MAYER·BROWN

Spring 2014

Real Estate

Legal and regulatory update

Welcome

Welcome to the Spring 2014 issue of the London real estate group's legal and regulatory update.

If you have any questions about any of the items discussed in this issue, please do not hesitate to contact your usual Mayer Brown contact or one of our real estate partners listed below.

Upcoming real estate events

PUBLIC PROCUREMENT SEMINAR

Leading procurement barrister, Michael Bowsher QC of Monkton Chambers and Julian Ellison, a partner in our Brussels office, will be hosting a presentation in Mayer Brown's London office on **Tuesday 13 May 2014** from 6.15pm to 7.30pm regarding the new public procurement regime, adopted recently by the EU.

If you are interested in attending, please contact Suzanne Ely at sely@mayerbrown.com / + 44 20 3130 8416 for further information.

Training

We are happy to organise training for our client teams, all of which can be tailored to your specific needs. If this would be of interest, please contact Philippa Thomas at pthomas@mayerbrown.com / + 44 20 3130 3742 for further information.

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REITs - a further boost for the UK's property investment sector

At the Autumn Statement delivered in December last year, it was confirmed that, with effect from 1 April 2014, UK real estate investment trusts ("REITs") and their foreign equivalents will be able to invest in another UK REIT without prejudicing that REIT's qualifying status. As we explain below, this could have a significant impact on the UK property investment sector.

What is a REIT?

A UK REIT is a UK property company (or group) that has elected for REIT status with HM Revenue & Customs ("HMRC") and operates in accordance with the UK's REIT rules.

Various conditions must be satisfied in order to qualify for REIT status. Notably, the company must be UK tax resident, its ordinary shares must be admitted to trading on an HMRC "recognised stock exchange", it must not be a 'close company' (i.e. a company under the control of five or fewer participators or participators who are also directors) - except where participants are qualifying "institutional investors" - and it must have a property rental business that qualifies as a "tax-exempt business" (i.e. a business that involves at least three properties and where no single property represents more than 40% of the total value of the properties of the business).

In addition, a UK REIT must distribute at least 90% of the net income profits from its tax exempt property business, it must derive at least 75% of its total income profits from its tax-exempt property business and the value of assets involved in the tax-exempt property business must be at least 75% of the value of its total assets.

From a tax perspective, there are significant advantages in obtaining REIT status: principally, income profits and capital gains from a REIT's tax-exempt property business are exempt from UK corporation tax.

What is changing and why does it matter?

Under current rules, only certain types of "institutional investor" can participate in UK REITs without breaching the close company rule and therefore prejudicing REIT qualifying status (for example, trustees/managers of pension schemes, open-ended investment companies, charities and long term insurance businesses). This itself follows from legislative changes brought in by Finance Act 2012, which enacted a "diverse ownership" rule enabling a wider range of investors to invest in REITs without breaching the no close company condition. Before these changes, only a limited partnership that was a collective investment scheme would satisfy the no close company requirement.

In March 2013, it was announced that HM Treasury would informally consult on widening the definition of "institutional investor" to include REITs and, at the Autumn Statement in December 2013, the adoption of this measure was confirmed.

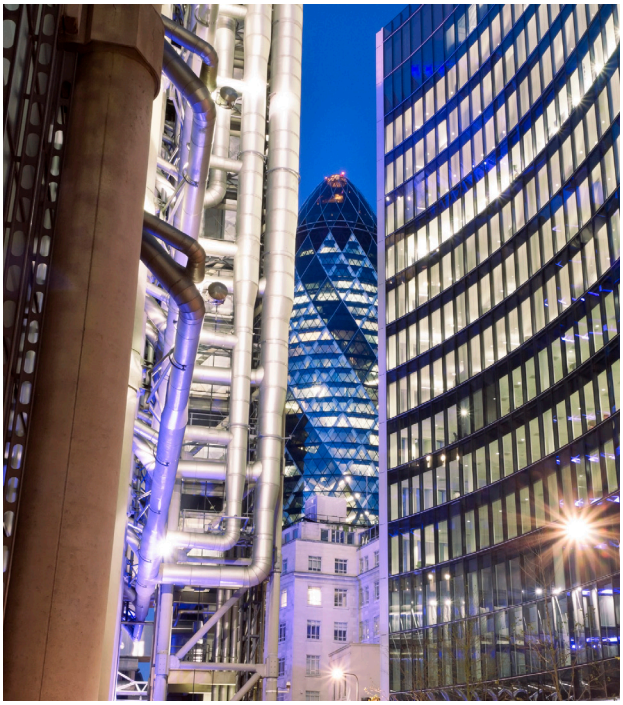
So, from 1 April 2014, UK REITs and their foreign equivalents will be treated as qualifying "institutional investors" and will be able to invest in other UK REITs without affecting REIT qualifying status. The policy objective behind this measure is to promote joint venture REITs and attract more international and institutional capital into the UK property investment sector. To quote from HM Treasury's announcement, this "...is expected to result in a more competitive and efficient UK real estate and REIT sector".

The impact of this change remains to be seen, but as a result of enabling UK REITs to attract more UK and foreign investors and to access more financing opportunities, we may well see increased use of co-ownership/co-investment arrangements involving UK REITs, especially on large scale developments. This could take the form of increased investment from well-established overseas REIT jurisdictions such as the US and Australia, but potentially also from evolving/emerging REIT markets in Asia and South America.

Another possibility is that we may see more property companies in the UK looking at converting to REIT status. There have been a number of other recent measures that have increased the attractiveness of the REIT regime for potential new entrants, most notably the abolition from 17 July 2012 of the 2% entry charge for companies becoming REITs. The UK's REIT sector is relatively small compared to other jurisdictions with REIT rules, but the progressive relaxation of the UK's REIT qualifying conditions should encourage new joiners.

Finally, we may see increased activity in the mergers and acquisitions arena involving UK REITs. Overseas REITs in particular may see an acquisition of a stake in a UK REIT as a perfectly viable alternative to a direct investment in UK property.

In summary, the change is a welcome and positive development for the UK's REIT sector and hopefully one that will benefit UK property investment more generally.



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This article was originally published in Estates Gazette on 29 March 2014.

> "...from 1 April 2014, UK REITS and their foreign equivalents will be able to invest in other UK REITs without affecting REIT qualifying status."

Coventry v Lawrence – implications for the development of land including rights of light

Summary

The Supreme Court has shaken up the law on the availability of injunctions to protect property rights and ruled that a court faced with an application for damages in lieu of an injunction, must:

- be much more flexible;
- not *"mechanically"* or *"slavishly"* apply the four tests of A L Smith LJ in *Shelfer*; and
- not approach the matter on the basis that it is only in *"very exceptional circumstances"* that damages should be awarded in lieu of an injunction.[1]

The rule in Shelfer

Rights of light have been a contentious issue for developers since the decision in *HKRUK II (CHC) Ltd v Heaney*[2] when the High Court awarded an injunction against a developer who infringed the rights of light to a neighbouring commercial property, despite the development having been completed. In deciding whether an injunction or damages was an appropriate remedy, the High Court strictly applied the well known "working rule" set down by Smith LJ in *Shelfer v City of London Electric Lighting Company*[3] which established that it is only in exceptional circumstances that an injunction is not granted to protect rights which are infringed and that damages should only be awarded in lieu of an injunction if all of the following four tests are satisfied by a defendant, namely:

1. The injury to the claimant's rights is small.
2. The injury is capable of being estimated in money.
3. The injury can be adequately compensated by a small money payment.
4. It would be oppressive to a defendant to grant an injunction.

The decision and its strict application of *Shelfer* has left developers having to negotiate with adjoining owners earlier and often paying ransom based damages in order to secure releases to permit their developments, as well as having to manage cautious lenders and joint venture partners requiring greater due diligence and certainty in view of the increased risk of injunction.

Shelfer shelved

For this reason, many developers will welcome the recent decision in *Coventry v Lawrence* in which the Supreme Court strongly criticised the courts' 'slavish' adherence to *Shelfer* and instead encouraged a more flexible approach to the question of the appropriate remedy for a claimant when rights are infringed.

In the lead judgment, Lord Neuberger said that *"(i) an almost mechanical application of A L Smith LJ's four tests, and (ii) an approach which involves damages awarded in only 'very exceptional circumstances' are each simply wrong in principle, and give rise to a serious risk of going wrong in practice"*.

His Lordship emphasised the discretionary nature of the power to award damages in lieu and warned that the discretion should not become fettered, offering the following guidance:

1. The *prima facie* position is that an injunction should be granted, so that the legal burden is on the defendant to show why it should not.
2. Subject to this legal burden, when a judge is called on to decide whether to award damages in lieu of an injunction there should not be an inclination either in favour of, or against, an injunction or damages. Rather, the outcome should all depend on the evidence and the arguments (each case will turn on its own facts).
3. In the absence of relevant circumstances pointing the other way, it would normally be right to refuse an injunction if *Shelfer's* four tests were satisfied.

1 Coventry v Lawrence [2014] UKSC 13
2 [2010] EWHC 2245 (Ch)
3 [1895] 1 Ch 287

4. The fact that those tests are not all satisfied does not mean that an injunction should be granted. [4]

Lord Neuberger also suggested that where public interest arose he would *"find it hard to see how there could be any circumstances in which it could not, as a matter of law, be a relevant factor"*[5]. His Lordship also indicated that, in some cases, *"the grant of planning permission for a particular activity (whether carried on at the claimant's or the defendant's premises) may provide strong support for the contention that the activity is of benefit to the public, which would be relevant to the question of whether or not to grant an injunction"*. [6]

Examples of factors relevant to the 'public interest':

- the fact the defendant's business may have to shut down if an injunction is granted;
- the fact the defendant's employees may lose their livelihood if an injunction is granted;
- the fact that an injunction would be a loss to the public or a waste of resources on account of what may be a single claimant; and/or
- the financial implications to the defendant would be disproportionate to the damage to the claimant if he was left with his claim in damages.

Lord Sumption went further than Lord Neuberger in his attempt to rein in the mechanistic effects of the *Shelfer* tests. In an interesting passage, his Lordship said:

"In my view, the decision in Shelfer is out of date, and it is unfortunate that it has been followed so recently and so slavishly. It was devised for a time in which England was much less crowded, when comparatively few people owned property, when conservation was only beginning to be a public issue, and when there was no general system of statutory development control. The whole jurisprudence in this area will one day need to be reviewed in this court. There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not normally be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests. In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission". [7]

Basis of damages

The court also looked at the basis on which damages in lieu of an injunction should be payable. The court observed that damages may be assessed by reference to the value of the consequent reduction in the value of the claimant's property, but they could alternatively be assessed by reference to the benefit to the defendant of not suffering an injunction. The court did not hear full argument on this issue and so although damages payable on a 'benefit-share' basis may well be something that the court will seek to scrutinise at a later date, for the time being, the position remains as it has been with damages for rights of light infringement, that is, being payable on a release fee basis.

A seminal judgment

The decision is good news for developers as although an injunction remains the prima facie remedy for interference with a property right, it supports a departure from the rigid application of the four fold test in *Shelfer*, in favour of a more flexible exercise of the court's discretion to award damages in lieu. This should give developers greater confidence that if they act reasonably, the court will now be able to take such factors into account when deciding whether to award damages instead of an injunction; and if the approach suggested by the Supreme Court is adopted in practice, it is likely that fewer injunctions will be granted and damages will become a more common alternative remedy.

> "...It is likely that fewer injunctions will be granted and damages will become a more common alternative remedy."

4 Paragraph [96] and [119]
5 Paragraph [124]
6 Paragraph [125]
7 Paragraph [161]

The Great Escape - guarantor released from liability

Summary

The Court of Appeal has delivered a salutary lesson for landlords on how not to inadvertently release guarantors when dealing with licences for alterations.[8]

If you are a landlord managing a portfolio of assets you should:

- consult guarantors and join them into any supplemental documents whenever the obligations in a lease are altered or varied;
- review portfolios of assets to identify whether there is any risk existing guarantors may have been inadvertently released from their obligations; and
- be mindful of the fact there are only a narrow set of circumstances in which a guarantor's liability will be preserved following a variation or alteration to which it has not consented: namely, that it must be immediately apparent the alteration or variation is unsubstantial or that the alteration or variation is incapable of adversely affecting the guarantor.

Landlord holds guarantor liable after tenant is dissolved

In 1981, a thirty five year lease for premises in Morecambe was granted. The original tenant was WH Smith Do-It-All (later known as Payless DIY Ltd, "Payless") and the guarantor was its holding company, WH Smith & Son (now known as Smiths News Trading, "Smiths"). Topland bought the freehold in 2001.

In 2011, Payless went into administration and the lease was disclaimed. Topland gave notice to Smiths requiring it to pay rent and all other sums owing and to take a new lease of the premises for the remainder of the term.

Smiths argued it had been released from its liability as a guarantor due to a variation to the lease in the form of a licence for alterations granted in 1987. The licence had permitted the alteration and extension of the premises and included the construction of a new garden centre. Smiths' had not been a party to the licence and had not consented to it.

The rule in *Holme v Brunskill*

The case revolved around a principle of law known as the rule in *Holme v Brunskill* which was established in 1878 when a tenant farmer was obliged under the terms of his lease to re-deliver a flock of 700 sheep in good condition. Unfortunately, when the time came, there weren't 700 sheep and they were not in good condition. The landlord looked to the farmer's guarantor to make good his losses but during the course of the lease, and unbeknown to the guarantor, the farmer had agreed with the landlord that he would surrender a field in exchange for a decrease in rent. Because the guarantor had not consented to this alteration to the lease, the court held that the guarantor was released from his obligations. The case established the rule that any amendments to the primary underlying contract, after the giving of the guarantee, will discharge the guarantor's liability under the guarantee: unless either the guarantor consents to the variation or the variation is patently insubstantial or incapable of adversely affecting the guarantor.

Guarantor released

The landlord argued that the rule in *Holme v Brunskill* did not apply to the present case on the basis that it was clear that the licence for alterations did not increase the tenant's obligations under the lease so as to prejudice the guarantor. The landlord contended that the definition of "the demised premises" in the lease incorporated any "additions, alterations and improvements to the property" and so, the guarantor must have known that the tenant's covenants would increase if the property was added to, altered or improved.

8 Topland Portfolio No.1 Ltd v Smiths News Trading Ltd [2014] EWCA Civ 18

The Court of Appeal however preferred the guarantor's argument that it knew, when it became a party to the lease, that the tenant would not be entitled to make any additions, alterations or improvements to the property unless the landlord granted the tenant permission to do so outside the framework of the lease. In that event, it was entitled to expect that its consent would be sought as well. The licence for alterations had the clear potential to increase the obligations (particularly repairing) of both the tenant and the guarantor, and so it followed that the rule in *Holme v Brunskill* should apply and the guarantor be released from all of its obligations under the lease.

Key questions

If you are a landlord and are concerned there has been an alteration or variation which may adversely affect your guarantors position, ask the following questions:

- Has the lease been changed in a way that was not contemplated at the outset?
- Did you obtain the consent of the guarantor to the change?
- Does the change have the potential effect (judged subjectively by the guarantor) that the guarantor's liabilities might be adversely affected?
- Is there a clause in the lease which makes the rule in *Holmes v Brunskill* ineffective?

Protecting your security

In the current market, tenant default is increasingly common and the landlord's first port of call is to require the guarantor to step into the tenant's shoes and meet the rent and other obligations under the lease. It is therefore vitally important that landlords obtain guarantor consent if any obligations in the lease are to be altered or varied. An alternative approach is also to ensure the guarantee contains wide-ranging saving provisions, including an express provision in the lease which states that the guarantor will not be released by any variation of the tenant covenants.

There are, of course, a variety of security measures available to landlords, but these too have their pitfalls. For example:

- CRAR: from 6 April 2014, the ancient common law right to distrain for arrears of rent is abolished and replaced by a new statutory procedure known as Commercial Rent Arrears Recovery. Under CRAR only the principal rent will be recoverable. Other payments, such as rates, service charges and insurance will not be recoverable.
- Assignments: a guarantor may sub-guarantee a tenant's obligations in an AGA but it cannot directly guarantee the performance of the assignees obligations. This would be void under the Landlord and Tenant (Covenants) Act 1995.

Landlords therefore need to consider not only the level of their exposure on the grant of a lease, but also how this is going to be affected by furture dealings.

Holding over – a lesson for landlords

Summary

Determining the status of a former tenant that has remained in occupation after the expiry of a commercial lease, which is excluded from the provisions of the Landlord and Tenant Act 1954, can be difficult, particularly if the tenant has paid, and the landlord has accepted, rent.

A recent Court of Appeal decision highlights the risks that landlord's run when tenants hold over for lengthy periods after the end of the lease.[9]

Periodic tenancy or tenancy at will?

The tenant occupied a property under a contracted-out lease. On 31 October 2009, the lease expired but the tenant remained in occupation for two years and continued to pay rent. During this time, there were occasional negotiations between the landlord and tenant about the grant of a new lease until the tenant decided that it needed a larger property. The tenant informed the landlord of its intention to leave in August 2011, and suggested that it should continue to hold over until it was able to move out, which it subsequently did, having given the landlord three months' notice that it would be vacating the property on 28 September 2012. The landlord, however, claimed that the tenant had an annual periodic tenancy, because it had paid rent by reference to an annual period, and that it was entitled to six months' notice to determine the lease. The High Court found that there was an annual periodic tenancy, but the Court of Appeal has overturned the High Court's decision and found that there was a tenancy at will.

The parties conduct is an important factor

The court ruled that, when a party holds over after the end of the term of a lease with the landlord's consent, the tenant becomes at the very least a tenant at will. However, the parties' contractual intentions must be determined by looking objectively at all relevant circumstances.

Applying the principles set out in *Javad v Aqil*[10], the court held that:

- The payment of rent did not give rise to a presumption of a periodic tenancy; the parties' contractual intentions fell to be determined by looking objectively at all the relevant circumstances.
- The most obvious and significant circumstance in this case was the fact that the landlord and tenant were in negotiation for the grant of a new formal lease. That implied that the parties did not intend to enter into any intermediate contractual arrangement inconsistent with remaining parties to ongoing negotiations. That would, in most landlord and tenant cases, lead to the conclusion that the occupier remained a tenant at will pending the execution of the new lease.
- For there to be a tenancy at will, the negotiations should be continuing in the sense that both parties intended that there should be a new lease on terms to be agreed. There was no requirement for a particular intensity of negotiations.

Lessons learned

If you are a landlord, at the end of a contracted-out lease you should:

- Consider contacting the tenant six to eight months prior to the lease expiry date to ascertain the tenant's future plans for the premises to give you sufficient time to deal with any issues.
- If the tenant has indicated that it wishes to remain in the premises, negotiations should commence for a new lease. If you are still negotiating the terms of a new lease after the expiry of the contracted-out lease, put a tenancy at will in place immediately to avoid a periodic tenancy from being implied and the tenant gaining security of tenure.
- If, a few weeks before expiry of the lease, it is unclear whether the tenant is staying or leaving, make sure the tenant vacates the premises on the expiry of the contracted-out lease.

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

10 [1991] 2 W.L.R 1007

Landlord triumphs in "magic words" appeal

Summary

The serving of a bad or defective break notice has produced a wealth of litigation over the years and a recent Court of Appeal decision provides tenants with a useful reminder of the strict approach the courts will take.[1] In particular:

- If a tenant wants to avoid expensive litigation, and the possible loss of a valuable right to break, he must pay close attention to all the requirements of the clause, including the formal requirements, and follow them precisely.
- This is the case even if the tenant thinks a particular requirement is insignificant or redundant.
- There is no room for any "permitted" or "excusable" non-compliance.

Was the notice valid?

The facts are straightforward. A lease contained a tenant's break clause. The break clause said that any notice given by the tenant exercising the right to break "must be expressed to be given under section 24(2) of the Landlord and Tenant Act 1954". The notice that the tenant gave did not contain those words, although it complied with the clause in all other respects. The issue on appeal was simple, was the notice valid?

At first instance, the High Court held that it was. The judge accepted that the words could not be disregarded and the court was driven to the inevitable conclusion that the notice was not compliant with the requirements in the lease. However, the judge concluded that from the authorities the position relating to non-compliant notices was as follows:

- The principles apply equally to statutory and contractual notices.
- Where the contract term provides that a non-compliant notice will be invalid or ineffective, that is the end of the matter.
- Where it doesn't, the court must assess the usual objective criteria, the background, the purpose of the provision and the effect of any non-compliance.
- Where it hasn't provided for the consequence of non-compliance, one may reasonably assume this is deliberate.
- The use of "must" or "shall" is not decisive.
- What is often decisive in practice is the effect of non-compliance.

The judge found, applying those principles, that the failure to use the required wording made no difference at all and concluded that he did not think *"incantation of the magic words was an indispensable condition; it was not something which gave the defendant necessary or even relevant information"*. So the notice was effective, and the lease was terminated.

A strict approach

However, the Court of Appeal has unanimously overturned this decision. In the leading judgment, Lewison LJ said that a break option *"in its classic form is a 'unilateral' or 'if' contract under which the promisor agrees to do something if the promisee does or refrains from doing something"*. He said: *"The promisee himself does not make any promise: it is up to him whether he does or refrains from doing whatever it is that triggers the promisor's obligation".*[2] He continued: *"I do not accept that in the field of unilateral (or 'if' contracts) there is any room for the notion of substantial compliance. The question is whether the relevant event has occurred. That question is to be answered 'Yes' or 'No'. It cannot be answered 'almost'".*[3] In this case, as the break clause stated that any break notice "must be expressed to be given under section 24(2) of the Landlord and Tenant Act 1954" and it did not, the break notice was invalid.

1 *Friends Life Ltd v Siemens Hearing Instruments Ltd* [2014] EWCA Civ 382

2 Paragraph [24]

3 Paragraph [65]

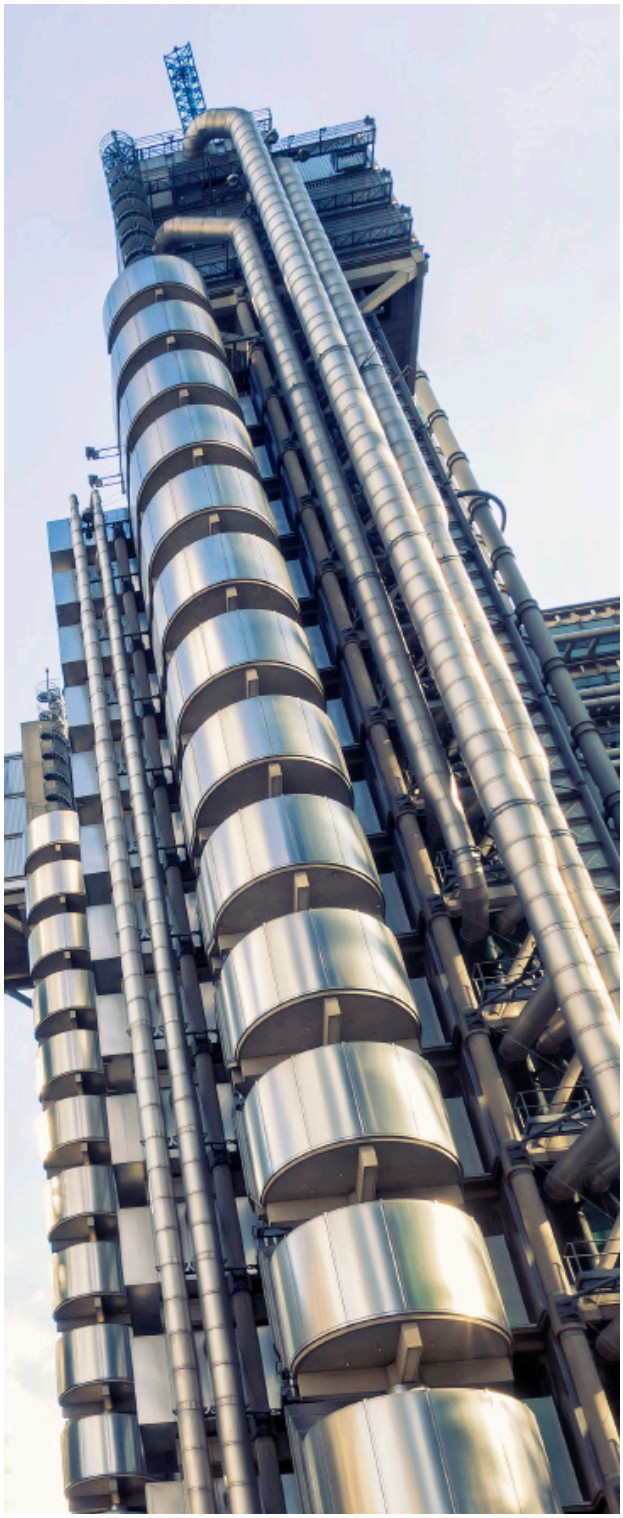
> The clear moral is: if you want to avoid expensive litigation, and the possible loss of a valuable right to break, you must pay close attention to all the requirements of the clause, including the formal requirements, and follow them precisely.

The moral of the story

In these challenging economic times there is a lot at stake for both landlords and tenants when a break clause is exercised. This decision gives landlords ammunition once again to pore over the minutiae of a break notice and challenge its validity. To avoid this, tenants must ensure they understand exactly what the break option requires and follow those requirements to the letter.

Tenants: hints and tips when exercising a break option

- Check the break date in the lease and period of notice required to be given to the landlord.
- Check the identity of the landlord.
- Check method of service of the break notice.
- Check who can serve the break notice.
- Check address for service of the landlord.
- Check conditions that will apply to exercise of break clause.
- If conditions apply to the exercise of the break clause, ensure that all conditions are strictly complied with.



Three developments to watch.....

Landlord appeals in M & S break clause battle

The landlord of Marks & Spencer's former head office premises at The Point, Paddington, launched its appeal on 25 March against a ruling allowing the retailer to claw back around £1.1m in rent and other charges after exercise of a break clause.

M&S exercised a break clause, part-way through a quarter, having paid the rent for the full quarter, and Morgan J in the High Court implied a term into the lease to the effect that, when M&S exercised its break right, the landlord was required to return rent in respect of the period from the break date to the end of the quarter. The decision was a departure from the widely accepted view that, in the absence of express provision, a tenant will not be entitled to a refund of any rent paid that relates to the period after the break date.

BNP Paribas Securities Services Trust Company (Jersey) Ltd is asking the Court of Appeal to overturn Morgan J's ruling on the grounds it was wrong for the judge to imply such a term.

Judgment has been reserved.

Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and anr (Court of Appeal -25 March 2014)

Capital allowances – don't miss out

From 1 April 2014, the tax relief produced by a capital allowances claim is lost for both the seller and buyer of commercial property if the capital allowances are not identified at the point of sale of the property. This means that in order to allow a buyer to claim capital allowances, the seller must include the plant and machinery in its tax return, even if it does not claim the allowances. If you are a buyer you will need to undertake additional due diligence before exchange of contracts, as if the pooling requirement is not met, you will not be able to claim allowances, or when it comes to sell, offer any allowances as part of the sale.

CRAR

From 6 April 2014, the ancient common law right to distrain for arrears of rent is abolished. This is to be replaced by a new statutory procedure to take control of and sell a defaulting tenant's goods – known as "CRAR" or Commercial Rent Arrears Recovery.

Further details about the procedure can be found in the Tribunals Court and Enforcement Act 2007 but in summary the key aspects of CRAR are: the lease must be in writing; applies to commercial premises only; only applies to rent; the landlord must give 7 clear days' notice in writing before entering the premises to seize goods; and notices to sub-tenants to redirect rent will only take effect 14 days after service.

About Mayer Brown

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We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

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