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Contents

How to have an imPACT on lease renewals

In this article, Richard Webber looks at the re-launch of PACT and asks whether landlords and tenants who are renewing their business leases should take advantage of it more often.

Professional Arbitration on Court Terms ("**PACT**") is a scheme backed by both RICS and the Property Litigation Association, which provides landlords and tenants with an out-of-court way to reach agreement on the terms of business leases at renewal. PACT was established in the late 1990s, and (whilst it has been generally well-regarded in principle) take-up has not been as extensive as hoped.

The re-launch follows a poll of the members of the Property Litigation Association, which found in summary that:

- around half the respondents had never used PACT and only 3.6% had used it five times or more
- of the respondents who had used it, more than 85% had found it satisfactory, although just over half only found it saved costs
- over 90% of respondents had appointed a surveyor, rather than a lawyer, which suggests that PACT is most used to determine rent rather than the other terms of the lease.

With that in mind, here are a few pointers for those who might wish to consider using PACT.

The essence of PACT is putting decisions in the hands of commercial property specialists

WHAT ARE THE ADVANTAGES OF PACT?

Flexibility

The parties get to take the key decisions on how the referral is structured, rather than being at the mercy of the court. In particular, the parties have final say on timescale, location, forum and choice of professional (surveyor, lawyer or both; arbitrator or expert).

Speed

Court proceedings invariably take time. PACT can move swiftly if the parties want it to.

Cost

The fees of an appointed professional are usually less than the costs of going to court. This is due in no small measure to the fact that, out of court, the parties do not have the added cost of litigation lawyers managing court proceedings – costs which are ultimately futile when the matter settles before trial, as it almost invariably does.

Expertise and familiarity

District Judges in the county courts can be hit and miss. Not all are familiar with the 1954 Act, and few know the ins and outs of the commercial property world as property professionals do. This is the very essence of PACT. The parties are putting decisions in the hands of commercial property specialists with whom they are familiar.

WHEN IS PACT LESS SUITABLE?

Where there is no pressure to settle

PACT tends to work best where the parties have narrowed the issues between them and seek, collaboratively, to resolve them by reference to a third party. Whilst it is not difficult for a tenant who wants to wait for the market to fall further to slow down the court process, it may be even easier to slow down the PACT process, at least in the early stages, when there are no sanctions for failure to co-operate in the process.

Where there are too many unresolved issues

It is no coincidence that most PACT referrals are on the question of rent. That is a question on which it ought to be possible to reach a fairly scientific answer. Determination of the other terms of the tenancy (including the length) is notoriously nebulous, and depends in part on interaction with the rent and other terms. By involving a third party the parties may simply be needlessly multiplying opinions.

HOW DO I USE PACT?

In the bad old days before June 2004, business lease renewals could only ever be negotiated by way of court proceedings. As originally launched, therefore, PACT required a court order to put it into effect.

These days, since the reforms to the renewal of business leases, the parties are able to keep the renewal out of court if they wish, and in practice the bulk of business lease renewals are now settled out of court. The relaunch scheme therefore has both "in court" and "out of court" procedures for instigating PACT.

The RICS Guidance Note on PACT contains four model consent orders for initiating the "in court" procedure. There is no set form of agreement for the "out of court" PACT procedure, although the RICS Guidance Note suggests that the parties cannibalise the terms of the model consent orders. (It goes almost without saying that even where the parties are using the "out of court" procedure, it is essential to have an agreement setting out the terms of reference.)

Having agreed the terms, the parties should make an application by way of a prescribed form[1] which, very simply, gives details of the property, the nature of dispute, details of the parties and (if different) details of the persons making the application. A fee (currently £353 inclusive of VAT) is payable.

The parties can apply either to the RICS Dispute Resolution Services or to the Law Society's Arbitration Service.

DECISIONS, DECISIONS

Before submitting their application, the parties should try to agree the terms of the reference, including the following:

- what are the issues to be referred?
- will the third party act as arbitrator or independent expert?
- is the matter to be referred to a surveyor, a solicitor, or both? Is the third party allowed to consult other professionals (for example, can a surveyor seek their own advice on points of law)?
- how are the third party's fees to be dealt with? How are the parties' costs to be dealt with?
- what will be the timetable for each step in the reference? For example, when are written submissions to be exchanged? Are counter-submissions to be permitted, and if so, when?
- how will documentary evidence, including comparables, be dealt with?
- where (as commonly) the third party is to determine the rent and/or the interim rent, what is to be the valuation date or dates? (This issue can be critical in a volatile market.)

Refining some of these issues may help the parties start to settle the renewal. For obvious reasons, the PACT process is likely to be more successful, quicker and less costly if the parties are able to narrow the issues between them to one or two discrete issues for the third party to determine.

DOES IT WORK?

Generally, where the parties have elected to use PACT, there is already some willing to settle the renewal. To that extent PACT's promise to assist the parties in settling is somewhat self-fulfilling.

As noted above, PACT works best where the parties have narrowed the issues and have agreed collaboratively to seek third party determination of one or two identified issues. As it is a voluntary scheme, PACT lacks the gravitas of having to comply with, for example, court ordered directions for a trial. PACT is unlikely to assist where one of the parties is keen to delay the renewal – the recalcitrant party cannot be forced into the PACT scheme. In fact, where there are no court proceedings in place between the parties, no obvious pressure can be brought upon them to force them into the scheme (with the possible exception of warnings on costs).

That said, PACT is a welcome alternative to the court procedure for those who wish to settle their renewal. In particular, it enables parties to avoid the vagaries of getting a District Judge to understand both their case and the intricacies of the 1954 Act, and put the matter in the hands of an expert who will instinctively understand the issues involved. Furthermore, although there seems to be little evidence of the courts promoting PACT as a means of settling lease renewals, the courts themselves are briefed to (and generally do) encourage the parties to settle by alternative means of dispute resolution. PACT presents itself as an obvious candidate for that.

Given the advantages, one would hope that PACT will continue to establish itself as the standard route for resolution of business lease renewals, with referral to the court a rare last resort – rather in the mould of the traditional (and usually contractual) position at rent review. That, however, needs wider industry take-up. It remains to be seen whether the relaunch of PACT will popularise it sufficiently to deliver that. Our view is: try it, you might like it!

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1 Form DRS2P.

Consents through the looking glass – a re-examination of consents in alienation clauses

Dellah Gilbert reviews case law relating to the often contentious topic of landlords granting consent to a prospective tenant when an existing tenant wishes to move on.

Controlling tenant mix, particularly in retail developments, is usually of utmost importance to landlords

Controlling tenant mix, particularly in retail developments, is usually of utmost importance to landlords. The need for this control can run counter to the tenant's need to dispose of its premises easily and quickly if those premises prove surplus to requirements. The restrictions on disposals which are agreed between landlord and tenant are to be found in the alienation provisions of a lease which typically provide that the tenant has to apply to the landlord for consent before it can dispose of the lease. The law on how landlords should respond to tenants' applications for consent has evolved over many years. Parliament has stepped in three times[1] to superimpose a statutory framework but this particular interface between landlords and tenants continues to be fodder for litigation.

The focus of this article is to clarify what procedural obligations are imposed on a landlord upon receipt of an application for consent, in particular, ones where insufficient information is provided by the tenant to allow the landlord to make a decision.

THE STATUTORY FRAMEWORK

First, the basics. Where a landlord is required to consent to a sale (by way of an assignment) or underletting, statute[2] implies a proviso that such consent is not to be unreasonably withheld. This concept was expanded in 1995[3] to provide that parties to post-1995 leases could agree objective circumstances and conditions for reasonably withholding consent. However the proviso that consent is not to be unreasonably withheld was limited. It did not impose any duty on the landlord to act reasonably, the breach of which would sound in damages. Rather, if a court agreed with a tenant's contention that consent had been unreasonably withheld, the tenant could complete the assignment or subletting. However if the assignee or subtenant had walked away from the deal, it was a pyrrhic victory. This proved to be quite a problem as many landlords were slow to respond to applications for consent which in turn caused substantial and irrecoverable financial damage to their tenants.

The Landlord and Tenant Act 1988 was intended to remedy these failings. It imposes on a landlord in receipt of an application for consent a statutory duty to the tenant within a reasonable time to give written notice to the tenant of the landlord's decision to:

- give consent, specifying whether the same is subject to reasonable conditions and, if so, what those conditions are; or
- refuse consent, where it is reasonable to do so, specifying the reasonable grounds relied upon.[4]

The burden of proving that this section of the Act has been complied with rests with the landlord. If the duty is breached, the tenant is entitled to be compensated in damages.

CASE LAW

The implementation of the 1988 Act certainly levelled the playing field to a significant extent but it also left open a number of questions which the courts have, piece by piece, been answering ever since. One of the principal questions was: "what is a reasonable period of time in which a landlord is to respond to a tenant's application?" As each case must be judged on its own facts, there could not be and there is not, a decisive period to apply in all cases. The rule of thumb, when advising tenants, was that they were unlikely to be able to threaten the landlord with proceedings (or pressing ahead with the transaction) before the expiry of a month on a straightforward application. But in the last decade the trend of the judgments appears to be that a landlord has an ever decreasing amount of time in which to respond with their decision.

In *Go West v Spigarolo*[5] Munby J was of the view that the reasonable time must be measured in weeks rather than days but even in complicated cases it should be measured in weeks rather than months. More recently, in the Court of Appeal decision in *NCR v Riverland Portfolio No 1*,[6] Carnwath LJ said:

> "In the absence of special exceptional circumstances a period of less than three weeks, particularly in the holiday period, cannot in my view be categorised as inherently unreasonable for that process."

At its most extreme, in *Blockbuster Entertainment Ltd v Barnsdale Properties Limited*,[7] the High Court concluded that consent ought to have been given seven days from receipt of all information. In that case, the tenant's application for consent to underlet omitted to include some financial information about the proposed subtenant. The landlord requested further information, such as bank and character references, two weeks after the application was received, was provided with the information 19 days later, but did not give its consent in principle for almost another three weeks. Whilst seven days may sound harsh, the judge concluded that time started to run from the date the application was made (despite its inadequacies) and was unimpressed with the landlord's dilatory response, saying "Of course, the landlord was entitled to ask for [the further information] in response to the [application] but it was under a duty to act in that respect with reasonable speed."

On analysis, the total periods of time that the application was with the landlord effectively amounted to three weeks, which is in line with the later NCR case. Even so, three weeks is not a long period of time particularly if information is drip-fed following an incomplete application.

The impression most landlords took from the *Blockbuster* case was that the onus lay on them to point out to the tenant in a timely fashion any inadequacies in the tenant's application and to specify the relevant information they required. Only then did the clock pause, beginning again when information was received. To be on the safe side, that information had to be processed by the landlord as and when it was received.

THE CURRENT POSITION

The case of *The Royal Bank of Scotland v Victoria Street (No 3) Limited*[8] (where Hogan Lovells acted for the successful landlord) will be of some comfort to landlords. The tenant made an application for consent to assign to a newly incorporated company. A few days later the landlord's agent requested "relevant financial" information regarding the proposed assignee. However, the day after that and before receiving the requested information, the landlord sent a letter refusing consent. The refusal was upheld by the court. Of more relevance to this article, Lewison J dismissed the suggestion that the 1988 Act duty extended to requiring the landlord to make enquiries of the tenant in order to meet any concerns which it may have had. He opined that the extent of the landlord's duty was simply to consider the application before it. If there was insufficient information for it reasonably to decide the application one way or the other, then the landlord would be entitled to refuse consent provided it stated its reasons in writing and promptly. But those reasons need not include setting out what information it would need in order to complete the process. This is a commonsense approach: after all, as the judge noted, a tenant can make any number of applications providing as much or as little information as it likes until it gets it right, whereas a landlord is under a duty to act reasonably in response.

There are advantages and disadvantages associated with this clarification. On the plus side for landlords, the clock stops completely as opposed to being paused until more information is provided by the tenant. When the tenant re-applies, the clock is reset and time begins afresh. On the downside, it is unclear whether a court would conclude that a shorter period was reasonable to consider documents where there have been a number of earlier failed incomplete applications for the same transaction, on the basis that the landlord will have had some of the documentation for a longer period. Further, there is a danger that a landlord will lose track of the multiple applications as they may well look similar and so a revised complete application may slip through the net.

There will always be landlords who will exploit this situation to the full and refuse all applications unless it is blatantly clear that sufficient information has been provided. For the many who embrace the Lease Code their treatment of consent applications may not change and they may still continue to issue a standard response seeking further information to allow them to complete their consideration of the application and be as helpful to the tenant as possible. But at least the *Victoria Street* case can give landlords comfort that, in an appropriate case, they are entitled to say no immediately.

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1 With the Landlord and Tenant Act 1927 (the "1927 Act"), the Landlord and Tenant 1988 (the "1988 Act") and various tweaks incorporated by the Landlord and Tenant (Covenants) Act 1995 (the "1995 Act").
2 Section 19(1), the 1927 Act.
3 Under the 1995 Act which applies to leases granted after 1 January 1996.
4 Section 1(3).
5 [2003] EWCA Civ 17.
6 [2005] EWCA Civ 312.
7 [2003] EWHC 2912(Ch).
8 [2008] EWHC 3052(Ch).

Double trouble: the issue of double insurance in property transactions

Double insurance often means double trouble when it comes to claims arising between exchange and completion. Peter Taylor and Stella Bliss explain the issues.

Real estate professionals are wary of including insurance provisions in sale contracts which result in both seller and buyer maintaining buildings insurance for the period between exchange and completion. The concern is that if a claim is made the insurers may seek to argue that the two policies should be read in conjunction with each other and that there is "double insurance" of the property.

The worst-case scenario for the contracting parties in a case of double insurance is that, on damage or destruction to the property between the date of exchange of contracts and completion, each insurer seeks to decline coverage under their own insurance policy, on the basis that another insurer has provided cover in respect of the same risk. This, it may be argued, would render the loss irrecoverable from either insurer, and thus put the insured severely out of pocket.

A recent case, *The National Farmers Union Mutual Insurance Society Limited v HSBC Insurance (UK) Limited*[1] has again brought to our attention the long held concerns about the risks of double insurance. The case has led us to re-examine the issue and consider whether in fact the concept of "double insurance" should really give real estate professionals cause for concern on the sale and purchase of property.

THE FACTS OF THE CASE

The owners of The Old Hall in Rutland contracted to sell The Old Hall for the price of £1.8 million. Prior to and following exchange of the sale contract The Old Hall was insured by the seller under a policy held with HSBC. The sale contract provided that the risk of damage to or destruction of The Old Hall passed to the buyer at the time of exchange. The buyer took out its own buildings insurance, with NFU, in respect of The Old Hall with effect from the date of exchange of contracts. So far, so usual. Between exchange of contracts and the contractual completion date a fire broke out at the property, causing extensive damage. At the time of the fire, The Old Hall was therefore the subject matter of buildings insurance taken out independently by each of the seller and the buyer in respect of their respective interests, with different insurers.

The buyer completed the purchase of The Old Hall, in accordance with the terms of the sale contract. The buyer made a claim under its insurance policy with NFU, and NFU paid out against that claim. NFU subsequently looked to recover a contribution from HSBC.

The HSBC policy covered "the buildings for physical loss or physical damage" and also "anyone buying [the building] who will have the benefit of [the insurance policy] until the sale is completed or the insurance ends, whichever is the sooner." On the face of it, the buyer therefore – perhaps unknowingly – benefited from insurance cover, as a purchasing party, under the HSBC insurance policy. However, the HSBC insurance policy went on to include an "escape" provision that stated: "we will not pay… if the buildings are insured under any other insurance."

The NFU policy wording read: "if, when you claim, there is other insurance covering the same accident, illness, damage or liability, we will only pay our share." There was, however, no absolute "escape" provision enabling NFU to resist paying out under the insurance policy if the risk was covered by another policy of insurance.

Gavin Kealey QC, sitting as a Deputy High Court Judge in this case, had to consider whether, upon a proper construction of the HSBC and NFU policies, the HSBC policy provided insurance cover to the buyers in respect of the fire in circumstances where the NFU policy did the same. This would result in "double insurance" entitling NFU to a contribution from HSBC towards the payment it had made to the buyers under the insurance policy.

On the facts of the case, it was held that because NFU's policy did not contain a provision entirely excluding coverage in the event that the buyer was otherwise insured in respect of the same risk, there was no issue of double insurance and NFU's was the **only** policy covering the buyers for damage to the property between exchange and completion. HSBC was not liable to make any contribution towards the sum NFU had paid under the insurance policy. Its clause was effective to relieve it entirely of responsibility; NFU's was not.

WHAT IF THE POLICIES HAD BEEN WORDED DIFFERENTLY?

Would the buyer have had a problem in making a successful insurance claim if both of the insurance policies contained an identical "escape" provision, along the lines of the HSBC policy, so that each provided that the insurer would not make a payment under a claim in respect of any loss or damage if the same risk was otherwise insured by another insurer. Could the two exclusions together effectively operate to eliminate all cover?

This would certainly be an undesirable, and totally uncommercial, outcome. If an escape clause were a successful means of avoiding making payment under an insurance policy, then insurers could effectively sidestep their contractual obligations, in respect of which the insured has paid premium to receive the benefit, purely because another insurer has agreed to cover the same risk.

Ideally the courts prefer to construe policies that seemingly give rise to double insurance so that a double insurance situation does not in law arise at all. If the wording of one of the insurance policies is not absolute, it makes life a little easier. In the Canadian case of *Evans v Maritime Medical Care Inc*,[2] the claimant was injured in a motor accident, and had in place insurance provided by both a motor insurance policy and a group hospital benefits policy. The motor insurance policy excluded the insurer's liability for any expenses recoverable under a hospital plan. The hospital plan excluded cover if similar benefits were payable under any other contract. It was held that the hospital plan exclusion was conditional upon payment being available under some other policy, whereas the motor policy's exclusion was absolute. The "benefits" in respect of which the insured was covered under the hospital plan were defined such that they fell squarely within the exclusion in the motor policy. Therefore, the hospital plan exclusion could have no effect in light of the absolute wording of the motor policy exclusion and the hospital plan was fully liable to meet the insured's claim.

The worst-case scenario in a case of double insurance is that each insurer seeks to decline coverage under their own insurance policy

Construction is a little more difficult if the wording of the clauses of each of the policies is absolute. In this instance, the courts will look at whether the policies contain, as many in practice will do, rateable proportion clauses. In *Gale v Motor Union Insurance Co*[3] both policies contained clauses, the effect of which was to exempt each insurer from liability in the event of the existence of concurrent insurance, but both policies also contained rateable proportion clauses. Roche J held that each company was bound to pay one half of the loss, on the ground that the rateable proportion clauses explained and qualified the exclusion clauses in the policy.

Even if policies which each contain exclusion clauses do not also contain operative rateable proportion clauses, the courts will generally apply specific rules of construction to judge what was intended. In the case of *Weddell v Road Traffic and General Insurance Co Limited*[4] the insured allowed his brother to drive the insured's car. The insured's policy covered both the insured and any friend or relative authorised by the insured to drive the insured's car. The brother also had his own insurance policy, which covered him driving his own car **and** those of other people. Each of the policies contained an exclusion if the driver was able to claim under another policy. The insured's policy contained a rateable proportion clause, but the policy of the brother did not. Rowlatt J said: "you look at each policy independently and if each would be liable but for the existence of the other, then the exclusions would be treated as cancelling each other out." So even if there are no operative rateable proportion clauses, **both** insurers are liable and the insurer who pays out under the insurance policy can claim a contribution from the other.

INSURANCE ON THE SALE AND PURCHASE OF PROPERTY

Most contracts for the sale of commercial real estate now incorporate the Standard Commercial Property Conditions (2nd edition) which can be varied in the main body of the sale contract as the parties may require. The default position under the Conditions is that the risk of damage or destruction to the property occurring between exchange of contracts and completion of the purchase passes to the buyer.

The Conditions also allow for the risk to remain with the seller between exchange of contracts and completion if **either** the parties have agreed this in the sale contract **or** if the property is let on terms that require the seller (whether as landlord or tenant) to insure. On the typical sale of a property subject to occupational tenancies, the seller will have a contractual obligation to its tenants, as landlord, to insure the property. This contractual obligation will not pass to the buyer until completion of the sale, so the seller must continue to insure.

In this circumstance, the buyer could simply rely upon the existence of the seller's insurance policy between exchange of contracts and completion, and only take out its own insurance policy at completion. This is a valid approach and the Conditions include provisions which require the seller to maintain the insurance policy, obtain an endorsement on the policy of the buyer's interest and pay to the buyer any insurance proceeds that are received as a result of damage to the property occurring between exchange of contracts and completion.

However, a buyer relying upon a seller's insurance policy would have to be very sure of its terms and availability, having conducted a thorough review of the insurance policy. A seller may be reluctant to disclose the contents of an insurance policy in full to a buyer, particularly if it is a block policy insuring a large number of properties. There may be clauses limiting the cover, or imposing high deductibles or conditions precedent to coverage, such as notice clauses. If the policy limits are exhausted by other claims, the limits may not be adequate. The policy may even be capable of avoidance in the event that the insured misrepresented or failed to disclose material facts to the insurer on inception. There is also the practical issue that the buyer would not necessarily be able to make any claim under that insurance directly, and might well need to enforce the contractual obligation in the name of the seller in order to have standing to make the necessary claim under the insurance.

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Institutional investors that purchase property with a view to adding it to their portfolio of assets will often have in place a block policy with an insurer that covers the investor's entire property portfolio. A buyer of this type will typically prefer to arrange its own insurance between exchange of contracts and completion, so as to avoid relying upon an insurance policy on terms that differ from its own block policy.

A buyer who arranges his own insurance to cover the period between exchange of contracts and completion will have to pay the premium for such insurance out of his own pocket, and will have no recourse against the seller for that premium. A buyer arranging his own insurance will generally see this additional expense as minimal in the context of the overall transaction cost and potential loss if the seller's insurance cover is inaccessible or just not good enough. A buyer ought to ensure however that his own cover does not contain clauses that are likely to give rise to potential double insurance arguments with concurrent insurers.

WHAT APPROACH SHOULD A BUYER TAKE?
We have seen that the courts will strive to construe competing insurance policies so as to avoid the result that the two insurance policies cancel each other out, leaving the insured without cover. The courts have held that it would be absurd if a risk were to be left uninsured as a result of the way in which competing insurance policies are worded.

In practice, it is common for a buyer to take the commercial decision to arrange his own insurance, giving him the comfort that the property is insured on adequate terms with which he is familiar. Buyers rely upon the natural inclination of the courts to construe policies as reasonable people would construe them, so that the likelihood of both the seller's and the buyer's insurer evading liability under their respective policy is slim.

As ever, the rule is simple: read the policy and if the terms are unclear, check it!

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1 2010 EWHC 773 (Comm).
2 87 DLR (4th) 173 (1992).
3 [1992] 1 KB 359.
4 [1932] 2 KB 563.

Case round up

Paul Tonkin summarises recent case law.

BENEFICIAL OWNER; LOSS OF PROFITS
Colour Quest Limited v Downstream UK Plc[1]
The proceedings arose from the Buncefield oil depot explosion. Shell sued Total (who had been found liable for the explosion in earlier proceedings) for property damage and loss of profits suffered as a result of damage caused to Shell's pipes and tanks by the explosion.

Total accepted liability for the property damage but disputed the loss of profits claim. It argued that the Shell company which held the legal title to the damaged property was not the same as the Shell trading company which had suffered the loss of profits and that only the legal owner of property, or someone with an immediate right to possession, had the right to claim damages for loss of profits flowing from property damage.

The Court of Appeal, overturning a first instance decision, found in favour of Shell. It held that although the Shell trading company was not the legal owner of the damaged property, it was the beneficial owner and was entitled to claim damages for loss of profits in this capacity on the basis that it was reasonably foreseeable that damage to the property would cause it to suffer losses.

MISREPRESENTATION; ENTIRE AGREEMENT CLAUSE
Foodco UK Limited v Henry Boot Developments Limited[2]
Foodco entered into an agreement for lease with Henry Boot ("HB") to take a lease of a retail unit within HB's new motorway service station. The marketing material for the development predicted footfall of 88,000 visitors per week. This proved to be wildly optimistic. Foodco argued that it had been induced to enter into the agreement for lease by HB's misrepresentations as to predicted footfall and in relation to the facilities which the site would offer. It argued that those misrepresentations were either fraudulently or negligently made. HB relied upon an "entire agreement clause" in the agreement for lease which provided that Foodco had not relied upon any representations made save for those in solicitors' written replies to enquiries.

The court found in favour of HB. As a matter of public policy, the entire agreement clause could not exclude liability for fraudulent misrepresentation and, if it sought to do so, the entire clause was likely to be struck down. However, as the clause did not mention fraud, the court interpreted it as excluding liability for negligent and innocent misrepresentation only. The clause would however only be effective if it was reasonable.[3] In the circumstances, the court held that the test was satisfied. The parties were of equivalent bargaining power and the inclusion of the clause had been negotiated between them with the benefit of legal advice.

Whilst Foodco could still have succeeded if it had shown fraud, the threshold for doing so was high and the court was not prepared to make a finding of fraud on the evidence before it.

VALUER'S NEGLIGENCE; BUY-TO-LET INVESTOR
Scullion v Bank of Scotland Plc[4]
Mr Scullion applied for a mortgage to fund the purchase of a buy-to-let flat. The mortgage company required a valuation and this was carried out by Colleys, now part of Bank of Scotland Plc. The mortgage application form included a disclaimer to the effect that neither the mortgage company nor the valuer would be liable as a result of an inaccurate valuation.

The property was valued by Colleys at £353,000 but subsequently turned out to be worth only £300,000. Mr Scullion sued Colleys for negligence. The court held that Colleys had been negligent and, moreover that they had a duty of care to Mr Scullion. Although the valuation was ostensibly carried out for the benefit of the bank, it was reasonably foreseeable that Mr Scullion would rely upon it rather than seeking an independent valuation. The disclaimer in the application was not sufficient to absolve Colleys of liability. It was unfair for Colleys to disclaim liability for something which should be well within their expertise, particularly where the disclaimer had not been drawn to Mr Scullion's attention beforehand.

BREACH OF REPAIRING COVENANT; RECOVERY OF COSTS
Agricullo Limited v Yorkshire Housing Limited[5]
Agricullo was Yorkshire Housing Limited's ("YHL") landlord of premises in Pickering. The lease contained a standard repairing covenant and further obliged YHL to pay "on demand and on an indemnity basis the fees, costs and expenses charged, incurred or payable by the Landlord, and its advisors or bailiffs in connection with any steps taken in or in contemplation of, or in relation to, any proceedings under section 146 or 147 of the Law of Property Act 1925 or the Leasehold Property (Repairs) Act 1938, including the preparation and service of all notices, and even if forfeiture is avoided (unless it is avoided by relief granted by the court)."

A dispute arose as to the state of repair of the Premises and Agricullo served on YHL a notice under section 146 of the Law of Property Act complaining of disrepair. YHL responded by serving a counter-notice claiming the benefit of the Leasehold Property (Repairs) Act 1938. YHL eventually carried out the works but Agricullo subsequently claimed £30,000 in respect of its solicitors' and surveyors' costs. It relied upon the costs provision in the lease.

The Court of Appeal held that the costs were not recoverable. The provision in this lease only obliged YHL to pay costs incurred in contemplation of or in relation to proceedings under the statutory provisions mentioned. In fact, Agricullo's costs had been incurred in negotiating and corresponding with YHL and in subsequently supervising and reporting on the works carried out. The court noted that the costs would have been recoverable had the covenant been drafted more widely to refer to the costs of ensuring compliance with the tenant's repairing obligations.

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DEPOSIT; DAMAGES

Ng v Ashley King (Developments) Limited [2010] EWHC 456 (Ch)

Mr Ng contracted to sell a house to Ashley King for £380,000. At the same time he contracted to purchase a property for the same price. Neither contract provided for the payment of a deposit but both provided that a 10% deposit would immediately become payable if the purchaser failed to complete on the completion date.

Ashley King failed to complete on its purchase from Mr Ng and Ng was accordingly also unable to complete on his purchase. Both therefore become liable to pay a deposit of £38,000. Mr Ng sued Ashley King for damages and a dispute arose over whether the £38,000 deposit already paid by Ashley King should be offset against those damages.

The court held that the deposit should be offset. The purpose of damages was to compensate rather than to punish. If Mr Ng was not required to give credit for the deposit received, he would have benefitted from a windfall at the expense of Ashley King.

PRE-PACK ADMINISTRATION; PRE-APPOINTMENT EXPENSES

Re Johnson Machine and Tool Co[6]

The company was the subject of a "pre-pack" administration, whereby it was placed into administration and its assets immediately transferred to a new company controlled by the directors and owners of the existing company.

The pre-pack transaction had been agreed prior to the company being placed into administration and the prospective administrators had incurred significant fees in connection with this. The administrators applied to court for their pre-appointment costs to be treated as expenses of the administration (with the effect that they would be payable in priority to the other unsecured debts of the company).

The court declined to exercise its discretion to order that the costs be treated as expenses of the administration. The judge considered that there was a distinction to be drawn between an administration which was clearly for the benefit of creditors and one where the balance of advantage appeared to lie heavily with the existing management. This was a case in the latter category and, as such, it was not appropriate for the court to exercise its discretion to allow pre-appointment costs. The court also commented that the standard practice of the creditors' sanctioning payment of the administrators' pre-appointment costs as an expense of administration was not proper as the creditors could only sanction true expenses of the administration.

ADVERSE POSSESSION; RECTIFICATION OF THE LAND REGISTER

Baxter v Mannion[7]

In 2005, Mr Baxter applied to the Land Registry be registered as the proprietor of a field then registered in the name of Mr Mannion, on the basis that Mr Baxter had been in adverse possession of the field for a period of over 10 years. In accordance with the provisions of the Land Registration Act 2002 the application was served on Mr Mannion, who had three months in which to object. Mr Mannion failed to object in the time limit and Mr Baxter was duly registered as proprietor.

Mr Mannion subsequently applied for the Register to be rectified. He argued that the registration of Mr Baxter as registered proprietor was a mistake on the basis that Mr Baxter had not actually been in adverse possession for the requisite 10 year period and it would be unjust not to rectify the register so as to reinstate Mr Mannion as proprietor.

The court agreed with Mr Mannion. In the circumstances, Mr Baxter had clearly not been in factual possession of the land for the necessary period and the decision to register him as proprietor was a "mistake" which should be rectified and it would be unjust not to do so.

ENFRANCHISEMENT; VALIDITY OF NOTICE

Hilmi & Associates Limited v 20 Pembridge Villas Freehold Limited[8]

The tenants of a block of flats served notice under of the Leasehold Reform, Housing and Urban Development Act 1993[9] to exercise their right to acquire the freehold. The landlord challenged the validity of the notice on the basis that, in relation to one of the tenants who was a company, the notice had been signed by a single director. The landlord argued that section 99(5) of the Act explicitly required that the notice be signed by the tenant itself rather than on behalf of the tenant and that, in the case of a company, this required either that the corporate seal be affixed or the notice be signed by two directors or a director and a secretary under section 36A of the Companies Act 1985.

The court agreed with the landlord. It held that there was a difference in law between documents which a company could authorise another to sign on its behalf (in which case the signature of a single authorised director would suffice) and those documents which were required to be signed by the company itself, for which the methods of execution provided for by the Companies Act were the only permitted means of signing.

Note: section 36A of the Companies Act 1985 has now been replaced with section 43 of the Companies Act 2006. It does not appear that this would affect the result of the case, save that the notice could alternatively have been signed by a single director and witnessed.

ESTATE MANAGEMENT CONTRACT; STATUTORY CONSULTATION

Paddington Basin Developments Limited v West End Quay Estate Management Limited[10]

West End Quay Estate Management Limited ("WEQEM") was the landlord of a block of flats forming part of the Paddington Basin development. It entered into an estate management agreement with Paddington Basin Developments Limited ("PBDL") whereby the latter agreed to provide estate management services for the benefit of the estate. The costs of the estate management were recoverable from the tenants under the service charge provisions in their leases. WEQEM failed to pay substantial sums due under the agreement and PBDL bought a claim for the sums due.

WEQEM argued in its defence that there was an implied term in the estate management contract to the effect that it would not be obliged to pay more than it could itself recover from the individual tenants of the development under the service charge. It argued that the estate management agreement constituted a "qualifying long term agreement" for the purposes of section 20 of the Landlord and Tenant Act 1985. If so, it, as landlord, was required to engage in a statutory consultation process with its tenants before entering into the agreement and, having failed to do so, was limited to recovering £100 per year per tenant in respect of the agreement under the service charge.

The court held (as a preliminary issue) that the estate management contract was a contract entered into between the landlord and a third party for the provision of services and so was a long term qualifying agreement for the purposes of the 1985 Act. As the landlord had failed to comply with the statutory consultation requirements it would be limited to recovering £100 per tenant accordingly. The court did not at this stage make a finding as to whether this also meant that the liability as between WEQEM and PBDL was likewise limited.

REPAIR OR IMPROVEMENT; DOUBLE GLAZING

Craighead v Homes for Islington Limited[11]

The claimants were the long leaseholders of flats in Islington. Their lease included service charge provisions allowing the defendant landlord to recover the costs of the "repair, maintenance and renewal of the premises." The landlord replaced the existing single glazed windows at the premises with double glazing and a dispute arose over whether the costs of this were recoverable under the service charge.

The Upper Tribunal considered that the existing windows clearly required repair. It noted that the cost of double glazing, as opposed to single glazing amounted to an additional 15%. In the circumstances, it considered that the replacement of the single glazed windows with new double glazed ones was within the scope of repair or renewal and did not constitute an improvement. In particular, the Tribunal were influenced by the fact that compliance with Building Regulations would require double glazing and that the works were not such as to replace the existing windows with something "so radical and extravagant as to amount to a completely new thing."

CONVEYANCER'S NEGLIGENCE; LOSS OF REDEVELOPMENT OPPORTUNITY

Joyce v Bowman Law Limited[12]

Mr Joyce instructed Bowman Law, a firm of licensed conveyancers, to act for him on the purchase of redevelopment land. The land had been advertised as having the benefit of a buyer's option to purchase additional adjoining land but Bowman negligently failed to ensure that the option was included in the conveyance. Mr Joyce sued Bowman for the profits he would have made in redeveloping the site, including the option land.

The court found that Bowman were or should have been aware that Mr Joyce was purchasing the land for redevelopment purposes. The loss of profits was accordingly within the scope of foreseeable loss. It considered that Mr Joyce could have potentially earned additional profits of £130,000 from redeveloping the site with the option land as opposed to the original land on its own. However, taking into account the various risks associated with the venture, there was only a 29% chance of Mr Joyce realising that profit. The court accordingly awarded damages of £37,700, being 29% of £130,000.

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1 [2010] EWCA Civ 180.
2 [2010] EWHC 358 (Ch).
3 Under Section 8 of the Unfair Contract Terms Act 1977.
4 [2010] EWHC 572 (Ch).
5 [2010] EWCA Civ 229.
6 [2010] EWHC 582 (Ch).
7 [2010] EWHC 573 (Ch).
8 [2010] 2010 EWCA Civ 313.
9 Section 13.
10 [2010] EWHC 833 (Ch).
11 [2010] UKUT 47 (LC).
12 [2010] EWHC 251 (Ch).

The clock is ticking faster than you think

Claims for professional negligence can be time-barred and lenders should not leave it too late to bring them, say Mathew Ditchburn and Paul Tonkin.

Lenders may be waiting for the property market to reach the bottom in order to establish the full extent of their losses before bringing claims

When the credit crunch first hit almost three years ago, many predicted a glut of claims against valuers as banks sought to plug the holes in their balance sheets left by defaulting borrowers and loans with inadequate security.

Surprisingly, the anticipated wave of valuers' negligence claims has been slow to start and their numbers so far have been significantly less than during the recession of the early 1990s.

There are several possible explanations.

Low interest rates have limited borrower defaults, particularly in the residential sector. Where the banks' losses have arisen from decisions to lend at loan-to-value ratios exceeding 100%, blame can hardly be placed at the feet of the valuer. It has also been suggested that lenders are biding their time, waiting for the property market to reach the bottom in order to establish the full extent of their losses before bringing claims. Although this is understandable, it has the potential to backfire.

SOLICITOR NEGLIGENCE

Axa Insurance Ltd (formerly Winterthur Swiss Insurance Co) v Akther & Darby Solicitors[1] concerned not a negligent valuation but a claim against a firm of solicitors. Axa's predecessor had issued After the Event legal insurance policies to the solicitor's clients. Axa sued the solicitor in negligence, claiming that, in breach of agreement, it had accepted cases with prospects of success that were less than 50% and failed to inform the insurer when prospects fell below 50%.

A dispute arose as to whether Axa's claim was time-barred. The limitation period for claims in tort (including negligence) under the Limitation Act 1980 is, in most instances, six years. This means that claims must be brought within six years of the cause of action accruing. A cause of action in negligence does not accrue, or time start running, until damage or loss is suffered. Axa argued that it suffered loss when it became obliged to pay out under the insurance policies, from which date the six year limitation period began to run. The solicitor argued that the loss was suffered earlier when policies were entered into and when they failed to make the appropriate notifications, in which case Axa's claims were time-barred.

The Court of Appeal agreed with the solicitor. It accepted the principle laid down in the House of Lords decision of *Law Society v Sephton & Co*[2] that an actual rather than merely contingent loss was required in order for time to run. However, it found that Axa had suffered an actual loss when it entered into policies that were more burdensome than if the solicitor had not been negligent and when it lost the opportunity to withdraw cover. This signals that the courts are more inclined to find that a loss is not only contingent and that time starts to run at an earlier point. Axa was accordingly out of time to bring its claim.

A QUESTION OF DATES

The court in *Axa* based part of its reasoning on the House of Lords decision of *Nykredit Mortgage Bank pic v Edward Erdman Group Ltd (No 2)*[3] – a classic negligent valuation case. In *Nykredit*, the bank had lent money on the basis of security valued by the defendant surveyor.

The borrower defaulted and the bank discovered that its security was insufficient to cover the outstanding moneys owed to it. It sued the surveyor, arguing that it had negligently overvalued the property.

In pinpointing the date at which the loss accrued and time started to run, the House of Lords acknowledged that there were several possibilities, ranging from the date on which the loan was made to when the security was sold for less than the outstanding loan. Since the average residential mortgage term is 25 years, the difference between these dates could be substantial.

After exploring the alternatives, their Lordships held that the loss had accrued at the date on which the combined value of the security and the borrower's covenant strength had fallen below the value of the outstanding loan. In some instances, where the security was overvalued and the borrower had little or no independent covenant strength, this would be immediate. In others, it would be necessary to track the value of the security and the borrower's covenant throughout the period of the loan to identify the point at which loss accrued. This exercise is not always straightforward. It also creates the anomaly where the borrower itself brings a claim against the valuer, in which case the cause of action accrues on the date of purchase because it is then that the borrower has acquired an asset worth less than it paid for it.

Nykredit shows that the limitation period for a lender's claim for negligent valuation may start to run long before the security is sold for less than the value of the loan and, in many cases, even before the borrower has defaulted.

Unusually, but perhaps understandably, the court in *Axa* acknowledged that the distinctions drawn in the cases were difficult to rationalise and urged the new Supreme Court to reconsider the law in this area. Current indications are that this could lead to claims becoming time-barred sooner rather than later. The court emphasised the policy behind *Nykredit* that time ought not to run for an action in tort from a much later date than any parallel action in contract. Limitation for a claim in contract for negligent valuation runs from the date of the valuation report.

NO PANACEA

The Latent Damage Act 1986 has come to the rescue of many claimants whose claims accrued many years before they became aware of them. It amended the limitation rules for negligence claims by providing that a claimant that issues proceedings within three years of actual or constructive knowledge of certain "material facts" relating to the claim will not be time-barred even if this is more than six years after the claim accrued. However, it is not a panacea.

It will not assist a claimant that has actual or constructive knowledge of the material facts relating to the claim unless it acts within three years of acquiring that knowledge. An overriding time limit of 15 years from the date of the negligent act or omission also applies.

Some lenders that have opted to weather the downturn before bringing claims may have had sufficient knowledge of the material facts for more than three years. If so, they may find that they have left it too late when they do finally decide to assess the damage caused by negligent valuations.

1 [2009] EWCA Civ 1166; (2009) 159 NLJ 1629.

2 [2006] UKHL 22; [2006] 2AC 543.

3 [1998] 05 EG 150.

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Q&A

Unwanted electricity cables running over development land and exclusivity covenants in shopping centres form the basis of this edition's Q&A.

Q: I have acquired a non-residential developement site and discovered that an electricity company has cables running across it. This is not documented in the deeds. Can I have them removed?

A. Possibly. The Electricity Act 1989 allows you to give notice to the electricity company for electricity cables to be removed. However, the same Act grants the electricity company a right to defend the location of cables by application to the Secretary of State for Trade and Industry.

As in this scenario, where there is no previous written agreement and a landowner has not received any payment from the relevant electricity company, existing cables are likely to be in place on a licence. As such, under the Electricity Act 1989, a landowner can give notice to the electricity company requiring the cables to be removed.

Even if the cables were in place on a written wayleave, this written agreement will typically contain specific terms permitting a notice to remove to be served. However, it is worth noting that, a landowner is not necessarily bound by a written wayleave entered into by its predecessor.

After serving a notice to remove the Electricity Act 1989 sets out the steps which follow. If the electricity company does not intend to comply with the notice it has three months to make an application to the Secretary of State to defend the cables. Electricity companies will typically apply to the Secretary of State to grant them a "necessary wayleave" to protect the cables and at the same time approach the landowner to see if they can reach a private agreement.

If an agreement cannot be reached the Secretary of State will appoint an inspector and a hearing will be held. The aim of the hearing is for the inspector to hear evidence on whether it is necessary or expedient for the cables to cross the land and the effect of the line on the land's use and enjoyment. Based on the inspector's report on the hearing the Secretary of State will either:

- grant the wayleave on terms the Secretary of State thinks fit; or
- refuse to grant the wayleave and the electricity company must remove the cables.

Compensation could be available on the grant of a necessary wayleave for: damage caused by the exercise of rights under the wayleave; disturbing the enjoyment of the land; and the courts have held, in certain circumstances, for loss of profit. It is unfortunate for developers that the question of compensation will not be addressed at the inspector's hearing or by the Secretary of State. This will need to be agreed between the parties or, failing agreement, settled by the Lands Tribunal.

Q: I am currently negotiating with the owner of a shopping centre the grant of a lease of a high-class stationers. Because of the nature of my business I want to make sure that the landlord doesn't allow any other high-class stationers into the centre so as not to detract from my business. The landlord has agreed that there will be an exclusivity covenant in the lease to that effect. I read in your last edition of the Real Estate Quarterly that land agreements will be covered by competition law with effect from April 2011. Does this mean that the exclusivity clause will be worthless after that date?

A. No. I think it is very unlikely that the restriction on the landlord allowing other, similar shops in the same development will breach the competition rules once they begin to apply to land agreements.

I do not think that there is any significant chance that this restriction will be unenforceable for competition law reasons although there may be other issues with enforcement. I cannot see any reason to think that the Office of Fair Trading, once the competition rules apply, would take any interest in such an arrangement.

Behind my view are two points, which will apply in most situations like this:

- competition law only prohibits agreements with an appreciable effect on competition. Here, denying a handful of possible sites in a particular development to a very limited number of specific businesses is highly unlikely to have an appreciable effect. It is very unlikely that the OFT would draw a product market as narrowly as "high-class stationers" and all of the other businesses which might use the other sites in the shopping centre will still be able to do so. Equally, unless the shopping centre is in a very isolated area, it is likely that the geographic market would include competing businesses (and potential sites for those businesses) outside the shopping centre and there is generally no shortage of sites for general retail
- even if there is an appreciable effect, competition law will consider possible relevant efficiency savings in determining whether there is a net negative impact on competition. Here, there is a good argument that could be advanced that the landlord's agreements with tenants not to allow direct competitor businesses in the same centre will produce such benefits. This is both directly for consumers (who will get a better shopping experience than if they found a more limited range of shops) and indirectly by attracting in tenants who would not take the risk of setting up if they thought that a direct competitor might open up in the next unit.

Finally, you should note that this revocation order has still not been made. The Government's intention had been that it would be made prior to the General Election, on around 6 April 2010, to come into force on 6 April 2011. I think that our working assumption has to be that it will still come into force on 6 April 2011. However, it may be that it will not in fact come into force until a year from the day on which it is ultimately made.

The OFT appears still to believe that the revocation will, at some stage at least, happen, since it intends to launch a consultation in the summer – a process which I would hope would give a useful guide on questions like this one.

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