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CPO Reform: Striking a balance?

Hannah Quarterman sheds light on the complexities of compulsory purchase.

The world of compulsory purchase has long been a confusing and unbalanced one, with compensation in particular likened to a dark art. So much so, that successive governments have seemed reluctant to really grapple with the topic, tinkering around the edges instead of making meaningful changes to improve this complex system.

Now though, the government has used the seemingly continual raft of planning legislation to begin tackling some of the issues. One of the aims seems to have been to address the imbalance between those working within the regime and those finding themselves victims of it. The proposed reforms are still piecemeal and whilst clearly they are an attempt to improve the system, they still leave much work to be done.

So where are we?

The core basis of the regime hasn't changed: CPOs empower certain public bodies to compulsorily acquire land (and rights) for a specified purpose in the public interest. Now though, there are new rights and obligations for authorities exercising their powers, and "clarification" on some concepts key when determining the compensation due to someone whose interest has been acquired.

The first set of changes was introduced within the Housing and Planning Act 2016 (although not all are yet in force). Key changes include, amongst others:

- Time periods before an Acquiring Authority ("AA") can take possession of land have been increased and landowners can require possession to be taken on a specified day, once certain steps are taken. These provisions should mean landowners have more certainty about relocation timetables;
- Clearer time targets have been introduced, providing more certainty about the timetable AAs and the Secretary of State should follow. However these targets are just that. Save for reporting requirements there are no sanctions for failure to meet those targets, making the provisions toothless;
- The period for implementing an Order if that Order is challenged can now be extended by up to a year if it takes that long to determine the challenge. Again, these provisions fall short of what is needed. Unfortunately it is still not unusual for a High Court challenge to remain undetermined after a year and if the government considered that the uncertainty caused by such challenges was risking otherwise valuable projects proceeding, it is curious that they chose not to fully reflect this in the new law by extending the implementation period for the full amount of time it takes to determine a challenge in each case; and
- AAs have new powers to enter land for the purposes of surveys. This means that even before land is included in a confirmed order an Authority can gain access to survey it. Resisting that access without reasonable excuse is a criminal offence.

Whilst most of these changes can be seen as a positive, albeit small, step in the right direction there are still some notable failings.

What's still to come?

Further measures are included in the Neighbourhood Planning Bill, currently making its way through Parliament. The changes currently included in this legislation are potentially more far reaching.

"No scheme world"

The legislation is being used to codify the "no scheme world" – the hypothetical background against which compensation claims are assessed. The principle required increases in value arising due to the CPO scheme to be discounted when calculating compensation. At face value any simplification of this is a positive step as the intricate web of legislation and case law which has previously set out the rules has made it one of the most contentious elements of the CPO process. However, the changes proposed to date leave relatively broad concepts, making it likely that some, if not much, of the existing case law will continue to be relied upon and will no doubt give rise to a whole new batch.

Further, the uncertainty surrounding the "no scheme world" is now compounded by what could in some cases be significant inequality. Discounting only value increases caused by the CPO scheme caused AAs to complain that the compensation they were paying reflected increases in value which arose as a result of separate, albeit linked, infrastructure improvements that they had paid for – effectively making them pay twice. The current proposal is that AAs will now be able to specify that certain transport infrastructure projects are part of the "scheme", and therefore any associated increases in land value must be ignored when calculating compensation. This leads to the artificial situation where, for example, if a new road has been built, anyone selling land in the area will benefit from associated increase in land prices, but those whose land is acquired compulsorily will not. The true inequity will depend on just how AAs apply this in practice. So far there is little guidance on the limits of this.

Temporary possession

Another potentially crucial change will be the introduction of the power to take temporary possession of land. Previously land acquired pursuant to a "standard" CPO (as opposed to a Development Consent Order or hybrid Bill, for example) could only be acquired on a permanent basis. As a result, if land was only required for a construction compound, for example, it needed to be acquired in the same way as land forming part of the development unless the parties could reach agreement. This new power could potentially mean that many landowners will be able to have some, if not all, of their interest returned to them, enabling them to enjoy the uplift in values usually resulting from a CPO led scheme.

How useful these powers are, and how often they are used, will remain to be seen. In other regimes where AAs have similar powers, they prefer to take the land permanently. This gives them the ability to sell it at the new market value, meaning that they, not the disposed owner, capture any uplift in value. Guidance in the form of further regulation is awaited to see whether an AA will now be bound to only take temporary possession of land where that is all that is necessary. We suspect that this will not be the case, especially where an AA can show even a hint of a risk that it may need the land more permanently.

Other important proposals include:

- Ensuring tenants with break clauses receive appropriate compensation by reviewing the "Bishopsgate" principle, which required the Tribunal to assume their leases would be terminated as soon as possible;
- Awarding a greater proportion of loss payments to occupiers, not landowners; and
- Increasing the interest payable on late advanced payments to the penal rate of 8% above base rate.

A whole new (no scheme) world?

So where does that leave us?

It is refreshing to see the government finally willing to grapple with some of the more significant issues facing the CPO regime, and to go beyond casual tinkering. However, the recent changes and current proposals still fall short of the comprehensive review that many would argue is needed. Instead much of the plethora of existing case law is likely to mean that the process remains complicated and drawn out for both AAs and those faced with compulsory acquisition.

Perhaps more importantly, little has been done to address the perceived mismatch in power between land owners who are new to the system and the AAs operating it. For example, the enhanced advance payment provisions seem something of a consolation prize against the potential diminution in compensation payable following inclusion of infrastructure projects in the "scheme".

As a result, it is likely that the CPO system will continue to be viewed with suspicion by those outside it and with frustration by those on the inside.

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Opportunity knocks for the Energy Savings Opportunity Scheme

ESOS was introduced in the UK to implement Article 8 of the European Union's 2012 Energy Efficiency Directive (EED). We currently expect Brexit to take place in 2019 which is when the next round of audits will be due. Where does this leave the current energy efficiency targets? Unless the government actively takes steps to disapply the current UK legislation, those audits will still need to be done. Simon Keen explains.

"Energy Savings Opportunity Scheme" (ESOS), requires large undertakings to audit the energy efficiency of their properties and present the findings to their directors. There is no obligation to implement the findings; where an audit reveals cost-effective ways of saving energy, the prospect of reduced operating costs should be sufficient incentive alone. Businesses should therefore not see Article 8/ESOS as a "green" hoop to jump through but as an opportunity to achieve financial savings.

In the UK, compulsory ESOS energy audits had to be completed over Winter 2015/16, with filings due in January 2016, to confirm compliance. We advised clients on their obligations in the UK and elsewhere in Europe, and some consistent themes emerged. Another round of audits is expected in 2019, if not sooner (they might become annual in the UK as a replacement for the reporting element of the Carbon Reduction Commitment), so businesses operating in the UK who might be subject to the next round of audits should bear these points in mind.

1. Start work in plenty of time. There will be a rush as each deadline approaches, so engage with your preferred assessor while they have capacity to assist you properly and can achieve your timetable and budget.
2. It helps (a lot!) if you can clearly explain your business structures. Complying with ESOS requires filings by or on behalf of all qualifying undertakings that are part of a group that, in aggregate, meets certain turnover or other size thresholds in the UK, so knowing whether an entity is part of your or someone else's corporate group for compliance purposes, or has to comply in its own right, is essential. This can require careful legal analysis; having the right information to hand makes the analysis quicker and easier, especially if you operate across several jurisdictions or employ complex structures. The UK ESOS compliance filings must identify exactly which subsidiary undertakings they include, so you need to be able to confirm this.
3. Sometimes a parent undertaking and its subsidiaries (particularly separate businesses held as investments) will more appropriately comply separately. ESOS allows some subsidiaries to be "disaggregated" from their parent for this reason. Conversations about disaggregation are better held at an early stage, so that everyone knows in good time who is doing what.
4. Know when and how your properties were acquired, and who holds the title to them. ESOS does not require businesses to audit properties acquired after certain dates, which vary depending on whether the asset was acquired directly or by acquiring an interest in a holding vehicle. Some cases will need careful analysis.
5. Your property managers must collect and provide to your assessor the data needed for the audits and benchmarking, such as energy consumption and billing information and any previous energy efficiency audits or assessments. Your property management agreements may need updating to ensure that they do this. When you acquire new properties, especially if you do so indirectly, you should consider obtaining historic information from the seller as you may need to include data for periods before your acquisition in the scope of the audit.
6. Finally, it is worth stressing that compliance with ESOS is not simply a "tick the box" exercise, nor is it one for which you have to comply property by property. The process of carrying out audits and reporting compliance needs to be undertaken across your corporate group in the UK, and if a group fails to comply at all, or does not comply properly, there can be separate penalties for each failure. For instance, the Environment Agency has the power to levy fines for certain failures (which can combine a fixed penalty of up to £50,000 for each failure with additional daily fines for late compliance) and also to publish on its website details of businesses that have not complied, what they failed to do, and how much they were fined for not doing it, which could lead to reputational damage.

Whilst compliance with ESOS can be a complex process, let's not lose sight of its main policy objective and the potential upside. If done properly, audits should identify energy savings that, when implemented, will save money as well as improving energy efficiency!

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Food for Thought on Forfeiture

In the landlord and tenant relationship, a right to forfeit imposes the ultimate sanction. Katie Dunn considers this right, which allows a landlord to terminate the lease in certain specified circumstances, usually a breach of the tenant's covenants or other conditions.

Whilst forfeiture sounds like an attractive mechanism for landlords seeking to remove a defaulting tenant, it is not the end of the story. The tenant can apply to the court for relief against forfeiture. The courts have a discretion when deciding whether to use their jurisdiction to grant the tenant relief, but it is not always an easy one to exercise. As recent case law shows, there is a balance to be struck between allowing the landlord to enforce their property rights and giving the tenant a second chance. This is particularly so when the advantage to the landlord in being able to forfeit is out of all proportion to the seriousness of the breach and the harm the landlord has suffered.

Restaurant Rows

The tenant in *Magnic Limited v Ul-Hassan [2015]*[1] ran a pizza restaurant from the premises without satisfying planning conditions, in breach of the lease. The landlord refused to allow the tenant to install a fume extraction system to the exterior of the premises, which was required to satisfy planning conditions, and sought to forfeit the lease.

The court confirmed that relief would be granted provided that the tenant ceased trading from the premises as a pizza restaurant by 11 February 2011. The tenant appealed and continued to trade in the mistaken belief that its application for permission to appeal had the effect of extending the deadline.

By the time the case reached the Court of Appeal, the dispute concerning the tenant's unlawful use of the premises had been on-going for over five years. However, the Court found that the tenant's failure to cease trading was not a deliberate breach of the conditions for relief, but instead was founded on erroneous legal advice. The tenant remedied the breach by ceasing to trade by the time of the appeal hearing. Accordingly, relief was allowed.

The Court may have had some sympathy for the tenant because they had at least attempted to comply with planning conditions.

In *Freifeld v West Kensington Court Limited [2015]*[2] the tenant had a valuable long leasehold interest. Their sub-tenants had mismanaged the Chinese restaurant operated from the premises to such a degree that it caused a nuisance to residential tenants in the same building and led to the landlord's insurer refusing to renew the building's insurance policy. The tenant then granted a future sublease to the restaurant owners without the landlord's consent, in breach of the lease. The landlord sought to forfeit the lease. The court refused relief on the basis of the tenant's conduct and failure to make any attempt to remedy the deliberate breach until the eleventh hour.

The Court of Appeal, however, granted relief. It accepted that there may be cases where a lease of substantial value could pass to the landlord by forfeiture, but only where there was no other way of securing the performance of the covenant. Relief was given subject to conditions requiring the tenant to appoint new managing agents and assign the lease within six months.

These cases show that a tenant's persistent and even deliberate breach of the lease is no bar to relief. This means that landlords can face a period of uncertainty following forfeiture.

Windfall Wars

The court in *Pineport Limited v Grangeglen Limited [2016]*[3] granted the tenant's application for relief, even though it was made 14 months after forfeiture. The court took account of human factors, including the tenant's custodial sentence for unlawful activity conducted from the premises, and financial and health issues suffered as a result. In the circumstances, the court decided that the tenant had acted with "reasonable promptitude". It was also satisfied that the tenant was capable of paying the amount due to the landlord, even though the landlord had to wait up to a further 16 weeks for payment.

[1] EWCA Civ 224
[2] EWCA Civ 806
[3] EWHC 1318 (Ch)

Again, the tenant in the case held a long and potentially valuable lease. Forfeiture meant that the landlord would receive a windfall. The court took this into account, particularly as it was unable to point to any long term detriment suffered by the landlord.

Administration Arguments

When a tenant enters administration, the landlord faces an additional hurdle: it must seek the court's permission before it is able to forfeit.

Lazari Investments Limited v SSRL Realisations Limited (in administration) [2015][4] reflects the approach taken by the courts in these circumstances. The administrators of the Strada restaurant chain sought to assign the lease to a buyer of the business and allowed them into occupation in breach of covenant.

Having decided that forfeiture would be detrimental to the purposes of the administration, the court balanced the landlord's proprietary interests against the interests of the unsecured creditors as a whole. The landlord had received two favourable offers to take a new lease of the premises. The tenant's administrators stood to gain £1.3 million from the assignment, but the landlord had refused consent to assign and validly terminated a licence arrangement that was key to any assignment. In the circumstances, permission to forfeit was granted.

The case provides some much needed good news for landlords, but getting permission to forfeit does not stop a tenant seeking relief. A landlord may find that they have won the first skirmish, but the fight is not over.

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[4]EWHC 2590 (Ch)

UK Bribery Act – keeping to the rules

Anyone who thought that the Bribery Act 2011 might not impact on real estate should pause for thought. Michelle Anthofer explains why.

Whilst most companies have put strict policies in place to govern corporate entertaining, recent events show that property companies must carefully govern procurement and tendering processes. According to Crispin Rapinet, head of Global Investigations, White Collar and Fraud practice at Hogan Lovells, *"property development involves interactions with government officials and a clear risk in some jurisdictions of people who want to line their pockets in return for permission"*.

Why does the Act have such a bite? For starters, the Act radically overhauled the UK's corruption legislation and introduced a much more stringent and far-reaching regime. Under the Act, the usual burden of proof is reversed, meaning corporates can only avoid conviction if they can prove "adequate procedures" were in place to prevent bribery. Demonstrating adequate procedures will show that the incident was a one-off anomaly rather than the result of institutional management failure.

The Act also introduced the strict liability offence of failure of a commercial organisation to prevent bribery. As such, there is no requirement for the prosecution to prove intention or knowledge on the part of a company's senior management. Where a bribe is paid by anyone acting on the company's behalf and for the company's benefit, the company will automatically be guilty of a criminal offence, subject to the "adequate procedures" defence.

Also unprecedented is the jurisdictional scope of the Act. Not only is the Act applicable to UK individuals and companies and conduct taking place in the UK, but also to any foreign company which carries on business in the UK. In the case of the corporate offence, liability will arise even if the bribe took place in an overseas jurisdiction, by a foreign agent or subsidiary and with no connection to the UK. These ramifications are far reaching, particularly when coupled with the increasingly diligent approach to enforcement by UK authorities.

The consequences of falling foul of the Act can be very serious. Lord Justice Thomas has signalled that the financial penalties imposed by the English courts ought to be consistent with those imposed in the US, which can run into the hundreds of millions of dollars, clearly illustrating the extent of the risk.

For corporates, concerns naturally stem from how corporate hospitality will be interpreted in line with the Act. While the lavishness of the hospitality relative to common market practice will be taken into account, some comfort can be taken from the Secretary of State for Justice's view that *"no one wants to stop firms getting to know their clients by taking them to events like Wimbledon and the Grand Prix"*. However, corporates should not become complacent in merely treating industry norms as acceptable if they are at risk of not being considered to be reasonable and proportionate. As a result of this, many corporates struggle with determining an acceptable level of corporate hospitality, which they often deem to be well below the price of a day at the tennis or the races.

With the impact of the Act becoming increasingly clear, corporates are advised to review their compliance programmes, so that they can demonstrate "adequate procedures" are in place to prevent bribery. Compliance programmes should cover a wide range of areas and go beyond written policies. Practical training, financial controls, due diligence on third parties and reporting and investigation procedures will all stand corporates in good stead in demonstrating compliance has been adequately addressed.

An earlier version of this article appeared on our Keeping It Real Estate blog: www.ukrealestatelawblog.com

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Q&A

In this quarter's edition, Christopher Somorjay looks at when an option to tax can be disapplied and Shanna Davison explains about new criminal sanctions which will apply to residential landlords under the Right to Rent regime.

Q: In what circumstances can an option to tax be disapplied?

A: Most landlords opt to tax in respect of their commercial buildings with an eye on the benefit which will accrue to their VAT recovery. However, there are a number of circumstances where the option to tax may be disapplied; a couple in particular can cause real headaches for unwary landlords.

First, an option to tax will not apply if a building, or part of it, is intended by the tenant for use solely for a "relevant charitable purpose"– broadly, for any use which is not in the course of furtherance of a business. In most cases, if you have let your vacant high street unit for use as a charity shop, you can breathe easy: use as a shop for income-generation for the charity would count as a business activity. Similarly, if the premises are to be used as an office (for general administration, such as head office functions), then again the option is not disapplied. However, a charity tenant could change its use of the premises and claim that the option is disapplied at any time – even after the lease has been completed – so as a precaution landlords may wish to include an express warranty from the tenant that they will not put the premises to 'RCP' use.

Perhaps more concerningly, an option to tax may also be unwittingly disapplied by virtue of the operation of certain anti-avoidance rules. These can kick in if all the following apply:

- the property is subject to the Capital Goods Scheme (CGS) – very broadly, this will be the case where VAT-bearing capital expenditure within the last ten years has exceeded £250,000 – or is expected to be subject to the CGS in the future; and
- the property is going to be occupied by an entity which cannot recover all or substantially all of its input tax (the VAT it incurs). This might be, for example, because it is a tenant in the insurance or finance sectors; and
- that expected occupier (or an entity connected with it) has provided, or is providing, the landlord with finance in connection with the property. This can include, for example, a tenant paying a contribution towards works at the property.

Such a circumstance can arise entirely coincidentally to the transaction. It may be that you have funded the construction or purchase of the property by borrowing from a bank, and a member of the same banking group happens to be one of the tenants. Fortunately, a retail bank occupying a single unit in a large shopping centre may not cause a problem: occupation by the entity in question can be ignored if it doesn't exceed 10% of the property.

However, you may not be so lucky if the 'funder' has a couple of floors in a small office building, and often the 'funding' may not have been expected at the outset. For example, an agreement for lease will often contemplate that the tenant should bear the cost of 'tenant's requested modifications' to landlord's works, without much thought being given to whether this is an option the tenant is actually likely to invoke.

Motive is, unfortunately, irrelevant. Perfectly innocent transactions can be caught by the rules, but the consequences can be far-reaching: the landlord will be unable to recover related VAT which it has incurred, and may even face clawback of past (previously recovered) VAT under the Capital Goods Scheme. It pays to be alert from the outset, not least as in most cases careful structuring can ensure that nasty surprises are avoided.

Q: I've heard that residential landlords might be subject to criminal sanctions for renting out property to illegal immigrants. Is that correct?

A: You are correct. From 1 December 2016, landlords will commit a criminal offence if they knowingly rent out their property to a disqualified person, or have reasonable cause to believe that the tenant is a disqualified person. The offence attracts an unlimited fine (previously a maximum fine of £3000) and up to 5 years in prison.

A landlord may have a defence where it takes reasonable steps to terminate the tenancy within a reasonable time of becoming aware of the true status of their tenant. The Home Office has issued guidance for the courts when deciding whether or not the defence applies. The guidance states that a "reasonable time" is the period needed by the landlord to end the tenancy by mutual agreement with the tenant or by taking steps to end it. As for the "reasonable steps" a landlord needs to take, it will depend upon the nature of the tenancy agreement and the relevant statutory provisions that apply, but a court should take into account all of the circumstances.

If the landlord does not have a right to evict the tenant, there is now a statutory right to terminate the tenancy following receipt of a notice from the Secretary of State that the tenant is a disqualified person. The landlord can serve a prescribed form of notice on the tenant which will allow the landlord to recover possession of the property as if it were an order of the High Court. This will make it easier for landlords to legally evict disqualified persons. However, it goes without saying that a landlord risks criminal liability if it receives one of these notices from the Secretary of State and doesn't take steps to evict the tenant within a reasonable time.

It remains to be seen how the courts will apply these sanctions in practice, but a relatively minor fine will probably be imposed on most landlords who fall foul of the regime, particularly where the breach has been inadvertent. In more serious cases involving repeat offenders or landlords who deliberately ignore the regime, tougher punishments including imprisonment will be on the cards.

Hogan Lovells is hosting a seminar on the Private Rented Sector on 17 January. Please contact the editors if you are interested in attending.

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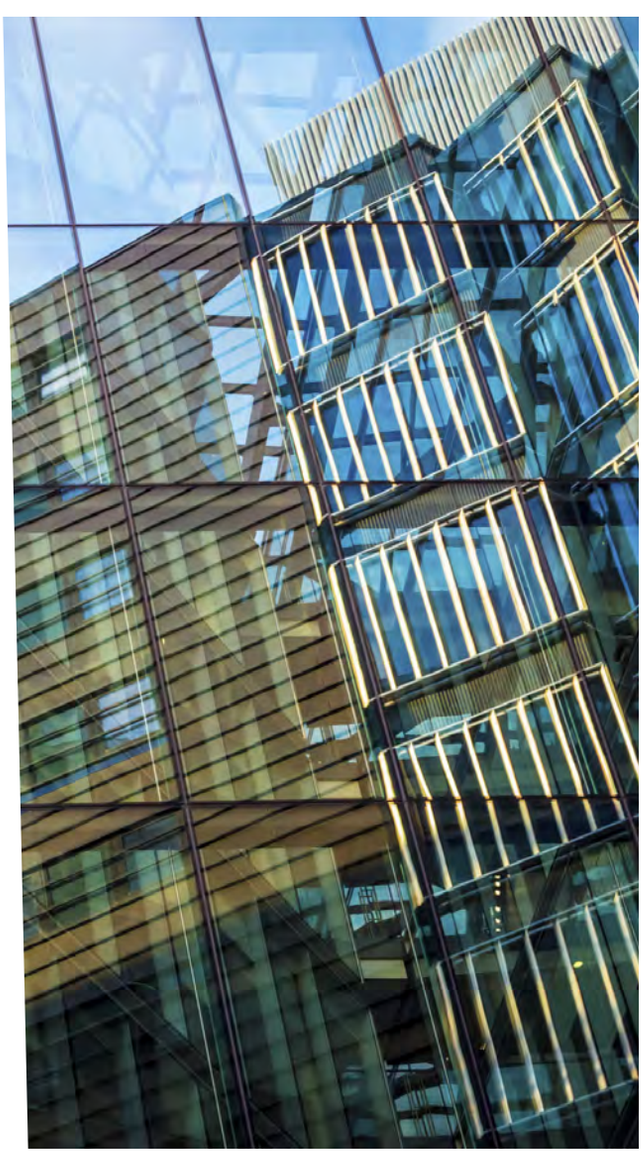


Case Round Up

Lien Tran and Paul Tonkin summarise recent case law

No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2016] EWHC 2438 Ch

High Court considers when landlords can reasonably refuse consent

The High Court has ruled that a landlord unreasonably withheld consent to assign under the Landlord and Tenant Act 1988, even though only one of its three reasons for withholding consent was unreasonable. The tenant, East Tower Apartments, held long residential leases of 42 apartments at No.1 West India Quay. The tenant wished to assign a number of its leases and sought the landlord's consent to assign. The leases expressly stated that consent was not to be unreasonably withheld.

The landlord imposed several conditions of granting consent, which the tenant argued were unreasonable. Ultimately, it refused consent to assign on the basis that the tenant:

1. challenged the landlord's request for the proposed assignees' bank references and refused to provide them;
2. challenged the landlord's request to inspect the property and refused to pay the associated fees; and
3. refused to give an undertaking of £1,600 plus VAT for the landlord's costs.

The High Court held that the landlord's first two grounds were reasonable. The landlord was entitled to require bank references of the proposed assignees to assess their covenant strength and ensure that they would be able to perform their obligations under the leases. Inspecting the premises at a cost of £350 plus VAT was also a reasonable request, as the landlord is entitled to assess whether any covenants have been breached.

However, the landlord's third reason was held to be unreasonable and in fact vitiated the other two good reasons. Citing the Upper Tribunal decision of Proxima GR Properties Ltd v Dr Thomas D McGhee [2014] UKUT 0059 (LC), the Court stated that the consent provision "may not be used as a source of profit for landlords or their managing agents". On the facts of this case, a reasonable figure for landlord's costs would have been £350 plus VAT. The requirement for the tenant to pay £1,600 plus VAT for the landlord's costs was therefore unreasonable.

The Court considered that the landlord's decision to grant consent turned on the tenant giving the undertaking for costs, and consent would have still been refused even if the first two conditions had been satisfied. The overall conclusion was therefore that the landlord's refusal of consent was unreasonable.

Francia Properties Ltd v Aristou [2016] (unreported)

Landlord's right to develop not incompatible with Right To Manage company's management obligations

A landlord sought to extend its freehold property by building a new flat on the top floor. The property was managed by a Right to Manage (RTM) company, who objected to the development plans on the basis that it had acquired the landlord's management functions under section 96(2) of the Commonhold and Leasehold Reform Act 2002. Under section 97(2) of the Act, landlords are not entitled to do anything which the RTM company is "required or empowered" to do. As the RTM company's management obligations included maintaining and repairing the roof, it argued that the landlord's development would prevent it from carrying out these functions. The tenants of the top floor also objected to the proposed works on the grounds that the resulting loss of light would amount to a breach of quiet enjoyment.

The Court held that the RTM company's acquisition of the right to manage did not in itself prohibit the landlord from redeveloping the property. Although the RTM company was obliged to maintain the roof, it was not "required or empowered" to carry out any development as part of its management functions. Furthermore, there was little evidence that Parliament had intended the Act to restrict a landlord's right to develop. The Court concluded that the landlord could carry out its development works, as long as it took all reasonable steps to minimise the disturbance to the RTM company's management functions.

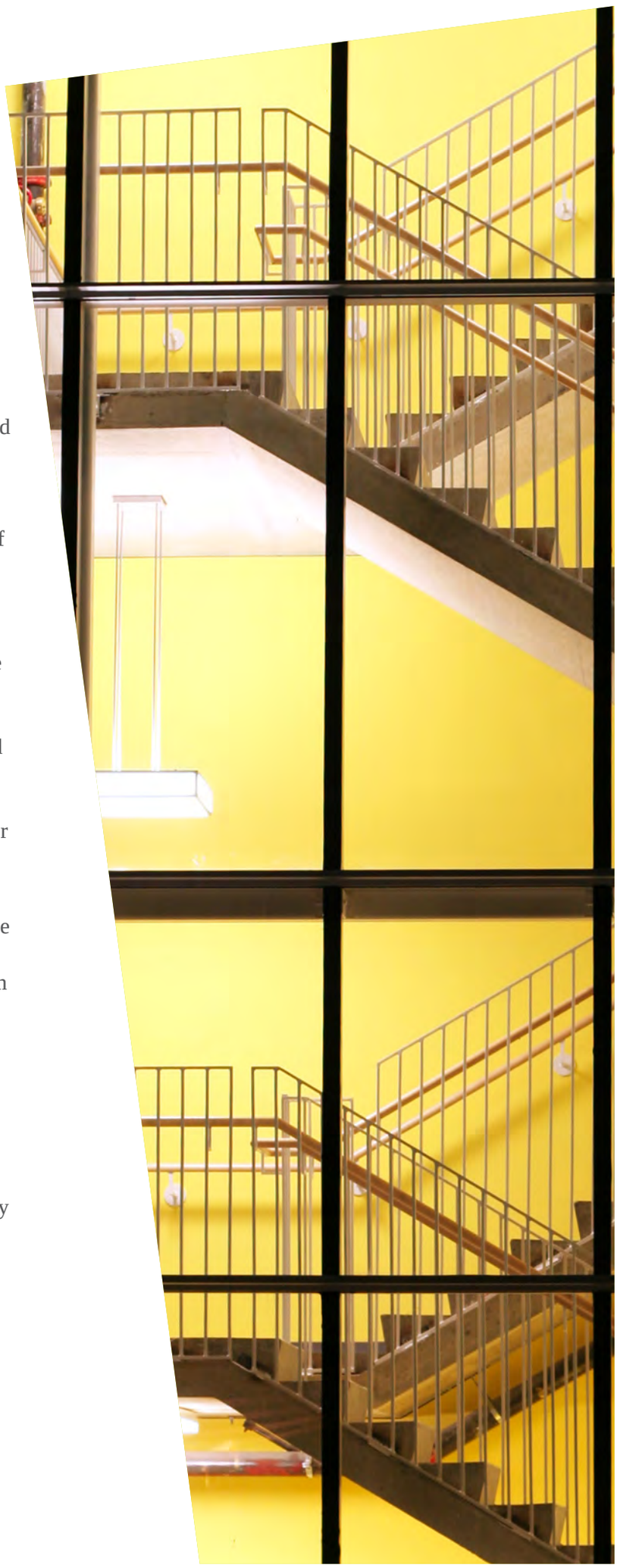
The Court further ruled that the loss of light to the top floor tenants' flat would not render it substantially or materially less fit for purpose. The landlord's development would therefore not constitute a breach of the covenant for quiet enjoyment or derogation from grant.

Nemcova v Fairfield Rents Ltd [2016] UKUT 303 (LC)

Tenant's use of flat for 'airbnb' lettings breached user covenant

A tenant owned a long lease of a flat in Enfield. The lease contained a covenant not to use the demised premises for any purpose other than as a private residence. However, the tenant granted several short-term lettings of her flat after advertising it online using "airbnb". The landlord sought a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 that the tenant had breached the user covenant in her lease.

The Upper Tribunal (Lands Chamber) agreed with the landlord's submission that the tenant had breached the user covenant. The Upper Tribunal reasoned that the lease required the tenant to use the premises as a "private residence", which did not necessarily have to be her own private residence. However, for an occupier to be using it as a private residence, there must be a degree of permanence. The fact that the short-term lettings were for days and weeks, rather than months, was material. As the occupation was transient, the short-term occupiers would not have considered the flat as their private residence even for the time they were there. The Upper Tribunal made clear that each case depends on its specific facts, but in this case the very short duration of the lettings meant that the tenant had breached the lease's user covenant.



Trevallion v Watmore [2016] (REF/2015/0295)

Buyer bound by lease that would have been revealed by a reasonably careful inspection of premises

The First-Tier Tribunal held that a buyer purchased a property subject to her neighbour's overriding interest, despite having no actual knowledge of the interest at the time of purchase. Although the neighbour's occupation was not visible from a brief look at the property, it would have been obvious had the buyer undertaken a reasonably careful inspection of the boundaries.

In 2013, Watmore (W) purchased a property in the Isle of Wight, which included a triangular piece of land in the corner of the freehold title. Trevallion (T) owned the freehold property next door and had been granted a long lease of the triangle of land in 1954 and had been using it for storage for many years. In December 2013, T applied to register their lease. W objected to the application on the basis that she had not been aware of T's interest.

The First-Tier Tribunal held that T's lease overrode the first registration of W's property. Under paragraph 2 of Schedule 3 to the Land Registration Act 2002, an interest will attract overriding status if either the buyer had actual knowledge of the occupation or it would have been obvious on a reasonably careful inspection of the land. It was accepted that W did not have actual knowledge of T's occupation of the disputed triangle at the time of purchase, as the land was obscured by a large bush. However, if she had undertaken a reasonably careful inspection of the garden, she would have looked behind the bush concealing the triangular land and discovered that T used it for storage. A reasonably careful inspection of the property, rather than a quick look, would at least involve inspecting the boundaries. T's application was granted and W was bound by the lease.

Publity AG v Chesterhill Properties Ltd [2016] EWHC 1994 (Ch)

No clear acceptance of landlord's offer results in no binding tenancy

Chesterhill was the landlord of a property in Mayfair. Publity wanted to rent the property and the parties entered into negotiations for a tenancy agreement. They agreed that Chesterhill would undertake various works to the property, Publity would pay a £52,000 deposit and the term commencement date would be 14 January 2016.

The first version of the tenancy agreement stated that the term would begin on the date originally agreed. It was signed by the landlord. However, the tenant was not granted access to the property on this date. As a result, the parties later created another version of the tenancy agreement which stated that the commencement date was 1 February 2016. This second version was signed by the tenant and the landlord's agent. The following week, a senior officer of the tenant printed off a further copy of the original tenancy agreement with the 14 January commencement date. The senior officer signed the document and sent it to the landlord.

The tenant claimed a declaration that a tenancy had been agreed. The landlord claimed that the parties had not entered into a binding agreement. The landlord further argued that it was entitled to keep the £52,000 deposit as it was in fact payment to undertake works to the property.

The Court held that the parties had not entered into a binding contract. The second version of the tenancy agreement (with the 1 February 2016 commencement date) constituted a counter-offer by the tenant and rejection of the landlord's original offer. The tenant could not accept the landlord's original offer by signing the first version of the agreement (with the 14 January 2016 commencement date) after it had lapsed. Although the counter-offer appeared to have been signed by both parties, it was not clear that the landlord's agent had authority to sign the amended contract on the landlord's behalf. No tenancy agreement had been completed.

However, the Court ordered that the £52,000 deposit should be returned to the tenant. It concluded that the parties had agreed that the money was to be paid as a deposit, not as payment under a side agreement for the landlord to carry out works.

23 Dollis Avenue (1998) Limited v Vejdani [2016] UKUT 365

Statutory consultation not required for on account payments of future service charge

The appellant (D) was the management company of a house which had been converted into four flats, which were let to the respondent tenants (V). D had served a demand on V for £10,200 in respect of sums to be paid on account for works to be carried out at the property during the following year. V claimed that D had failed to comply with its statutory consultation requirements under section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultations Requirements) (England) Regulations 2003.

The First-Tier Tribunal held that D's estimated costs of the works had not been sufficiently detailed, which invalidated the section 20 notice procedure. The tenants were therefore only liable to contribute £250 each towards the works.

On appeal, the Upper Tribunal held that the £250 limit is only applicable to costs incurred by the landlord in carrying out works, rather than in respect of sums payable on account of works to be carried out in the future. Therefore the statutory consultation requirements do not apply where sums in excess of £250 are requested on account of future service charge payments for intended works. Such service charge which is payable in advance only has to be reasonable. The landlord's failure to fulfil the consultation requirements may be taken into account in assessing the reasonableness of the service charge sum, but did not in itself prevent the landlord from recovering amounts exceeding £250. It is still necessary for landlords to consult before carrying out any proposed works, as its ability to draw down on the service charge may be challenged if it fails to satisfy the statutory requirements.

Fairhold Freeholds No. 2 Limited v Moody [2016] UKUT 311 (LC)

Landlord unable to recover enforcement costs under indemnity covenant

Moody (M) was the tenant under a lease which included an obligation to pay ground rent of £100 per year. When M moved out of the flat, he failed to notify the landlord, Fairhold (F), or their agents who collected the ground rent. The agents sent several letters to M's previous address which he did not receive, leaving the ground rent unpaid. When they finally found M's current address, they demanded payment of the ground rent and a further £50 in administration charges for pursuing the arrears.

The lease contained a clause which stated that the tenant would "indemnify the Lessor against all actions, proceedings, costs, claims and demands in respect of any breach non-observance or non-performance thereof." A separate clause gave F the right to recover costs incurred in enforcing the tenant's obligations under the lease.

The Upper Tribunal held that the purpose of the indemnity clause was to protect the landlord against a third party action arising from a breach by the tenant. This liability would only arise if F had been liable to a third party, which was not the case here. The tenant was not liable under the indemnity covenant to pay the landlord's costs where the landlord had taken enforcement action against the tenant itself, particularly as there was a separate clause which dealt with such circumstances. As the administration charges and solicitors' fees arose only as a result of F's instructions, rather than as a result of M's failure to pay the ground rent, the costs were not recoverable under the indemnity covenant.

Secretary of State for Communities and Local Government v South Essex College of Further and Higher Education [2016] PLSCS 249

Tenant failed to exercise break option where vacant possession was not given

The claimant was the landlord of a commercial property, which it leased to the defendant tenant for a term of 11 years. The tenant had installed non-structural, internal partitioning to create several teaching areas and other rooms for use as a college. The lease contained a break option for the tenant to terminate the tenancy in September 2012, provided that there was no outstanding rent and the tenant gave up vacant possession. Although the tenant paid the rent, it failed to return the keys and alarm codes. It also failed to remove the internal partitioning and other chattels from the property, including reception desks, photocopiers and student files. The landlord claimed that the tenant had not given vacant possession, which meant that the break option had not been validly exercised and the lease would continue. The tenant countered that the assets left behind were moveable and did not obstruct the landlord from regaining possession.

The Court held that the tenant had failed to give vacant possession of the property on the break date. The tenant should have complied strictly with the break conditions, which included giving vacant possession of the entire premises. The tenant had not taken positive action to demonstrate to the outside world that it had given up vacant possession, particularly as it had neither communicated that it was giving up possession nor arranged a handover meeting with the landlord. The failure to hand over the keys and alarm codes was also particularly relevant in this case, as the landlord did not have its own keys and did not know the codes to access the property. The tenant was deemed to be continuing to make use of the premises after the break date by keeping its items on site. The landlord would have to remove the partitioning and other chattels before it could occupy the premises itself, which amounted to a substantial interference with a substantial part of the property.

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