



N A B A R R O

CLARITY MATTERS

Real Estate update

The Budget: A “tough but fair” result? We’ll have to wait and see... [page 2](#)

Development: Jumping the hurdles [page 5](#)

Compulsory acquisition: Irrelevant off-site developments [page 8](#)

Practical Completion: A guide for developers
[page 10](#)

Managing voids: Guidance for landlords [page 13](#)

Surrender: How an improperly surrendered lease can allow a buyer to escape [page 16](#)

Ask a question

If you have any questions please contact Marie Scott, Partner
T +44 (0)20 7524 6783
m.scott@nabarro.com

The Real Estate team

To find out more about the team, and our capabilities [click here](#)

Quarter Day Midsummer Edition

Our latest Real Estate Dispute Resolutions update [click here](#)

The Budget: A “tough but fair” result? We’ll have to wait and see...

Summary and implications

Just five days before England suffered its worst ever World Cup defeat, Chancellor George Osborne delivered his first budget. Who are the winners and who are the losers? Despite a couple of significant changes to tax rates, many areas will be addressed by the coalition later. For the property sector in particular there’s still a lot to play for!

We offer our post match analysis...

Stock dividends for REITs

The autumn Finance Bill will introduce legislation that will allow stock dividends to be counted as property income distributions for the purposes of the requirement for a REIT to distribute 90 per cent its net income profits.

It was also stated that income tax will have to be accounted for when a property income distribution is made by way of a stock dividend. These changes will only apply to distributions made on or after the date of the autumn Bill.

In relation to REITs, no major shift from the March 2010 announcement, but it appears that this remains a positive step for the property sector. REITs will soon be able to pay dividends in shares and so conserve cash. It is hoped that presenting REITs with such opportunities will increase investment.

1–0 to the taxpayer.

VAT change of standard rate: anti-forstalling legislation

The VAT increase is likely to be an unpopular announcement amongst retailers. With a large number of shops still standing empty, landlords could be forced to decrease rents. This could have an impact on the rate of further development and investment in the property sector.

Legislation will be introduced in the Finance Bill 2010 to seek to prevent arrangements that are set up in order to apply the 17.5 per cent VAT rate to goods or services to be delivered on or after 4 January 2011. In certain circumstances, a supplementary charge to VAT of 2.5 per cent will be due on supplies where the 17.5 per cent rate has been declared.

The measure will only affect businesses which either:

- a) receive a prepayment or issue an advance VAT invoice before 4 January 2011 for a supply of goods to be delivered or services to be performed on or after that date; or

Ask a question

If you have any questions please contact
Simon Rose, Partner
T +44 (0)20 700 6823
s.rose@nabarro.com

The Tax team

To find out more about the team, and our capabilities [click here](#)

- b) make supplies of rights or options to receive goods or services before 4 January 2011, where the goods or services are supplied free or at a discount and will be delivered or performed on or after that date.

Broadly, this charge will apply where the customer cannot recover all of the VAT and one of the following conditions is met:

- the supplier and the customer are connected;
- the value of the supply exceeds £100,000, unless prepayment or the issue of an advance VAT invoice is normal commercial practice;
- the supplier or someone connected to the supplier funds a prepayment for the goods or services; or
- an advance VAT invoice is issued where payment is not due in full within six months.

If such a charge is made, it will not become due until 4 January 2011 and will be chargeable in addition to standard rate VAT on the supply at 17.5 per cent.

The supplementary charge will not apply to certain supplies. For example, real property lease premiums paid on grant prior to 4 January 2011 relating to a lease term extending beyond that date will not be caught.

We do not expect this to catch landlords as the supplementary charge will not apply to supplies consisting of the lease, hire or rent of any asset in normal commercial practice, provided the VAT invoice only covers a period of up to one year. Therefore, invoices for rental income for the December quarter should still be charged at 17.5 per cent even though it will cover a period after 4 January 2011.

1-1.

Anti-avoidance

The Government is continuing to consult on anti-avoidance and will provide more detailed guidance later. From a property perspective, all we know at the moment is that they are considering a general anti-avoidance rule (but there is no mention of which taxes this would apply to) and whether further changes are required to the SDLT rules on high value property transactions.

Probably 2-1 to HMRC.

SDLT

The Government is set to examine whether the SDLT rules for high value residential property transactions should be reviewed in order to deal with avoidance in this area. The new Government have also stated that it will review first-time buyer relief that affects residential properties where the consideration does not exceed £250,000. More details will be provided once the consultation has taken place.

In relation to SDLT overpayment claims, the Government has announced that it will introduce legislation dealing with this at a later date.

The Chancellor also confirmed what we already knew from the March 2010 budget; new SDLT rate of five per cent for purchases of residential property where the consideration exceeds £1m. This is planned to take effect on 6 April 2011. All other SDLT rates and thresholds are the same as before.

A new SDLT rate of five per cent for purchases of residential property where the consideration exceeds £1m

Capital gains

Capital Gains Tax (CGT) has been raised to 28 per cent but the coalition has kept things simple by not changing taper or indexation relief. Basic rate taxpayers will continue to pay an 18 per cent rate on their gains. The 10 per cent CGT rate for entrepreneurial business activities will be extended from the first £2m to the first £5m.

3-1 to HMRC.

Capital allowances

From April 2012 the rate of capital allowances on the general pool of plant and machinery will be reduced from 20 per cent to 18 per cent, and the rate of allowance on the special rate pool of plant and machinery will be reduced from 10 per cent to eight per cent.

The BPF describe this reduction as *"not welcome, but...not unexpected"* and the general feeling is that it could have been much worse.

4-1 to HMRC

A lot like playing Germany then!

Development: Jumping the hurdles

Summary and implications

A major casualty of the downturn has been the lack of speculative development resulting in a predicted shortage of new space coming on to the market around 2014. In certain locations it may be even earlier.

Development projects have a substantial lead-in period so developers will need to gear up now for the upturn to fill that gap.

Funding is still a major hurdle for many developers, but what about some of the other hurdles developers may face? We consider some here.

Development issues

Title matters

Adverse title matters can cause problems with funders as well as potentially frustrate a possession claim against a protected business tenant. Indemnity insurance should be considered first since insurers will usually only provide insurance if third parties have not been contacted about potential breaches. Developers can then consider other options including approaching third parties for release or variation of rights, or in restrictive covenant cases applying to the Lands Tribunal for modification or discharge.

Electronic communications apparatus

The telecoms industry has grown substantially over the last decade. Telecoms agreements are governed by the Telecommunications Act 1984 (as amended by the Communications Act 2003) which can have unforeseen consequences for land owners wanting possession for development.

Savvy land owners seek to contract out of the Act in circumstances where redevelopment may occur. For those who have not, a developer will need to use the procedure set out in the Act to obtain possession, which may require a court order for the removal of the equipment. A court order will only be granted if removal of the apparatus will not substantially interfere with any service provided by the operator's system. This can prove timely and costly, so developers should beware of short-term agreements unless they contain adequate protection. Developers should also factor in dealing with telecoms issues in their vacant possession timetable.

Environmental

Site remediation can potentially be significant. Sufficient contingency for environmental liability should be included in any development appraisal.

Ask a question

If you have any questions please contact:

Julie Gattegno, Partner
T +44 (0)20 7524 6302
j.gattegno@nabarro.com

Jennifer Rickard, Partner
T +44 (0)20 7524 6330
j.rickard@nabarro.com

Faisal Nisar, Associate
T +44 (0)20 7524 6543
f.nisar@nabarro.com

The Real Estate Dispute Resolution team

To find out more about the team, and our capabilities [click here](#)

Developers with existing brownfield sites where development has been stalled following the downturn may need to consider whether the delay has increased clean-up costs.

In the recent *Sandridge* case¹ a residential developer of a site previously used for chemical production was responsible for contamination of a water supply which occurred when the site was left dormant following some initial preparatory works which led to the contamination. The developer was held to have **caused** the contamination as a result of both its inaction and action during the development.

Rights of light

Rights of light can cause a considerable headache for developers. Understanding what rights neighbouring properties to the development site enjoy, and whether the proposed development will interfere with any rights is essential to any redevelopment strategy.

At an early stage developers should consider:

- all title documents to ascertain what rights or agreements exist;
- the rights of freehold and leasehold owners of adjoining buildings;
- service of light obstruction notices where appropriate to stop time running for acquisition of a prescriptive right to light;
- employing a rights of light consultant to advise on the proposed scheme; and
- pursuing negotiations with adjoining owners.

Strategy and timing for obtaining Vacant Possession

Timing for obtaining vacant possession (VP) of redevelopment sites is crucial to any scheme. Delay can have major cost implications and impact on the scheme's profitability.

Lead-in time will always depend on the size and complexity of the site. A landlord developer should prepare his redevelopment VP strategy at an early stage, (ideally two to three years before it would like vacant possession) factoring in:

- the termination date of the tenancy or tenancies;
- whether the works contemplated fall within ground (f) (see box to the right);
- the length of time to obtain a termination order from the court; and
- whether it can prove at the trial that it has the necessary intent under ground (f) to carry out the development.

Competent landlord

It is the **landlord** who must have the necessary intention and ability to carry out the proposed works within ground (f) but that does not mean the landlord must do the work himself. He can carry out the works through building contractors, servants or agents. He can also carry out the works under an agreement for a building lease as long as it is clear that the landlord retains control over the works.²

¹ *Crest Nicholson Residential Ltd (R on the application of) v Secretary of State for Environment Food & Rural Affairs* [2010] EWHC 561 (Admin)

Acquisition of a right to light

By:

- express grant or reservation;
- implied grant under section 62 Law of Property Act 1925 and *Wheeldon v Burrows* [1879];
- by prescription under:
 - (a) common law;
 - (b) lost modern grant; and/or
 - (c) Prescription Act 1832.

Paragraph (f) section 30(1) Landlord and Tenant Act 1954

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

² *Gilmour Caterers v St Bartholomew's Governors Hospital* [1956]

Service of notices under the 1954 Act

The timing of service of the notice or notices should always be carefully considered. Timing will depend on how advanced the landlord's plans are and what hurdles it will have to overcome before the case reaches trial, when the landlord will have to prove it has the necessary intention and ability to carry out its intended scheme on or shortly after termination of the tenancy. Getting it wrong could lead to lengthy delays in obtaining possession.

Other grounds of opposition

A landlord can rely on any of the grounds of opposition under section 30(1) of the Act if more than one ground is available to him, for example one of the tenant default grounds or where the landlord can offer suitable alternative accommodation. If the landlord succeeds on one of the non-compensatory grounds, he will not have to pay the tenant statutory compensation even if he is also relying on ground (f).

Statutory compensation

A landlord who successfully opposes the grant of a new tenancy on ground (f) alone will have to pay the tenant statutory compensation at the appropriate rate.

Landlords should also be aware of exposure to a claim for compensation under section 37A of the Act for misrepresentation or concealment of material facts. In a recent case³ the landlord served a section 25 notice opposing on ground (f) under cover of a letter confirming its intention to redevelop following discussions with the tenant about its plans. The tenant took a lease of other premises at a higher rent based on the landlord's representations and later discovered the landlord had postponed its redevelopment scheme. The court concluded that the landlord's letter amounted to a continuing representation. When the landlord failed to update the tenant of his change of position, this amounted to a misrepresentation or concealment within section 37A. The landlord was liable to pay compensation based on the difference in the rent the tenant would have paid for its former premises and the rent payable for its new premises, with a discount for early receipt.

3 Inclusive Technology v Williamson [2009]

Section 37(A) of the Landlord and Tenant Act

Compensation for possession obtained by misrepresentation:

1. Where the court:

- (a) makes an order for the termination of the current tenancy but does not make an order for the grant of a new tenancy; or
- (b) refuses an order for the grant of a new tenancy, and it is subsequently made to appear to the court that the order was obtained, or the court was induced to refuse the grant, by misrepresentation or the concealment of material facts, the court may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of the order or refusal.

2. Where:

- (a) the tenant has quit the holding (i) after making but withdrawing an application under section 24(1) of this Act; or (ii) without making such an application; and
- (b) it is made to appear to the court that he did so by reason of misrepresentation or the concealment of material facts,

the court may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of quitting the holding.

Compulsory acquisition: Irrelevant off-site developments

Summary and implications

Developers and public authorities should consider what can be learnt from the recent Supreme Court (formerly the House of Lords) decision in *R (Sainsbury's) v Wolverhampton City Council* (May 2010):*

- The proposed reasons for compulsorily acquiring land should be carefully scrutinised and justified. In *R v Wolverhampton City Council*, the compulsory purchase order was quashed, but could have been upheld if it had been justified in a different manner.
- Compulsory acquisition issues need to be considered very early on to feed into the overall planning strategy.
- Sometimes the development of a compulsorily acquired site has to be cross-subsidised to be viable. There is nothing to prevent that practice continuing.

Background

Both Sainsbury's and Tesco own part of the main development site and obtained planning permissions for competing schemes. A compulsory purchase order is required for the carrying out of either scheme.

Tesco also controls and proposes to redevelop a second nearby site as desired by the Council containing listed buildings in a poor state. The development of this second site is not viable unless the Council select Tesco's scheme for the main site (necessitating a compulsory purchase order) enabling it to "cross-subsidise" the redevelopment of the second site.

The Council decided to make a compulsory purchase order under section 226(1)(a) of the Town and Country Planning Act to acquire Sainsbury's interest in the main site. This was to facilitate Tesco's redevelopment of that main site (in preference to Sainsbury's scheme). The Council decided that Tesco's scheme for the main site offered a decisive advantage by enabling the redevelopment of the second site and thus would further contribute to the well-being of the area.

Court decision

The Court held that section 226(1)(a) did not authorise the Council in making a compulsory purchase order for the main site to take into account Tesco's commitment to secure the development of the second site (located outside the compulsory acquisition site) to achieve further well-being benefits for the area.

Before off-site benefits are relevant, there has to be a real, rather than a fanciful or remote, connection between the off-site benefits and the

Ask a question

If you have any questions please contact Rob Bruce, Senior Associate
T +44 (0)20 7524 6493
r.bruce@nabarro.com

The Planning team

To find out more about the team, and our capabilities [click here](#)

*To read the full Court decision [click here](#)

development for which the compulsory acquisition is made. A strict approach is required because of the serious invasion of property rights.

There was only a connection in the sense that either

- the Council was being tempted to facilitate the development of the main site because it wanted another development on the second site; or
- Tesco was being tempted to undertake an uncommercial development on the second site to obtain the development of the main site, which it wanted.

The Council had taken into account an unlawful consideration and the compulsory purchase order was quashed.

Lessons

First, developers and public authorities need to work closely together on large scale redevelopments. The public authorities will normally have to facilitate development through compulsory acquisition. The case demonstrates the need for both to carefully scrutinise and justify very early on the proposed grounds and reasons for compulsorily acquiring land. This should form part of the developer's initial planning strategy. If the compulsory acquisition in *R v Wolverhampton City Council* had been justified in a different manner, it could have been upheld.

Second, the viability of developing a compulsorily acquired site can be a highly relevant factor and sometimes that development may have to be cross-subsidised through nearby commercial or residential enabling development. For example, this often occurs in relation to large sports stadiums. There is nothing in *R v Wolverhampton City Council* preventing this practice continuing.

The decision in *R v Wolverhampton City Council* does however prevent public authorities, when making a compulsory purchase order, taking account of a cross-subsidy from a compulsory purchase site to a second otherwise unconnected site. Any well-being benefit derived from that type of cross-subsidy is to be construed as an irrelevant off-site benefit.

Third, principles applying to when off-site benefits are relevant considerations for planning applications also apply to compulsory purchase orders, but a stricter application of the principles is required.

Compulsory acquisition for planning purposes

Section 226 is widely drafted and thus often provides the power of choice for compulsory land acquisition for large scale developments and regeneration schemes.

Under section 226, a Council can compulsorily acquire land:

- (a) if it thinks the acquisition will facilitate a development, redevelopment or improvement on or in relation to the land, which is likely to contribute to achieving the promotion or improvement of economic, social or environmental well-being; or
- (b) required for a purpose which is necessary to achieve for the proper planning of an area.

Practical Completion: A guide for developers

Summary and implications

When the development and property markets are buoyant, the interests of developers, tenants and contractors generally align in wanting to see developments completed and handed over as soon as possible.

In the current market their interests do not align. Tenants may be trying to stall handover of new buildings to delay starting to pay rent, contractors will (as always) be keen to hand over to avoid triggering penalties for late completion, and developers will be divided between those who have pre-lets in place and are keen to start receiving rent flow, and those who do not and would prefer to have the contractor still in control of the site (with corresponding insurance, security and other obligations) and paying the developer damages due to late completion.

In the context of these competing pressures, having a clear understanding of the requirements of practical completion of works is central to avoiding disputes.

It is therefore important for developers to understand:

- what "practical completion" is; and
- what flows from "practical completion".

The term "practical completion" is not defined in most building contracts, but case law indicates that there should be no outstanding works and only "trifling" defects outstanding.

What is practical completion?

The term "practical completion" is frequently used in development agreements and building contracts, yet the main standard form building contracts do not actually provide clear definitions of what the term means. It is usually left to the professional expertise and discretion of the consultant issuing the certificate. This leaves room for doubt and disputes.

Market conditions

In a busy development market where the developer is keen to move to their next project, and the occupier is keen to occupy, disagreements over practical completion are less likely. Practical completion may be accepted by all concerned on the earliest possible date, without any of those involved focusing in too much detail on what the term means or whether absolutely all criteria have been satisfied.

However, when the occupier does not want to occupy and start paying rent, it is likely to be more pedantic, and may try and use any problems

Ask a question

If you have any questions please contact Penny Moore, Partner
T +44 (0)20 7524 6217
p.moore@nabarro.com

The Construction team

To find out more about the team, and our capabilities [click here](#)

Practical completion – a term of art, no standard definition

or perceived problems surrounding practical completion as an opportunity to delay or negotiate more favourable terms. Set against this the contractor will want to hand over the works as early as possible to avoid any delay claims against it under the building contract.

The standard contracts and the case law

The standard form building contracts are, as a whole, pretty vague about what practical completion means, using phraseology such as practical completion being “when the project is complete for all practical purposes”, but that does not achieve any level of precision.

Practical completion: completed free from any patent defects other than ones to be ignored as “trifling”

Case authority is not particularly helpful either. One case authority¹ takes the view that practical completion means that there must be no apparent defects at the date of certification, but another² acknowledges that practical completion could be certified if minor “de minimis” works had not been carried out, though not if there were any patent defects.

1 *Westminster Corporation v J Jarvis & Sons Limited* (1970) 1 WLR 637

2 *HW Nevill (Sunblest) Limited v William Press & Sons Ltd* (1981) 20 BLR 78

3 *Mariner International Hotels Limited v Atlas Limited* (unreported 20 April 2007)

Some clarity, however, has been subsequently given by the courts³, which remains the most useful judicial guidance, to the effect that practical completion is a state of affairs in which the building has been completed free from any patent defects other than ones to be ignored as “trifling”.

In practice

The reality is that practical completion certificates are commonly issued with attached snagging lists of either defective matters or sometimes outstanding works, commonly landscaping. It is important to be aware that the majority of standard form building contracts do not recognise this concept, and accordingly that they do not include particular obligations on timing and arrangements for completing such snagging items. If a certificate of practical completion is issued with a snagging list attached, there should always be some exchange of letters or other agreement between the parties on the timescale for dealing with such matters.

Snagging lists: agree timetable to complete listed works

Implications of practical completion

Under most standard form building contracts issue of the certificate of practical completion cuts off the developer’s ability to claim liquidated damages for delay to the works and is the trigger for releasing the first half of any retention to the contractor. Under development agreements and agreements for leases it may also be (alone or with other issues) the trigger for the cessation of the developer’s responsibility for design and construction.

The certifier (often either the architect or the project manager) faces competing pressures. If the certifier prematurely issues the certificate, the certifier will be open to complaints by the developer whose ability to secure prompt completion of outstanding works is diluted and whose right to claim liquidated damages is curtailed. If the certifier is tardy in certification the contractor will face liquidated damages. It all boils down to the certifier’s professional expertise and judgement.

For the certifier himself there is a risk: if he wrongly issues the certificate of practical completion he may face a claim, for failure to exercise professional skill and care, from the client under the appointment or from a third party such as an occupier who is relying upon the certificate as the trigger for grant of a lease etc.

There are other consequences of practical completion:

- insurance – (commonly for new build schemes) the contractor takes out insurance in the joint names of the developer and the contractor but the building contract arrangements come to an end at practical completion, so this becomes something for the developer to deal with and pay for;
- security – the contractor's responsibility for site security will end at practical completion so the developer will need to put other arrangements in place, particularly if there is no occupier going straight into occupation;
- defects liability period – the period (usually 12 months) during which the contractor must return to site to fix defects starts to run.

Consequences:

- Insurance responsibility;
- Site security arrangements;
- Defects liability period starts.

So when should the certificate of practical completion be issued?

The test is ultimately a matter of fact for the certifier who needs to ask:

1. Has all the work under the building contract or development agreement been completed?
2. To the extent that there are any apparent defects in the works are they of a trifling nature?

If the answer to either of these questions is "no" then it is premature for the certificate to be issued.

Managing voids: Guidance for landlords

Summary and implications

Managing empty properties is still a live issue for landlords wanting to minimise their cost exposure.

Landlords will need to consider:

- the benefits of retaining an insolvent tenant;
- other parties they may be able to pursue following default;
- issues with utilities and insurers;
- empty rates;
- short-term occupation; and
- issues with pre-packs and "phoenix" companies.

Retaining an insolvent tenant

Whether a landlord can retain an insolvent tenant will depend on the form of insolvency regime being used. In liquidation, the liquidator has power to disclaim the lease ending the insolvent tenant's liability – the landlord has no control over this. In administration, the lease will only come to an end by forfeiture (with consent) or by the landlord accepting a surrender, both of which require the landlord's agreement.

In administration, by keeping the lease on foot, the landlord may be able to recover rent due and the administrator will also be responsible for utility charges incurred at the property. The landlord will also avoid taking on the rates liability.

The landlord should be cautious to avoid inadvertently accepting a surrender of the lease, by, for example accepting keys back from the administrator.

Is there anyone else to pursue?

The landlord may have the benefit of some form of guarantee (which is not usually affected by administration or liquidation) which it can pursue. This may be a direct guarantee, an authorised guarantee agreement (AGA), a rent deposit deed, or, in the case of a pre-January 1996 lease, a former tenant.

The landlord should consider whether the guarantee is worth pursuing. Where the guarantor is in the same group of companies as the tenant it may be in similar financial difficulties, making a claim uneconomic to pursue.

Also, if the landlord pursues a former tenant or guarantor under an AGA and the relevant debt is settled, the former tenant is entitled to take an overriding lease. An overriding lease is a lease on

Ask a question

If you have any questions please contact
Tanya Holt, Senior Associate
T +44 (0)20 7524 6735
t.holt@nabarro.com

A former tenant may be entitled to take an overriding lease – but does this fit with the tenant mix?

similar terms and containing similar covenants to the lease in respect of which the payment was made, and granted for a term equal to the remainder of the term of that tenancy plus three days. Is the landlord willing for that former tenant or guarantor to become its new tenant? How does this company fit with the tenant mix? Could the landlord, long term, achieve better terms going to the market?

If there are any underleases in place on the tenant's insolvency, the landlord may consider serving a notice on the undertenant requiring the undertenant to pay its rent to the landlord until the arrears are discharged.

In the case of multi-lets, the landlord may be tempted to "re-distribute" insurance and service charge costs relating to void units amongst other occupiers. However, many leases will contain a clause providing for the landlord to be responsible for any costs relating to void or unoccupied areas. The landlord will, unfortunately, bear these costs as out of pocket expenses.

Issues with utilities and insurers

A landlord with an empty property may assume a liability for gas and electricity which is continued to be supplied to the property.

The landlord's liability only arises on determination of the supply contract with the occupier. It may be that the action of the administrator or liquidator has terminated the contract.

Where an electricity supply contract has been terminated, a "deemed contract" arises between the land owner and the supply company. In this case, and without intervention by the landlord, it is for the supplier to determine the amount of power supplied and how it will be calculated. This is often charged at the suppliers' published rates, which are likely to be higher than negotiated rates. The landlord also needs to ascertain whether any enhanced capacity has been made available to the property and which is no longer required.

Landlords should think carefully before terminating any supply as reconnection fees are likely to be high – a cost which an incoming tenant is unlikely to be willing to bear. Consideration should also be given for the need to maintain a supply for fire alarms and viewings.

Building insurance policies usually require that unoccupied premises are secured, various fire prevention and other measures taken and vacancies notified to the insurers. As more property has become vacant, insurance claims have increased and landlords can expect insurers to take a harder line on compliance with the small print.

For vacant properties, insurers may take a hard line on compliance with the small print

Empty rates

Most commercial properties can claim three months of 100 per cent rates relief, with industrial and warehouse premises getting 100 per cent relief for six months. After these periods, full rates are payable.

Some landlords have found potential ways of minimising rates liabilities – these range from the extreme strategies of demolishing otherwise perfectly useable buildings or stripping out or damaging the property in order to remove it from the ratings list to the less extreme strategies of:

There are strategies available to landlords for minimising rates liabilities

- intermittent occupation (by the owner or independent third parties) involving the property being occupied for at least six weeks in order to trigger a new rate free void period;
- granting short-term lettings to charities or community amateur sports clubs (who have the benefit of ratings relief); or
- finding a legal prohibition of occupation which exempts the property from rates liability (e.g. a prohibition order under health and safety legislation).

Companies in administration and liquidation are exempt from rates liability in respect of their empty properties.

Grant a short-term tenancy

If the landlord cannot find a tenant to take the property on a typical fixed term of 10 or 15 years, it might be able to find a tenant looking for a shorter term tenancy or tenancy at will.

Landlords need to be aware that informal arrangements can result in the tenant obtaining security of tenure under the Landlord and Tenant Act 1954 (the 1954 Act) so the landlord will need to protect against this by ensuring that any short-term tenancy document is carefully drafted and it may be prudent to exclude security of tenure where possible.

"Phoenix" companies and "pre-packs"

Landlords should remain vigilant so that potential illegal assignments can be identified and considered before the landlord's rights are prejudiced.

A typical situation is where an insolvent tenant's business is purchased by its management and a new company carries on the same business in the tenant's place from the premises.

If a landlord accepts rent from a payee other than the tenant this will waive the landlord's right to forfeit the lease in respect of the unauthorised assignment of the lease from the tenant company to the new entity.

Landlords' finance departments should be instructed to be on the lookout for payments in different names or from different sources and to make sure those payments are not automatically accepted. If in doubt, it is best to put a rent stop on the rent account and review the source of payments before accepting them.

Surrender: How an improperly surrendered lease can allow a buyer to escape

Summary and implications

The High Court decision in *Weir v Area Estates** serves as an important reminder that failure to follow the correct procedure when dealing with the surrender of a lease from an insolvent tenant can have far reaching consequences on any future sale.

This article will look briefly at:

- the key implications of *Weir v Area Estates* from both a seller's and a buyer's perspective;
- what is a "special condition" in a sale contract; and
- practical points to note when dealing with the surrender of leases from insolvent tenants.

Key points to remember following *Weir*:

a) Informal surrenders:

- Informal surrenders carry risks and may affect a subsequent sale if the legal title remains alive.
- In some circumstances, such as upon the bankruptcy of the leaseholder, an informal surrender can be ineffective despite the agreement of both parties.

b) For a seller:

- If offered an informal surrender, a cautious landlord should instead deal with this by way of formal deed and ensure the title is investigated properly and the Land Registry title is updated.
- If, on a sale, you realise that there is a potential "defect" in title, such as the existence of a leasehold interest, appropriate provisions should be included to make the sale subject to any such interests i.e. to qualify any obligation to provide vacant possession.

c) For a buyer:

- A prudent buyer will always investigate title before buying to avoid any surprises. Whilst *Weir* was able to (and may have been happy to) rescind his contract and rely on the obligation of the seller to provide vacant possession (which the court decided was paramount in this case), very often contracts are drafted so that buyers take subject to anything registered against the property.

The facts

In January 2008, Mr Weir successfully bid at auction for the freehold title of a property in Hertford from the seller, paying £40,000 as a deposit.

Ask a question

If you have any questions please contact Verity Waington, Senior Associate
T +44 (0)20 7524 6257
v.waington@nabarro.com

*[2009] All ER (Dec) 189

The general conditions in the sale contract provided that the seller would sell with full title guarantee and that all matters recorded in public registers were to be treated as within the actual knowledge of the buyer.

Two special conditions provided that vacant possession would be given on completion and that a leasehold interest noted on the title had been determined by operation of law and that the buyer accepted this position and could not raise any further objection or requisition.

In fact, the leasehold title remained registered against the freehold title.

Prior to the auction, a bankruptcy petition had been presented against the leaseholder and a notice was entered on the title register of the leasehold title.

The leaseholder vacated and in August 2006 offered to surrender his lease. The freeholder purported to accept the surrender by operation of law. Subsequently a bankruptcy order was made against the leaseholder and a restriction was entered against the leasehold title.

The purported surrender was void as the trustee in bankruptcy was the only person entitled to surrender the lease

When the time came for completion in March 2008, it emerged that the leasehold interest remained noted against the freehold title. The purported surrender by operation of law had been void because only the trustee in bankruptcy had the right to surrender the lease once the petition had been presented. Mr Weir refused to complete the sale. He rescinded the contract and issued proceedings to claim the deposit back plus interest.

Decision

The court held that as the seller had not been in a position to offer clear title at the time of completion in accordance with the vacant possession special condition, this amounted to a breach of a condition, and Mr Weir was entitled to rescind the contract and recover his deposit with interest.

What is a special condition in a sale contract?

The label given to a particular term does not necessarily mean it is a “condition” in the true legal sense. The test is whether the term in question is of such importance, or so fundamental that it goes to the root of the contract, and the effect a breach would have on the innocent party at the time it happens.

If a party breaches a condition, the consequence is serious, as it not only entitles the other party to sue for specific performance and/or damages, but it also may allow that party to elect to terminate the contract, as the *Weir v Area Estates* case has highlighted.

In a contract for the sale of land (whether residential or commercial) the special conditions are those terms which are specific or special to the particular property being sold. In property transactions, special conditions are likely to include those relating to title to the property.

Practical implications

- Comply with proper procedures:
 - Always follow the correct procedure to bring property interests to an end, particularly when dealing with insolvent or bankrupt parties or companies in administration.
 - The Insolvency Act 1986 prevents individuals who are about to be made bankrupt from disposing of their interest (including by surrender) in properties without the consent of the trustee or the court.
 - Remember that regardless of what the individual parties agree, if the correct insolvency law procedure is not followed, the purported surrender or assignment could be invalid, with far reaching consequences. **Charges survive a surrender so always obtain appropriate releases from fixed and floating charges**
- Investigate title:
 - Company searches and Land Registry searches will also reveal any existing charges over the property.
 - As a charge on a property survives any surrender of a lease, a landlord (freeholder) could inadvertently become liable on the terms of a tenant's mortgage, if appropriate releases of all relevant charges (registered and/or floating) are not obtained from the charge holder prior to the surrender being completed. It may sometimes be easier to forfeit the lease. **You should always seek legal advice on this.**
 - Update the Land Registry title to ensure it reflects the correct position post surrender to avoid any situations as seen in *Weir v Area Estates* occurring.

London

Lacon House,
84 Theobald's Road,
London WC1X 8RW
T +44 (0)20 7524 6000
F +44 (0)20 7524 6524

Sheffield

1 South Quay,
Victoria Quays,
Sheffield S2 5SY
T +44 (0)114 279 4000
F +44 (0)114 278 6123

Brussels

209A Avenue Louise,
1050 Brussels, Belgium
T +32 2 626 0740
F +32 2 626 0749

Alliance firms

France

August & Debouzy
Gilles August
T +33 (0)1 45 61 51 80
www.august-debouzy.com

Germany

GSK Stockmann + Kollegen
Rainer Stockmann
T +49 (30) 20 39 07 - 0
www.gsk.de

Italy

Nunziante Magrone
Gianmatteo Nunziante
T +39 06 695181
www.nunziantemagrone.it

Nabarro LLP

Registered office: Lacon House, 84 Theobald's Road, London, WC1X 8RW.

Nabarro LLP is a limited liability partnership registered in England and Wales (registered number OC334031) and is regulated by the Solicitors Regulation Authority. A list of members of Nabarro LLP is open to inspection at the registered office. The term partner is used to refer to a member of Nabarro LLP.

Disclaimer

Detailed specialist advice should be obtained before taking or refraining from any action as a result of the comments made in this publication, which are only intended as a brief introduction to the particular subject. This information is correct on the date of publication. Nabarro LLP is not responsible for the operation or content of any external website or hyperlink referred to in this publication.

© Nabarro LLP 2010