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A lesson in possession

Paul Tonkin considers the tactics and pitfalls involved in obtaining possession for redevelopment under the Landlord and Tenant Act 1954.

Landlords should not forget the fact that a tenant who is refused a new lease on redevelopment grounds will be entitled to statutory compensation under the Act.

An on-going shortage of property supply, particularly residential, has put redevelopment back at the top of the agenda for many landlords looking to maximise investment value. While most will be all too familiar with potential delays and complications in the planning process, they should not overlook the need to obtain possession from any existing tenants at the property they wish to develop.

A landlord may be fortunate enough to have a building with tenancies that are all about to expire and are contracted out of the Landlord and Tenant Act 1954 ("**the Act**"). Sadly, life is rarely that simple: there may be break notices to exercise, surrenders to negotiate and 1954 Act rights to grapple with. Failing to overcome these hurdles in the right way and at the right time can prevent the landlord from obtaining possession when he wants and, in a worst case scenario, halt a development scheme in its tracks.

Important Notice

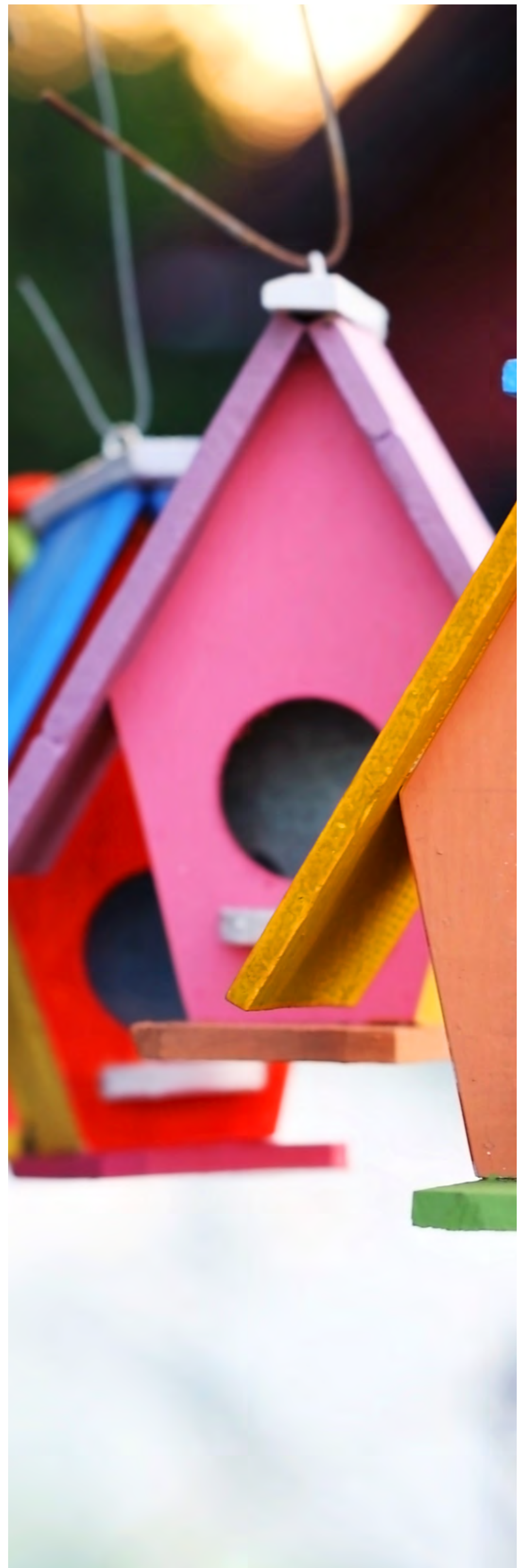
Where tenants have security of tenure under the Act the landlord will not be entitled to possession until he has met the requirements of the Act. This provides that where a lease comes to an end then (assuming it benefits from protection under the Act) the tenant will be entitled to remain in occupation until either party takes steps under the Act to bring the tenancy to an end. This broadly requires service of between six and 12 months' notice and requires the landlord to indicate whether he is willing to grant a new tenancy. If the landlord wants to gain possession he must specify at least one of the grounds of opposition set out in section 30(1) of the Act.

Where the landlord relies on a ground of opposition, the tenant can put the landlord to proof and, ultimately, the court will decide whether the landlord satisfies his ground. This can be crucial from a timing perspective: a landlord who simply serves six months' notice and waits to see if the tenant gives up possession could find himself in real difficulty where his tenant applies to court just before expiry of the notice. He will potentially be unable to get possession until the court process runs its course. With a court system under incredible strain, that can take 12 months or longer. The Act allows landlords to start the process as soon as they have served notice and this can be an important strategy where the landlord wants possession as soon as possible.

Getting in on the Act

Most landlords know that "redevelopment" is a ground of opposition under section 30(1)(f) of the Act (often simply referred to as "ground (f)") and it is tempting to assume that, as a result, a landlord is not going to have difficulties in recovering possession where he intends to redevelop. That is a dangerous assumption to make.

First, it is not enough that the landlord intends to redevelop. The redevelopment must come within the scope of ground (f). This requires that "on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial works of construction on the holding or part thereof and that he could not reasonably do so without obtaining



possession of the holding". There are a number of elements to be satisfied:

a) The works must amount to demolition, reconstruction or substantial construction. A landlord who intends to do a refurbishment project without any significant demolition or structural works may find that he does not meet this requirement.

b) The works must relate to the "holding". This basically means the premises demised by the lease, less any part no longer occupied by the tenant. In particular, it is not enough that the landlord intends to do works to other parts of the building, even if it is impossible to carry out those works with the tenant in occupation. Difficulties can also arise where the tenant's premises do not include any part of the structure of the building – a so-called "eggshell demise". In those cases, the courts have held that the landlord will usually succeed if his works include removing whatever has been demised, for example, the plasterwork, flooring and ceilings.

c) The landlord must be unable reasonably to do the works without obtaining possession. The courts have held that this means legal possession rather than physical possession and so the landlord will not succeed where he has sufficient rights under the lease to access the premises for his intended works.

The Best of Intentions

Even assuming that the landlord's works tick all the right boxes, this will not be enough unless he actually intends to carry them out.

There are two separate elements to this. First, the landlord must actually have made a firm and settled decision to carry out the works. In the case of a company, any board resolutions and approvals to enable the company to make the decision would be required.

Secondly, the landlord must have a reasonable prospect of implementing that intention. For example, he will have to show that he has reasonable prospects of obtaining planning and other consents required for the works, of obtaining possession of the rest of the building and of dealing with any other third party rights which impede the development. He will also need finance in place to do the works. If the landlord cannot overcome each of these hurdles then his claim for possession is likely to fail.

All in the Timing

The Court of Appeal has recently re-confirmed that the relevant date on which the landlord needs to establish his intention to redevelop is the date of the court hearing, not the date on which he serves his notice or issues court proceedings. This has important strategy implications. A landlord can serve his notice knowing that he has a window of opportunity afterwards in which to get his ducks in a row to establish his intention at court, which may be many months down the line. A tenant who suspects that the landlord's development plans are at an early stage may consider serving an early notice and pushing the claim to court quickly in the hope of forcing the landlord to trial before he is able to establish the requisite intention.

One often overlooked element of the Act is that, even where the landlord does satisfy his ground of opposition, he does not get possession straight away. Section 64 gives the tenant a grace period of three months, plus any period for appeal, before he has to leave. It is important to factor this in when predicting likely dates for possession.

Compensation Culture

Finally, landlords should not forget the fact that a tenant who is refused a new lease on redevelopment grounds will be entitled to statutory compensation under the Act. The amount will be either one or two times the rateable value of the holding, depending on whether the tenant's business has operated from the premises for more than 14 years.

Compensation can be substantial and should be included in the landlord's redevelopment budget. In some cases there may be scope for reducing the amount by seeking to have the rateable value of the premises reassessed but this would need to be done before notices are served as it is assessed as at the date of the notice.

Compensation can potentially be avoided altogether where the landlord can also satisfy a "non-compensation" ground for opposing a new tenancy, for example where alternative premises have been offered. This will not be an option in all situations but can be a helpful negotiating tool in the right case. As ever, tactics are key.

Why This Matters

Delay on any development project can be extremely costly. A strategy for obtaining possession from existing tenants needs to be worked out at an early stage and the likely timescales for implementing that plan should be built into the development timetable. A timetable which envisages planning consent being secured six months after obtaining possession will not work where the landlord may have to demonstrate at court that he has, or will shortly get, planning consent in order to obtain possession.

Even where the landlord has a strong case, a tenant is still able to issue court proceedings, creating delay. A landlord who has thought about these issues early and allowed himself enough time to deal with them will be in a much stronger position.

The landlord's goal should be to enter into binding agreements with the tenants, providing certainty as to when possession will be obtained, and avoiding the risk of a last minute court application.

This will require proactive engagement with tenants at an early stage. Tactics for reaching this goal as quickly as possible could include applying pressure by issuing court proceedings and providing the tenants with a pack of evidence supporting the landlord's intention to redevelop at an early stage. It may also be possible to apply pressure using Calderbank or Part 36 offers to put the tenant at risk on costs if they proceed to court and lose.

Finally, landlords and their advisors should be aware of disclosure obligations throughout the process. If court proceedings are started, the landlord will be obliged at a relatively early point to provide the tenant with copies of all documents relevant to their intention to redevelop, including emails. This includes both helpful and unhelpful documents. It is important that the whole of the landlord's project team is mindful of this obligation when emailing or otherwise creating documents. Legal advice is not disclosable and so should be sought if in doubt.

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Start-ups for 10

Starting a new business is hard work. Finding the right location and premises from which to operate, at a time when flexibility is most needed, is a key issue for start-up businesses. For landlords who operate in the "experiential" sphere, the ability to attract new, dynamic, cutting edge tenants is fundamental to the sustainability and growth of their own businesses but other landlords require a strong, established covenant and longer commitment.

Gill McGreevy considers 10 key considerations for start-up businesses.

Start-up businesses often require flexible break rights, particularly rolling break rights.

1. Will security be required?

A rent deposit provides the landlord with easily accessible security against non-payment of rent. For the start-up, initial cash flow issues mean little spare cash for a deposit. A compromise might involve the early release of the deposit once certain profit thresholds are hit for a sustained period.

Alternatively, a personal guarantee from directors might be acceptable. In some circumstances, the landlord may agree to an early release of personal guarantors when the tenant is more established and able to provide alternative security.

Less frequently, a landlord might accept a bank guarantee. A bank will require sufficient monies to be placed on deposit to support the guarantee. As with a rent deposit, funds will be tied up at a time of tight cash-flow.

2. Form of rent deposit

The form of rent deposit is important to landlords, arguably even more so when the tenant is a start-up. The landlord will stipulate the type of rent deposit structure it prefers.

3. Parent company guarantees

Where the start-up is a subsidiary of an existing business or a new entrant to the UK market, a company guarantee from a parent of substance might be required.

The domicile of the proposed guarantor will be relevant, with an opinion from a local law firm as to enforceability a pre-requisite if the guarantor is based abroad.

4. Lease length

The optimum lease length for a start-up will depend on initial outgoings, projections and financing. There may be various options, depending on the nature of the business.

Some landlords might offer incubator units, or lettings of some premises for very short terms on a "trial" basis.

Pop-up shops allow start-up retailers to trial alternative locations for as little as a week at a time. They provide an opportunity to test the market for a concept or product with no long term commitment and at a fixed cost. For landlords, they provide short term solutions to vacant premises and different retail experiences to attract footfall.

Serviced offices provide office start-ups with a great deal of flexibility for a fixed fee and no up-front capital investment. There are various operators in the market offering a wide choice of locations. Users will be licensees, rather than tenants, and a shopping bag of flexible terms is usually available.

At the opposite end of the spectrum, start-ups which require significant up-front fit-out investment, such as gyms, nightclubs and restaurants, will require significantly longer lease lengths over which the fit-out costs can be amortised.

5. **Breaks**

Start-up businesses often require flexible break rights, particularly rolling break rights. This might be mutually beneficial to a landlord who wants to test out a new concept but retain an ability to terminate the arrangement if it doesn't work out.

6. **Security of tenure**

Landlords frequently exclude from leases the security of tenure provisions of the Landlord and Tenant Act 1954.

Where the provisions are excluded the tenant will not have a statutory right to remain in the premises at the end of the lease and may need to relocate to alternative premises.

If the start-up has become well established and successful, it may be able to negotiate a new lease with the landlord on market terms.

7. **Rental profile**

Stepped rent might be available, which gives the business a chance to grow.

Rent free periods may be available as an alternative or as part of a rental package.

For retail and restaurant start-ups, a turnover rent might be available, consisting of a minimum base rent plus a turnover element linked to profits. In retail, turnover structures are decreasing in popularity as on-line retailing makes it difficult to determine where profits are made when calculating turnover attributable to the premises.

8. Uncapped liabilities

It is crucial for start-up businesses to understand cash flow and projections down to the last penny. Uncapped liabilities in leases, for example relating to service charge, can consequently prove problematic.

An inclusive rent or capped service charge liability can provide a solution for the tenant but for a landlord, they increase the risk of service charge shortfalls and affect the accounting treatment of rents. To offset this risk, the parties may agree a corresponding increase in principal rent.

9. Alienation and Pre-emption

Particularly in retail and leisure, the experience and/or concept offered by the start-up may be crucial and restrictions on alienation, at least for an initial period, are common.

The landlord may also require a pre-emption right should there be a change of control. The owners behind the start-up will require an exit strategy and may resist provisions which trigger a pre-emption if the business is sold.

10. Open for business

The landlord may require the start-up to open and remain open for trade during prescribed hours appropriate to the locality, with very limited exceptions (for example to carry out fit-out works). These provisions are usually a must when there is a turnover element to the rent.

An earlier version of this article appeared in the EG London Investor Guide – March 2016.

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Beware the hidden costs of ground rents

On 21 January, Sir Peter Bottomley MP tabled an early day motion in the House of Commons requesting that Flat 1 Blythe Court, Solihull, be withdrawn from an upcoming auction. The motion was tabled because the sellers were apparently "withholding essential information of penal ground rent provision that make the premises worthless". The property was indeed withdrawn and the legal pack removed from the auctioneer's website. David Horan investigates.

What was it about the property that caused such a concern? We cannot speculate on what the legal pack contained, but we have obtained a copy of the lease for the property from the Land Registry.

The lease, like most flats in England and Wales, contains a yearly ground rent which, for 1 Blythe Court, is £250 "*during the first 10 years of the New Term hereby granted and the annual rent during every successive 10 year period of the New Term twice that which was in the previous 10 year period*".

This ground rent was introduced in 2014 by a deed of variation, which also extended the lease term from 99 years starting in 1961, to 160 years starting in 1961 (the "New Term"). So, on careful reading of the lease, the initial £250 ground rent is backdated to 1961 and doubles every ten years. Since 1961, the rent has doubled five times and is now £8,000 a year. Over 12% of the guide price! This compounding means that in 2021 the rent will increase to £16,000 a year and by the end of the lease it will be over £8m a year.

The case is a vivid reminder of how compound interest can turn very small sums into very large ones.

Had the ground rent at 1 Blythe Court been described in the lease by using the table here instead of a formula, we very much doubt the leaseholder would have agreed to it.

If tenants and leaseholders are offered fixed rent increases, they should tread carefully and make sure they understand what they are signing up to.

An earlier version of this article appeared on our blog: Keeping it Real Estate. You can subscribe to the blog at www.ukrealestatelawblog.com

Years	Yearly Ground Rent
1961-1970	£250
1971-1980	£500
1981-1990	£1,000
1991-2000	£2,000
2001-2010	£4,000
2011-2020	£8,000
2021-2030	£16,000
2031-2040	£32,000
2041-2050	£64,000
2051-2060	£128,000
2061-2070	£256,000
2071-2080	£512,000
2081-2090	£1,024,000
2091-2100	£2,048,000
2101-2110	£4,096,000
2111-2120	£8,192,000

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Right to Rent: Government shifts responsibility onto landlords

From 1 February 2016 landlords across the country will become responsible for policing the immigration status of their tenants. Paul Tonkin and Rob Struckett consider the new obligations.

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New legislation will impose fines of up to £3,000 on landlords in England who rent out their property to illegal immigrants. To avoid this fine, landlords will have to carry out more stringent immigration and identity checks on their tenants. There is a new code of practice for landlords to follow which will outline the checks they need to do.

Within 28 days of the start of a tenancy, landlords will have to carry out checks on all people aged 18 or over who will live at the property as their main home. All private landlords of residential properties in England will be subject to these rules, although certain types of tenancy, such as social housing, student accommodation and leases of seven years or more, are exempt.

Landlords will need to check the original documents that allow the tenant to live in the UK. A valid passport and (if necessary) visa endorsement should be sufficient in the majority of cases, but the government also provides a list of acceptable documents. Landlords should keep copies of all documents inspected and evidence of correspondence with the tenant. A government checking service will also be available.

If the tenant's stay in the UK is time-limited, the landlord will have to make a further check just before the later of (a) the expiry date of the tenant's right to stay in the UK or (b) 12 months after the previous check. If the tenant fails the follow-up check once the tenancy has already been granted, landlords do not need to evict the tenant but they must make an official report to the Home Office.

In most cases landlords are expected to pass responsibility for rent checks onto letting agents as part of the due diligence process on prospective tenants. This should be clearly agreed as part of the landlord's contract with the letting agent.

The extra paperwork and threat of fines could lead to increased costs. Such costs may ultimately be passed down to tenants in the form of rental increases.

For now, landlords who fail to comply will escape with just a fine. However, parliament is considering introducing further sanctions, including prison sentences of up to five years.

There is a new code of practice for landlords to follow which will outline the checks they need to do.

Modern slavery and the property industry

The term "slavery" conjures up images of a shameful colonial past and a practice which was outlawed by the British government more than 200 years ago. However, as the Rt Hon Theresa May MP pointed out ahead of the Modern Slavery Bill in 2014: "the grim reality today is that slavery still exists in towns, cities and the countryside across the world. And... slavery is taking place here in the UK". Louise Moore and Laura Oliver investigate.

The grim reality today is that slavery still exists in towns, cities and the countryside across the world. And.... slavery is taking place here in the UK

Modern slavery encompasses slavery, servitude, forced and compulsory labour and human trafficking. The UK Modern Slavery Act 2015 (MSA) was enacted as part of the government's broader strategy to tackle such crimes and regulations were introduced at the end of last year which bring into effect corporate disclosure requirements under the MSA.

How does this affect the property industry?

Affected organisations will need to publish a publically available statement for each financial year setting out what steps they have taken to eliminate slavery and human trafficking in their business and supply chains.

At first glance this would seem to have little relevance for the property industry. However the reality is that a large number of property organisations will need to issue a statement (see textbox). Whilst most could probably reflect on their own organisations with some confidence, the fact that the statements must extend to their supply chains may be more problematic and will require more considered thought.

Consider, for example, the property management company who enters into a facilities management contract with a third party who in turn sub-contracts the cleaning requirements to a much smaller organisation or individual where there is a real risk of forced or bonded labour. The property management company is quite remote from the risk, but their statement should set out what they are doing to identify and tackle it.

Developers should also be aware that one of the most common forms of labour exploitation reported by victims identified by the National Crime Agency's Strategic Assessment in 2013 was in the construction sector. Their statements should acknowledge this and outline the action they are taking to prevent the use of such labour.

What does the statement need to cover?

"Transparency in Supply Chains etc. A practical guide" has been published by the government to provide guidance on how the government expects organisations to develop a credible and accurate slavery and human trafficking statement each year and sets out what must be included in a statement. Appendix E of the guidance includes the MSA examples of information that may be included in a statement, together with additional examples of good practice and case studies. Broadly these fall into the following categories:

- The organisation's structure and supply chains;
- The organisation's policies on slavery and human trafficking;
- The organisation's due diligence processes aimed at uncovering slavery and human trafficking;
- The procedures the organisation has in place to assess and manage the risk of slavery and human trafficking;
- Performance indicators to appraise the organisation's progress in relation to slavery and human trafficking;
- The training provided by the organisation to raise aware of slavery and human trafficking.

The guidance accepts that organisations will build on their statements year on year and that they will evolve, and improve, over time.

The guidance endorses the use of clear organisational policies and procedures, but says that this does not necessarily require a standalone modern slavery policy and that it may be possible to adapt existing policies and procedures. The statement should provide links to relevant publications, documents and policies.

The guidance makes it clear that whilst greater efforts might be expected in relation to tier one direct suppliers, organisations should engage with lower tier indirect suppliers wherever possible.

When does the statement need to be produced?

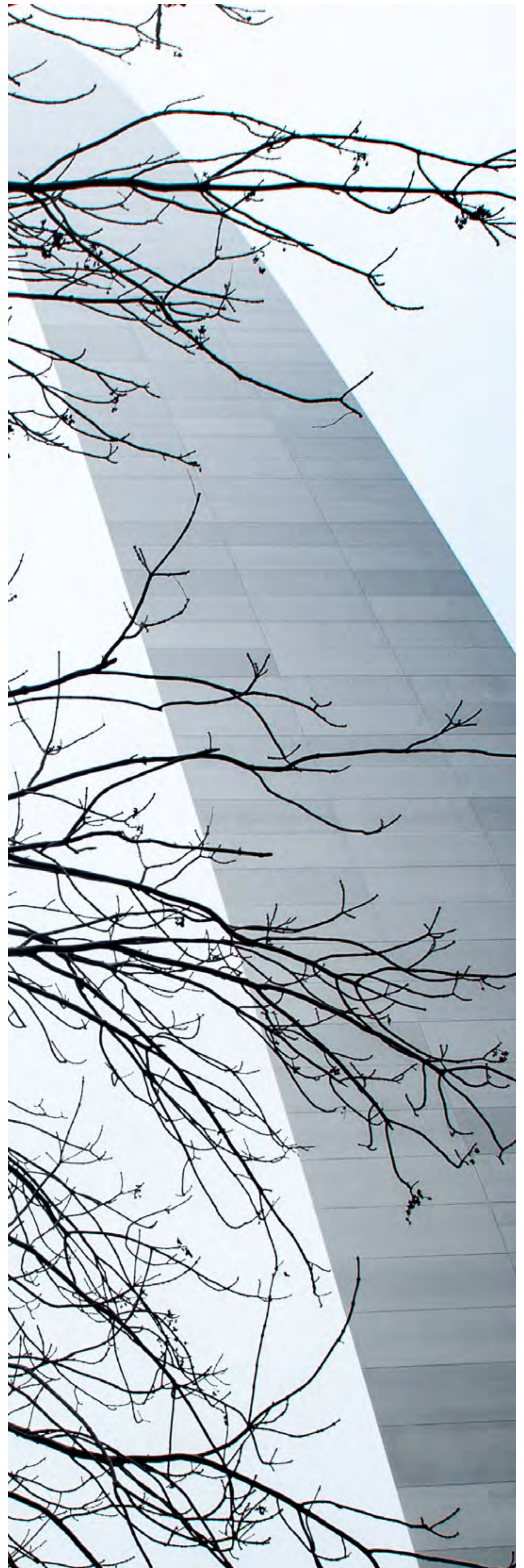
The regulations provide that the first statements will be required for financial years ending on or after 31 March 2016. The guidance encourages organisations to report within six months of each financial year end, meaning that the government expects the first statements to be published by the end of September 2016.

The UK government is seeking a "race to the top" by encouraging businesses to be transparent about what they are doing in relation to modern slavery and human trafficking. It anticipates that failures by organisations to take and disclose sufficient steps will result both in pressure from consumers, investors and NGOs, and in adverse reputational impact.

Who needs to produce and sign off on the statement?

Strictly, a company only needs to report on its business and supply chains, and not those of other group companies. Where more than one company in a group is caught by the new requirements (in their own right), each is required to prepare a statement. The guidance confirms that a single statement may be used to cover companies in the same group but that the statement should be published on each company's website.

However, the guidance notes that if a subsidiary is "part of the parent company's supply chain or own business, the parent company's statement should cover any actions taken in relation to that subsidiary to prevent



modern slavery". It also says that it is good practice to report on the activities of all subsidiaries whether or not they are caught, particularly for subsidiaries in a high-risk industry or location. Following this guidance, it seems that the application of the requirements to groups may be wider than might appear from the face of the MSA and the regulations.

The statement must be approved and signed by a company director, with comparable requirements for partnerships, LLPs and limited partnerships.

What should property businesses be doing now?

The transitional period and guidance will be welcome, but for many businesses there will remain uncertainty as to the application and scope of the new requirements and the practical measures that they should take to assess and manage modern slavery risks in their business and supply chains. This is particularly true of the property industry, which has not traditionally been seen as at high risk of slavery and with problems in the sector potentially growing rather than reducing.

Although the guidance recognises that statements will be something of a work in progress, organisations likely to be affected will need to confirm to which entities the new requirements apply, and start assessing the relevant business activities and supply chains. Early preparation is essential to ensure that organisations will be in a position to publish a statement that will satisfy the expectations of shareholders, customers and other stakeholders.

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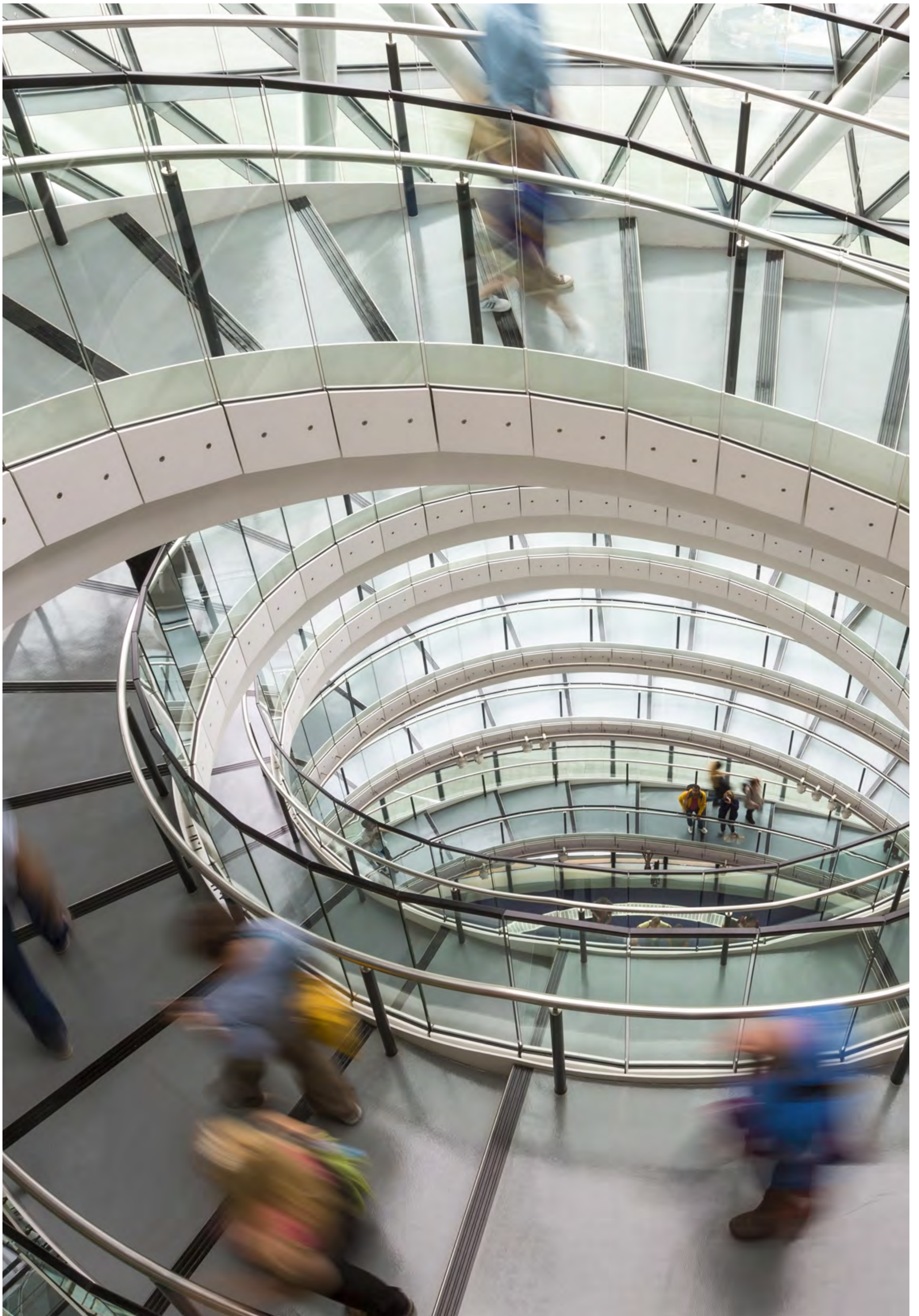
Who has to comply?

The reporting requirements apply to any corporate body, LLP or partnership (whether incorporated or formed in the UK or overseas) which:

- Carries on its business or part of its business in the UK;
- Supplies goods or services; and
- Has an annual turnover above £36 million (including the turnover of any subsidiary undertakings.



Q&A

In this edition Laura Oliver considers the implications of a leap year for completion statements and Simon Keen looks at the practical impact of the *Mazars* case on business rates.

Q: I am selling a property and a colleague has mentioned that the leap year could impact the completion statement. Is that right?

A: It is true that 29 February can have an unexpected consequence for buyers and sellers of commercial properties when they work out their completion statements.

The Standard Commercial Property Conditions are a set of standard conditions which are incorporated (to a greater or lesser extent) into most commercial sale contracts. Under the Standard Conditions, when instalments of annual sums, such as rent, are apportioned the buyer is attributed with an amount equal to 1/365th of the annual sum for each day. This is true whether there are 365 days or 366 days in the year.

For the number of days in a year to make a significant difference the rent has to be fairly high, which is probably why the Standard Conditions don't attempt to distinguish between normal years and leap years. However it is not inconceivable that the anomaly could have a noticeable impact for high income producing properties where completion occurs shortly after a quarter day in 2016. For example the sale of a property producing an annual rent of £10,000,000 completes on 1 April so the buyer is entitled to 85 days' rent. In a 365 day year the daily rent will be £27,397, but in a leap year the daily rent is £27,322. Under the Standard Conditions, the buyer will be entitled to £6,375 more than it would be if the actual daily rent was used to calculate its apportionment.

The buyer will also receive a leap year bonus where a seller has agreed to provide rent top ups or rent guarantees as part of a sale and the buyer is entitled to a period which includes 29 February. For example a sale completed on 1 February and there is a rent free period until 1 March when the property will produce an annual rent of £10,000,000. In a normal year the buyer would be entitled to 28 days at a daily rate of £27,397. In 2016 the buyer is entitled to 29 days at a daily rate of £27,322. The difference is an extra £25,222 due to the buyer.

So in 2016:

– The buyer will get a leap year bonus where he is entitled to an apportionment of the rent paid by tenants for the property as a denominator of 365 produces a slightly higher daily rate.

– The buyer will also get a leap year bonus where the buyer is entitled to income for 29 February and the seller has agreed to guarantee or top up the rent.

– The seller will get a leap year bonus where rent is paid for the property to a superior landlord.

Where the rent in question is significant, astute buyers and sellers may therefore want to vary the Standard Conditions to correct the leap year peculiarity. Similarly where top ups and rent guarantees are involved, actual daily rents should be calculated and agreed between the parties.

Q: We are considering taking a new lease which will comprise several floors. Should we be thinking about the *Mazars* case?

A: Yes. The decision of the Supreme Court last year in *Woolway (VO) v Mazars LLP* could lead to significant increases in the business rates liability of large businesses, which could also be imposed retrospectively.

The businesses at risk are those who occupy multiple floors of office buildings in the UK. Previously these floors might have been assessed for rates as one unit of occupation, but they could potentially now all be assessed separately, leading to an increase in the overall rateable value of their space and so higher business rates bills year on year. Given the potential amounts at stake, clients should be proactive about this and understand whether or not they will be liable for any increase in their business rates, even if just for budgeting purposes.

If you are thinking of taking new space, our advice would be to take floors which are contiguous and at the top of the building as the Valuation Office has confirmed that you would then be treated as an exclusive occupier for rates purposes.

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Case round-up

Eleanor Stark and Paul Tonkin summarise recent case law

Ottercroft Ltd v Scandia Care Ltd and Dr Mehrdad Rahimian [2015] (unreported)

Injunction awarded for rights of light breach

Dr Rahimian and his wife were the sole directors of Scandia, a company that owned an investment property at 14 Pauls Row, High Wycombe. In 2008, Dr Rahimian decided to redevelop the property, wishing to build a café on the ground floor and residential flats above. In particular, he wanted to build a store room for the café in the yard which was part of number 14, but which divided it from 12-13 Pauls Row, a property owned by Ottercroft.

Dr Rahimian's initial proposal was to build the store room in the yard with its outer wall placed within inches of the wall of 12-13 Pauls Row. This proposal was met with objections by Ottercroft. The plan was eventually abandoned but not before Ottercroft had begun proceedings against Dr Rahimian and obtained an undertaking from both Dr Rahimian and Scandia not to obstruct their rights to light.

Following the undertakings, Dr Rahimian proceeded to build a metal fire escape staircase in the yard, servicing the residential flats above. He did so without planning permission and without informing Ottercroft of his plans. The staircase obstructed the right to light of one of the windows at 12-13 Pauls Row. Ottercroft sought an injunction requiring the staircase to be removed because it interfered with its rights of light.

The judge found that Dr Rahimian was at all material times aware that the staircase would impact on Ottercroft's right to light and had deliberately undertaken the works at a time when 12-13 Pauls Row was unoccupied. Whilst the infringement was minor, with the loss of light only worth £886, the court found that Ottercroft was entitled to a positive injunction requiring the removal of the staircase, and a negative injunction preventing any further infringement of the right to light thereafter. The fact that Dr Rahimian had provided an undertaking which was then breached, was critical in this decision.

The Gulf Agencies Limited v Abdul Salam Seid Ahmed [2016] EWCA Civ 44

Landlord entitled to possession for own occupation of protected tenancy

Mr Ahmed was the landlord of 210 Edgware Road, London. Mr Ahmed, a solicitor and notary public, carried on his practice at a rented property in London. He also owned a minicab service which operated from premises at 220 Edgware Road. The ground floor and basement of 210 Edgware Road were occupied by Gulf Agencies under an oral lease. Mr Ahmed served a notice on Gulf Agencies under section 25 of the Landlord and Tenant Act 1954 opposing the grant of a new lease specifying ground (g) (that he intended to occupy the premises himself). He later confirmed that he intended to run his firm of solicitors and the minicab company from the property.

In order to demonstrate ground (g), Mr Ahmed was required to establish both that he subjectively intended to occupy and that he was objectively in a position to implement this intention. Despite Mr Ahmed's unequivocal evidence on the subjective element, the judge at first instance could not find a firm and settled intention to occupy the premises. In relation to the objective element, there was a subsisting certificate of lawful use of the premises under Class A1 (retail) issued to Gulf Agencies. Mr Ahmed's objection to the certificate had not been determined by the date of trial. This meant that he could lawfully use the premises for Class A2 (financial and professional services) for two years without permission. Nevertheless the judge found that the lack of evidence about Mr Ahmed's plans if his objection was unsuccessful put his intention in doubt. The judge ordered the grant of a new tenancy.

Mr Ahmed's appeal was allowed by the Court of Appeal. The judge at first instance had made no clear findings in relation to whether he believed the evidence of Mr Ahmed, although it was implicit from the judgment that he did not. The Court of Appeal found that was unacceptable, and a clear finding was required if the court disbelieved evidence. In such circumstances, the judge's conclusions on Mr Ahmed's subjective intention could not stand. The Court found that the objective element would have to be re-examined in the context of the legislative and policy positions existing at the date of re-trial.

Megan Dodd v Raebarn Estates Limited [2016] EWHC 262 (QB)

Freeholder not liable for accident on steep staircase without handrail

Mrs Dodd was the widow and executrix of Paul Dodd, who suffered a fatal fall whilst visiting a flat at 194-196 Kensington Park Road, Notting Hill. Mrs Dodd alleged that defects in the staircase, and the lack of handrail, were responsible for the fall. Mrs Dodd brought a claim against the freeholder of the block under the Defective Premises Act 1972, arguing that the accident had been caused by a defect in the staircase which the freeholder could have rectified and that its failure to do so was a breach of its duty under the Act to keep visitors safe from personal injury arising from a defect.

The court at first instance struck out the claim against the freeholder. The Act did not impose a general duty to make safe and to carry out improvements. If the defect complained of was not a defect arising from want of repair or maintenance, but simply a feature of the premises then it could not be a relevant defect for the purposes of the Act. This was the case even if the lack of handrail was dangerous and represented a failure to comply with Building Regulations. Mrs Dodd's appeal was dismissed.

Fresca-Judd v Golovina [2016] (unreported)

Landlord not entitled to bring subrogated claim against tenant on behalf of an insurance company

Ms Fresca-Judd was the landlord of a cottage which was let to Ms Golovina under a short-term lease arranged through an estate agent. The lease required the landlord to take out insurance to cover a number of risks, including water damage. The lease also required Ms Golovina to leave the heating on when not in the property to prevent the water pipes from freezing.

Whilst Ms Golovina was away from the property, the water pipes froze and burst. Ms Fresca-Judd argued that Ms Golovina could not have left the hot water on as required but she argued that she had. The estate agent had a record of Ms Golovina's partner confirming that they had turned the heating off before leaving.

Ms Fresca-Judd's insurer paid out under the insurance policy and then brought proceedings against Ms Golovina in Ms Fresca-Judd's name through a subrogated claim. Ms Golovina applied for summary judgment and the application was refused – the court found that the claim was sufficiently arguable.

Ms Golovina appealed arguing that the insurer was not entitled to bring a subrogated claim against her, that the claim was not sufficiently arguable and that on the balance of probabilities the court ought to find that the claim was not sufficiently arguable.

The High Court ruled that the insurer was not entitled to bring the subrogated claim against Ms Golovina. In principle, where a landlord takes out insurance under a lease for the benefit of both landlord and tenant and the landlord has been idemnified by the insurers, the insurer was not entitled to bring a subrogated claim against the tenant in the landlord's name. This principle depended on the wording of the lease, which the court held showed a common intention that the insurance policy would benefit both parties even if the tenant was responsible for the damage and had not contributed to the insurance premium. It was of particular importance that the parties had added a provision to the lease that Ms Golovina would compensate Ms Fresca-Judd if a claim was made for fire damage despite this being a risk covered by the insurance policy. The court went on to find that Ms Fresca-Judd had not proved on the balance of probabilities that Ms Golovina had turned off the heating.

South Kesteven District Council v Digital Pipeline Ltd [2016] EWHC 101 (Admin)

Judge placed too much weight on fact there was no activity at the premises when applying charitable exemption for rates purposes

Digital Pipeline, a charity, leased premises at London Road Retail Park, Grantham under a two year lease at a peppercorn rent. The premises comprised a large retail warehouse with a supported storage floor or mezzanine. It used the premises to hold charity appeals on irregular occasions (10 separate two day periods during the course of the lease). On appeal days, two employees from Digital Pipeline would attend the premises and set up gazebos and information boards detailing the charity's work. The appeals used approximately 42% of the available space at the premises. Kesteven District Council was the local rating authority.

Digital Pipeline argued that the charitable exemption relieving it from liability to pay at least 80% of rates liability under the Local Government Finance Act 1988 applied as "the ratepayer is a charity or trustee for a charity and the hereditament is wholly or mainly used for charitable purposes". Kesteven District Council argued that even on appeal days, the premises were not wholly or mainly used for charitable purposes and therefore rates ought to be paid for both the periods between the appeal days, when Digital Pipeline was clearly not occupying the premises, and for the appeal days themselves.

The judge at first instance held that on appeal days the property was mainly used for charitable purposes particularly as there was no other activity during these days. The judge also found that Digital Pipeline ought not to be liable for rates for the periods between appeal days. The Council appealed, arguing that the judge was not entitled to find that on appeal days the hereditament was wholly or mainly used for charitable purposes given that less than 50% of the premises were used for such purposes or, alternatively, that the case ought to be quashed and remitted back for consideration given the errors in the approach of the judge.

The High Court agreed with the Council and quashed the decision. Whilst there was no presumption that if less than 50% of floor space was being used, a finding could not be made that the premises were being used for charitable purposes, the judge had erred in placing too much weight on the fact that there was no other activity at the premises.

Re Alpha Students (Nottingham) Limited (in liquidation) v Eason and another [2015] WL9701529

Court exercised discretion to direct the Land Registry to remove unilateral notices registered by off-plan purchasers of leases for unconstructed apartments as notices could not be turned into value on liquidation

Alpha Students was developing a site in Hockley, Nottingham for student accommodation. It sold “off-plan” to a number of purchasers some of the 131 student suites which it intended to construct. Purchasers paid a deposit of 50% of the purchase price. All of the purchasers entered unilateral notices on the register of title at the Land Registry in respect of the agreements for lease into which they had entered. Before construction could begin, Alpha Students became insolvent and entered into a creditors’ voluntary liquidation.

The liquidators wished to sell the site and found a purchaser. However, they could not obtain a price that would allow the deposits to be returned to the purchasers and could not remove the unilateral notices, which were preventing the sale. They applied to the court for directions on a number of questions, including whether the purchasers were entitled to assert a right to secure repayment of the deposit and if so over what part of the land and in what proportions relative to each other.

The court exercised its discretion to direct the Registrar to remove the unilateral notices. The court found that in circumstances where there was an available buyer, it should enable the sale of the site by removing the notices allowing arguments about the split of the sale proceeds to take place at a later date. If the sale did not proceed, there would be no money to refund to the purchasers. The purchasers’ interests in the site arose from the payment of the deposits, which represented part of the purchase price for land. Therefore, provided they could still assert a right over the proceeds of sale, there was no need for the unilateral notices to remain.

Greenridge Luton One Limited and another v Kempton Investments Limited [2016] EWHC 91 (Ch)

Purchaser entitled to damages and return of its deposit due to seller’s reckless misrepresentations

In September 2013, Greenridge exchanged a contract to purchase three office buildings near Luton Airport from Kempton for a sale price of £16,250,000 with a deposit of £812,500 payable in two tranches. The majority of the property was let to a single tenant. In its responses to the Commercial Property Standard Enquiries (CPSEs), Kempton confirmed that there were no arrears of service charge and no disputes or complaints “so far as the seller is aware”. The sale contract contained the usual provisions confirming that Kempton was selling the property free from incumbrances, that full disclosure of all incumbrances had been made and that Greenridge would be entitled to rescind the contract where an error or omission resulted from fraud or recklessness on the part of Kempton.

In January 2013, the main tenant of the premises had raised what it considered to be serious concerns about the management of the service charge and had deducted sums from the quarterly payment due in June 2013.

Greenridge rescinded the contract. Kempton accepted that the contract had come to an end but retained the deposit. Greenridge commenced proceedings to recover the deposit and damages under the Misrepresentation Act 1967, claiming that they had been induced to enter into the contract by false representations, and that Kempton had breached warranties in the contract.

The High Court found in favour of Greenridge. Kempton’s replies gave a false impression and the contract contained a misrepresentation that Kempton had made a full disclosure in the CPSEs. Greenridge had relied on those misrepresentations and had been induced to enter into the contract. The Court further found that Kempton had lacked an honest belief that there were no service charge arrears and that such a representation was made at least recklessly.

Greenridge was entitled to the return of its deposit and to the damages it claimed.

Geyfords Ltd v O'Sullivan and others [2015] UKUT 683 (LC)

Landlord not entitled to recover legal costs for service charge proceedings through service charge

Geyfords was the freehold owner of Woodcote Court, a mixed use building with a car showroom, garage and workshop on the ground floor and flats on the floors above. The property was let on a mix of long leases (of which there were five) and assured shorthold tenancies.

During the course of two pieces of litigation against three of the long leaseholders for non-payment of interim service charges, Geyfords incurred substantial legal fees of around £55,000 which it claimed through service charge for a number of years. O'Sullivan and the other long leaseholders disputed their liability to pay these costs under their leases, which were in a common form.

The tenants' leases were granted for terms of 99 years in return for a premium and payment of a modest ground rent. The tenants were required to pay a "Maintenance Contribution" which was to be one-twelfth of the "costs expenses outgoings and matters" set out in a schedule which included a reference to "all other expenses (if any) incurred by the Lessors or their managing agents in and about the maintenance and proper convenient management and running of the Development".

The First-tier Tribunal found that the language of the service charge provisions was not wide enough to allow Geyfords to recover the legal expenditure. Geyfords' appeal was dismissed. The Tribunal found that it was not obvious that proceedings to enforce individual leasehold obligations to make payments fell naturally within the "management and running" of the building. Clear and unambiguous terms would be required to impose an onerous and unusual obligation on tenants which was not the case in the lease here.

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