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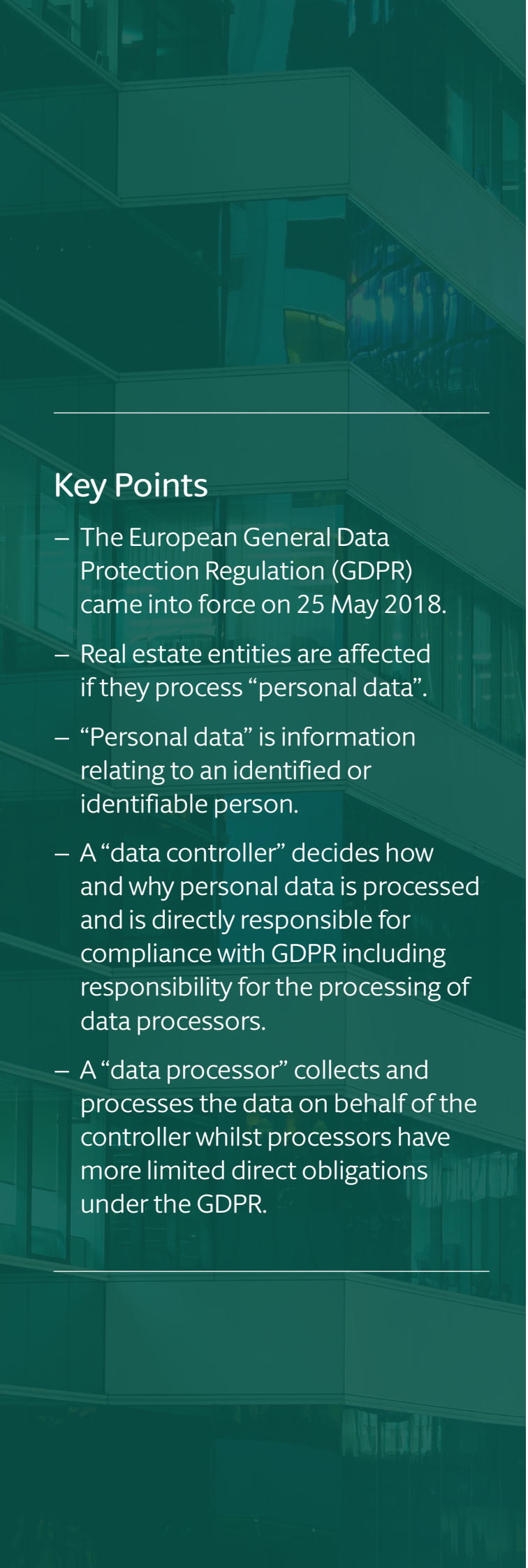
Contents



Key Points

- The European General Data Protection Regulation (GDPR) came into force on 25 May 2018.
- Real estate entities are affected if they process "personal data".
- "Personal data" is information relating to an identified or identifiable person.
- A "data controller" decides how and why personal data is processed and is directly responsible for compliance with GDPR including responsibility for the processing of data processors.
- A "data processor" collects and processes the data on behalf of the controller whilst processors have more limited direct obligations under the GDPR.

The General Data Protection Regulation (GDPR): implications for real estate

The EU General Data Protection Regulation (GDPR) came into force on 25 May 2018 and applies throughout the European Union. Jane Dockeray and Nick Westbrook consider its impact.

In the UK, the main provisions of the Data Protection Act 2018 are now in force, replacing the previous data protection legislation and broadly implementing the GDPR. The new Act will continue to apply after Brexit and will future proof the transfer of personal data between the UK and EU as, after Brexit, the GDPR will no longer apply.

Any entity that "processes" personal data is subject to the GDPR. "Processing" is widely defined and catches virtually anything an entity does with data, from collection and storage through to analysis, sharing and destruction.

The GDPR only applies to "personal data". Personal data is any information relating to an identifiable natural person such as name, identification number, location data or online identifier. Certain types of data are more sensitive than others, including data relating to health, race, ethnicity and biometric data.

How is real estate affected?

As well as traditional property management information, the surge in PropTech, coupled with a vision of smarter, more agile working has prompted the growth of flexible, multi-purpose space and the development of sophisticated building management systems which harness personal data to increase building efficiency.

In multi-occupied buildings, personal data might be gathered via security systems which depend on knowing the identity and movement of personnel, and often deploy CCTV cameras. In the retail sector, personal data might be collected from customers to help both landlords and retailers provide a tailored shopping experience which in turn drives up income.

Other examples of personal data include the names and addresses of residential tenants and guarantors. In recent years there has been a surge in investment in the private rented sector and student accommodation, resulting in a parallel increase in the volume of personal data being collected.

On developments, contractors and sub-contractors provide employment details of personnel working on site, or there may be a flow of personal data between the various parties to the development.

Who controls the data?

A "**data controller**" is a person or entity who decides how and why personal data is processed. Data controllers will be directly liable for data processors and are directly responsible for compliance with all aspects of the GDPR, for example providing appropriate notice to individuals, ensuring there is a legal ground for the processing, responding to requests from individuals to exercise their rights over their personal data, carrying out Data Protection Impact Assessments, keeping personal data secure and accurate, not using it for purposes which are incompatible with those for which it was collected, only keeping it for as long as necessary, not collecting more than is necessary, and complying with the rules around transferring data outside the EEA.

A "**data processor**" is a person who processes personal data on behalf of a data controller.

Under the GDPR, a data controller is required to enter into a contract with the data processor which imposes certain obligations on the data processor. Establishing who is the data controller and who is the data processor is an important part of the data protection process as the data controller will be responsible for personal data in the data processor's hands.

Complex ownership structures

With common property ownership structures, the ultimate owner often will be different from the asset manager and the property manager. For example, a pension fund is administered by trustees who employ an asset manager to decide how and what properties to invest in.

In these circumstances, each entity may have its own data protection responsibilities and should analyse what data is being collected and by whom, whether it is personal data, what the purpose of having the data is, and who is making the decisions as to how it is used, in order to establish who is the data controller and who is the data processor.

Although management agreements between owners, asset managers and property managers can helpfully clarify the role of each party in relation to data protection and compliance with the GDPR, ultimately the identity of the data controller and data processor is one of fact.

Lawful grounds for processing

Data processing of personal data is only lawful if one or more of the following applies:

- the person to whom the data relates has given consent to the processing.
- the processing is necessary for the performance of a contract with that person.
- processing is necessary to comply with a legal obligation to which the data controller is subject.
- the legitimate interests of the data controller or third party necessitate the processing and those interests are not outweighed by any detriment to the person.
- processing protects the vital interests of that person.
- it is necessary for reasons of public interest.

Under the GDPR, the threshold for establishing consent will be higher than under the Data Protection Act 1998. Consent should generally not be included in written documents that concern other matters (for example leases). Silence, pre-ticked boxes or inactivity will not amount to consent. The strict requirements for consent make it an unattractive ground to rely on, particularly as consent can be withdrawn at any stage.

Processing of data collected as part of managing a building such as CCTV footage, keyholder details and personnel data for security passes will often be justified by the legitimate interest of the data controller who needs to preserve the security and value of the asset.

Market data obtained to monitor footfall in retail centres may be carried out for the legitimate interest of maximising the value of the asset, provided it was solely used for that purpose. However, wherever legitimate interest is relied upon, it will be important to ensure that appropriate steps are taken to mitigate any risks to the individual.

Putting people in control of their data

One of the principles behind the GDPR is to give individuals more control of their data. New rights for individuals include: rights of access to the data; to have any inaccurate or incomplete data rectified; to restrict processing in certain circumstances which means that the controller can continue to store data but may only process in limited circumstances; a right to erasure ("right to be forgotten"); to data portability meaning that an individual can obtain a copy of the personal data and transmit to another data controller in a machine readable format; and to object to the processing process.

Privacy notices

Data controllers have extensive obligations in relation to personal data, including an obligation to notify individuals how they use the data. This information is often included in a privacy notice. For example, a privacy notice relating to the use of CCTV might be a sign on the side of the building. Privacy notices are also often displayed on the controller's website.

Where a data controller has no direct relationship with the individual (for example with a customer in a shopping centre), the data controller may want to control the wording of any privacy notice displayed at the property by third parties (for example any notice advising the use of CCTV) to ensure that it is sufficiently widely drafted to satisfy the data controller's extensive legal obligations.

Record keeping and accountability

Under the GDPR, data controllers will no longer have to register with the Information Commissioner's Office ("ICO") although they will still have to pay a fee. They will also be subject to record keeping requirements and must make their records available to the ICO on request.

In addition, data controllers must be able to demonstrate compliance to the ICO with the data protection principles. This will be much easier to do for entities who have properly documented procedures.

Third parties who process data on behalf of a data controller must keep similar records.

Cyber-security

Although the Data Protection Act 2018 does not specifically single out cyber-security, by implementing the GDPR standards it requires organisations that handle personal data to evaluate the risk of processing such data and implement appropriate measures to mitigate those risks.

For landlords and tenants with linked building management systems, this will be a particular concern as any data leakage will inadvertently affect the other. A combined data breach policy, including identifying individuals or teams who will take the lead in responding to a breach, should be considered.

Contractual obligations in leases could require the tenant to report a breach to the landlord as soon as the tenant is aware of it, and to assist the landlord with gathering information necessary to comply with the breach notification requirements.

Data breaches

Where there is a "personal data breach" the data controller must notify the ICO of the breach within 72 hours of becoming aware of it. The data controller must also notify the individual of the breach, where the breach would be likely to cause a high risk to the individual's rights and freedoms which may be given by a public communication.

In contrast, a data processor simply has to notify the data controller without undue delay after becoming aware of a personal data breach.

Sanctions for non-compliance

Breaches of certain provisions, including those relating to basic principles for processing; individuals' rights; or transfers of personal data to a third country, may result in fines of up to:

– 20m Euros; or, if higher,

– 4% of annual worldwide turnover.

In relation to some other breaches, the ICO may impose sanctions of up to 10m Euros or, if higher, up to 2% of an undertaking's total worldwide turnover.

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Nine steps towards compliance with the GDPR

– Assess who is the data controller and who is the data processor by reviewing what personal data is collected by whom, and who is deciding on why it is used.

– Review management agreements between asset owners, asset managers and property managers and document the respective data protection obligations.

– Assess the type of personal data being processed and the legal grounds for processing that data.

– Assess where the data comes from, how it is stored, used and shared.

– Conduct a data protection impact assessment for any high-risk processing to assess whether there are any gaps between current analysis and GDPR requirements.

– Review privacy notices.

– Can you comply with the new personal rights in relation to data such as the right to be forgotten?

– Assess whether cyber-security measures are up to scratch and keep them under review.

– Adopt a data breach policy, including who will take the lead in responding to a breach.

Reflecting on rights of light

A right of light is an easement. Interference with a right of light gives rise to a claim in nuisance in the same way that an interference with a right of way or any other easement is a nuisance. Paul Tonkin and Oliver Law consider the implications.

In the context of a right of way, the law is clear that not every impediment to exercising the right will be a nuisance. Rather, to be actionable, and therefore to entitle the claimant to damages or an injunction, the interference must be "substantial". The position relating to an interference with a right of light is exactly the same.

The law reports are full of cases about whether or not interferences with rights of way are sufficiently substantial to be actionable, so why not rights of light?

The Waldram effect

The credit (or blame) for this can largely be given to Percy Waldram. In the 1920s, Waldram devised a method for measuring light and (more importantly) loss of light to a room. The Waldram method proceeds on the basis that 10 lumens of light per square metre (or lux) is a sufficient amount of light (equivalent to the illumination which would be received from a candle one foot away).

A typical overcast sky without any obstruction of light has an illumination value of 5,000 lux and therefore 10 lux = 0.2% of this, referred to as a sky factor of 0.2%. Waldram concluded that if at least 50% of a room at desk height had a sky factor of at least 0.2% then the room could be considered sufficiently well-lit.

This approach has become known as the 50/50 rule and, as a matter of practice, rights of light surveyors have generally proceeded on the basis that an interference with light will be substantial and therefore actionable where it results in less than 50% of the room enjoying a sky factor of at least 0.2% and will not be actionable where at least 50% of the room remains "well-lit". While this approach has the advantage of certainty, the results can be startling: if a room goes from 80% to 55% well-lit this will not be a substantial interference but a change from 53% to 46% will be.

The Waldram approach can also be criticised for what it does not take into account.

A Waldram analysis will not take account of the impact of artificial light, for example. Case law seems to indicate that, for now at least, that is probably the correct approach.

However, of more significance is the exclusion of reflected light. In reality, only a limited part of the light which we perceive comes directly from the sky. A significant element is by way of reflected light off surfaces (including light reflected off of the new development itself). The Waldram approach fails to take account of this additional source of light, thereby over-emphasising the impact of the interference.

The courts have long since recognised that the Waldram approach and the 50/50 rule are not definitive and should not be treated as more than a "rule of thumb". But, all too often, Waldram is treated as being conclusive and, in practice, the analysis of the extent of the interference is rarely taken beyond the Waldram analysis.

As such, the question of whether or not there is in fact an actionable interference is one which is rarely in dispute, meaning that the court's opportunity to depart from the "rule of thumb" has been very limited.

Commercial parties value certainty and there is undoubtedly something to be said for the fact that applying the 50/50 rule does provide an objectively certain outcome and means that the parties know where they stand.

However, developers (and adjoining owners) should not lose sight of the fact that Waldram is not the final word on the matter and that, ultimately, the adjoining owner must demonstrate that the development will cause a substantial interference with its access to light.

Alternatives to Waldram

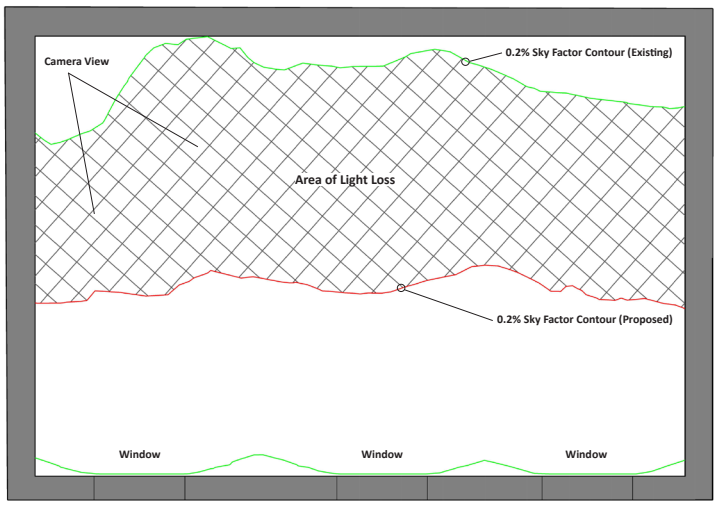
How else might a substantial interference be assessed? Asking the judge simply to imagine for him or herself how much light will be lost if the development is built is challenging to say the least.

In the 1920s, the options available for measuring light were primitive – Waldram's method is based on the level of light needed to comfortably read a newspaper by candle light.

However, technological advances in the use of virtual reality and CGI mean that it is now possible to measure light in different ways and to demonstrate the impact that the development will actually have on the human perception of light. The use of this technology exposes some of the anomalous outcomes that can arise from an unwavering adherence to the Waldram method.

Take, for example, the contour diagram below. This shows the impact that (applying the conventional Waldram method) a hypothetical proposed development would have on a neighbouring room.

Waldram contour



The diagram shows that before the proposed development, some 91% of the room enjoyed a sky factor of at least 0.2% (the green contours) whereas after the development, this will reduce to 40% with the hatched area behind the red contour, no longer enjoying a sky factor of at least 0.2%.

The loss of light appears dramatic and, applying the Waldram methodology and the 50/50 rule, the conclusion that there is a substantial and actionable interference seems irresistible. But what if alternative methods of measuring the loss of light are used? The outcome of three alternative measurements is considered below.

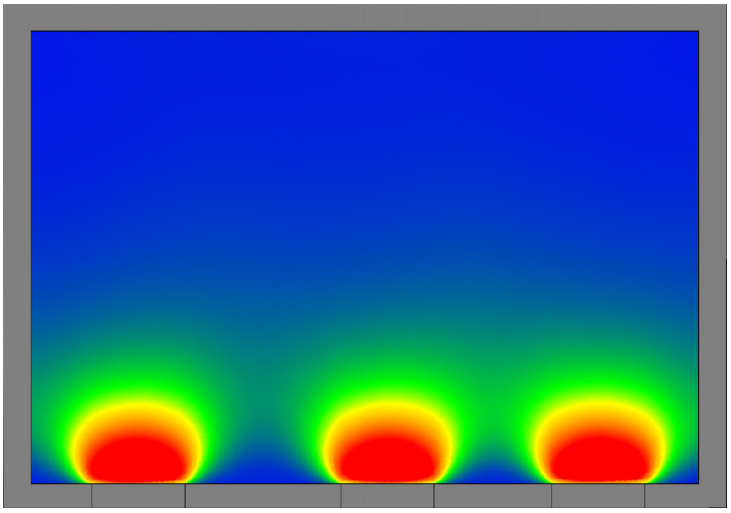
Right of light

The purpose of a right of light is to protect enjoyment of light. The task for the court in any given case is to determine whether or not an interference with that enjoyment is sufficiently substantial to merit protection from the court. The Waldram analysis is undoubtedly an important tool in that exercise. But it is not the only tool and developers should consider whether conclusions reached on the basis of a Waldram analysis might be open to challenge based on alternative methods of measurement.

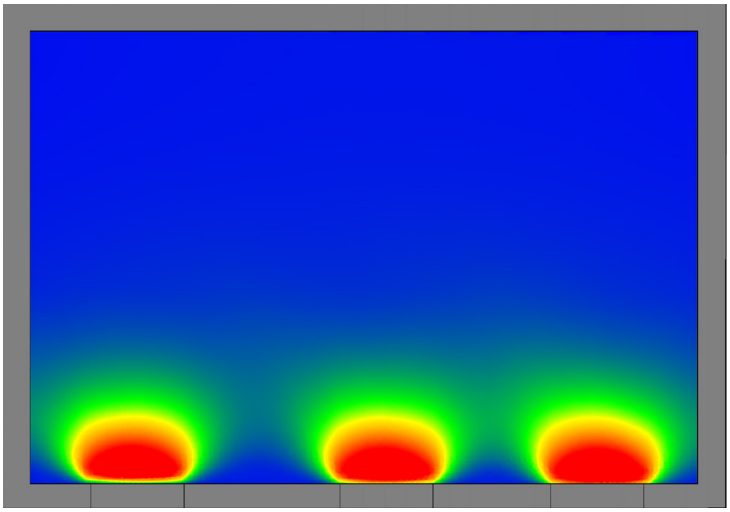
Holistic approach

The proper approach to assessing whether or not an infringement is substantial ought to be a holistic one, taking account of all available evidence and, perhaps most importantly, applying a commonsense approach. If a reduction in light can only be demonstrated by technical measurement and does not ultimately have any material impact on human perception or enjoyment it is very difficult to see why it should be regarded as substantial and actionable. Waldram revolutionised the practice relating to measurement of light but is it time for a new revolution? It also avoids inadvertently incorporating future changes t the 1987 Order which could have the unintended consequence of widening or restricting the scope of the permitted use under the lease.

Moving away from Waldram Daylight factors



Daylight factor existing



Daylight factor proposed

Daylight Factor (DF) is a measurement of the diffused daylight in a room. The measurement takes account of the size and location of the window and the room as a whole and, importantly, the impact of light being reflected off the walls, ceiling and floor. The impact of our hypothetical development on the DF is much less severe.

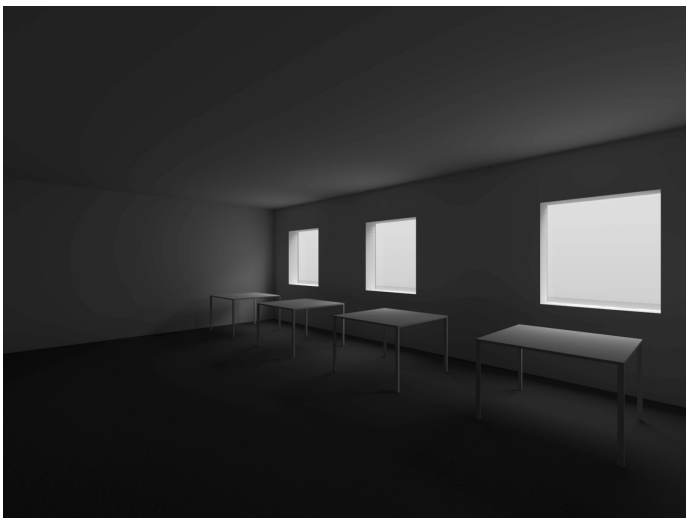
Illuminance

Illuminance existing

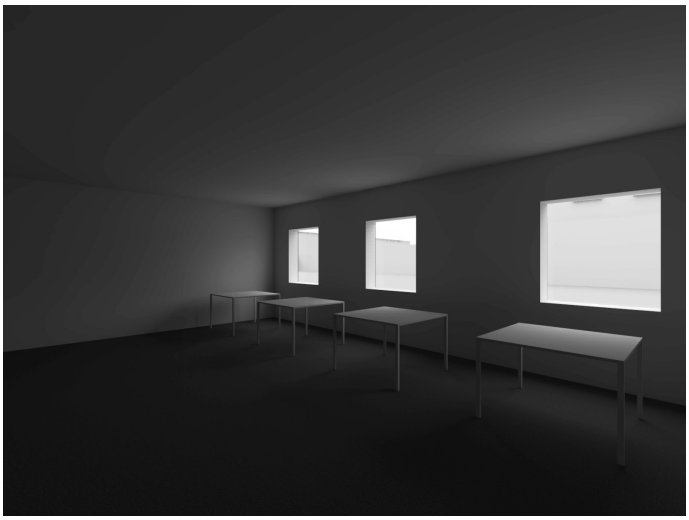
Illuminance proposed

Alternatively, measuring illuminance can be used. This is the approach regularly adopted by engineers when designing a lighting strategy (natural or artificial) for a given use in a room and involves measuring the amount of light which hits the surfaces within the room. Again, the impact of our hypothetical development on the level of illuminance in the room is minimal.

Luminance



Luminance existing



Luminance proposed

Finally, what of the impact of the development on luminance? Luminance (not to be confused with illuminance) is intended to show the power of the light that will actually be detected by the human eye when looking at any given surface. It therefore takes account of both internally and externally reflected light and provides a good gauge of how the light in the room would actually be perceived by an occupier. What the Waldram method would show as a clear actionable interference is much less significant in terms of luminance.

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Top tips for taking serviced office/co-working space

Serviced offices and co-working environments are all the rage at the moment. They work especially well for both start-ups and small businesses, who want a flexible way to ensure that they can move in quickly close to their peers, and move out equally as quickly. Dion Panambalana and Simon Keen offer their top tips.

Established businesses are also using them to satisfy their short term overflow needs as well as their longer term needs for specific projects more suited to being housed away from their other space.

All workspace providers have their own standard contracts, which can (when read cold) look unappealing! However, reputable providers looking to build a resilient business depend on their previous customers for repeat business and their market reputation for new business, so they are unlikely to use their standard provisions to trip people up. That said, there are some bear traps to watch out for, and (however painful!) some time spent on the contract upfront could save you time and money in the longer term.

Here are our top tips for negotiating contracts for serviced offices and co-working space.

1. Check how long you are signing up for, and how and when you can exit the arrangement. Some providers will tie you in for a minimum period, which can be longer than you might expect for a flexible workspace arrangement; whilst you might be able to terminate early, you could end up forfeiting a deposit or still having to pay for the minimum period. Minimum periods of 12 months or more are not unusual. Conversely, though, watch out for rights for the provider to terminate sooner than you expect.
2. Check what space you have been allocated. Is it just a number of desks, or do you have specific offices? Will they be the same every day or are they allocated on a first-come-first-served basis? An open plan "hot desking" arrangement might not work if you have specific technology, security or confidentiality requirements, so ensure the contract reflects what you need (but you might well find that you cannot be given an office with a door you can lock because that could create a lease). Some providers do not contractually commit to giving you any space at all. Does that work for you and what should you do about it?
3. You may need to identify (by name) the members of your staff who are allowed to use your desk(s) or office space. If there are processes for clearing your staff to enter the building or the working area, or just for issuing them with passes, make sure you understand what those processes are (and, if possible, complete them in advance), so that time is not wasted when your staff first arrive at the building to work.
4. How do office services like printing, scanning, photocopying, telephones, internet data services and IT support work? Are they provided as part of your fee for the space, or are you paying for them separately; and if you are paying separately, are you paying a certain amount each day/week/month, or are you billed on a "pay as you go" basis? There are benefits and disadvantages to each approach, and different solutions.
5. The same thing goes for things like drinks and snacks – what your staff are consuming may not be freebies!
6. Consider what happens if you want to stay on in the space for longer. Do you have the right to renew, and if so what will you be charged for the space when you do? What should you do to protect yourselves going forward on price and extra space?
7. Most providers ask for some kind of deposit or retainer when you sign your contract with them. Make sure you understand what you need to do in order to get it back when your contract ends, and that you can actually do what is required! The provider you sign up with at the outset might not be the provider you are dealing with when it comes to getting your deposit back, as providers can sometimes change while occupiers are in their space.
8. Are there any other "hidden" costs, e.g. business rates, for which you might be charged? How should you deal with them?
9. If you are a major corporate, do you need to bring your own IT equipment/telecoms cables etc into

the space? If you do, pre-agree with your provider exactly how this is going to work. Has your provider got all the necessary rights in its lease for the installation of cables in risers and to use building entry points for telecoms providers etc? If not, what can you do to avoid paying your provider for space before you can use it?

10. And finally, watch out for the boilerplate! A lot of providers include "standard" clauses in their contracts on things like anti-money laundering, bribery and corruption and the use of brokers. Check what they say and that you can sign up to them.

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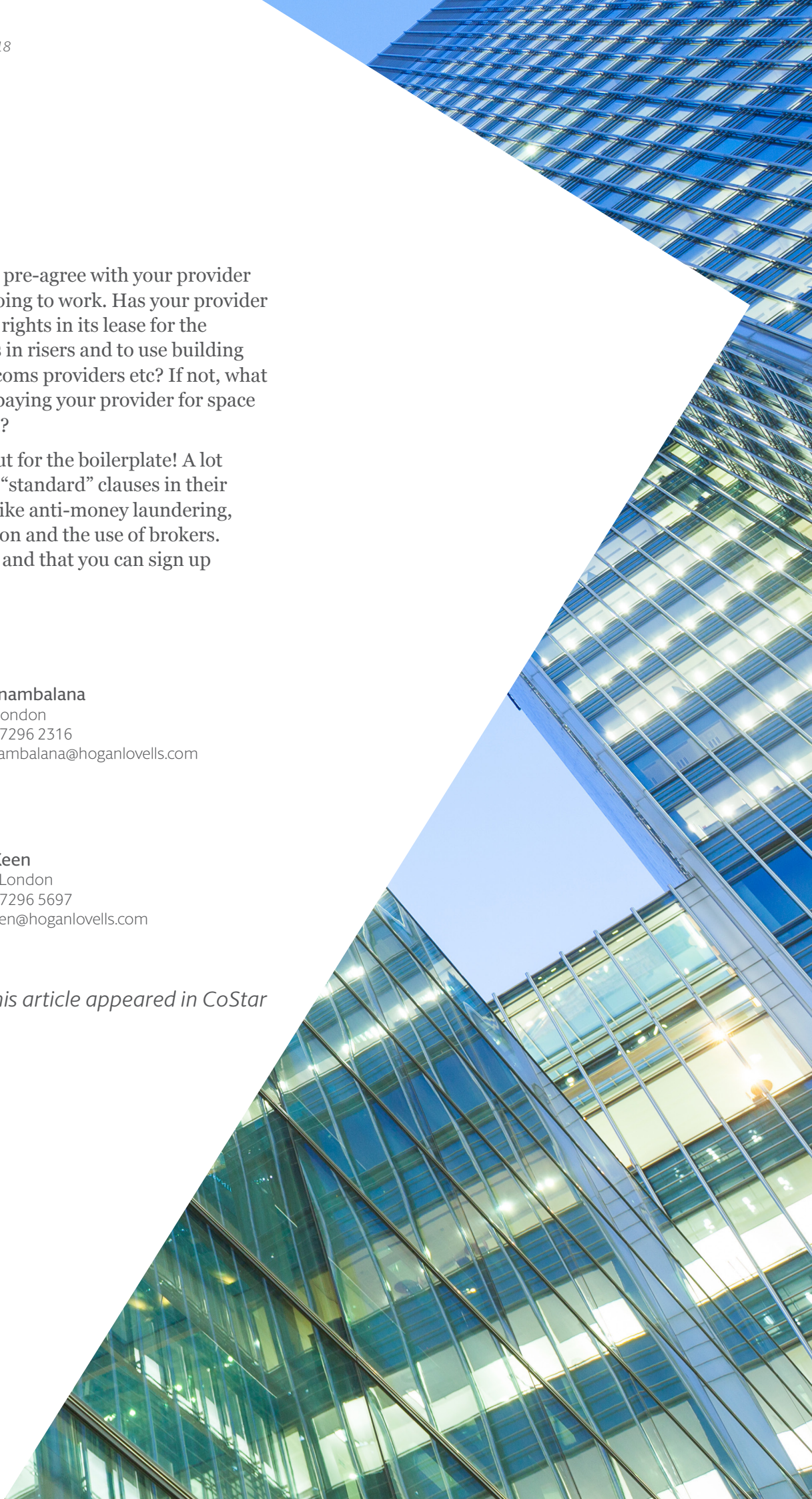
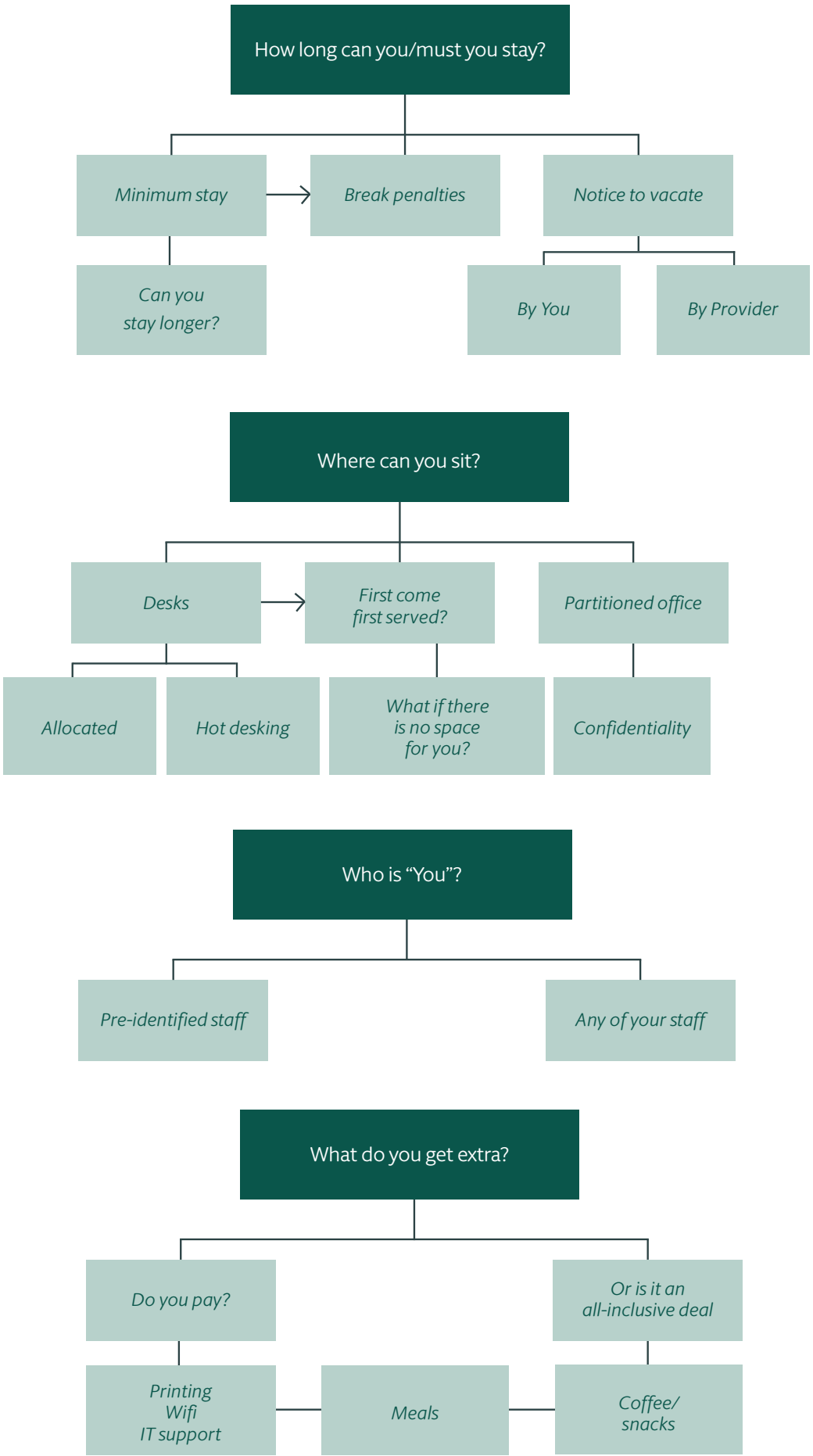
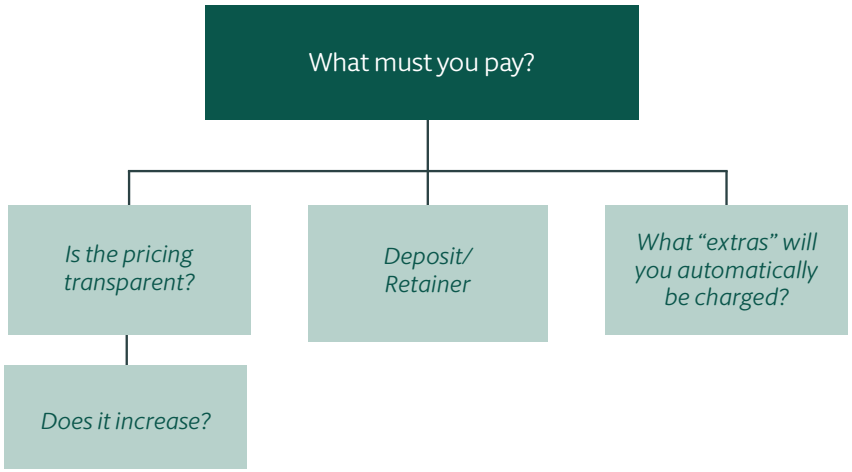
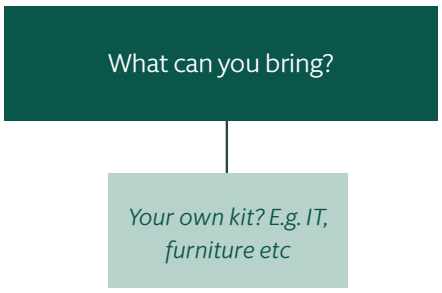
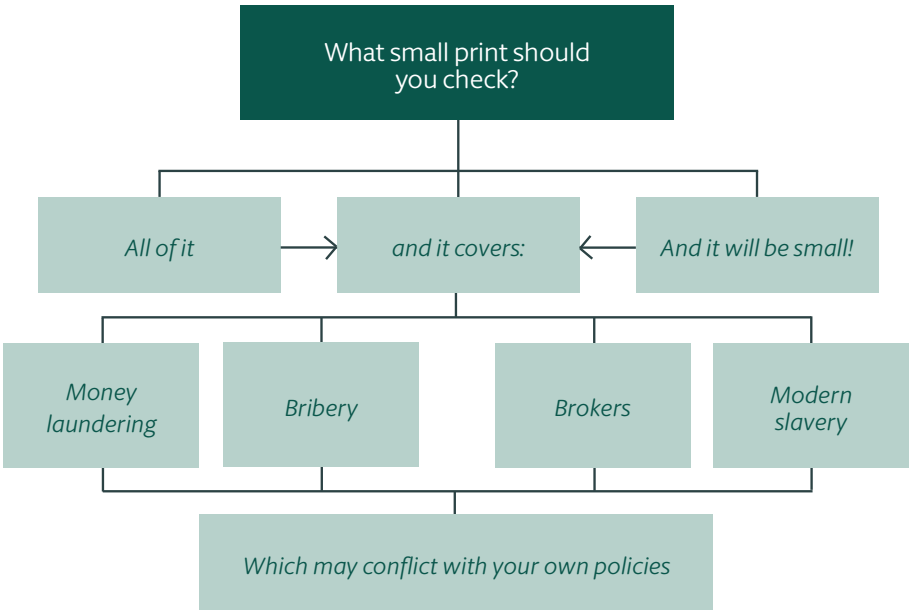


Key points to consider when taking serviced offices / co-working space




What must you pay?
Is the pricing transparent?
Deposit/ Retainer
What "extras" will you automatically be charged?
Does it increase?


What can you bring?
Your own kit? E.g. IT, furniture etc


What small print should you check?
All of it
and it covers:
And it will be small!
Money laundering
Bribery
Brokers
Modern slavery
Which may conflict with your own policies

Q & A

In this edition Simon Keen looks at subrogation in the context of real estate, whilst Ingrid Stables considers the definition of "Permitted Use" in leases.

Q. What is subrogation and why does it matter?

A. Subrogation is a well-known principle of insurance law, which also affects real estate. It means that an insurer who has settled a claim may then "step into the shoes" of the insured and try to recover what it has paid from anyone who has contributed towards, or caused, the loss.

In real estate, landlords' insurers can "subrogate" against a tenant if the tenant has contributed to the insured damage. As the tenant, in effect, pays for the insurance, that doesn't sit well so tenants will typically get protection against this.

How do they do that? Mainly by getting the lease right. If the drafting requires the landlord to insure and to reinstate insured damage, and the tenant is required to contribute to the insurance premium but has no liability for damage by insured risks, the insurers cannot bring a subrogated claim against the tenant. This is generally known as the "Berni Inns" principle, after the case deciding it (*Mark Rowlands v Berni Inns Ltd* [1986] 1 QB 211). Generally, that should be enough, but (being cautious by nature) lawyers normally want to see more if possible.

Most professional property investors' insurance policies include a clause by which the insurer expressly waives its subrogation rights against the tenants. Tenants often reinforce this with lease clauses requiring the landlord to ensure (or make efforts to ensure) that the policy includes a subrogation waiver.

The tenant could also be specifically named on the policy as a co-insured (or composite insured). This is more than being "noted" on the policy, which is covered through a "general interests" clause. However, co-insurance is not a normal arrangement, for both practical and technical reasons.

Tenants should also consider the position of their contractors carrying out works such as fit-outs. Neither co-insurance nor a subrogation waiver in favour of a tenant will automatically benefit a contractor and the Berni Inns principle won't apply. The tenant could require the landlord to obtain a subrogation waiver in favour of a contractor. Not doing so could affect the way in which the contractor prices the work, as expensive additional contractor's insurance will be needed. There is usually an additional premium for the waiver which the tenant would be expected to pay, but it should be substantially less than the cost of the additional insurance.

Some tenants also ask the landlord to insure the fit-out itself, which can be slightly cheaper than insuring it themselves. Many landlords are comfortable doing this (as long as they are given an accurate reinstatement value). Although there can be a debate over whether the landlord has an "insurable interest" in the tenant's fit-out, most insurers seem quite happy to cover it.

Q. As a landlord granting a lease why does the definition of "Permitted Use" always refer to the 1987 Use Classes Order "in the form as at the date of the Lease" and not as originally enacted? Is this the case for properties in both England and Wales?

A. The definition of Permitted Use in your lease would usually refer to the Use Classes Order 1987 (in the form in which that Order existed as at the date of this Lease).

This is to deal with amendments to the Use Classes Order 1987 which came into effect back in 2005 pursuant to the Town and Country Planning (Use Classes) (Amendment) (England) Order 2005. The amendments apply to England only. Therefore for properties in Wales the 1987 Order as originally enacted will always apply.

The amendments mean that:

- pubs and wine bars were moved from Class A3 into a separate Class A4 and hot food takeaways moved out of A3 into a separate Class A5.
- you can change use from A4 or A5 to A1, A2 or A3 without needing planning consent but not the reverse.
- internet cafes are placed in Class A1 (the same class as ordinary shops).
- retail warehouse clubs and nightclubs are *sui generis* (which literally means in a class by itself). This means that you cannot change to or from such uses without needing planning consent.

It is important to refer to the 1987 Order "as at the date of this Lease" so that you are referring to the amended 1987 Order; incorporating the changes above. It also avoids inadvertently incorporating future changes

to the 1987 Order which could have the unintended consequence of widening or restricting the scope of the permitted use under the lease.

This is particularly important for leases which refer to an A1 and/or A3 use or which permit a change to an A1 and/or A3 use.

As a result of the application of the amended 1987 Order (as opposed to the Order as originally enacted), A3 use will be more restricted (excluding pubs, wine bars and hot food takeaways) and conversely A1 use will be wider than before (including internet cafes).

If it is intended to give your tenant a wider A3 use as permitted under the original 1987 Order, then you should consider amending the definition of Permitted Use to refer to the Use Classes Order 1987 (as originally enacted).

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Case Round-Up

Lien Tran summarises recent case law

Warborough Investments Limited v Lunar Office S.A.R.L [2018] EWCA Civ 427

Underletting conditions

A lease contained conditions relating to the tenant's ability to underlet. The conditions did not contain any link to each other by way of connecting words such as 'and' or 'or' and therefore disagreement arose as to whether the conditions applied cumulatively, or whether they were alternatives to one another.

One of the conditions prohibited underlettings of part, other than complete floors or shop units for at least 10 years and at rents and on terms which accorded with the principles of good estate management. A separate provision prohibited underlettings of any part of the premises without the consent of the landlord (which was not to be unreasonably withheld) and except at the best rent reasonably obtainable between willing parties.

In the High Court, the judge decided that the conditions were separate and independent, meaning that the tenant was entitled to sublet as long as it complied with the one of the conditions but it did not need to comply with both.

The Court of Appeal overturned this decision. The conditions were restrictive and both needed to be satisfied for the underletting to be lawful. The Court was not convinced with the argument that the tenant should be able to pick and choose with which conditions to comply. The Court commented that there was a danger in approaching the construction of the agreement with pre-conceived ideas about the commercial intentions of the parties. The starting point must be the language used in the document. There was nothing in the wording to suggest the conditions were to be alternative routes of a lawful underletting.

J N Hipwell & Son v Szurek [2018] EWCA Civ 674.

Entire Agreement Clauses: not entirely effective

The tenant (T) brought a claim to recover losses, which she alleged resulted from a repudiatory breach by the landlord (L) as to the safety of the electrical installation at her business premises.

T leased a café targeted at new or expectant parents. T had experienced problems with the electrical installation at the premises and decided to close her business and sought to recover her losses from L.

The court was asked to consider (i) whether there was a legitimate basis for implying an obligation on L to be responsible and maintain the safety of the electrical installation; and (ii) whether the entire agreement clause prevented the court from doing so.

At first instance, the High Court implied a term into the lease on the basis that this was consistent with both parties' true intentions that the landlord should be responsible for the electrical installation. L appealed.

The Court of Appeal dismissed the appeal but rejected the High Court's reasoning, stating that a term may only be implied where it is necessary to give business efficacy to the agreement. The Court must consider whether the agreement in question contains any provision expressly covering that point and always consider the possibility that the parties deliberately decided not to include the term. The parties' subjective common understanding was insufficient.

The Court decided that there was an obvious gap in the lease and that it was necessary to imply a covenant on the part of L to the effect that the electrical installation was safely installed and continued to be covered by a safety certificate.

Goldman Sachs International v (1) Procession House Trustee (2) Procession House Trustee 2 Limited 3 May 2018 (Unreported)

Tenant successfully exercises break option

Goldman Sachs (T) occupied office premises under a 25-year lease. T had a break right at year 20 subject to there being no outstanding arrears and the tenant "being able to yield up the premises with vacant possession as provided in clause 23.2".

Clause 23.2 provided that on the expiration of the break notice, "the term shall cease and determine (and the tenant shall yield up the premises in accordance with clause 11 and full vacant possession)". Clause 11 then provided that T should remove any alterations and additions and reinstate the premises to their original layout.

The landlord argued that the break would only operate successfully if T gave up vacant possession

and complied with the requirements of clause 11. T contended it only needed to return the premises with vacant possession. Clause 11 did not contain the language of conditionality, it simply served as a reminder of what would happen when the break was exercised.

The High Court agreed with T. The requirements in clause 11 were broad and would not be a suitable break condition. The court stated that clause 11 was merely a reminder of the tenant's yielding up obligations upon a successful break, but was not a condition of the break operating successfully.

Anthony John Wright and Geoffrey Paul Rowley as joint liquidators of SHB Realisations Limited (formerly BHS Limited) (in liquidation) v The Prudential Assurance Company Limited [2018]

CVAs and payment of rent

The High Court held that BHS could not challenge its own CVA as an unenforceable contract and, upon termination of the CVA, the payment of rent was to be treated as an expense of the administration.

BHS entered into a CVA in March 2016. Just a month later, the company went into administration. It was eventually liquidated in November 2016 and the CVA terminated.

The CVA provided for reduced rents under a number of the company's leases whilst the CVA was in force. However the termination clause of the CVA read:

"Upon a termination under this clause 25… the compromises and releases effected under the terms of the CVA shall be deemed never to have happened such that all Landlords and other compromised CVA creditors shall have the claims… that they would have had if the CVA proposal had never been approved".

One of the company's landlords sought to recover the full amount of contractual rent payable under the relevant leases dating back to the approval of the CVA. The landlord argued that this amount was payable as an administration expense for the period during which the administrators continued to trade from the premises.

The liquidators sought to argue that: (i) the obligation under the CVA to pay the full contractual rent was unenforceable as the additional payments constituted a penalty; (ii) the claims contravened the pari passu principle that all creditors are treated equally; and (iii) the payments would not be payable as an expense of the administration as they fell due after the period of trading.

The court was not persuaded that the payments constituted a penalty, as, whilst the CVA has contractual effect, it does not mean that every principle of contract law applies. There was no negotiation with the landlords, so the court could not see how a company putting forward a CVA could subsequently claim to have been oppressed by it. The clear intention of the termination provision was to ensure that landlords were not disadvantaged if the CVA was terminated, by being forced to accept a concession which was expressed only to apply while the CVA remained in force.

The court also held that the payment of the outstanding rent did not offend the *pari passu* principle and was an expense of the administration as it related to a period while the company was trading even if it only fell due subsequently.

Steel and another v NRAM Ltd [2018] UKSC 13

Borrower's solicitor is not responsible for negligent misstatements to lender

Steel (S), a solicitor who acted for a borrower in a series of transactions, was held not to have assumed responsibility for the accuracy of her statements to the lender (NRAM), who was not her client. S had given a statement to NRAM, which ultimately led NRAM to discharge its security on a loan to the borrower.

The Supreme Court considered whether S could be liable to NRAM for her negligent misrepresentation. The Court considered whether (i) NRAM was entitled to rely on the statement; (ii) NRAM did in fact rely on the statement; (iii) NRAM ought to have used its own judgment; and (iv) NRAM did or ought to have sought independent advice.

The Court held that it is not usual for a solicitor to assume responsibility for a third party unless it was reasonable for the third party to have relied on their statements and the solicitor could have reasonably foreseen that they would do so. The Court held that S had not stepped out of her normal role and it would

not be reasonable for NRAM to rely on S's statement. Furthermore, NRAM did not check the accuracy of the representations by S against its file, which would have shown that they were incorrect. The email sent by S went against the key terms of the agreement, and it could not therefore be reasonable for NRAM to rely on a description of its terms put forward by or on behalf of the borrower.

This case serves as a useful reminder to lenders to ensure they do not solely rely on statements from the opposite party's solicitors, but carry out their own enquiries and due diligence, particularly where discharge of securities is involved.

Morris-Garner and another v One Step (Support) Ltd [2018] UKSC 20

New test established for awarding "negotiating damages"

The Supreme Court has set out the test for establishing when 'negotiating damages' may be available. Negotiating damages (also known as "Wrotham Park damages") are based on the amount which the party in breach would hypothetically have paid to negotiate a release of the relevant contractual obligations. The claimant alleged that it had suffered financial loss as a result of the defendants' breach of their non-compete and non-solicitation obligations under the contract. The claimant contended that the breaches resulted in loss of profits and goodwill.

The Court held that the test to determine whether negotiating damages are available was whether the loss suffered is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. This may be where the breach results in the loss of a valuable asset created or protected by the right which was infringed. The Court went on to say that the defendant in this case had taken something for nothing, for which the claimant was entitled to require payment.

This case is helpful in providing clarity to the muddle of case-law that went before it, however the test is not clear-cut and whether negotiating damages will be available for a particular case is not easily answered.

Rotrust Nominees Ltd v Hautford Ltd [2018] EWCA Civ 765

Landlord unreasonably withheld consent to planning application for change of use

Hautford was a tenant who applied to its landlord, Rotrust, for consent to make a planning application for change of use of part of its demised premises. Hautford sublet the property to Romanys Limited who wished to let out the upper floors of the building to residential tenants. The lease permitted residential use and Romanys had fitted out the floors accordingly. However, two of the floors required planning consent for change of use. Hautford had covenanted under its lease not to apply for planning permission without the landlord's consent not to be unreasonably withheld.

Hautford sought the landlord's consent to make the planning application. However, Rotrust refused consent because it wanted to keep control of the property for estate management purposes and was concerned that granting consent and therefore allowing the residential use might enable Hautford to acquire the freehold of the property under the Leasehold Reform Act 1967. This would have a detrimental effect on both the reversion and the value of its wider estate.

At first instance, the County Court held that Rotrust had unreasonably withheld consent. The Court considered that the landlord was attempting to achieve a collateral purpose, using the planning covenant to restrict the tenant's use. The landlord appealed.

The Court of Appeal dismissed the landlord's appeal. The Court held that the same principles should apply as for a fully qualified alienation covenant. The purpose of the consent covenant was not to restrict the residential use to prevent enfranchisement. As the user clause permitted residential use without landlord's consent, using the consent clause to restrict such use would be a "re-writing" of the user clause.

P&P Property Ltd v Owen White & Catlin LLP & anr and Dreamvar Ltd v Mishcon de Reya & anr [2018] EWCA Civ 1082

Solicitors to share the cost of fraudsters

The Court of Appeal considered who ought to bear the losses in two landmark cases involving identity fraud.

Mishcon de Reya (Mishcon) acted for Dreamvar, a developer who instructed them to purchase a £1.1

million property in London. Mary Monson Solicitors (MMS) was the Manchester law firm acting for Mr David Haeems, the seller. However, MMS' client was in fact an imposter who claimed to be Mr Haeems using forged ID documents. Neither law firm had met the seller in person, instead relying on Denning Solicitors, another law firm, to certify the purported seller's ID documents on behalf of MMS.

Mishcon was instructed to complete the sale as quickly as possible. After simultaneous exchange and completion, Mishcon transferred the completion monies to MMS. MMS then sent the funds onto Denning, who sent them on to a bank account in China.

P&P Property Ltd v Owen White & Catlin was a similar case where Owen White & Catlin (OWC) was the law firm acting for the supposed seller, who was also an imposter.

Both cases concerned negligence, breach of warranty of authority, breach of undertaking and breach of trust.

At first instance, the High Court held that MMS was not liable to either Dreamvar or Mishcon for breach of trust because it was not responsible for the seller's breach of contract. However, Mishcon was in breach of trust as it was only authorised to release the purchase funds for a genuine completion of a genuine purchase.

On appeal, the Court of Appeal held that Mishcon, whilst not negligent, was still liable for the buyer's losses. However, MMS, as the imposter's solicitor, was also liable. The Court concluded that both OWC and MMS acted in breach of trust when they transferred the purchase funds to the seller's solicitors, as a genuine sale had not taken place and therefore the monies remained subject to a trust in favour of the buyer.

Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24

'*No Oral Modifications' clause is found to be effective*

The Supreme Court was asked to consider whether a contractual term, which provided that an agreement could only be amended in writing and signed on behalf of the parties, was legally effective.

Rock Advertising Ltd (Rock) entered into a contractual licence with MWB Business Exchange Centers Ltd (MWB) to occupy office space at Marble Arch Tower in Bryanston Street, London.

The licence included a clause which stated:

"All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."

Rock was in arrears of licence fees and proposed a schedule of payments to MWB which would spread the payment of arrears over the remainder of the licence term. There was a discussion of the schedule over the telephone in which Rock claimed that MWB had agreed to vary the licence agreement in accordance with the proposed scheduled payments.

MWB then terminated the licence and claimed for the arrears. Rock counterclaimed for wrongful exclusion of the premises on the basis that it was not in breach of the licence, as varied by the conversation. MWB disputed that the licence had been varied and relied upon the "no oral modifications" clause.

The judges held that the parties' intentions were clear, and whilst oral variations were not forbidden, they would be invalid. Agreeing to an oral variation is not a contravention of the clause, but simply a situation to which the clause applies. The Court's view was that the inference from the parties' failure to observe the formal requirements of the clause was not that they intended to remove it, but that they overlooked it.

If the parties had acted on the oral variation, then estoppel would have prevented MWB from relying on the no oral modification clause. However, estoppel did not arise in this case as there were no unequivocal words or conduct representing the variation as valid over and above the informal promise.

Whilst providing certainty to contracting parties, the case serves as a reminder to parties to check for a no oral modification clause, and wherever possible, ensure that agreements are put into writing to avoid any argument over validity.

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Time to think seriously about cyber-security

With the General Data Protection Regulation (GDPR) now in force and the threat to building management systems ever increasing, now is the time to take cyber-security seriously. GDPR is a major overhaul of data protection legislation, which radically alters the risk profile of cyber breaches for any business handling personal data. The threat is not limited to cyber space; is your smart building safe? We are increasingly reliant on sophisticated computer systems controlling every moment we spend in our workspace and leisure space, from lights and lifts to CCTV and AV. But what if those systems fall into the wrong hands? Daniel Norris and Katie Dunn consider the potential consequences and some measures you can put in place now to reduce the risk.

Building management systems (BMS) are the mothership of modern buildings. Whether you work in a smart building, window shop at the weekend or while away the hours in a luxury spa hotel, you are likely to spend at least part of your week with a BMS controlling your environment or offering you services at your convenience. These increasingly sophisticated systems offer centralised control for satellite services such as automatic doors, lifts, lighting and self-monitoring air conditioning.

Large commercial buildings are often populated by thousands of busy people, all with pockets full of personal data, yet relatively little is done to protect them from the emerging risks of cyberspace. The retail and leisure sectors, for example, collect huge amounts of personal data, from account details to information on spending habits. Hardly surprising then that retailers have been one of the sectors hardest hit by cyber breaches in recent years.

The risks

Technological advancements mean that BMS are more integrated with occupier networks than ever before; offering convenience for consumers but multiple entry points for hackers. Once "in", the hacker has a finger on the button that controls the lifts, doors, alarms and sprinklers. It's not difficult to imagine the chaos that could be caused in city centre locations. The door is also open to the hacker to take a trek through the shops with account details collected from card payment devices, through the installation of malware. Landlords and tenants will also need to be concerned about trading data. Often collated as part of the management of shopping centres, retailers will be concerned about any leak of this confidential information, particularly if it is weak trading data that indicates financial difficulties – and even more so if it is price-sensitive information.

For the individual, the impact of a cyber breach is serious and immediate but the consequences for building owners are not limited to angry customers and reputational damage. The data protection regime has been overhauled in May of this year with the introduction of General Data Protection Regulation (GDPR).

Those with duties to serve and protect individuals and their personal data have a lot to learn from the new regulations, but the increase in fines is perhaps the most headline grabbing feature. The maximum fine will increase to a gravity-defying €20m (£17m) or 4% of worldwide turnover of the undertaking (whichever is the higher). This alone should be enough to put cyber-security higher up the agenda but, in case further incentive is required, building owners and occupiers should also be thinking about the potential damage to their buildings and their tenants' possessions within them. Tenants will undoubtedly seek recompense if their stock is soaked from malicious use of the sprinklers or a food retailer's freezers are all turned off. The damage caused could also be non-physical – locking out customers or halting all the lift services may not cause physical damage but may make premises inaccessible.

The solution

Protecting property against potential cyber breaches starts with proper maintenance of the BMS. Regular upgrades and updates to security software should be carried out to ensure the BMS continues to outpace hackers. Proper attention should be given to password policies and physical security arrangements since some of the simplest attacks start with a password on a post-it note or an intruder with a USB stick. Specialist advisers can assist with risk assessments and simulated attacks. Staff should be properly trained and vetted and checks should be carried out to ensure that suppliers and service providers are being as vigilant.

Once the BMS is in good order, steps should be taken to future proof it to ensure the system is upgraded and secure. That is true of standalone systems too – a disgruntled employee or professional hacker will be able to introduce malware to the system through a physical breach.

Building owners should look at their leases. Who is responsible for keeping the BMS in repair and does this include a requirement to keep security software updated? If the responsibility falls to the building owner, then can the cost be recovered through the service charge? Where will the liability fall for loss, damage or inconvenience suffered as a result of a cyber breach?

Insurance is available for third-party costs incurred as a result of a cyber breach and some first-party costs, such as the costs of the response to the breach, network interruption, data restoration and cyber extortion if the landlord is held to ransom; but these products are new and evolving and a careful review of policy wording and cover is needed. At the moment, these policies do not cover everything and building owners can still find themselves exposed to reputational costs and the cost of repairing physical damage.

Questions remain, such as: can the landlord recover the cost of the insurance through its leases? What are the landlord's lease obligations to tenants for reinstatement in the event of physical damage? In what circumstances will the rent suspension provisions kick in?

Don't delay

Building owners must assess the risks they face, both to their tenants and visitors, as well as understanding their legal obligations. Before an incident occurs, they should develop response plans, incident response simulations and consider insurance strategies. The response phase is also crucial and requires proper management of breach notifications, communications and public relations, law enforcement interactions and forensic investigations.

Finally, landlords should engage with relevant legal, regulatory and governmental authorities and be ready with a defence strategy to counter potentially costly damages claims and negative PR.

This is not science fiction.

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This newsletter is written in general terms and its application in specific circumstances will depend on the particular facts.

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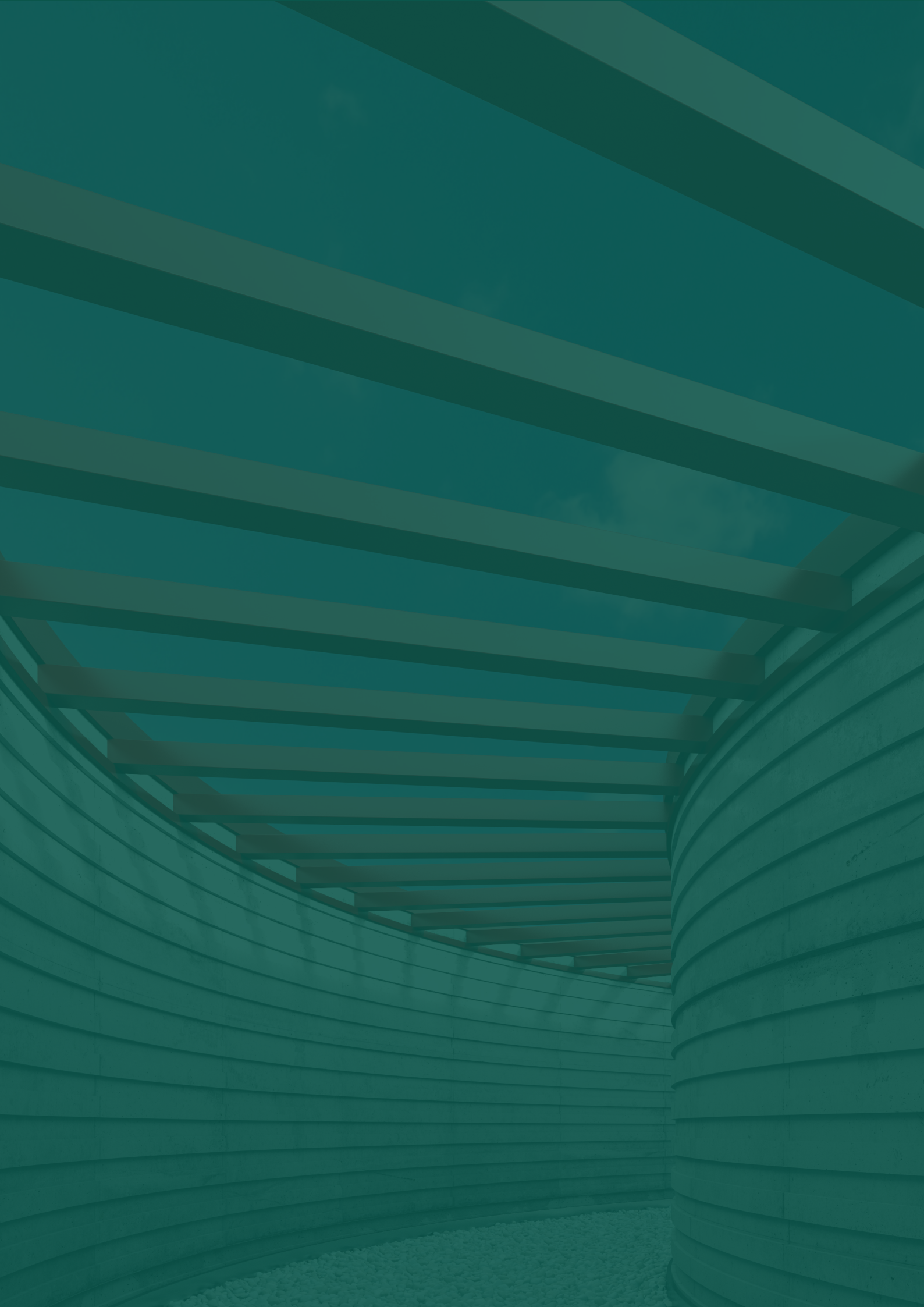

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