Real Estate Quarterly

Winter 2018

Hogan Lovells

Contents

Daylight and sunlight: a break in the clouds?

Hannah Quarterman and Kathryn Hampton consider what constitutes acceptable daylight and sunlight levels in urban developments and compare new national planning policy with the approach taken by the courts.

Everyone agrees that the country needs more homes, but how this is achieved is more controversial.

As location and connectivity are increasingly prioritized over spare rooms, should planning policy continue to demand the same amenity standards for housing? Or have these become outdated?

There are few areas where the debate is fiercer than in the context of daylight and sunlight.

So what's the issue?

It has long been established that the amount of daylight and sunlight that an occupier of a new development can enjoy is a key part of assessing the quality of that development, and its amenity. So too is the impact of the new development on the daylight and sunlight enjoyed by the occupiers of neighbouring properties. But how is this measured?

The starting point is the relevant BRE (Building Research Establishment) guidance, which establishes various tests to assess daylight/sunlight as well as target values which should be achieved in each case. However, it has its limitations. Key amongst these is that for each test there is a single target standard, typical of the levels of daylight/sunlight typical of suburban locations. Whilst the Guidance is clear that the standards should be applied flexibly, it doesn't explain what that means, leaving developers and councils to argue it out.

What often makes this difficult is that many councils have incorporated the Guidance into their local planning policy, requiring strict adherence unless a departure can be justified.

Doom and gloom in the Capital

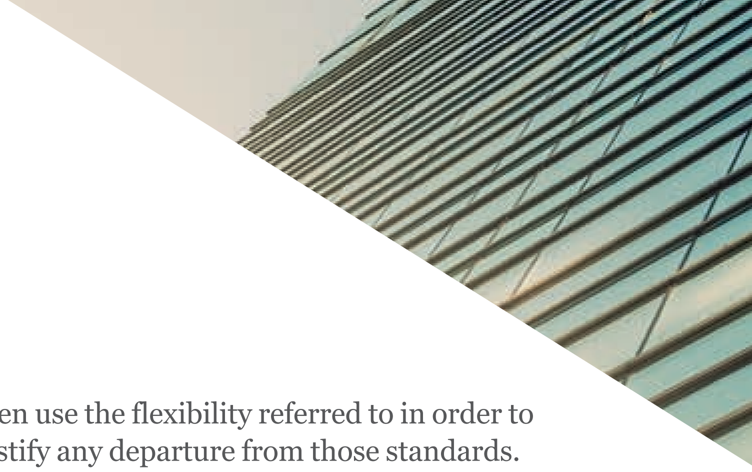
The problems caused by the targets are particularly acute in urban locations. Here there are often planning policies requiring high densities and/or the maintenance of a historic street pattern, both of which require buildings to be tall and/or close together – often making it impossible to achieve suburban levels of daylight and sunlight!

The Greater London Authority addressed the issue in its Housing Supplementary Planning Guidance adopted in March 2016. This recognised the need to apply the standards flexibly, and for the first time gave guidance on how to do this. It advocated a more nuanced approach, considering levels of daylight/sunlight already experienced in comparable locations to guide what should be acceptable for any given development.

Light at the end of the tunnel

However, there was still uncertainty about what this approach meant in practice. Many developers took great comfort from the Whitechapel planning appeal decision, which we acted on (and our client, the developer, won!). The inspector agreed that the "*blanket application*" of the BRE standards was not appropriate and as the levels of daylight/sunlight largely replicated those enjoyed by comparable developments, they were acceptable.

Importantly, he also recognised that whilst there were "*some significant individual reductions*" in daylight/sunlight-these levels were acceptable in order to achieve the required density of development.



So in London at least, it seemed settled that daylight and sunlight should be judged by what was appropriate for the context and not by slavish adherence to the BRE targets.

Dark clouds gathering

But the story didn't end there. Two recent High Court cases arguably draw back from the position established in the Whitechapel appeal decision, reaffirming the primacy of the BRE Guidance. Whilst the particular facts of the cases mean they may be distinguishable from future scenarios, they do raise important points which need to be grappled with by developers going forward.

In *Rainbird v the London Borough of Tower Hamlets*[1], the court concluded that there is always a material detriment to amenity if daylight/sunlight standards are not achieved. This is irrespective of context and any flexibility referred to merely means that there could be occasions where the detriment is excusable. When assessing daylight/sunlight impacts, the key BRE tests need to be passed and the planning permission was quashed as a result.

In *Guerry v the London Borough of Hammersmith and Fulham*[2], known as the *Hoxton Hotel* case, the court also quashed the planning permission. It held that the council had failed to apply the BRE guidance properly and that as a result, council members had not been correctly informed when making their decision. It stressed the importance of considering both the total amount of daylight and its distribution within the building.

It is therefore clear that, until there is greater clarity on the implications of *Rainbird* and *Hoxton Hotel*, those relying on the Housing Supplementary Planning Guidance in London, and similar policies, will need to ensure that they first fully consider the BRE targets, and then use the flexibility referred to in order to justify any departure from those standards.

The outlook

Daylight/sunlight is, of course, not only an issue in London. The need for flexibility is now enshrined in the new National Planning Policy Framework (NPPF) and therefore applies nationally. The NPPF is clear that developments still need to achieve acceptable living standards, but there is still scope for argument about what it is required.

The new national policy is a positive step for developers in how daylight/sunlight policies should be applied by councils. But the recent case law means that daylight/sunlight will continue to be a controversial and sometimes determinative matter for many urban schemes, providing grounds for objectors and reasons for refusal for councils in some cases. What is vital is that assessments are accurately summarised and reported back to members so that the decision makers have the correct information on which to exercise their planning judgement.

Hannah Quarterman
Senior Associate, London
T +44 20 7296 2287
hannah.quarterman
@hoganlovells.com

Kathryn Hampton
Senior Knowledge Lawyer, London
T +44 20 7296 2000
kathryn.hampton@hoganlovells.com

1 [2018] EWHC 657 (Admin)

2 [2018] EWHC 2899

A new moratorium for struggling businesses – giving companies a fair chance or a step too far for creditors?

Ben Willis looks at government proposals for a new moratorium for companies in financial difficulties.

Companies have a number of options open to them if they wish to restructure their liabilities. They can either seek an agreement with their creditors by consent, or they can look to rely on their right to propose a company voluntary arrangement ("CVA"). Alternatively, a business can look to enter into administration which will often result in a pre-pack purchase of profitable parts of the business in order to allow those to continue to function as going concerns.

In May 2016 the government launched a consultation for a '*Review of the Corporate Insolvency Framework*'. One of the core elements of the consultation, which anticipates an extensive reform of the UK's insolvency framework, is the proposal to create a new interim moratorium against creditor enforcement action. This will provide companies with an opportunity to benefit from a temporary period of respite to consider how best to restructure their business, free from the threat of legal or enforcement action by creditors.

What has happened since?

The consultation was announced just after BHS had fallen into administration. Since then, we have seen many well-known high street brands such as Toys R Us, Maplin, House of Fraser, Poundworld and Evans Cycles enter into administration, together with a spread of proposals for company voluntary arrangements by brands including Homebase, House of Fraser and New Look.

One of the main creditor bodies affected by these high-profile insolvencies was landlords. For the property industry, landlords and tenants alike, this has highlighted the crucial and far-reaching role of the UK's insolvency regime.

In August 2018 the government published its responses to the consultation and so we now have a better idea of what the proposed interim moratorium will look like.

As set out in the consultation document, the proposal was aimed at providing "*an opportunity for all businesses seeking to restructure their debts to explore options and develop a restructuring plan*". However, the government appears keen to emphasise that it wants to strike the right balance between allowing a company a chance to restructure, and the rights of creditors.

This is important when you consider the position that many landlords have found themselves in over the past year as a result of the number of high-profile retail failures and the high number of proposals for 'landlord' CVAs, where landlords have seen their rents slashed.

On the one hand, it could be argued that the number of failures suggests that there is a need to radically overhaul the UK's current insolvency regime in order to seek to avoid or minimise the number of company failures. However, on the other hand, consideration needs to be given to those creditors who are likely to be affected by such a moratorium.

The current proposal for a moratorium

The current proposal is that most companies (excluding certain companies such as insurance companies and banks) could apply for a temporary moratorium to provide an opportunity to restructure. In order to do this, they would need to appoint a 'monitor', who will be a qualified insolvency practitioner. The monitor will be responsible for supporting "*the integrity of the moratorium process*" and will "*ensure creditor interests are protected*". The moratorium will be effected by filing the necessary papers at court.

Eligibility

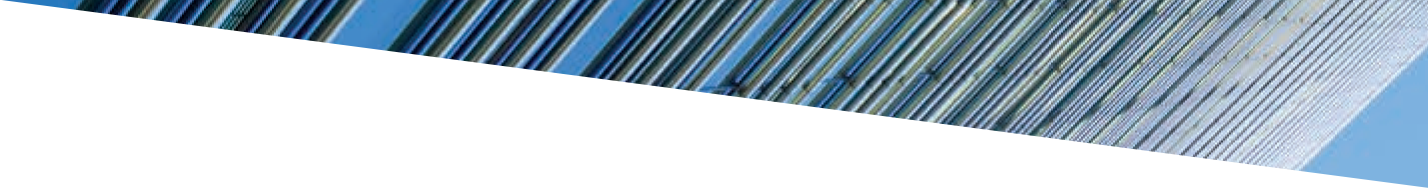
The company will need to satisfy a number of eligibility tests and qualifying conditions before entering into a moratorium:

- The company will need to show that it will become insolvent if action is not taken.
- The company can not have entered into a moratorium, administration or CVA in the previous 12 months.
- The company must satisfactorily demonstrate that "*on the balance of probabilities*" it will be able to reach a compromise or arrangement with its creditors.
- The company must be able to show that it is "*likely*" to have sufficient funds to carry on its business during the moratorium, in order to ensure that "*existing creditors are no worse off*".

Although the company will need to file papers at Court, it will actually be for the monitor to check that the company meets the above criteria, and continues to do so throughout the moratorium. If any of the criteria cease to apply, then the monitor will be obliged to terminate the moratorium.

Length

As for the length of the moratorium, the initial moratorium can only be for 28 days which can be extended by a further 28 days provided that the monitor considers that the qualifying conditions continue to be met. However, the Government also thinks that the company should be able to extend the moratorium beyond 56 days where there remains "*a good prospect of achieving a better outcome for creditors than might otherwise be possible*". In order to do so, the extension will need to be approved by more than 50 per cent of secured creditors by value and more than 50 per cent of unsecured creditors by value.



Protection for creditors

There will be a right for creditors to challenge the moratorium, either on the basis that the eligibility criteria are not being met or on the grounds of unfair prejudice. Unlike the limited 28 day period for challenging a company voluntary arrangement, a creditor will be able to challenge the interim moratorium at any point whilst it continues.

Costs incurred during a moratorium (including rent and other sums due to landlords under leases) will be given similar priority as expenses under an administration.

What are the issues?

At this stage there are a number of elements to the proposals that are cause for some concern:

1. Certain of the qualifying criteria are quite vague. For example, it is going to be difficult to assess whether "*on the balance of probabilities*" a company is going to be able to reach a compromise or arrangement with its creditors. Such vague categories open up the possibility of companies seeking to abuse the moratorium process, notwithstanding the appointment of a qualified insolvency practitioner as a monitor.
2. As currently envisaged, there is the possibility that a moratorium may be extended indefinitely, provided a sufficient proportion of creditors consent. There is, of course, the ability for a creditor to challenge the interim moratorium. However, given the limited grounds of challenge, this may prove difficult and, as a result, unlikely.
3. There is a risk that this process will simply become a precursor to a company either proposing a CVA or entering into administration. Interestingly, although the monitor will be prohibited from taking a subsequent appointment as a liquidator or administrator, the monitor will be permitted to take on a subsequent appointment as a CVA supervisor, which suggests that from the outset, the Government thinks that many of these interim moratoria will ultimately result in a CVA.

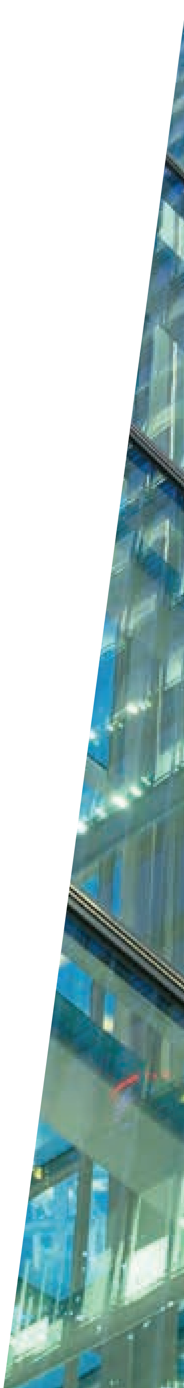
What's next?

Until draft legislation is published, we will not know what the final proposal for an interim moratorium will look like, or where the balance lies between the rights of creditors and the Government's desire to promote "*entrepreneurship, investment and employment*".

The Government has made clear in its response that it will bring forward legislation as soon as parliamentary time permits; however, with Brexit currently playing on the Government's mind, we do not yet have any idea of when this will be.

Companies and particularly retailers are clearly making use of the current insolvency regime, and in the case of CVAs, this has often been to the detriment of landlords. Only time will tell whether the new proposed moratorium will be used by companies who genuinely want an opportunity to engage with creditors to restructure their obligations, or whether it will become a safe way to buy some time before proposing a CVA.

Ben Willis
Associate, London
T +44 20 7296 5564
ben.willis@hoganlovells.com



Houses in Multiple Occupation

Properties that qualify as Houses in Multiple Occupation (HMOs) have long presented a potential headache for unwary landlords, but from the start of October 2018 the headache got bigger. Caroline Stares looks at the recent changes.

Originally the requirement for an HMO licence only applied to properties that comprised at least three storeys, but under new rules, introduced on 1 October 2018, size is no longer relevant. The change was brought in to tackle sub-standard and overcrowded homes and poor management practices. It is expected that it will bring an additional 160,000 properties within the HMO remit.

When do I need an HMO licence?

Landlords need to get an HMO licence from their local housing authority if:

- they rent out a property to five or more people who form two or more households; and
- the property meets one of the following tests:

The **"standard test"** is met if the property:

(a) consists of one or more units of living accommodation (excluding self-contained flats);

(b) is occupied by two or more households, is the tenants' only or main residence (this includes students only occupying during term time) and this is the only use of the property;

(c) one or more tenants pay rent; and

(d) two or more tenants share a toilet, bathroom or kitchen, or the accommodation is lacking in one of these.

The **"self-contained flat test"** is met if the property is a self-contained flat with a bathroom, toilet and kitchen available for the tenants' exclusive use, and (b)-(d) above apply (but it must not be a purpose-built flat in a block of three or more self-contained flats).

The **"converted building test"**: the property is a converted building and (a)-(c) above apply.

A landlord will commit an offence if he doesn't have a licence and could face an unlimited fine and a rent repayment order or a penalty of up to £30,000 as an alternative to prosecution.

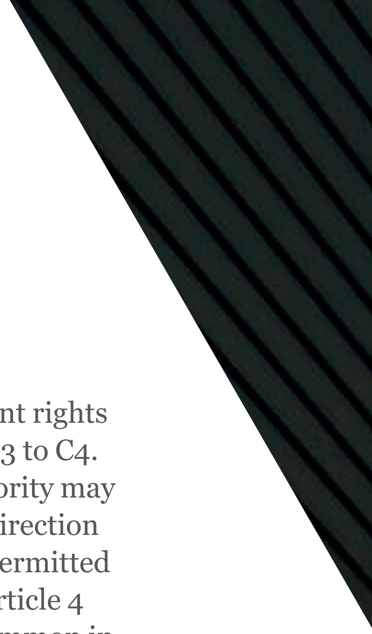
Even if a property doesn't meet the HMO licence criteria, there is still a risk that it will need an HMO licence as local housing authorities have powers to extend the mandatory licensing regime to other properties (typically where social and economic improvement is a priority in their area).

What sort of conditions will be included in the licence?

The licence must include various conditions ranging from landlords submitting annual gas safety certificates to the local housing authority to installing smoke and carbon monoxide alarms.

The new rules also introduce extra mandatory conditions: minimum bedroom sizes, restrictions on the number of people of certain ages in each bedroom and waste storage and disposal requirements. These conditions are intended to reduce overcrowding and problems with waste.

A landlord who fails to comply with the licence conditions could face a fine of up to £5,000. If he knowingly permits occupation in excess of the number of tenants or households authorised by the licence, the



resulting fine is unlimited. In either case a penalty of up to £30,000 could be imposed as an alternative to prosecution.

When do I need planning permission for an HMO?

To keep landlords firmly on their toes, some HMOs may need planning permission. The two regimes are distinct, so landlords may need a licence but not planning permission and vice versa. Having an HMO licence doesn't mean planning permission will be granted.

Different types of residential properties fall into different planning use classes and landlords need to make sure they have the right permission for the properties they are renting:

- Class C3: use as a dwelling for a single household.
- Class C4: use as an HMO for up to six people (excluding a converted block of self-contained flats) – a small HMO.
- Use as an HMO for more than six people – a large HMO. This doesn't fall within a specific use class and is considered "sui generis".

There are permitted development rights for a change of use from Class C3 to C4. However, a local planning authority may remove this right by making a direction under Article 4 of the General Permitted Development Order 2015 (an Article 4 Direction). This will be more common in areas where there are already lots of HMOs, such as university towns. For example, Birmingham City Council issued an Article 4 Direction for the wards of Selly Oak, Harborne and Edgbaston so landlords must get planning permission for a change of use from single households to small HMOs (unless the property is purpose-built student accommodation).

Any change to or from a large HMO will require planning permission.

Caroline Stares
Associate
T +44 207 296 5947
caroline.stares
@hoganlovells.com

Tangled in knots: Owners beware

Japanese knotweed has blighted UK properties for over a century. It was first brought to the UK as an ornamental plant in the mid-nineteenth century but has since broken free from the confines of residential gardens. Sanjay Dave considers a recent court case involving this troublesome weed.

Japanese knotweed has blighted UK properties for over a century. The invasive plant's roots and stems spread rapidly and have the capacity to smash through concrete, damaging a building's foundations. Eradicating the knotweed is another headache entirely. As a result, securing finance on blighted properties can prove to be very tricky.

These issues were at the heart of the recent Court of Appeal case of *Network Rail Infrastructure Limited v Williams* and *Waistell*[3]. Williams and Waistell each owned a bungalow neighbouring part of Network Rail's estate from which Japanese knotweed had spread.

The County Court originally held that for "*encroachment*" type nuisance claims to succeed, physical damage has to have been caused to property. The difficulty faced by the respondents was that they could not prove that the knotweed had damaged their properties' foundations. Despite this, the respondents were awarded damages in excess of £30,000 in connection with a "loss of amenity" type nuisance claim. This sum was based on the loss in the value of the respondents' properties caused by the presence of the knotweed.

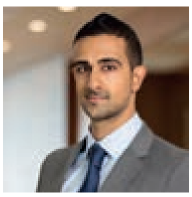
On appeal, the Court of Appeal agreed with the outcome of the decision at first instance, but for different reasons.

The Court of Appeal held that private nuisance claims, at their very core, concern the protection of the owner of land and their use and enjoyment of it, rather than protection of the market value of property. As such, damages for nuisance should not be linked to the diminution in value but should instead compensate for loss of use and enjoyment of property. The presence of the knotweed would increase the costs incurred by the respondents when developing their land (whether or not such development was currently intended). It is this increase in cost that should form the basis of the damages claim.

Crucially, the Court of Appeal also clarified that the categorisation of nuisance claims into "types" (such as "loss of amenity" type) is archaic, and the constituent parts of a valid claim are the same irrespective of "type". As such, physical damage isn't necessary as a pre-requisite to a successful nuisance claim as long as there is some identifiable loss of amenity.

The fact that an owner's liability can arise prior to physical damage being caused to neighbouring property will alarm landowners. A more proactive approach to estate management will need to be adopted by landowners who already have a knotweed problem, to identify areas of risk at an early stage so that potentially costly claims can be avoided.

An earlier version of this article appeared in Property Law Journal in November 2018



Sanjay Davé
Associate, London
T +44 20 7296 5090
sanjay.dave@hoganlovells.com

3 [2018] EWCA Civ 1514

Q&A

SDLT Christmas Special: Chris Somorjay and Ed Newport consider the new tax on overseas buyers of residential property and the imminent 14 day SDLT deadline.

Q. I've heard that Theresa May is planning an additional SDLT levy on foreign buyers. Is this really going to happen?

A. Theresa May's announcement at the Conservative Party conference in October 2018 that foreign investors into the UK property market were going to be targeted with an additional SDLT levy has caused further consternation within the industry.

Asserting a determination to "level the playing field" for those who live and pay taxes in the UK, the Prime Minister paved the way for yet another stamp duty surcharge, building on the higher levels already introduced for second homes and for corporates purchasing residential properties. Whilst ostensibly aimed at the overseas oligarchy whose empty penthouses attract the continued ire of many who are struggling to get onto the property ladder, developers have claimed that the charge will have a negative impact on viability and thus reduce the more general supply of new housing stock coming to market – precisely the opposite of the intended effect.

A consultation will be published in January 2019 on a 1% surcharge for foreign buyers. Although this is at the bottom end of the 1% to 3% range outlined at the Party Conference, it is not proving a popular proposal.

The planned additional SDLT levy follows a clear pattern and policy trend of targeting particular types of buyer through increased tax take. These have included:

- An additional 3% on top of normal SDLT rates if buying a residential property that means you'll own more than one.
- A flat 15% SDLT rate on residential properties costing more than £500,000 when purchased by certain corporate bodies or 'non-natural persons' and, in some circumstances, a 3% surcharge when the price is less that £500,000 (but more than £40,000).
- The 'Annual Tax on Enveloped Dwellings' (ATED) – an annual levy on the value of residential property (above a threshold value of £500,000 per separate dwelling), again where held by non-natural persons.

As ever with SDLT, the devil will be in the detail when it comes to analysing the implications of this latest additional charge. The industry waits to see what further detail will be revealed in the January 2019 consultation. In the meantime, it does seem apposite to ask: to what extent is the UK really "open for business"?

Q. Is the SDLT filing window changing? When is this happening and will it affect all transactions?

A. Yes. From 1 March 2019 the window to file a Stamp Duty Land Tax ("**SDLT**") return, and pay any SDLT due, will reduce from 30 days to 14 days from the effective date of the transaction.

As a reminder, generally the "effective date" is the date of completion. However, where a contract for the sale of land or (for example) an agreement for lease is "substantially performed" before completion, the effective date is the date of that substantial performance. Examples of substantial performance include where a purchaser takes possession of the property, or pays the majority of the consideration for the transaction, before completion.

The reduced filing window will apply to all transactions with an effective date on or after 1 March 2019. Businesses and lawyers will need to ensure that internal processes are updated in line with this change to avoid late filings.

HMRC's objective with the reduced window is to improve efficiency in the SDLT system. When HMRC originally consulted in relation to the proposed change, we felt that substantial simplification of the forms and of the amount of information required would need to be undertaken in order to mitigate the risk of late filings under the new regime. In our experience, the process of preparing the forms to report complex commercial transactions can be extremely time-consuming.

HMRC have recently consulted on proposed changes to the return and have published draft legislation including the reduced number of questions. There is a helpful reduction in the amount of information which now needs to be supplied, particularly in relation to new leases granted and occupational leases to which a property is subject. HMRC assert that there will be "no significant impact on business, charities or voluntary bodies [... as the...] majority of returns are already filed within 14 days of the transaction". However, SDLT remains a complicated tax and in time-pressured transactions it is now going to be even more important for all involved to engage at an early stage with the approval of the significant amount of information which still needs to be included on the returns.

The changes to the SDLT return will be in place for 1 March 2019.

Edward Newport
Senior Associate, London
T +44 20 7296 2000
edward.newport@hoganlovells.com

Chris Somorjay
Counsel, London
T +44 20 7296 5561
christopher.somorjay
@hoganlovells.com

Case Round-Up

Lien Tran summarises recent case law

Thirunavukkrasu v Brar & Brar [2018] EWHC 2461 (Ch)

Exercising CRAR waives right to forfeit

Thirunavukkrasu was the tenant of premises in Teddington, Middlesex and the Brars were the landlords. The rent was due quarterly and the tenant had failed to pay the December 2015 quarter's rent. The landlords decided to exercise Commercial Rent Arrears Recovery ("CRAR") on 1 February 2016 to recover rent arrears by taking control of and selling the tenant's goods. As the lease contained a forfeiture clause, the landlords subsequently purported to exercise their right to forfeit for non-payment of rent on 12 February 2016.

One of the issues before the County Court, which was then considered by the High Court on appeal, was whether exercising CRAR waived the right to forfeit. The County Court concluded that the landlords' purported forfeiture was unlawful. The High Court also found in favour of the tenant and dismissed the landlords' appeal.

In the High Court, the judge held that the purpose of CRAR was to replicate the common law remedy of distress. At common law, a landlord can waive a right to forfeit for a "once and for all breach" (for example, not paying rent on the due date) by unequivocally confirming the existence of the lease and communicating this to the tenant. CRAR can only be exercised after termination of the lease if certain conditions (set out in section 79(4) of the Tribunals Courts and Enforcement Act 2007) are met. In this case, the conditions were not met so CRAR could only be exercised while the lease continued.

The judge held that the landlords' exercise of CRAR in this case amounted to an unequivocal representation that the lease was continuing and therefore, waived the right to forfeit.

Vastint leeds bv v persons unknown [2018] EWHC 2456 (ch)

Injunction granted against potential trespassers

Vastint (V) were the owners of a development site in Leeds which contained several vacant buildings. Some of the buildings were structurally unstable and contained hazardous substances such as asbestos. Although there were various security measures in place on the development site, there had been several incidents of trespass over the years, primarily involving caravans. V and other members of its corporate group had also experienced similar incidents of trespass elsewhere which caused significant damage.

V was concerned about three key risks: travellers in caravans, illegal raves and fly-tipping. In anticipation of these risks, V sought a *quia timet* injunction (an injunction to prevent threatened or imminent wrongful acts) against potential trespassers (persons unknown).

In assessing whether to grant an injunction, the judge considered two issues. First, he considered whether there was a strong probability that V's rights would be infringed in the absence of an injunction. V had taken careful steps to secure the site, yet trespassers had still managed to enter the site. Even though the "persons unknown" could not be identified, there was a strong likelihood that trespassers would infringe V's rights in the future.

Second, the Judge asked whether the harm was sufficiently serious that damages would be an inadequate remedy. As the trespass here concerned risk to health and safety due to the structural instability and hazardous materials on the site, the judge held that it was clear that such risks should be avoided. The financial costs that V would suffer in removing trespassers from the site would also be significant and in reality, difficult to recover from the trespassers. Therefore the judge granted the injunction to restrict travellers and illegal raves, but concluded that there was insufficient evidence of potential fly-tipping to extend the injunction further.

Santander UK PLC v LPC Estates Limited [2018] EWHC 2913 (Ch)

Use of a building lease to satisfy ground (f) remains on solid ground

Santander (S) was a tenant with security of tenure under the Landlord and Tenant Act 1954. When S requested a renewal lease, its landlord LPC (L) opposed on the basis that it intended to redevelop the premises under section 30(1)(f) of the Act ("ground (f)"). However, those works would be carried out by a new tenant under a building lease.

L claimed that a third party could carry out the works on its behalf. S argued that this did not fulfil the requisite intention on the part of the landlord required to satisfy ground (f).

As it has been established that it is not necessary for a landlord itself to do the works, the judge concluded that a building lease could satisfy ground (f). Previous case law established that choosing a building lease to establish intention to redevelop for the purposes of ground (f) was sufficient, provided the landlord retained sufficient control over the works. Even though L only decided to do the works when they were proposed by the new tenant, its intention would still have been established at the date of trial.

S claimed that similar issues would *shortly* be considered in the upcoming Supreme Court judgment of *S Franses Ltd v The Cavendish Hotel (London) Ltd*. In that case, the landlord admitted that it would not go ahead with its development works if the tenant left voluntarily, so its only motive in carrying out the works was to satisfy ground (f).

However, the judge considered that *Franses* was concerned with a substantially separate point – whether the requisite intention is satisfied when the works are only carried out to fulfil ground (f) to oppose the grant of a new tenancy. The judge concluded that *Franses* was not directly relevant and would not have a material impact on the decision in this case.

Carnegie v Nolan 2018 (unreported)

Easements and derogation from grant

Mr Carnegie (C) owned two pieces of land – Tower Court and West Court. Mr Nolan (N) owned land surrounding both Tower Court and West Court. The case centred around the easements that burdened N's land and benefitted Tower Court and West Court.

Shortly after C acquired Tower Court, the parties entered into a deed of easement giving C the right to park five motor vehicles in car parking areas on N's land. The parking areas were defined as the initial designated spaces or "*such other area as the Grantor may designate from time to time*". The initial designated spaces were next to C's house.

N tried to re-designate the parking spaces to an area 378m away from the original spaces and argued that there was nothing in the deed to limit the location of the spaces. C argued that the purpose of the easement was to benefit his property. Designating car parking spaces 378m away meant that he could no longer park next to his property. Particularly as public parking was available closer to the property than the new spaces, it effectively made the easement worthless.

The court found in favour of C and held that the re-designation amounted to a derogation from grant. The court affirmed the principle that reallocated spaces should have substantially the same convenience as the existing designation.

C also argued that he was entitled to put scaffolding on N's land in order to repair his roofs and chimneys. C argued that this right was implicit in the deed, and that it was necessary for the reasonable enjoyment of his land. He argued that it was realistically impractical to access the properties to carry out repairs other than using scaffolding.

The court concluded that putting up scaffolding amounted to exclusive possession, so there could not be an easement to put up scaffolding. They found that there was an implied easement to access N's land to the extent that it is necessary to maintain the land, but not to erect scaffolding.

Beaumont Business Centres Limited v Florala Properties Limited [2018] EWHC 2112 (Ch)

Developer is denied summary judgment in rights of light case

Beaumont (B) was the tenant of an office building at Moorgate in London. The owner of a neighbouring property, Florala (F), wanted to increase the height of its building which would reduce the light reaching B's building. B applied to court for an injunction to prevent F from redeveloping its property and claimed for damages.

B had previously entered into a rights of light deed with the former and current landlords of its property, which dealt with what would happen if the neighbour, F, increased the height of its own building. The deed provided that for the next 15 years, the former landlord would retain the benefit of any right to light claims, so that it could – alongside the tenant, B – negotiate a settlement agreement with F.

F applied for summary judgment on the basis that there was no realistic prospect of a final injunction being granted. F argued that the wording in the deed was clearly not designed to protect the right to light but rather to provide financial compensation for B.

The court disagreed, stating that the existence of the deed did not prevent the tenant from seeking an injunction. It was not clear that the terms of the deed were motivated by financial reasons rather than a need to enforce the right to light.

Cantt Pak Ltd v Pak Southern China Property Investment Ltd [2018] EWHC 2564 (Ch)

Seller entitled to rescind contract despite its own breach of contract

Cantt Pak (the Seller) owned a large area of land in Manchester which was occupied by various commercial tenants. In December 2015, the Seller entered into a contract to sell the land to a third party, who assigned the contract to PSC (the Buyer). The sale contract required the Seller to obtain vacant possession by the completion date of 1 December 2016.

The Buyer failed to complete on the completion date as it insisted that VP should be given before completion. However, the Seller wanted confirmation that the Buyer was in funds before incurring costs of terminating the tenancies.

The Seller served a notice to complete on 8 December 2016, making time of the essence and requiring completion to take place by 22 December 2016. The Buyer failed to complete by that date, so the Seller served a notice to rescind the contract on the grounds of the Buyer's repudiatory breach. However, as the Seller had not achieved VP by the completion deadline, the Buyer argued that the Seller was not ready, willing and able to complete.

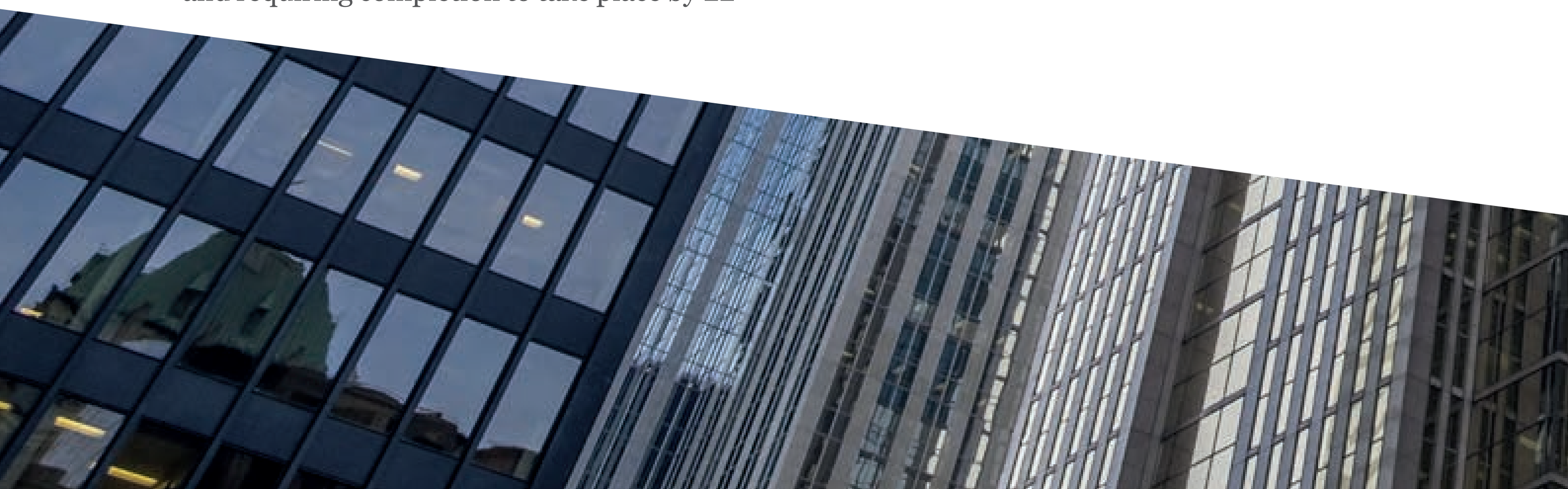
The High Court confirmed the validity of the Seller's notice to complete. The validity of the notice depends only on whether the server is ready, willing and able to complete on the completion deadline at the time when it served the notice, not at all points following the notice. When the notice was served, the Seller would have been ready, willing and able to complete on 22 December, as it would have been able to terminate the tenancies upon a few days' notice.

Even though the Seller failed to secure VP in breach of the contract, the Buyer chose not to rescind and instead treated the contract as continuing. From that point the Buyer was obliged to complete, so its failure to pay the purchase monies entitled the Seller to rescind the contract notwithstanding its own breach.

The Manchester Ship Canal Company Limited v Vauxhall Motors Limited (formerly General UK Motors Limited) [2018] EWCA Civ 1100

Relief from forfeiture requires proprietary or possessory rights

Manchester Ship Canal Company (M) granted a licence to Vauxhall (V) to discharge water and trade effluent into a canal.



The licence was granted in perpetuity in 1962 for a fee of £50 per annum. In 2013, V failed to pay and, after a reminder notice, M terminated the licence in accordance with its right to do so under the licence. Following a period of negotiation for a new licence, V issued proceedings for relief against forfeiture seeking the reinstatement of the original lease.

The High Court granted relief, rejecting M's arguments that it could not do so because the licence did not confer any proprietary or possessory right on V and that relief ought not to be granted due to the delay in V's application.

M appealed to the Court of Appeal on the grounds that V could not obtain relief from forfeiture as its rights were analogous to an easement, rather than proprietary or possessory rights. By the time of the hearing, the value of V's right under the licence was estimated to be between £300,000 and £440,000 per year.

The Court of Appeal dismissed M's appeal. The court confirmed that the right to relief from forfeiture arises only where the applicant has a proprietary or possessory interest in the subject matter. On these particular facts, V had a possessory interest and was entitled to relief.

The Court of Appeal commented that the High Court was entitled to take into account the potential windfall to M if relief were refused, recognising recent cases in which proportionality is an important consideration for the court when exercising its discretion to grant relief. Further, the delay in V's application did not make it wrong in principle to grant relief.

Jones and another v Roundlistic Ltd [2018] EWCA Civ 2284 (19 October 2018)

Absolute prohibition on sub-letting is not held to be an unfair term

Jones and Seymour were tenants of a maisonette, pursuant to a new lease granted under the procedure for claiming a lease extension under the Leasehold Reform, Housing and Urban Development Act 1993 (LRHUDA). The lease contained a restrictive covenant that tenants were not to use the premises other than as a single private dwelling house occupied by the current tenant and the family. However, the tenants sub-let the lower maisonette to a third party and notified the landlord, Roundlistic, of their intentions. The landlord argued that the restrictive covenant prevented the tenants from sub-letting the property.

The First-Tier Tribunal agreed with the landlord that the terms of the lease prohibited the sub-letting. However, the landlord was estopped from relying on the lease's wording because it had previously offered the tenant a variation of the lease to permit the sub-letting. The FTT also considered that the covenant was an unfair term and therefore did not bind the parties. On appeal, however, the Upper Tribunal found that the landlord was not estopped from relying on this term and no relevant "contract" had been made for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR). As the landlord had been statutorily obliged to grant the new lease to the tenant, the regulations did not apply.

On a further appeal, the Court of Appeal confirmed that the clause was not an unfair term within the meaning of the UTCCR, but for different reasons. To prove that the term was unfair, the tenants had to show that:

(i) the clause fell within the scope of the UTCCR;

(ii) there was an imbalance of power between the parties caused by the covenant; and

(iii) that it was granted contrary to the requirement of good faith.

Although in principle leases granted under the LRHUDA are exempt from the UTCCR as they are granted pursuant to statutory provisions, the UTCCR did in fact apply to the user covenant because the exact content of the covenant had not been prescribed by statute. The Court confirmed that there was an imbalance between the parties as a result of the user covenant. However, the inclusion of the covenant was not in bad faith so there was no contravention of the UTCCR. The original tenant would have had the benefit of legal advice and could have renegotiated the term on the grant of the new lease.

Wild Duck Limited v Smith [2018] EWCA Civ 1471

Court of Appeal upholds landlords' right to step in following developer's insolvency

Smith, the owner of a freehold site, entered into a development agreement in 2005 with a developer to build 40 holiday homes in the Cotswolds. The development agreement provided for the incorporation of a management company, who was responsible for the common parts including access ways and a sewage treatment system.

Leases of the holiday homes were pre-let prior to the commencement of construction of the units. Each lease contained a provision allowing the landlord to carry out repair and maintenance obligations if the management company defaulted (Clause 7). As the units were part of a wider development, the leases were granted prior to construction commencing. Finalising the necessary common parts was not a pre-requisite to completion.

In 2009, prior to completion of the works, the developer entered into voluntary liquidation. The management company was subsequently dissolved and the tenants of the units formed a management committee to assume the responsibility of finishing the works. However, the landlord invoked Clause 7 with the intention of carrying out the works itself and recovering the costs from the tenants.

The High Court initially dismissed claims from the tenants that the landlord had prevented the management committee from complying with their contractual obligations. The tenants committee appealed, claiming that there was no failure to perform and that the landlord had acted wrongfully by imposing works and attempting to recover the costs.

The Court of Appeal dismissed the appeal, finding that the management company had failed to perform and, at most, they had prepared to carry out their obligations and not actually done so. The Court also found that the landlord acted within the scope of Clause 7 and therefore the lease permitted the landlord's actions.

Lien Tran
Associate, London
T +44 20 7296 5502
lien.tran@hoganlovells.com

Contacts

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

If you would like to receive this newsletter by email please pass on your email address to one of the editors listed below.

If you would like to follow up any of the issues, please speak to one of the contacts listed below, or to any real estate partner at our London office on +44 20 7296 2000, or to any real estate partner in our worldwide office network as listed at the back of this newsletter:

Daniel Norris
UK Head of Real Estate, London
T +44 20 7296 5590
daniel.norris@hoganlovells.com

Jane Dockeray
Knowledge Counsel, London
T +44 20 7296 5126
jane.dockeray@hoganlovells.com

Ingrid Stables
Senior Knowledge Lawyer, London
T +44 20 7296 5252
ingrid.stables@hoganlovells.com

For topical commentary on key issues in today's rapidly evolving real estate market, visit our Keeping it Real Estate blog: www.ukrealestatelawblog.com or follow us on twitter at @HLRealEstate

Notes

Notes

Alicante
Amsterdam
Baltimore
Beijing
Birmingham
Boston
Brussels
Budapest*
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta*
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Riyadh*
Rome
San Francisco
Sao Paulo
Shanghai
Shanghai FTZ*
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar*
Warsaw
Washington, D.C.
Zagreb*

*Our associated offices

www.hoganlovells.com