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DAVITT JONES BOULD
REAL ESTATE LAW SPECIALISTS

PROPERTY LAW UPDATE

JUNE 2019

COMMERCIAL PROPERTY UPDATE
Barclays, 1st Floor, 3 Hardman Street, Manchester, M3 3HF

Speaker: Richard Snape
20TH June 2019
3 CPD Points

DAVITT JONES BOULD
REAL ESTATE LAW SPECIALISTS

ABOUT DJB

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

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

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

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

The firm enjoys top tier rankings in all of the main directories including Chambers and the Legal 500. The firm has been announced as finalists at the Lawyer Awards 2019 for National Firm of the Year and was recently awarded Boutique Firm of the Year at the British Legal Awards 2018.

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THE AMERICAN LAWYER GLOBAL LEGAL AWARDS

DAVITT JONES BOULD
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RECENT COMMERCIAL LEASE CASE LAW

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.

AUTHORISED GUARANTEE AGREEMENTS

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.

In 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.

Tindall Cobham v Adda Hotels [2014] EWCA 1215. Here the clause that required the guarantor to enter into an authorised guarantee agreement with the assignee as a condition of assignment was void. However, it could be severed from the rest of the lease and acted as a provision whereby a guarantor could be required if reasonable.

The Court of Appeal in **KS Victoria v House of Fraser [2011] EWCA 904** 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.

In **EMI v O&H Q1 Ltd [2016] EWHC 529 (Ch**) the High Court decided that a tenant could not assign a lease to their guarantor as this would fall foul of the anti-avoidance provisions in s25 Landlord & Tenant (Covenants) Act 1995. The case was meant to be heard by the Court of Appeal in May 2017 but has now been settled.

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 AND BREXIT

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.

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 have now been given leave to appeal to the Court of Appeal.

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 121 (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] EWCA 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.

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.

SERVICE CHARGE LIABILITY

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

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

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

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

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

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

In **Zagora Management v Zurich Insurance Plc [2019] EWHC 140 (TCC)** the cost of replacing the cladding was £10m. This was covered by a newbuild guarantee but the guarantee had a cap of £3.5m.

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

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JAPANESE KNOTWEED

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

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

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

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

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

Ryb v Conway Consultants, **June 2019**. In this case a surveyor was successfully sued for not spotting Japanese Knotweed in a residential garden in North London. He should have taken photographs and made a record of the knotweed. The claimant successfully argued that he would not have bought the property or would have wanted a reduced price if he had known. Damages were assessed at £50,000.00.

EASEMENTS

ASCERTAINING THE DOMINANT TENEMENT

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

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

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

and

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

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

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

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

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

Parker v Roberts [2019] EWCA Civ 121 here the court refused to accept an easement benefitting the residential house could also benefit a proposed house which was to be built on a piece of land acquired by the dominant owner at the back of their house in a different transfer.

VARIATION OF EASEMENTS

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

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

The Four essentials of an easement are:

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

(2) The easement must accommodate the dominant tenement.

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

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

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

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

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

This case has now been confirmed by the Supreme Court.

Once an easement has been established, questions remain about the amount of user which is permitted. Moreover, either the dominant or servient owner may wish to vary the extent of the easement.

It appears that for gifts of way created otherwise than by prescription, alteration of the dominant tenement does not extinguish any easement. Thus in **Graham v Philcox [1984] QB 747** the dominant owner acquired neighbouring property which he then incorporated in his own land. He was still able to claim an easement over the servient land even though the amount of user had been increased. However, if the change to the dominant tenement is such as to impose an excessive burden on the servient land greater than that which might have been reasonably contemplated at the date of grant, the increased user will not be permitted. In **Jelbert v Davis [1968] 1WLR 589**, the dominant tenement was converted from agricultural land into a caravan site. The consequent massive increase in traffic over the servient land was prevented by means of an injunction.

The Court of Appeal held in **White v Richards [1993] 68 P & CR 105** that a right "at all times hereafter to pass and repass on foot and with or without motor vehicles" over a dirt track 2.7 metres wide and 250 metres long did not entitle the dominant tenement owner to take up to 14 juggernaut lorries daily over the track. Notwithstanding that a right of way is granted in wide terms, it may be limited by the physical characteristics of the path over which it subsists.

In **Davill v Pull [2009] EWCA 1309**, a right of way for all reasonable and useful purposes was sufficiently general to allow access to newbuild houses on the dominant land, even though the latter had been described as garden land.

A similar problem arises when the servient owner varies the extent of the easement. He is allowed to do so only in so far as the variation does not prevent reasonable user by the dominant owner. Thus, in **Celsteel Ltd v Alton House Holdings Ltd [1985],** reducing the width of a right of way by more than a half, from 9 metres to 4.14 metres amounted to an infringement of an easement. The right was required for vehicular use and, although 4.14 metres was adequate to drive a car down, it was reasonable on the facts to expect cars to be able to turn around in the same space and this was not possible with the reduction in width.

See **Attwood v Bovis Homes [2000] EGCS 54**

Here, land was subject to drainage rights from neighbouring farmland. The farmland was acquired by B for 1,000 homes: planning permission being subject to improvement of the existing drainage. The servient owner argued that, on analogy with rights of way, the change in character of the dominant land destroyed the easement. Held: this was not so, as long as there was no substantial increase then the easement continued to exist.

In **McAdams Homes Ltd v Robinson and another - [2004] All ER (D) 467 (Feb)**, the Court of Appeal looked at previous conflicting cases. It was held that two factors need to be established in order for the easement to continue to be enjoyed for the purpose of the land as developed, i.e:

(a) whether the development of the dominant land represented a radical change in character or a change in the identity of the land as opposed to a mere change or intensification in the use of the site; and

(b) whether use of the site as redeveloped would result in a substantial increase or alteration in the burden on the servient land.

It was also held that in this context there will be little difference between an easement arising by prescription and an implied easement.

In spite of this, many cases seem to depend on their facts in Thompson v Bee [2009] EWCA Civ 1212 the Courts held that an access way could not be used for access to three houses. It was held that the use of the words 'all purposes' in a grant does not authorise an unreasonable interference in use by the servient owner.

Obtaining an Injunction

The Supreme Court have held in the case of **Coventry v Lawrence [2014] UKSC 13** that Shelfer does not give rise to an inflexible principle. The starting point is that an injunction should be awarded and it is up to the defendant to prove that this is unreasonable. If the requirements of Shelfer are met then in the absence of other relevant circumstances an injunction will probably not be available but even this is not definite. In the present case the Courts awarded an injunction to prevent noise nuisance caused by a nearby motor rally circuit. The circuit had planning permission but this did not overrule an unlawful act. Moreover, there was no defence that the applicant had come to the nuisance even though they had built the house after the planning permission had been obtained. There was a possibility, although not on the facts, of obtaining a prescriptive right to commit a nuisance.

Stanning v Baldwin June 2019

Here, an access easement was still available when an older Mill House was demolished and replaced by a row of four terraced cottages

RECENT CASE LAW

FENCING COVENANTS

Churston Golf Club v Haddock [2019] EWCA544

Several past cases had accepted that there may be an easement to fence which arises through custom. This is an acception to the normal rule that easements cannot require positive expenditure on the part of the servient owner. In the present case the High Court had accepted that a positive covenant to maintain boundary walls and fences forever hereafter could constitute an easement. The Court of Appeal have reversed this decision. It could not be an easement as it referred to the right being a positive covenant. The Courts left open the question as to whether there may be a general easement to fence.

ADVERSE POSSESSION

Thorpe v Frank [2019] EWCA 150

To claim adverse possession then there must be a factual possession and an intention to possess. Fencing is clear evidence of factual possession but not essential. Here the Court of Appeal accepted that paving a piece of neighbouring land could give rise to adverse possession where due to the layout of the land and the existence of restrictive covenants fencing was inappropriate.

STAMP DUTY LAND TAX AND THE DEFINITION OF A DWELLING

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.

ELECTRONIC COMMUNICATIONS CODE

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

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

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

1. Is the company a licensed operator?

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

2. What kind of property is involved?

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

3. Are you the occupier?

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

4. Are consents required?

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

5. Does the agreement allow for sharing between networks?

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

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

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

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

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

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

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

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

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

12. What other health and safety issues are there?

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

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

    This is really a development of the above question.

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

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

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

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

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

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

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

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

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

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

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

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

THE DIGITAL ECONOMY ACT 2017

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

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

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

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

The code makes clear that the Landlord and Tenant Act 1954 will not apply to the relevant equipment. Terminating no earlier than the end of the agreement, the land owner may serve at least 18 months notice to leave. If this is counter noticed then the land owner must apply to courts and show that there has either been persistent rent arrears, breach of other terms of the agreements, or that they have no intention to demolish and reconstruct the site.

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

The provisions came into force on 28th December 2017.

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

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

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. Paragaph 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])

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]).

GROUND RENT ISSUES

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

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

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

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

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

General Points

The CML guidance states the following:

- "Given that lenders must consider both affordability of the borrower, and the sustainability of the value of the property, lease terms which involve obligations for future payment, such as ground rents, are more likely to be considered acceptable for lending purposes if they are set at levels that will not materially change mortgage affordability in the future, or impact on the value of the property; and that the lease length is suitably long (i.e. is granted for hundreds, rather than tens of years). ·

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

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

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

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

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

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

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

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

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

- The ground rent review formula (if not a fixed figure). Professional advisers should take into consideration: o The CML Lenders' Handbook at s 5.14.9, which provides that lenders will accept a periodic increase in ground rent, provided that the amount of the increased ground rent is fixed or can be readily established and is reasonable. Where the formula is one which uses increases in line with an index, whether the index is a recognised UK index and is appropriate and/or acceptable to them. Some lenders may also expect a cap on the maximum ground rent amount, to guard against the ground rent reaching an unreasonably high sum, which could impact on the property's value, the continued affordability of the mortgage and the future saleability of the property. Some lenders may be concerned to see the use of compounding formulas, or the use of minimum increases, in conjunction with an index-linked formula. Where the formula does not link with a recognised index, and instead uses a multiplier (e.g. doubles) at set intervals, the frequency of the rent review intervals. There is no single industry view on a minimum acceptable frequency, as it may depend on other factors such as the initial amount of the ground rent, and whether there is a cap on the number of times the rent is reviewed. ·

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

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

- banning newbuild leasehold houses, with some exceptions

- Banning increases of ground rent at lease than 21 year intervals

- Preventing ground rents of more than £250 per annum giving rise to assured tenancies

- Allowing tenants of leasehold houses to have the same rights as those in flats to question the reasonableness of administration charges.

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

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

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

Legislation will be introduced for new build properties only:

- Banning leasehold houses, save in exceptional circumstances, e.g. shared ownership
- All new long leasehold dwellings to be at a peppercorn rent
- Allowing those in leasehold houses to question the reasonableness of administration charges as well as service charges in the same manner as currently available for flats.
- Allowing freeholders to question the reasonableness of service charges as currently available for leaseholds. The White paper refers the service charge but presumably means such things as estate rentcharges
- Speeding up the process of leasehold extensions and enfranchisement

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

Mortgage Instructions

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

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

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

- If the lessor is a Management Company and all the leaseholders are obliged to be members so there is no merit in paying themselves a ground rent. Check that there are adequate provisions for repairs, maintenance, insurance, etc and an adequate maintenance charge.
- If the lessor covenants do not require any positive action, e.g. in the case of maisonettes.
- If the lessor is the Local Authority.

- If the lessor is a long established shed company and adequate repairing and other arrangements together with a maintenance charge are contained in the lease.
- If the lessor is a Housing Association or Local Authority under shared ownership arrangements.
- The lease has been extended under the Leasehold Reform Housing and Urban Development Act 1993 (as amended) which gives an additional 90 years at a peppercorn ground rent.
- Escalating ground rents are acceptable provided the amounts and terms are clearly stated and they comply with the following requirements

RPI linked Ground rents

- Ground rent is indexed to RPI no more frequently than every 5 years
- Ground rent up to 0.1% of the current market value is acceptable.
- We may accept Ground rent up to 0.2% of the current market value subject to review.

Doubling ground rents:

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

Leasehold Houses

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

HIGHER GROUND RENTS

Be careful where the ground rent exceeds £250 per annum or £1,000 per annum in Greater London. Recently many mortgage companies have refused to accept this. This will also be a problem if the ground rent can double beyond these amounts. It only applies to leases created from 15 January 1989 onwards but this would include lease extensions which constitute a surrender and re-grant.

For new leases you may require a term whereby the ground rent does not increase so as to create an assured tenancy. Also, there may be provision whereby the Landlord and their successors will notify any mortgage company before they commence possession proceedings, as in shared ownership leases. Note that if such a provision is to be included in a Help to Buy newbuild then the consent of Homes England must be obtained as otherwise any additions to the mortgage advance will be a breach of the Help to Buy scheme.

Note also that any forfeiture provisions in an assured tenancy are void. There will be no relief from forefeiture. Insurance policies are framed in terms of a forefeiture underground 8 of the Housing Act 1988. This is incorrect.

Part 1 of the Landlord and Tenant Act 1987 gives qualifying tenants in blocks of flats a right of first refusal if the landlord is going through a relevant disposal such as a sale of the reversion. It applies when 50% of the flats are held by qualifying tenants which are defined as tenants with a lease of more than 21 years duration and protected tenants under the Rent Act 1977. Assured tenants are excluded and if the ground rent is more than £250 per annum this valuable right is lost.

Assured tenancies require a tenant to occupy as their only or principal home. If the premises are let out the problem does not arise.

When the Rent in Homes (Wales) Act 2016 comes into force in Wales then ground 8 will no longer apply and rent arrears will be discretionary as a grounds for possession. Inadvertently this will solve the problem in Wales.

ASSURED TENANCIES

On or after 15 January 1989, security is provided by the **Housing Act 1988**. Security will exist in favour of an assured tenant, i.e. under S.1:

(a) a tenant of a dwelling house let as a separate dwelling (as with the Rent Act 1977 above);

Miller v Eyo [1999] 31 HLR 306

If the landlord wishes to move into occupation and share with the tenant, the lease must contain a clear provision to this effect.

To be let as a separate dwelling, cooking, eating and sleeping must be carried on in the premises. **Uratemp v Collins [2001] IEGLR 156** recognised that a hotel room which where there was no cleaning provided, might give rise to an assured tenancy. It is important that hoteliers realise this fact. If the premises constitute a persons principal home, even though cooking facilities are not provided, there will be an assured tenancy.

See also **Adam v Akram (2002), Times 19th November** – where a tenant shared a kitchen and bathroom with the landlord he still had security of tenure.

and

(b) let to an individual(s); (i.e. not a company let); and

(c) let as their only or principal home. See **Crawley Borough Council v Sawyer [1988] 20 HLR98**. Premises might remain an only or principal home even after a substantial absence. The best course of action would be to serve a notice seeking possession, if the lease allows this, then service might be at the last known address under **S.196 Law of Property Act 1925: Chesterfield Borough Council v Crossley (1998) 24 April, CA.**

See also **Blunden v Frogmore (2002) 21EG85** – service is covered by the terms of the lease.

Again, there are certain exclusions, in **Schedule 1**, e.g**.**

(i) holiday lets;

(ii) student accommodation let by a higher education establishment;

(iii) resident landlords - however, the landlord must be resident as his only or principal home. This may prove more difficult to demonstrate than residence under the **Rent Act 1977.**

Possession proceedings

An assured tenancy can only be brought to an end by means of a court order: **S.7**. If the tenancy terminates contractually (e.g. by a break clause or effluxion of time) then **S.5** operates to create a statutory periodic tenancy.

A preliminary to possession will be service of a **S.8 notice** seeking possession which must be in prescribed form and state which grounds are to be relied upon (during any fixed term, only grounds 2,8,10-15 and 17 may be used).

Consider e.g. **Mountain v Hastings C19931 24 HLR 427, CA**

The tenant was 8 months in arrears of rent. The landlord sought possession on ground 8 - defined rent arrears. When issuing proceedings under **s.8 HA 1988** the landlord referred to ground 8 and wrote "At least three months rent is unpaid". Later, under the heading "particulars", he stated the monthly rent and how much was owed. Held: this was a substantial deviation from the prescribed form in that the tenant was not made aware of what she needed to do i.e. repay the arrears prior to the hearing. The notice was void.

Torridge District Council v Jones [1985] 18 HLR 107

Although a public sector secure tenancy case, the principle remains the same. Here the notice stated that "the reason for taking these proceedings are non-payment of rent ". This was an insufficient notice.

South Buckinghamshire District Council v Francis (1985) 11 CL 152

Similarly "Various acts of nuisance" as a ground did not amount to a sufficient notice.

The Grounds for Possession

The court may award possession if grounds are shown. Again, some grounds are discretionary, and depend on reasonableness. Other grounds are mandatory.

Discretionary Grounds

The major discretionary grounds are:

Ground 9: suitable alternative accommodation

Ground 10: some rent arrears

Ground 11: persistent delay in paying rent;

Ground 12: breach of some other contractual term;

Ground 13: deterioration of the dwelling

Ground 14: nuisance of annoyance

Mandatory Grounds

Grounds 1 to 5 require written notice in advance of the tenancy agreement, unless the court dispenses with the need.

It seems that the courts are readily willing to dispense with notice as being just and equitable.

Boyle v Verrall [1997] 04EG145

It was just and equitable to dispense with notice where the landlord had failed to serve an **S.20** notice of an assured shorthold tenancy.

Mustafa v Ruddock [1998] 30HLR495, CA

The need for a notice was dispensed with as the landlord's managing agent had been negligent towards him.

Hegab v Shamash [1998] 17 March, CA

It was not just and equitable to dispense with notice where the landlord had illegally evicted the tenant in the past and had not yet paid the tenant's costs.

Ground 1: premises required by a previous landlord/occupier. Or a landlord now wishes to occupy as a residence and he or a predecessor did not buy subject to a sitting tenant

Ground 2: mortgage company requires possession

Ground 3: out of season lets which have been used as holiday accommodation during the previous 12 months

Ground 4: student accommodation out of term time

Ground 7 allows possession against a successor (other than a spouse or cohabitant). To be used, proceedings must begin within 12 months of the landlord hearing of the tenants death. In **Osada v Shepping [2000] Times, March 23rd** , this was held to mean that court proceedings must begin within 12 months. Where a **S.8 notice** had been served as a preliminary to court action within this time, this was not enough.

Ground 8: defined rent arrears of two months or, where rent is paid weekly or fortnightly, 8 weeks. This must exist at both the date the S.8 notice is served and the date of the court hearing. Set off and lack of a S.48 notice may be defences available to the tenant.

Note: If the rent is payable yearly at least three months rent must be three months in arrears.

LEASEHOLD EXTENSIONS

The Leasehold Reform Act 1993 allows tenants of flats to either collectively enfranchise or individually extend their term for 90 years. Tenants of houses have similar rights to enfranchise or extend under their Leasehold Reform Act 1967. A house is anything which may be reasonably so called.

Jewelcraft v Pressland [2015] EWCA Civ 1111

The Leasehold Reform Act 1967 allows a tenant to enfranchise a house and purchase the freehold. In **Spurgeon v Tandon Trustees [1982] AC 755** and **Day Estate v Hosebay Ltd (2010)** the House of Lords and Supreme Court have held that the legislation applies if accommodation can reasonably be described as a house and this will apply if a material part of premises is designed or adapted for residential purposes at the relevant date. In these cases there was a common staircase to the residential unit. This constituted a house.

In the current case, there had originally been a common staircase but at a later stage this had been blocked and a separate access provided at the back. It was still a house.

The need to extend the term

Mortgage companies will not lend when the term falls below a certain level which will be stated in Part II of the CML Handbook. It is also much cheaper to extend the term before it has 80 years or less left to run as marriage value is not payable.

Sportelli v Cadogan Estates [2008] UKHL 71

If a tenant wishes to extend the term of 90 years, they will have to pay landlord's reasonable costs, a capitalisation of the ground rent and the landlord's share (50%) of marriage value. The latter will come into existence when there is 80 years or less left of the term. House of Lords - This is a technical valuation case but its consequences are that the more expensive flats will cost less to extend the term whereas the majority of flats will cost more. As a consequence most mortgage companies are requiring a longer term before they will give a mortgage on a leasehold flat. The case was confirmed by the House of Lords in December 2008.

Note: Make sure you remind the client, when closing the file, that if they are bound for the remainder of a 99 year term they should extend it as soon as possible. It is possible for the assignor to commence the process of leasehold extension and assign the benefits to the purchaser.

Note: An idea of the cost of extending the lease may be given by entering the relevant information about rent, location and duration in the Leasehold Advisory Service website.

Ground Rent

On a lease extension the rent will be a peppercorn. If the landlord tries to voluntarily extend the term not using the act they will require a comparatively high ground rent. Notice under the Act must be given to avoid this.

Arnold v Britton [2015] UKSC 36 here 99 year leases of holiday chalets required a service charge to be paid based on the work which was done on the premises plus a yearly sum of £90 which rose by 10% compound interest each year. The consequence of this was that by 2072 the liability would be £554,000 per annum. The Supreme Court confirmed that as this was the clear meaning of the provision they would not be prepared to re-write it. This case may remind some people of the Blue Dolphin litigation in the early 1990s whereby some solicitors were held liable for not noticing compound interest in commercial lease rent review clauses.

Stamp Duty Land Tax

SDLT will be payable subject to normal provisions on a lease extension or enfranchisement. HMRC consider that the additional dwelling surcharge will apply where appropriate on consideration of £40,000 or more. As of 22nd November 2017 no SDLT will be payable in these circumstances if the premises was the main residence for the previous 3 years and will continue to be a main residence after the extension.

Things to Note

In flats marriage value becomes payable when there are 80 or less years left on the lease. Clients should be told of the need to extend the term well before the 80 year mark. There is a statutory right to extend once the tenant has held the lease for 2 years. Otherwise the seller can start to extend the lease and assign the benefit of the process to the buyer.

If there is an enfranchisement of a leasehold house where the lease was created from 1 April 1990 onwards then marriage value is always payable regardless of the term.

Most extensions are done voluntarily and not using the Acts. The clients will be told that this will be cheaper as under the legislation a valuer is not needed but is highly desirable and costs and possible Tribunal proceedings will add to the expense. Warn the clients if the landlord intends to impose ground rents, particularly if they escalate or exceed £250 per annum as under the legislation the extension will be at a peppercorn.

The landlord can require to the tenant to pay a deposit of either £250 or 10% of the offer price whichever is the greater. Where the cost of extension is high, make sure that the tenant has the money available.

ESTATES RENTCHARGES

ENFORCEABILITY OF POSITIVE COVENANTS

1. Positive Covenants and Restrictions

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

Direct covenants and restrictions

Here each new purchaser enters into a direct covenant with the original seller or their successor. They are therefore contractually bound. A restriction should be placed on the register (in registered land) to the extent that no disposition is to be registered unless the transferee produces to the Land Registry a deed of covenant in that form.

Stamp Duty Land Tax

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

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

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

Fencing Covenants

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

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

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

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

3. Estate Rentcharges

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

Rentcharges Act 1977 defines a rent charge as a fixed sum or periodic payment issuing out of or charged on freehold land. Even though called a service charge or maintenance charge it will constitute an estate rentcharge. To bind third parties in registered land the charge should be registered as a notice.

Rentcharges Act 1977 s2

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

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

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

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

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

(c) which is an estate rentcharge;

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

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

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

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

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

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

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

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

The estate rentcharge was still reasonable even though it referred to maintenance of the estate and a private road that the property owner would never use. It seems to be very difficult to question apportionments of rent charges.

Extinguishment of Rentcharges

Fixed sum rentcharges can be extinguished under s8-10 of the Rentcharges Act 1977. This is done by application to the Department of Housing, Communities and Local Government. There is a statutory formula as to the amount which is usually around 16 times the annual rentcharge. A certificate of redemption will be obtained which can be used to notify HMLR.

This can only be done if the rent owner is known. Otherwise, insurance may be appropriate. However, make sure that the policy covers not just debt but other remedies (see later).

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

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

The Problem

S1 of the Rentcharges Act 1977 provides that a rentcharge created since implementation is void if it has any profit elements. The rentcharge must collect purely from maintenance. However, administration charges can be expensive and clients should be warned of this. Unlike leasehold flats and administration charges there is no statutory ability to question the reasonableness of administration charges. It must be made clear in the provisions that charges must be reasonable. Even then application through the Courts, and not Tribunals, to question reasonableness may be difficult.

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

Note: **Roberts v Lawton [2016] UKUT 396 (TCC)** s121 (4) of the Law and Property Act 1925 allows the holder of a rentcharge to appoint trustees who will be tenants under a 99 year lease if a rentcharge is not paid within 40 days of being due. This will be the case whether the charge is formally demanded or not. Here the arrears amounted to between £6 and £15. This was held to be a lease which can be registered at HMLR. The lease will continue even if the arrears are paid. In the present case, the holder of the rentcharge used this fact to hold home owners to a ransom in order for them to pay administration charges. S121 (4) will apply equally to estate rentcharges. The provision can be excluded but only in the document that creates the rentcharge.

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

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

Some estate rentcharges include an express right of entry but the effect of s121 (3) is to have a statutory right anyway. It is suggested that there should be a clause whereby the mortgagee is given at least 28 days notice by the rent owner prior to

proceedings being brought. This may cause problems with newbuild Help to Buys for reasons we have seen in relation to ground rents.

Some mortgagees e.g. Barclays are requiring such a mortgagee protection clause and exclusion of s121, especially where the residents are not members of the management company. Nationwide now require a Deed of Variation if **Section 121** if not excluded.

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

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

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

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

5. Long Leases

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

Note: **Woodall v Clifton (1909)** Options to purchase, as opposed to options to renew the lease, will not pass with the land. If the lease was created from 1 January 1996 onwards, then all covenants will pass unless expressed to be personal under Sections 2 and 3 of the Landlord and Tenant (Covenants) Act 1995. On enlargement of a long lease without a rent and without forfeiture provisions, positive covenants will pass onto the freeholds under Section 153 of the Law of Property Act 1925.

6. Commonhold

Under Part 1 of the Commonhold and Leasehold Reform Act 2002, a Commonhold Association may be set up, and the various freeholders will become members. They will agree to be bound by positive and restrictive covenants via the Memorandum and Articles of Association. Since September 2004, very few commonholds have been set up, mainly as there is no right to sublet in relation to a dwelling for more than seven years and thus affordable housing cannot

be built into the developments via shared ownership leases. Moreover, as the mortgage companies are concerned at the Commonhold Association being struck off, thus giving rise to a series of flying freeholds, many are reluctant to give mortgages.

If there is an enfranchisement of a leasehold house where the lease was created from 1 April 1990 onwards then marriage value is always payable regardless of the term.

Most extensions are done voluntarily and not using the Acts. The clients will be told that this will be cheaper as under the legislation a valuer is not needed but is highly desirable and costs and possible Tribunal proceedings will add to the expense. Warn the clients if the landlord intends to impose ground rents, particularly if they escalate or exceed £250 per annum as under the legislation the extension will be at a peppercorn.

The landlord can require to the tenant to pay a deposit of either £250 or 10% of the offer price whichever is the greater. Where the cost of extension is high, make sure that the tenant has the money available.

Published March 2019

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