeks before end of the termination of the s25 Notice and had been in occupation for the previous 14 years lost his right to double compensation for disturbance under s37 LTA 1954 at the end of the lease and the landlord uses s30(I) (e), (f) or (g) for opposition to a new tenancy.

Surrender

1. If the tenant surrenders his lease to his immediate landlord and the landlord accepts, the tenant's lease merges with the landlord's reversion and comes to an end.

2. An express surrender should be by deed but a surrender for value which is evidenced in writing or supported by an act of part performance would be effective in equity by analogy with the doctrine in **Walsh v Lonsdale (1881)**.

3. Surrender by estoppels may arise where the tenant or landlord or both do an act which shows an intent to end the lease and it would be inequitable for them to rely on the fact that no express surrender deed had been accepted by the landlord.

Note: **Implied 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.

Cricket v Shaftesbury Ltd [1999] All ER 283

S.43(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 All ER 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.

Deeds of Variation and Guarantors

Holme v Brunskill [1878]. It was held that where a tenant surrenders the lease or a part thereof without the guarantors consent the agreements will come to an end. Likewise, if the landlord allows the tenant to pay the rent late without the consent of the guarantor in writing, the guarantor's liability will also be discharged.

In **Howard de Walden v Pasta Place [1995] 1 EGLR 79** a revocable licence to widen permitted use also without the consent of the guarantor also brought the guarantee agreements to an end. Any variation of the lease unless they are insubstantial or incapable of adversely affecting the tenant will have this effect

More recently in the **Topland Portfolio No 1 Ltd v Smiths New Trading Ltd [2014] EWCA Civ 18** 21st January (2014) Court of Appeal. 20 years previously the tenant obtained permission to alter the premises without any formal guarantor's consent. Subsequently the tenant went into administration. The Court of Appeal has confirmed that as the guarantor was not a party to any supplemental documents, the guarantor was not liable.

Merger

Merger would occur in the following circumstances:

a. Landlord leases land to tenant and landlord's reversion and tenant's leases later pass into the hands of X.

b. Landlord leases land to tenant and tenant later acquire landlord's reversion.

Disclaimer

The major example of disclaimer arises under **s315 Insolvency Act 1986** which provides that a tenant's trustee in bankruptcy in whom an onerous lease has been vested can disclaim the lease.

The effect of disclaimer in such a case as between landlord and tenant is that the lease is at an end but this does not affect the rights of third parties. Thus, if the tenant had mortgaged his lease to E, the court may make an order vesting the lease in E. In **Hindcastle v Barbara Attenborough (1986)** the House of Lords held that disclaimer by the tenant will not affect liability of any quarantors, who may still be sued. See also **Shaw v Doleman (2009)** liability under Authorised Guarantee Agreements will also continue after a disclaimer.

See **KS Victoria v House of Fraser [2011] EWCA 904**

Good Harvest Partnership v Centaur [2010] UKHC 330 - Section 24 of the Landlord and Tenant (Covenants) Act 1995 states that, on the original tenants ceasing to be liable, anyone whose liability is dependent on the original tenant will also cease to be liable for breaches. Section 25 of the Act states that the provisions of the Act cannot be avoided. Here the guarantor was required as a condition of assignment to enter into an authorised guarantee agreement (AGA) which would guarantee the assignee's debts. The Judge held that such an absolute condition would be a breach of Section 25 and seemed also to suggest that such a requirement, even though not a condition of the lease, would also be a breach. Furthermore, the Judge refused to accept as established law that an original guarantor could be made liable to guarantee a tenant under an AGA.

Contrast this case with the House of Lords decision in **Avonridge v Mashru [2005] UKHL 70**. Sections 6 to 8 of the Act allow the landlord to serve notice after assignment of the reversion requesting that the tenant release him from his covenants, and if the tenant refuses, the court will decide if such a release is reasonable. Most leases circumvent this requirement by stating that the landlord's liability automatically ceases on assignment of the reversion and, in the present case, this was held not to fall foul of the avoidance provisions.

The Court of Appeal has now heard the case of **KS Victoria**. This case has confirmed that a guarantor cannot be directly required in the lease to guarantee an authorised guarantee agreement as it would render s24 of the Act redundant Moreover, a guarantor cannot be required to guarantee an assignee. However, if reasonable to do so, the guarantor may be required to guarantee the tenant's AGA, and if the lease allows it, the guarantor may be required to guarantee the tenant's AGA.

Co-operative General v A and A Shah 2019 UKUT 941. Here, a Licence to Assign repeated the obligations of the assignor and guarantor in the licence. This was held to be a direct guarantee and was void. However, a sub guarantee whereby the guarantor guaranteed the assignee was still valid.

Frustration

The House of Lords in **National Carriers Ltd v Panalpina (Northern) Ltd. (1981),** held that the doctrine of frustration can apply in rare cases to a lease of land. The event would have to be such that no substantial use, permitted by the lease and in contemplation of the parties, remained available to the tenant.

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. EMA were given leave to the Court of Appeal but the case has now been settled and the lease has been assigned to We Work, a major provider of office space.

FORFEITURE AND PEACEABLE RE-ENTRY

The landlord may peaceably re-enter the premises. See **Billson v Residential Apartments [1992] 1 AC 494**. However, if the tenant is using the premises as a dwelling, a Court Order must be obtained under s.2 of the Protection from Eviction Act 1977. There may also be a criminal offence of violent entry committed under s.6 of the Criminal Law Act 1977.

Forfeiture may not be an effective remedy in a downward market, in particular in view of the payment of full business rates for empty properties. See **B&Q v GS Fashions (199**4), a tenant does not have to seek relief from forfeiture in which case the lease will be terminated on service of a notice. A better alternative may be illustrated by the case of **Hemingway v Dunraven Securities [1995] 09 EG 233**.

Here an injunction was ordered preventing an unlawful subletting. In this situation, the original tenant's lease will continue. See also **Innovative Logistics -v- Sunberry Properties [2008] EWCA CIV 126 t**he Company, who held a thirty year lease, were in administration. The administrators granted a six month licence of the premises for storage without consent. The Landlord obtained an injunction. The Court of Appeal set aside the injunction as, when a company is in receivership, not merely do the Landlord's interests have to be taken into account in deciding any remedies available but also those of other tenants.

Goldacre (Offices) Ltd v Nortel Networks Ltd [2009] EWHC 3389

Rent falling due under the lease during administration will amount to a cost of administration, even if only a part of the premises is being used to pay the creditors. There is no element of discretion to this and it will apply whether or not the Landlord has requested rent.

Leisure Norwich II v Luminar Lava Ignite [2012] EWHC 951

Here the High Court confirmed that rent due prior to administration was not a cost of administration.

Re Games Station Limited (also known as Jervis v Pillar Denton Limited) [2014] EWCA Civ 180

On 26 March 2012, a group of companies went into administration. A pre-pack sale to a new company enabled the new company to take over the business and occupy more than half of the stores under a licence from the administrators.

Under the leases of those stores the tenant was due to pay rent on the usual quarter days. Rent was therefore due on the March quarter day, which was the day before the administration.

The administrators decided not to make those March rent payments relying on the following cases.

Relying on Goldacre and Leisure Norwich above.

In the instant case the administrators paid the rents that fell due for subsequent quarters as expenses of the administration.

At first instance, on an application by the administrators for directions as to payment of rent, the judge had followed the above decisions and held that rent falling due before administration was simply provable as a debt in the administration, but rent due in a period when administrators were using the property amounted to an administration expense. The landlord appealed to the Court of Appeal.

The Court of Appeal allowed the landlord's appeal.

Lord Justice Lewison, delivering the judgment of the court, said that the Goldacre and Leisure (Norwich) decisions had left the law "in a very unsatisfactory state' as administrators would either end up paying "more than the true benefit" of their use of the property or less – depending on the timing of the administration.

In **United Dominions Trust v Shellpoint Trustees [1993] 4 All ER 310,** the court accepted that a sub-lessee and mortgagee could also claim relief under s.146 (2). This may be highly desirable, in particular, where there is merely a ground rent paid, as only rent arrears may be found and not mesne profits after the date of forfeiture. In **Escalus Properties v Robinson [1996] QB 231** a subtenant and mortgagee can also claim under s.145(2) if service charge is reserved as rent. In this case only service charge arrears must be found. If service charge is not reserved as rent then the court has a discretion as to whether to order relief under s.146(4).

In **High Street Investments v Bellshore (1996)** an equitable assignee was able to take the benefit of s.146(2).

If a landlord expressly or impliedly waives his right to forfeit the lease, he loses his right to re-enter in respect of the breach concerned, though not as regards subsequent breaches. The two essentials of waiver are that:

a. The landlord is aware of the commission of an act of forfeiture by the tenant and

b. The landlord does some positive act which is a recognition of the continuance of the tenancy.

Thus, if the landlord:

i. Accepts or sues for rent falling due after a right to forfeiture arises, or

ii. Distrains for rent whether due before or after the breach, or

iii. Grants a new lease to a defaulting tenant,

Each of these acts is strong evidence that he has elected not to forfeiture the lease. It is important to distinguish between continuing and non-continuing breaches of covenant as the waiver applies only to the particular breach in question. Once the landlord has unequivocally and finally elected to treat the lease as void, or by serving a writ for recovery of the land, no subsequent receipt of rent or other act will constitute waiver. See **Chrisdell Ltd v Johnson (1987)**, where continued acceptance of rent by the landlord was not held to amount to waiver in circumstances where the landlord accepted representations from the tenant believing them to be true when in fact they were not.

Leasehold Property (Repairs) Act 1938

This applies to all proceedings for damages or forfeiture where the lease was granted for seven years or more and three years or more are unexpired. The Act applies to a "covenant or agreement to keep or put in repair during the currency of the tenancy" (see **Starrokate Ltd v Burry (1982)**). Where the Leasehold Property (Repairs) Act 1938 applies the landlord cannot proceed without first serving a notice under s146 of the LPA 1925 which must inform the tenant of his right to serve a counter-notice. If the tenant serves a counter-notice no further proceedings can be taken without leave of the court.

A notice under s146 of the LPA 1925 must contain the following information:

a. Specify the breach of covenant complained of; and

b. If the breach is capable of remedy, require the tenant to remedy the breach; and

c. In any case, require the tenant to make monetary compensation for the breach.

The court may not give leave under the 1938 Act unless the landlord shows that the immediate remedying of the breach is required:

a. To prevent substantial diminution in the value of the reversion;

b. By any Act or bye law;

c. In the interests of any sub-tenant;

d. Because it can be remedied at an expense that is relatively small in comparison with the much greater expense if the work was postponed;

e. Because it would be just and equitable to grant leave.

In **Jervis v Harris (1996),** it was settled that if the landlord reserves the right to enter, carry out work and charge, the claim is in debt and is thus not covered by the Act. In **Associated British Ports v C H Bailey (1989)**, the House of Lords held that to proceed with action the landlord had to show the case that he would succeed on a balance of probability in a full case. He failed as the lease still had a 94 year term left, equipment in disrepair would be obsolete anyway.

Note: By reserving the right to enter and carry out works, the landlord will render himself potentially liable under s4 defective Premises Act 1972. Whereby any person reasonably likely to be affected by repairing breaches may sue. The duty arises whenever a landlord has or should have knowledge of a breach also regular inspections must be made.

A form of special relief in respect of internal decorative repairs is available under s147 of the LPA 1925. The court may have regard to all the circumstances of the lease and may wholly or partially relieve the lessee from liability for such repairs.

THE RATING (EMPTY PROPERTIES) ACT 2007

The provisions came into force on 1 April 2008. An empty commercial property will pay full business rates after 3 months industrial units and warehousing will pay full business rates after 6 months. Charities are now subject to 100% relief as are Community Amateur Sports Clubs, Listed Buildings and buildings of companies in liquidation, receivership, or administration. As previously, for full business rates not to apply property must be occupied for more than 6 weeks within the billing period. The Government will also allow changes to the structure of the building to make it unmarketable and thus avoid full business rates although both of these provisions will be reviewed at a later date.

Exemptions from the business rates charge

After the initial three or six month rate free period expires, an empty property is liable for 100 per cent of the basic occupied business rate charge unless:-

1. The rateable value of the property is less than £2,900. (Less than £2,600 from 1 April 2011 to 31 March 2017 and less than £18,000 in 2010/11).

2. The owner is prohibited by law from occupying the property or allowing it to be occupied.

3. The property is kept vacant because of action taken by or on behalf of the Crown, or any other local or public authority, to prohibit occupation of the premises or acquisition of them.

4. The property is included in the schedule of monuments compiled under s.1 to the Ancient Monuments and Archaeological Areas Act 1979.

5. The property is the subject of a building preservation notice within the meaning of the Planning (Listed Buildings and Conservation Areas) Act 1990 or is included in a list compiled under section 1 of that Act.

6. The owner is entitled to possession only in his capacity as the personal representative of a deceased person.

7. One of the following insolvency or debt administration situations exists:

- A bankruptcy order within the meaning of section 381 (2) of the Insolvency Act 1986.
- The owner is entitled to possession of the property in his capacity as trustee under a deed of arrangement to which the Deeds of Arrangement Act 1914 applies.
- The owner is a company subject to a winding-up order made under the Insolvency Act 1986 or which is being wound up voluntarily under that Act.
- The owner is entitled to possession of the property in his capacity as liquidator under s112 or s145 of the Insolvency Act 1986.
- The owner is a company in administration under the Insolvency Act 1986 or is subject to an administration order.

There are also no business rates to pay on an empty property if:

- it is held by a charity and appears likely to be next used for charitable purposes.
- it is held by a community amateur sports club and appears likely to be next used for the purposes of the club.
- it is a newly-built non-domestic property completed after 1st October 2013 and before 30th September 2016.

Business Rates & Empty Properties

John Laing & Son Ltd v Kingswood Assessment Committee [1949] I KB 344 at p350 here, the court accepted that occupation for business rates purposes had four aspects:

1. Actual occupation

2. Beneficial occupation

3. Exclusive occupation, and

4. Occupation must not be too transient

In Kenya Aid Programme v Sheffield City Council [2013] EWHC 54 (Admin) it was accepted that occupation by a charity for storage purposes in two adjoining warehouses could avoid business rates liability even though only 25% and 30% of the floor area was actually occupied. The Charity Commission subsequently warned charities that they should not be involved in avoiding business rates.

In **Makro Properties Limited v Nuneaton & Bedworth Borough Council [2012] EWHC 2250 (Admin)** the court accepted that storage of 16 pallets for 6 weeks every 3 months was sufficient to avoid business rates.

Principled Offsite Logistics Ltd v Trafford Borough Council [2018] EWHC 1687 (Admin) Empty office premises attract full business rates after 3 months but if premises are occupied for more than 6 weeks in any 3 month period business rates can be avoided. Here, POLL were given 43 day leases to occupy premises for the sole purpose of avoiding business rates. They paid a peppercorn rent and received 20% of the avoided business rates. This was held to be sufficient occupation and there need not be any specific purpose. The rates were avoided.

Rossendale Borough Council v Hurstwood Properties (A) Ltd & Others [2019] EWCA 364 (Ch) in this case special purpose vehicle companies were set up with no assets. They then went into liquidation or were struck off the company's register for non-production of accounts and the lease went to the crown under bona vacantia. As premises of companies in liquidation and the crown do not pay business rates on empty properties, no rates were payable.

Kenya Aid Programme v Sheffield City Council [2013] EWHC 54

Premises were held to be occupied wholly or mainly for charitable purposes even though the charity only occupied 25 to 30% of the surface area. The occupation did not have to be efficient or economically viable. Business rates were therefore avoided. The case was referred back for a decision as to whether the use was wholly or mainly for charitable purposes. In **Public Safety Charitable Trust v Milton Keynes Council [2013] EWHC 12 37**, the court reiterated the need for the use to be wholly or mainly charitable; and having wi-fi points for use by the charity was insufficient. The Charity Commissioners have also warned charities as to their responsibilities in relation to business rates relief.

Sunderland City Council v Stirling Investment Properties LLP [2013] EWHC 1413

Here a 43 day lease for the tenant's occupation for his bluetooth equipment was satisfactory as a lease of more than six weeks in duration. As the premises were warehousing this allowed six months of empty business rates liability to be avoided.

OTHER EMPTY PROPERTY ISSUES

Note that insurance may be vitiated if the property remains empty for a period of time. Insurers should be notified and specialist insurance obtained.
Once a former landlord comes into control of the premises he will be liable to carry out fire safety and asbestos risk assessments under the Regulatory Reform (Fire Safety) Order 2005 and Control of Asbestos Regulations 2012. Not to do so is a criminal offence and may also vitiate buildings insurance.

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www.djblaw.co.uk
0344 880 8000

CONTACTS

Madeleine F Davitt, Senior Partner
Central Government and Property Companies
T: +44 203 026 8295
M:+44 7904 677 739
E: madeleine.davitt@djblaw.co.uk

Geoffrey Lander, Non-Executive Chairman
T: +44 207 870 7500
M: +44 777 617 2000
E: Geoffrey.lander@djblaw.co.uk

Nick Martel, Non-Executive
T: +44 203 026 9714
M: +44 7764 768 903
E: nick.martel@djblaw.co.uk

Sophie Davies, Account Director
Property Companies
T: +44 203 026 8307
M: +44 7812 677 645
E: sophie.davies@djblaw.co.uk

Emma Tonkin, Partner
Property Companies & Leisure Industry
T: +44 203 026 8239
M: +44 7971 051 724
E: emma.tonkin@djblaw.co.uk

Lizzie Collin, Account Manager
T: +4420 3026 9443
M: +44 7534 424 801
E: elizabeth.collin@djblaw.co.uk

Sarah Galley, Account Manager
T: +44 203 026 0045
M: +44 7557 502 973
E: sarah.galley@djblaw.co.uk

Sean Gardner, Account Manager
Central Government and Property Companies
T: +44 203 026 8303
M: +44 7812 677 647
E: Sean.Gardner@djblaw.co.uk

Peter Allinson, Chief Executive
Real Estate Support for Other Law Firms
T: +44 203 026 8290
M: +44 7904 677 773
E: peter.allinson@djblaw.co.uk

Sue McCormick, Account Director
Local Authorities
T: +44 1823 328 084
M: +44 7535 655 060
E: sue.mccormick@djblaw.co.uk

OFFICES

LONDON
Level 24, The Shard,
32 London Bridge Street,
London SE1 9SG

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

BIRMINGHAM
2 Snow Hill,
Birmingham B4 6GA

TAUNTON
12-14 The Crescent, Taunton,
Somerset TA1 4EB

DAVITT JONES BOULD
REAL ESTATE LAW SPECIALISTS