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Real Estate Team of the Year 2017

Since our last edition went to print, the Hogan Lovells Real Estate Team won Team of the Year at the Legal Business Awards 2017 for its work on a major residential scheme. Nicholas Roberts, who led the team, comments on the sector, the challenges and the opportunities.

The residential property market has been an area of much focus. New entrants, developers, builders, investors and operators continue to chase suitable available stock and projects at the right price while politicians grapple with the essential building blocks of this diverse market.

Collectively the housing market is often referred to as "broken" and "needs fixing", but the solution is not straightforward. Take London for example, those closest to the issues accept that no one solution (whether building on the greenbelt; building upwards; redevelopment of existing stock; or garden cities) will be the "cure" – the scale of the requirement is just too big. A combination therapy needs to be administered but what that combination is has yet to be identified.

It is certainly not a "one size fits all" environment. Take the Build to Rent (BTR) sector, by way of example, which The Housing White Paper has recognised as an area which needs its own form of support.

As my planning colleagues have previously commented, the Housing White Paper suggests a two pronged attack on the housing crisis. The government is putting more pressure on local planning authorities (LPAs) to plan and grant consent for more homes, and on developers to build out quickly and not "land bank" housing schemes.

The approach is one of both carrots and sticks. The government will allow LPAs to raise their planning fees by 20%, but it will also require them to be accountable for the delivery of more homes. One such stick is the housing delivery test. This will automatically trigger a pro-development assumption for housing applications at certain thresholds. From November 2018 it will apply to those LPAs who have not met 25% of their annual housing requirement (rising to 65% in 2020).

Sadly there are more sticks than carrots for developers: completion notices, shorter implementation periods and more "track record" scrutiny, to name a few. These are all measures which the government has consulted upon, so we wait to see whether they will be taken forward.

Looking at one of the more mature aspects of the sector, student accommodation, this continues to be popular as the question turns from whether to invest in this alternative investment market to whether it is, indeed, an alternative market. Is it simply an established mainstream investment decision? The continued interest in this sector has seen, in our experience, new and interesting structures to ensure an investment grade product delivered using SDLT and VAT efficiencies.

The residential property market may have its challenges but with challenge comes opportunity and a chance for stakeholders in the market (and their advisors) to find innovative solutions.

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A new dawn? The revised telecoms code is breaking through

In the sweep-up sessions just before Parliament was dissolved in May, the Digital Economy Act 2017 received Royal Assent. The Act, once brought into force, includes a new Electronic Communications Code. Shanna Davison explains what it is and why it matters.

Property owners are often happy to allow telecoms operators to install equipment on otherwise redundant parts of their properties, such as the roof, and enjoy the revenue stream. But there's a catch. Once installed, it can be extremely difficult to get rid of the equipment if the owner wants vacant possession in order to redevelop. The existing Electronic Communications Code provides statutory rights for telecoms operators to keep their apparatus on privately owned land. There are ways in the Code to remove operators, but they are contradictory and complex, resulting in landowners often having to resort to paying a cash settlement to the operator for them to go.

The existing Code has also struggled to keep up with advances in technology and is famously quoted by a senior judge as being "one of the least coherent and thought-through pieces of legislation on the statute book".

So, has that been fixed with the new Code? Leaving aside termination of Code rights and removal of equipment, it is largely based on the existing Code. Operators can enter into an agreement with property owners to install equipment, which now needs to meet certain formalities, or they can apply to court for an order imposing Code rights. The test for whether a court will impose Code rights has now been placed on statutory footing, as has the method of compensating any owner or occupier for the imposition of rights. This removes any ransom value that the owner or occupier previously held, which is particularly important for operators in rural locations where there are limited sites to extend their network and provide the coverage expected by consumers and businesses today. But arguably, it removes much of the incentive for owners or occupiers to grant Code rights voluntarily.

A key change is that the new Code enshrines the automatic right for operators to upgrade and share their equipment. Any restrictions on those rights in agreements granted after the new Code comes into force will be void.

The biggest change, however, is the process for terminating Code rights. The new Code removes the dual protection currently enjoyed by operators under both the Code and the Landlord and Tenant Act 1954.

For agreements made under the new Code, there will be a two stage process for termination, potentially involving two applications to the court and a timescale of at least two years to achieve vacant possession. At first blush, this might horrify landowners as the timescales in the existing Code appear much shorter. In practice, existing timescales tend to be similar where an operator contests the removal of equipment. Once the new Code is in force, it is likely that landowners will continue to negotiate with operators to leave early, but they may have to pay a higher price as operators may leverage the longer notice periods involved.

The majority of the new Code only applies to agreements made after it comes into force, but the termination provisions in Parts 5 and 6 may apply to an existing agreement with an operator where a landowner take steps to obtain possession only after the new Code comes into force. The flowchart on the next page indicates the general routes that a landowner may have to take, but they should seek legal advice before acting.

Transitional provisions will apply for any landowners who, before the existing Code is repealed, serve a paragraph 21 notice under the existing Code to require the operator to remove its equipment. The transitional provisions will enable landowners to follow the paragraph 21 termination process under the existing Code, without having to engage with the termination provisions in the new Code. Therefore, any landowner who has an existing agreement where the contractual term has expired, is due to expire or can be terminated early should carefully consider which route would be most beneficial for them if they are planning to obtain vacant possession of their property in the near future. Any landowner who wants to benefit from the existing paragraph 21 route should act promptly, as they will lose the right to do so once the new Code is in force.

The new Code is not without criticism and a number of areas have already been identified as ripe for dispute. There is no indication at this stage when it will be brought into force, but watch this space.

Step by step guide indicating the process for removal of existing telecoms apparatus under the New Code

Does the Landlord and Tenant Act 1954 apply to the Agreement with the operator (i.e is it a tenancy of premises occupied for the purpose of a business)?

- **Yes** → Has it been contracted out of the 1954 Act?
  - **No** → Landowner needs to successfully oppose the grant of a new tenancy under the 1954 Act → Once the tenancy has been terminated, the landowner must serve a Removal Notice → Landowner must serve a Removal Notice, giving the operator a reasonable period to remove the apparatus and restore the land
  - **Yes** → Is the primary purpose of the Agreement to grant Code rights?
    - **Yes** → The operator has Code rights. Landowner[1] must serve a Termination Notice on the operator to terminate the Agreement. The Notice must give at least 18 months' notice and cannot expire earlier than the expiry date of the Agreement[2] and must state the statutory ground of opposition (see below)
    - **No** → Once the Agreement has expired, the landowner must serve a Removal Notice → Landowner must serve a Removal Notice, giving the operator a reasonable period to remove the apparatus and restore the land
- **No** → The operator has Code rights. Landowner[1] must serve a Termination Notice on the operator to terminate the Agreement. The Notice must give at least 18 months' notice and cannot expire earlier than the expiry date of the Agreement[2] and must state the statutory ground of opposition (see below) → Did the operator serve a counter notice within 3 months?
  - **No** → The Agreement will terminate on expiry of the Termination Notice. The landowner must then serve a Removal Notice → Landowner must serve a Removal Notice, giving the operator a reasonable period to remove the apparatus and restore the land
  - **Yes** → Did the operator issue court proceedings within 3 months of serving the counter notice?
    - **No** → The Agreement will terminate on expiry of the Termination Notice. The landowner must then serve a Removal Notice
    - **Yes** → Did the landlord prove the statutory ground of opposition before the court?
      - **Yes** → The Agreement terminates. The landowner must then serve a Removal Notice → Landowner must serve a Removal Notice, giving the operator a reasonable period to remove the apparatus and restore the land
      - **No** → Operator retains Code protection and may keep their apparatus in situ

Landowner must serve a Removal Notice, giving the operator a reasonable period to remove the apparatus and restore the land → Have the parties reached an agreement for the removal of the apparatus within 28 days?

- **Yes** → Apparatus is removed
- **No** → Landowner can apply to court for an order requiring the operator to remove the apparatus or entitling the landowner to sell it

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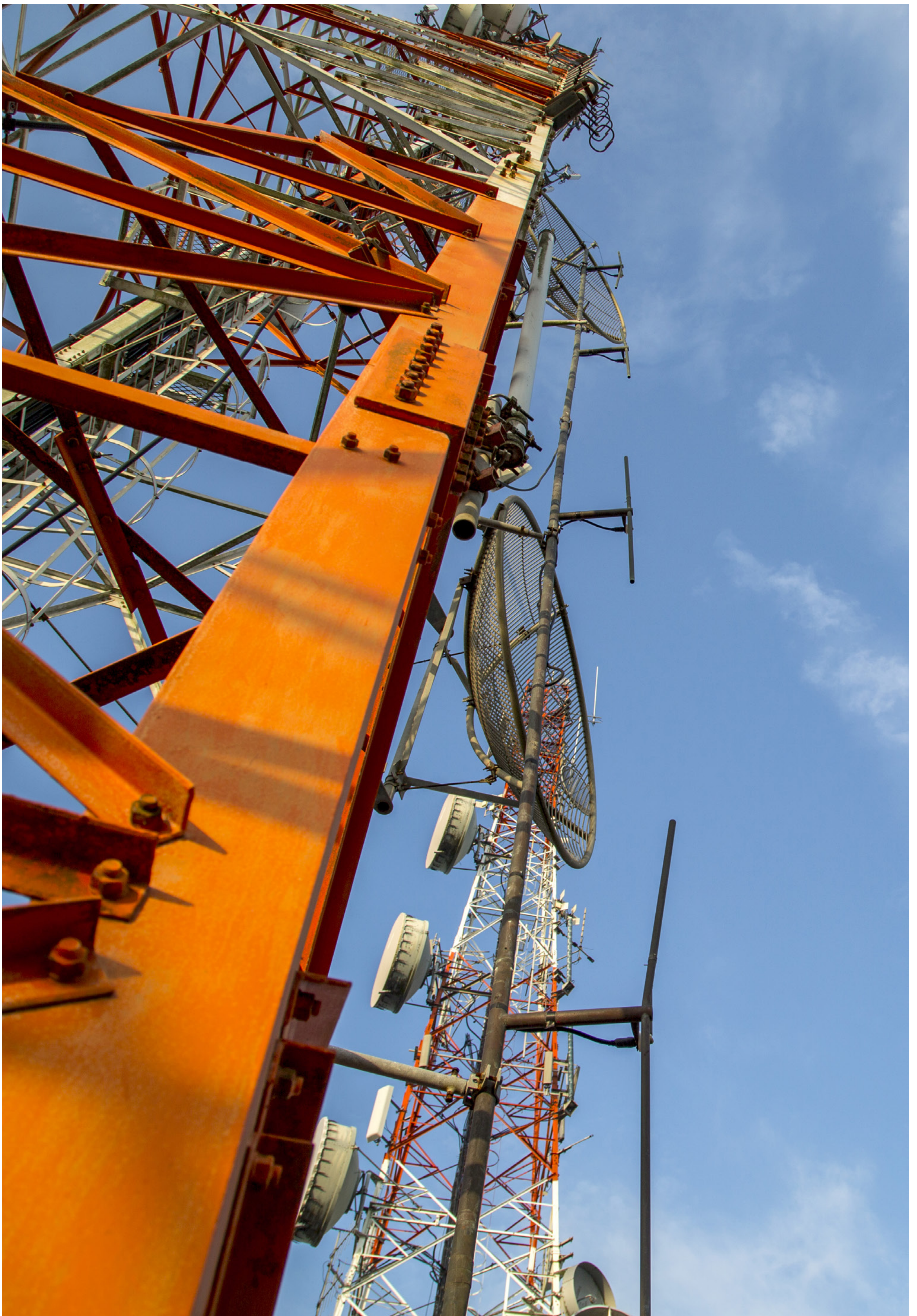
Statutory grounds to terminate the Agreement

- Substantial breaches by the operator of its obligations under the Agreement
- Persistent delays by the operator to make payments under the Agreement
- The landowner intends to redevelop and could not do so whilst the Agreement exists
- The test for imposing Code rights is not met, which is:
  - the imposition of Code rights can be adequately compensated by money; and
  - the public benefit of imposing Code rights outweighs the prejudice to the landowner

1 This assumes the landowner is a party to the Agreement.

2 If the Agreement has less than 18 months to run when the new Code comes into force, the notice period is reduced to a period equivalent to the unexpired term or 3 months, whichever is longer.



Knot in my back yard – the perils of Japanese knotweed

Sarah Brown examines a recent decision of the Cardiff County Court which highlights the legal risks associated with Japanese knotweed and clarifies the responsibilities of landowners towards the owners of neighbouring land.

What are the effects of finding Japanese knotweed on your land? Most concerned owners will consider removal or decontamination of their land. But what about their responsibilities to neighbouring landowners?

Japanese knotweed is an invasive, non-native plant which was originally introduced in the UK as an ornamental plant in the nineteenth century. It grows very quickly and is now a significant problem across the UK because it can cause physical damage to buildings and infrastructure and is extremely difficult to eradicate.

In *Williams v Network Rail Infrastructure Ltd*[3], two neighbours were the adjoining freehold owners of two semi-detached bungalows in South Wales. Immediately behind the two bungalows was an access path and embankment owned by Network Rail Infrastructure Limited. It was accepted that the Japanese knotweed had been present on Network Rail's land for at least 50 years. The neighbours brought a claim of private nuisance against Network Rail. They argued that:

- Network Rail was liable for encroachment of the Japanese knotweed on to their land; and
- the presence of Japanese knotweed on Network Rail's land was an interference with the "quiet enjoyment" or "amenity value" of their property. This was on the basis that the presence of the Japanese knotweed affected their ability to sell their properties at a proper value.

The neighbours sought an injunction requiring Network Rail to treat and eliminate the Japanese knotweed on the railway land and damages for the diminution in the value of the neighbours' respective properties.

The court found no proof of damage to the properties and so rejected the claims for encroachment. However the court held that the presence of Japanese knotweed on Network Rail's land amounted to an unlawful interference with the neighbours' quiet enjoyment or amenity of their property. It found that the amenity value of a property could include the ability to dispose of it at market value. The court also found that even if the Japanese knotweed on Network Rail's land was treated, the value of the neighbours' properties would still be diminished.

The court then considered whether the bungalow owners were in breach of duty in allowing or permitting the nuisance to continue. Network Rail accepted that it had actual knowledge of Japanese knotweed being present on its land. However it argued that this knowledge did not impose any duty to eradicate or otherwise remove the Japanese knotweed prior to receiving complaints from the bungalow owners in 2013.

3 [2017] UK CC (2 February 2017).

The court disagreed with this argument and found that Network Rail had constructive knowledge of the risk of spread and consequential damage to the neighbours' property from 2012/13 when guidance was published by the RICS and the Property Care Association. It found that the steps taken by Network Rail to treat the Japanese knotweed were inadequate and not in accordance with the obligations of a reasonable landowner to eliminate and prevent interference with the quiet enjoyment of the neighbours' land. The court awarded damages to pay for treatment with an insurance-backed guarantee, for the residual diminution in the values of their properties and general damages.

Because this is a county court judgment, the court's decision is not binding on other cases but it does raise the possibility of claims being brought against other large landowners, such as Network Rail, on similar grounds. In particular, the case makes clear that Japanese knotweed on neighbouring land can be an actionable nuisance even without it causing any physical damage.

The decision serves as a salutary lesson to owners or occupiers of land on which Japanese knotweed is present. It is incumbent on such owners to treat and dispose of any Japanese knotweed in an effective manner and fully in accordance with all current standards in order to protect themselves against liability.

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Have side letters gone out of fashion?

The decision earlier this year in *Vivienne Westwood Limited v Conduit Street Development Limited*[4] casts doubt on the enforceability of termination rights in side letters and may well have left some landlords asking themselves how many of their side letters would suffer the same fate. Ben Willis explores the case and allays some of those concerns.

Vivienne Westwood Limited was the tenant of premises on Conduit Street in London's West End. The landlord was Conduit Street Development Limited. In 2009 the tenant and the landlord's predecessor entered into a lease together with a side letter which capped the rent due under the lease notwithstanding subsequent rent reviews. The terms of the side letter provided that it could be terminated by the landlord if the tenant breached any of the terms of the side letter or the lease.

By 2015, the capped rent due under the side letter was little more than half the market rent for the premises. Unfortunately, the tenant failed to pay a quarter's rent on time and the landlord served notice purporting to terminate the side letter, meaning that the full rent would become payable. The tenant took issue with this and successfully argued at court that the termination provision was a penalty and, therefore, unenforceable.

Bad news for landlords?

Many landlords agree side letters, either at the same time as granting a lease or subsequently. At first glance this decision looks rather worrying. This article, however, aims to allay some of the concerns that landlords may have. It is clear that, in this case, the court took into account a number of specific factors when concluding that the termination provision in the side letter was penal in nature. These factors are explored below.

When is a clause a penalty?

A clause in an agreement which is regarded in law as a penalty is unenforceable. Last year the Supreme Court comprehensively reviewed the law of penalties in *Cavendish Square Holding BV v Talal El Makdessi*[5]. The main principles were as follows:

- A penalty clause can only exist where a secondary obligation is imposed as a consequence of a breach of a primary obligation owed by one party to another.
- The clause will only be a penalty if the secondary obligation imposes on the defaulting party a detriment out of all proportion to any legitimate interest of the innocent party in the performance of the primary obligation or, in other words, is exorbitant, extravagant or unconscionable.
- The courts will not lightly conclude that a term in a contract negotiated by well advised parties of comparable bargaining power is a penalty.

So why was the termination provision in the side letter a penalty?

Was there a secondary obligation? In this case, the court read the lease and side letter together as part of the "substantial bargain" made by the parties and concluded that the primary obligation was for the tenant to pay the capped rent in accordance with the terms of the side letter. When the tenant breached the side letter and the side letter was terminated by the landlord, this triggered a secondary obligation to pay the higher rent as per the terms of the lease. The first part of the test was therefore met.

Did the landlord have a legitimate interest in the performance of the tenant's obligation to pay the capped rent? The landlord needed to establish that it had a legitimate interest in seeing the tenant perform its obligations promptly. The court did take into account that having a tenant pay rent in a timely manner is of benefit to the landlord and that a tenant that fails to comply with its covenants may negatively affect the value of the landlord's reversion. However, the court thought that the value of the landlord's reversion would only really be affected in the case of "serious breaches of covenant". This did not accord with the landlord's ability to terminate the side letter for any breach without "regard to the nature of the obligation broken or any actual or likely consequences for the lessor". The court went on to describe such a blanket termination right which applies regardless of the breach in question as having "one of the hallmarks of a penalty".

4 Vivienne Westwood Limited v Conduit Street Development Limited [2017] EWHC 350 (Ch).

5 [2016] A.C. 1172.

Was the obligation to pay the higher rent exorbitant or unconscionable? The court described the obligation to pay the higher rent as a "blunt instrument that…may give rise to a very substantial and disproportionate detriment". Such detriment was considered by the court to be exorbitant and unconscionable in comparison to any legitimate interest of the landlord.

What was particular about this side letter?

So does this mean that termination provisions in all side letters are now vulnerable? We think not. The court made it clear that "one should not lightly infer a penalty in a contract freely negotiated by two advised parties of equal bargaining power". However, in the end the court was swayed by the following factors:

- The effect of terminating the side letter was retrospective as well as prospective, i.e. the tenant would have been required to pay 6 years' worth of the difference between the capped rent and uncapped rent. If the effect of the side letter had just been prospective, the court suggested that "the issue would be less clear-cut".
- The side letter and lease were entered into at the same time. As a result, in the court's opinion the "true bargain" was that the tenant would pay the capped rent. However, in the case of a subsequent concession, for example an *ex gratia* rent concession half way through the term of a lease, the court reasoned that the termination provision in such a concession is much less likely to be construed as a penalty.
- The landlord had the right on termination, in addition to recovering the uncapped rent retrospectively, to interest and its costs on an indemnity basis. The court considered that the landlord's ability on termination also to recover interest and its costs helped to "tip the balance" in favour of the tenant's argument that the provision was a penalty.
- The side letter was terminable for any non-trivial breach. Some side letters will only entitle the landlord to terminate for specific breaches. Restricting the landlord's ability to terminate a side letter can reduce the likelihood of such a provision being seen as penal in nature.

It is also worth bearing in mind that many side letters granting tenants concessions are terminable at will by the landlord. If this happens to be the case, then there need be no breach by the tenant for the landlord to terminate the arrangement. Therefore it follows that there will be no breach of a primary obligation. No breach of a primary obligation means that there is no penalty clause. Similarly, side letters are more commonly drafted so that the primary obligation remains the obligation to pay the rent in accordance with the terms of the lease but, for so long as the tenant complies with the terms of the side letter, the tenant, as a concession, may pay the rent in accordance with the side letter instead. This structure does not seem to be susceptible to the same criticism.

Hopefully the above has shown that the *Vivienne Westwood* case is by no means a blanket authority for the proposition that termination provisions in side letters are unenforceable. Far from it, the decision highlights that the interpretation of any given side letter will need to be carefully considered on its individual facts. Therefore, although a useful warning, this decision should not be seen as unduly restricting the ability of contracting parties to utilise side letters effectively.

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Regular and diligent progress of construction works – what does it mean?

Mark Crossley and Katie Duval set out how a contractor complies with a duty to proceed regularly and diligently with construction works.

Most construction contracts and development obligations require contractors/developers to proceed with their works "regularly and diligently" (or an equivalent requirement such as "with due diligence" and "with due expedition and without delay"). Surprisingly, not many cases explain this phrase's meaning under English law.

The few cases there are stress that the starting point is to review the words in the context of the whole contract using the normal rules of contractual interpretation. Further guidance is then found in the unanimous Court of Appeal decision of *West Faulkner Associates v London Borough of Newham* [1994] 71 BLR 1. The phrase essentially means:

"to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work".

The court said it was impossible to give useful guidance beyond this formulation and that, "like the elephant", the failure to proceed regularly and diligently is "far easier to recognise than to describe".

However, a good touchstone by which to judge whether a contractor is proceeding regularly and diligently is to consider the extent to which there is successful progress towards the achievement of contractual obligations.

The court also clarified that although the two words "regularly" and "diligently" import distinct concepts into the obligation, they should not be considered separately as they partly overlap. This means a contractor must proceed regularly **and** diligently. However, the court also said that a contractor can in appropriate circumstances be dismissed from the site if he fails to do either.

A leading construction law textbook describes the *West Faulkner* definition as very wide and suggests that "almost any failure by the contractor to comply with a major contractual requirement would amount to a failure to proceed regularly and diligently".

The *West Faulkner* guidance was recently elaborated in two more recent English Technology and Construction Court cases, *SABIC UK Petrochemicals Ltd v Punj Lloyd Ltd* [2013] EWHC 2916 (TCC) and *Vivergo Fuels Ltd v Redhall Engineering Solutions Ltd* [2013] EWHC 4030 (TCC).

In *SABIC*, the contractor was required to carry out and complete the works "with due diligence" in accordance with the contract. The judge confirmed that the due diligence obligation is to be directed towards discharging those contractual obligations which relate to completing the works.

Delay itself is not conclusive proof of a lack of due diligence, but may suggest and evidence a lack of due diligence and call for an explanation.

Neither is the obligation to use due diligence an absolute promise to achieve a particular outcome. Nonetheless, if an outcome is or has become impossible to achieve, it is still relevant when considering whether the separate obligation to achieve due diligence has been met. Put another way, the due diligence obligation does not become less onerous if it is or becomes impossible to achieve a particular contractual object. In such cases, due diligence should be used to minimise any ongoing breach. This may include adopting accelerative measures.

The amount of due diligence will vary throughout the life of a project, depending on the contractual objects at hand. This view was supported in another Court of Appeal case in 2015, which held that an obligation to proceed with the works with due expedition and without delay "is not directed to every task on the contractor's to-do list [but] principally... to activities which are or may become critical".

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In *Vivergo*, the judge also approved the *West Faulkner* definition of the obligation to proceed “regularly and diligently” and gave examples of failures which might indicate a breach of the obligation:

- failure to achieve programmed productivity, as this may demonstrate a lack of resources. At the same time, the judge made it clear that where an employer encourages a contractor to redeploy resources from one area to another (higher priority) area to mitigate alleged delays, the employer will find it harder to argue that the contractor has failed to resource the works adequately, even if the employer’s action was caused by the contractor’s lack of productivity in the first place;
- failure to supervise workers on site for a sufficient period of the working day is not a separate ground for establishing a failure to proceed regularly and diligently but does provide further support for the case that a contractor is responsible for alleged low productivity;
- failure to produce a proper programme for planning and monitoring the works may in practice prevent a contractor from proceeding continuously, industriously and efficiently, but is not conclusive evidence as, in theory, a contractor without a proper overall programme could proceed regularly and diligently if it deployed proper resources to complete the works on time.

As with all termination related notices, care should be taken when issuing default or termination notices on the grounds of a failure to proceed regularly and diligently with the works. If the default notice is defective or the contractor makes serious attempts to increase productivity to cure failures identified in a default notice, the employer might not be entitled to terminate and, should it purport to do so, it might find itself facing a claim from the contractor that the employer has repudiated the contract.

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Case Round Up

Lien Tran summarises recent case law.

Lejonvarn v Burgess and another [2017] EWCA Civ 254.

Architect liable for botched project for friends

An architect was liable for losses resulting from a project which she had undertaken for friends. Even though the architect had provided the services for free, she had still assumed responsibility in a professional context and her friends had relied on the proper performance of her services.

Mrs Lejonvarn, an architect and project manager, lived next door to Mr and Mrs Burgess. The Burgesses wanted to landscape their garden. Lejonvarn agreed to assist them with the project. She would work for free during the early stages of the project and would only charge later for design work on the garden.

The Burgesses were unhappy with Lejonvarm's work. Eventually, they asked her to cease work on the project and hired another designer to finish the job. They sued Lejonvarm to recover the cost of the remedial works which they alleged were required as a result of her defective work.

The trial judge held that there was no contract between the parties, as the legal requirements for a contract were not made out. However, Lejonvarn still owed the Burgesses a duty of care in tort, on the basis of an assumption of responsibility and would be liable for a breach of that duty.

The Court of Appeal dismissed Lejonvarn's appeal. Despite the services being offered for free, they were provided in a professional context and with the expectation that Lejonvarn would eventually be paid for her design work. Lejonvarn volunteered her professional services in the knowledge that the Burgesses were reliant on her proper performance of them. Rather than a brief piece of ad hoc informal advice, the services were provided over a lengthy period of time and at significant cost to the Burgesses. It was foreseeable that they would suffer economic loss if Lejonvarn failed to perform her services properly. Whilst she was not obliged to carry out the services, to the extent that she did, she owed a duty to exercise reasonable skill and care.

Dreamvar (UK) Limited v (1) Mishcon de Reya (a firm) and (2) Mary Monson Solicitors Limited [2016] EWHC 3316 (Ch)

Buyer's solicitors held liable for breach of trust in identity fraud case

The High Court has held that Mishcon de Reya (Mishcon), the solicitors acting for a buyer on a property purchase, was liable for breach of trust in the case of identity fraud by the seller.

Mishcon's client was 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.

The identity fraud came to light when the Land Registry noticed several inconsistencies when they came to register the sale. There was no connection between the real owner and the address on the ID documents. By this point, the imposter had disappeared with the funds.

Dreamvar sued Mishcon and MMS for negligence and breach of trust, amongst other claims. Mishcon claimed against MMS for breach of undertaking. MMS admitted that it had failed to carry out proper identity checks on the fraudster as a competent solicitor would have, as it did not request a meeting with the client or any original documents.

The High Court held that MMS was not liable to either Dreamvar or Mishcon for breach of trust. Even though the sale document was a nullity, MMS was not required to take responsibility for the seller's breach of his contractual obligations. MMS was entitled to release the purchase funds to Denning. The court further held that there was no breach of undertaking to Mishcon. MMS had undertaken that it had its client's authority to receive the purchase monies on completion. The fact that MMS' client was an imposter was not sufficient to constitute a breach.

The Court did not consider Mishcon to be negligent in failing to advise Dreamvar on the risk of identity fraud. 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. It had paid the purchase funds in exchange for void documents, so there was no genuine purchase.

Mishcon sought relief under section 61 Trustee Act 1925 on the basis that it had acted honestly and reasonably. Although the court accepted that Mishcon had indeed acted honestly and reasonably, it refused to grant relief. Mishcon was in a better position to absorb the loss, as its professional indemnity insurance covered the full amount. In contrast, the loss was "disastrous" for Dreamvar, as it was uninsured and had no claim against MMS. Mishcon has appealed and an appeal is pending.

JCAM Commercial Real Estate Property XV Limited v Davis Haulage [2017] EWCA Civ 267

Tenants giving notice of intention to appoint administrators

It has long been a bone of contention for landlords that tenants can simply file a notice of intention to appoint administrators in order to get an automatic moratorium against any enforcement action. This prevents a landlord from forfeiting, suing or exercising CRAR irrespective of whether the tenant goes into administration and, seemingly, whether it ever really had such an intention.

Not anymore. On 11 April 2017, the Court of Appeal handed down judgment in *JCAM Commercial Real Estate Property XV Limited v Davis Haulage* confirming that any notice filed without a settled and unconditional intention to appoint administrators was an abuse of the court's process, and liable to be struck out. It is a welcome decision for landlords concerned about tenant companies playing the insolvency process for their own ends.

The case was about warehouse premises in Crewe where the tenant, Davis Haulage, had built up considerable arrears. By January 2016, the landlord had had enough and issued forfeiture proceedings. Unknown to the landlord, the tenant had shortly beforehand filed at court a notice of intention to appoint administrators. The result was that, under paragraph 44 of Schedule B1 to the Insolvency Act 1986, forfeiture was a breach of the statutory moratorium and the landlord could not continue the proceedings without the court's permission. This moratorium lasted 10 business days, but the tenant went on to file three further notices giving it a much longer period of protection.

By the time the tenant filed the fourth notice, it had proposed a company voluntary arrangement (CVA) to compromise its debts. The tenant's justification was that, if the CVA was not approved by its creditors, then it would have to consider selling the business through a "pre-pack" administration.

The landlord made an application to have the fourth notice struck from the court's file on the basis that the tenant did not have a fixed or settled intention to appoint administrators. The decision turned on the wording in paragraph 26(1) of Schedule B1, which requires anyone who "proposes" to appoint an administrator to give notice of intention to certain parties. At first instance, the judge found for the tenant, saying that someone can propose to do something without having any settled intention.

This has now been overturned on appeal. The Court of Appeal said that if "propose" did not mean "intend" in this context then it would not be called a "notice of intention". The real issue, however, was whether that intention could be conditional, and the court said that it could not. This followed from the facts that a company proposing to appoint was obliged, not just entitled, to give notice and that the purpose of it was to give qualifying floating charge holders and others a chance to exercise their prior right to appoint. It was also relevant that a process was available for small companies proposing a CVA to obtain a moratorium; if the tenant was right then this would be redundant and any company, large or small, could file a notice to get a moratorium.

Whilst the court stopped short of saying that the tenant or its advisers had filed notices without believing it was entitled to do so, it made clear for the future that any notice filed with only a conditional intention to appoint administrators would not be validly given.

Acredart Limited & Car Giant Limited v London Borough of Hammersmith and Fulham [2017] EWHC 197 (TCC)

Dilapidations: actual cost of repair should be used as a guide for diminution in value

In this terminal dilapidations claim, Hammersmith and Fulham London Borough Council was the lessee of a property in Willesden, London. The claimants were the Council's landlords. At the end of the lease term, the Council was in breach of its repairing covenants. The landlords brought a terminal dilapidations claim for a sum which exceeded the actual cost of their works. Some repairs were carried out but not all of the works described in the schedule of dilapidations had been undertaken. After those initial repairs, the units were re-let and no further works were carried out.

The general principle is that landlord's damages should not exceed the difference in value between the state that the property should have been in and its actual condition, as at the date of termination. The High Court held that the cost of repair should be used as a "very real guide" to evaluating the damage to the landlords' reversion. The landlords had not shown any real intention to undertake the rest of the repair

works, nor provided any evidence that the value of the reversion had been diminished by the equivalent cost.

Camelot Property Management Ltd and another v Roynon (24 February 2017, Bristol County Court, unreported).

Guardian of property occupies under AST instead of licence

Guardianship agreements can be used to deter squatters by granting a licence to a "guardian" to occupy vacant buildings. However, the County Court has held that such agreements may amount to an assured shorthold tenancy rather than a licence.

Bristol City Council owned a residential home which fell into disuse. The Council appointed the claimant (C) to find a guardian to occupy the property. Mr Roynon (R) entered into a guardianship agreement with C to occupy the property in 2014. The agreement stated that it was a licence rather than a tenancy, and that exclusive possession was not granted to R in respect of any part of the property. R was offered a choice of rooms to occupy within the property and selected two, for which he kept the keys. Other guardians had their own rooms and were not permitted to access R's room without his permission. R had communal access to other facilities.

C served notice to quit on R in 2016. However, R refused to vacate and C commenced possession proceedings.

The County Court held that the guardianship agreement was an assured shorthold tenancy (AST) rather than a licence, as R had exclusive possession of his two rooms. In spite of onerous restrictions on R's use of the property, they only affected the way in which R was to use his two rooms. Such limitations are often seen in tenancy agreements and are not incompatible with exclusive possession. There was no requirement for R to move rooms at C's request or allow other people into his rooms. The fact that C exercised its right of entry to carry out monthly visual inspections of the rooms did not preclude exclusive possession.

Kingsgate Development Projects Ltd v Jordan and another [2017] EWHC 343 (TCC)

Do gates constitute substantial interference with right of way?

Mr and Mrs Jordan purchased a property called Ferndown in 2012. Ferndown included a track over which the neighbouring property, Kingsgate Farm, had the benefit of an express right of way. When the right of way was created in 1960, the track was part of the open countryside. However, by 2012, an electric gate had been installed at the track's entrance (Gate 1) and another further along the track (Gate 3). The Jordans erected a further unlocked gate between the two existing gates after they bought the land (Gate 2).

Kingsgate claimed that the right of way had been substantially reduced, rendering it unsuitable for its intended use. In particular, they argued that Gate 1 was narrower than the right of way and Gate 3 restricted access for vehicles to the farm.

The court held that gates 1 and 3 did not interfere with the exercise of the right of way. They were unlocked and so did not impede access but did serve a legitimate purpose in separating the farm from the domestic property.

However, the court did not find any justification for the presence of Gate 2. As this resulted in three gates within 100 metres of each other, Gate 2 was held to be a substantial interference with the right of way. The court ordered that Gate 2 should be removed.

First Tower Trustees Ltd and another v CDS (Superstores International) Ltd [2017] EWHC B6 (Ch) (20 February 2017)

Landlords can't rely on wide exclusion clauses to evade misrepresentation claims

First Tower Trustees was the landlord (L) of several bays in a warehouse which it let out to CDS, the tenant (T). Before entering into the lease, L had provided T with replies to pre-contract enquiries that stated there were no asbestos issues in the property. L also stated that it had not received notice of any environmental problems, "but the Buyer must satisfy itself".

Before T completed the leases, L received notification that there was a potential asbestos problem. However, it did not communicate this to T. Following completion, T carried out works to the property and promptly discovered the presence of asbestos. T claimed against L for misrepresentation.

L argued that it was not liable for misrepresentation, as it was protected by an exclusion clause in the lease. The clause stated that the lease had not been entered into in reliance on representations made by the landlord. However, the judge concluded that the clause was too broad in purporting to exclude liability for all representations and so failed the test of reasonableness in Section 3 of the Misrepresentation Act 1967, meaning it could not be relied upon. L should have updated its replies to pre-contract enquiries when new information emerged and its failure to do so was an actionable misrepresentation.

Port of London Authority v Mendoza [2017] UKUT 146 (TCC)

Mooring houseboat does not amount to adverse possession

The Port of London Authority (PLA) applied to the Land Registry to register part of the Thames river bed and foreshore. Mendoza (M) lived on a houseboat, the Wight Queen, which had been moored at the same spot since 1997. In recent years, M had marked out the boundary of his mooring with piles of rocks and ropes. Mendoza objected to the PLA's application on the basis that he had acquired title to part of the river bed by adverse possession.

Adverse possession has two elements: factual possession (what M actually did) and the intention to possess (what M had intended). The Upper Tribunal held that there was factual possession. As for M's intention to possess, it was insufficient for M to claim that he had always intended to possess the river bed to the exclusion of the world at large. Instead, the court considered the act of mooring and whether M's conduct was "equivocal". From the perspective of the world at large, M could have been moored with permission, pursuant to an easement, by exercising the public right of navigation or even by trespass. The act of mooring by itself did not demonstrate M's intention, as the boat's mere presence would not show an obvious intention to possess to a casual observer. Even though M used the boat as his place of residence, it would not have been obvious to a third party and the boat was still capable of relocation.

The court also commented that there was no rule precluding adverse possession where public rights of navigation existed.

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Event fees on retirement homes: how might regulation help?

Nicholas Roberts and Annabelle Allen summarise a recent report on event fees which recommends increased regulation.

More and more people each year are turning to specialist retirement homes that can meet the needs of the 55+ population. Typically, a resident will purchase a long lease (over 99 years) in return for a capital sum. What is more unusual about retirement housing is that these long leases can require the owner to pay "event fees" (also known as transfer fees and exit fees) when certain events occur. These events will typically include sales, lettings and change in occupancy of the home and are usually paid at the end of a person's occupation.

Although the are advantages for leaseholders, these fees can come as a surprise and, as the Law Commission has reported, often leave leaseholders frustrated because they have not understood the costings. The amount charged as an event fee varies – it is usually expressed as a percentage of the purchase price and can vary from 1% to 30%. The fees can run into tens of thousands of pounds.

The event fee may be payable to the freeholder, the developer, the operator or the managing agent or it may go to a sinking fund used for the maintenance of the development.

The fees have several justifications and benefits for the consumer. They may be used to cover some of the landlord's costs for providing services (including the extra care and support services found in retirement homes) or the fees might be used to contribute to or cover the costs of improving the property. The fees benefit consumers in that they offer deferred payment of the increased managment costs for providing these added services or costs, making the much needed specialist properties more affordable, especially to the asset rich but cash poor older population.

The OFT investigation

In 2013, the then OFT investigated the use of event fees. Although recognising the need for the fees, the OFT found them to be potentially unfair. It found that the fees were often unexpected and might not be disclosed to a buyer until a late stage of the purchase. This means that the buyer may not appreciate the financial implications of the fees. Moreover, the fees were very wide-ranging and could include payment for changes in occupation such as a carer or spouse moving in as well as mortgaging or subletting the property.

The Law Commission's recommendations

In light of the investigation, the Law Commission has called for greater transparency in their recent report. They have recommended change through a new code of practice (published in September 2016) which would bind landlords and, if breached, would render the event fee unenforceable. Incorporating this code into the Consumer Rights Act 2015 would allow residents who enter new leases to enforce the code directly against the landlord as a landlord would be bound by the code regardless of whether or not they had signed up to it. Landlords of existing leases would be bound if they subscribed to the code.

The reforms would:

- Limit the circumstances in which fees are charged to sale, subletting, and change of occupancy where the resident has died or the property is no longer the resident’s only or principle home. A spouse or carer moving in would not trigger an event fee.

– Cap the fees for subletting or changing occupancy. The cap would be no higher than 10% of the total event fee payable on the sale of a property.

– Require guidance to be issued by landlords at the beginning of a purchase to indicate the likely amount of the fee, how it is calculated, who receives it and what the resident will receive in exchange.

What does this mean for landlords?

This proposed new regulation, providing standardised, transparent information could remove the lack of clarity surrounding event fees. Maintaining the use of event fees, rather than banning them outright, would continue to allow the resident to defer payment and would preserve an essential part of the landlord's economic model.

However, the proposed changes have the potential to result in losses for the landlord. By not being able to charge fees when a carer moves in, for example, the landlord could be faced with double the occupancy, service and maintenance costs without being able to recover them. This may put pressure on the communal services and facilities which are there for the overall benefit of the tenants. Moreover, the prescribed cap may not reflect the landlord's actual costs.

Nonetheless, the proposed new regulation may go some way towards removing the current media stigma attached to event fees and may be an important step in encouraging growth within this market.

We now await the government's response.

A copy of the report can be found at ***www.lawcom.gov.uk***

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