Commercial property update

Magnus Hassett and **Nikolas Ireland** discuss Land Registry practice, leases, M&S's failed appeal, insuring trees and the new capital allowance rules

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Conveyancers should be aware that, with effect from 30 June 2014, they no longer need to send any original documents to the Land Registry when they apply by post to change the register of an existing registered property. The registry only needs to see certified copies of deeds or documents submitted with applications. This applies whether applications are sent by post or through its preferred electronic document registration service, e-DRS.

Once the Land Registry has made a scanned copy of the documents, they will be destroyed. This applies to both originals and certified copies. As a result the Land Registry recommends that practitioners do not send in any original documents. To avoid the destruction of original documents, practitioners should only lodge certified copies.

The update to the Land Registry's policy on original documents does not apply to first registrations, where they will still need to see (and should return) original documents.

Making this change will bring the Land Registry's paper registration process in line with e-DRS: given that it accepts certified copies of documents to support electronic applications, the registry says it is logical to extend this approach to paper applications.

The Land Registry continues to promote using e-DRS by reducing the fees for certain applications made electronically and says e-DRS is "another step on our journey towards becoming a world leader in digitising land registration services".

Certainly in our experience, e-DRS has resulted in both time and cost savings when making applications and applications are handled as quickly, if not more quickly, than when sending applications by post.

Covenants should fit together

The recent case *Century Projects Ltd v Almacantar (Centre Point) Ltd* looked at the interaction between landlord's repair covenants and landlord's covenants for quiet enjoyment. The court gave clear guidance that the covenants should be made to fit together instead of one taking priority over the other.

The tenant runs the Paramount restaurant from the top of Centre Point Tower in London and has based its business around the unique panoramic view it enjoys over the city. The landlord is required under the lease to carry out external repairs to the concrete facade of the building and proposed to carry out this work by erecting scaffolding around the windows of the tenant's demise for about six months.

While it was accepted that the repair works were necessary, the tenant said that alternative methods could be used that would minimise any disruption to the tenant's business. By carrying out the works using scaffolding, the tenant claimed that the landlord would breach the quiet enjoyment covenant and applied for an interlocutory injunction to prevent the works.

In refusing the injunction, the court suggested that a landlord will be entitled to carry out works to its building despite the disruption it may cause to a tenant's business interests if the execution of those works is reasonable in all the circumstances.

The court recognised that where the landlord has an obligation to carry out repairs, with that comes the responsibility to engage contractors, specify a programme of works and the method of execution. Accordingly, it would be unusual to encounter a situation where a third party could dictate to the landlord how to perform the works that it was obliged to carry out.

The court made it clear that neither the repair covenant nor the quiet enjoyment covenant is intended to trump the other and, therefore, while it does not seem likely that a landlord will be prevented from carrying out repair works to its building, they should be reasonable in their execution of those works.

Practitioners should note that where a landlord relies on professional advice, it is likely to be persuasive that the works are therefore reasonable. Tenants and their advisers should remember that the mere presence of a covenant for quiet enjoyment will not mean that a landlord must only carry out works in such a way that >>

>> results in the least possible interference to the tenant's business.

Rent refund after break date

The Court of Appeal has recently overturned the first instance decision in the Marks & Spencer – BNP Paribas break case. At first instance, last year, the High Court had implied a term into a break clause to entitle M&S to a rebate of all rent and other amounts paid in respect of the period falling after the break date (amounting to over £1m), notwithstanding that the lease was silent on the point.

The Court of Appeal has held that there were no grounds to imply such a term, meaning that the tenant was obliged to pay both its break penalty payment and rent and other sums due under the lease for the full quarter without refund. (Thankfully for M&S, it had at least paid the full amount so the break remains effective.)

Practitioners should consider the following when acting for a tenant:

- In relation to leases that are under negotiation, tenants should include specific provisions for the repayment of any sums attributable to the period after the break date, or provide that a break is effective if an apportioned sum calculated up to the break date has been paid.
- In relation to completed leases where the break is conditional on payment of all rents due up to the break date and the break date falls on a quarter day, the tenant should pay the full quarter's rent for the break to be effective.
- Tenants should, where possible, ensure that break dates fall on the day before the rent payment date.

Landowners should not insure nature

In *Stagecoach South Western Trains Ltd v Hind,* a rail company sought to hold a landowner liable for substantial damage to a train that was caused by the stem of a large ash tree on her property falling on to the track.

The judge provided a useful summary of the principles relating to a landowner's duty in respect of trees:

- The owner of a tree owes a duty to act as a reasonable and prudent landowner.
- Such a duty must not amount to an unreasonable burden or force the landowner to act as the insurer of nature. But they have a duty to act where there is a danger that is apparent to them and can be seen with their eyes.
- A reasonable and prudent landowner should carry out preliminary/informal inspections or observations on a regular basis.
- In certain circumstances, the landowner should arrange for fuller inspections by arboriculturalists. This will usually be because preliminary/informal inspections or observations have revealed a potential problem, although it could also arise because of a lack of knowledge or capacity on the part of the landowner to carry out preliminary/informal inspections. A general approach that requires a close/formal inspection only if there is some form of 'trigger' is also in accordance with published HSE guidance on maintenance of trees.
- The resources available to the householder may have a relevance to the way in which the duty is discharged.

In this case, the court held that the defendant had limited resources and no obligation to have the tree regularly inspected by an arboriculturist just because it was by a railway line.

She was a keen gardener and had sufficient knowledge and experience to inspect it herself. She had inspected the tree from time to time and had also demonstrated that she was willing to spend considerable sums on tree surgery in her garden where she thought it appropriate.

There was nothing to put her on alert that the fallen ash tree was dangerous as the tree itself appeared healthy. She was not obliged to seek to inspect the trunk through all the ivy and nettles that surrounded it. The train company's claim failed.

Capital allowances rules change

Practitioners are reminded that the transitional rules for how to claim capital allowances in respect of fixtures on a sale or a lease came to an end on 31 March 2014 for corporation tax purposes. From then, if a seller was entitled to claim plant and machinery capital allowances, then for the buyer to claim allowances the seller must 'pool' them.

Conveyancers should obviously familiarise themselves with the changes and ensure that they are dealing with matters appropriately in sale and purchase contracts and in replies to CPSEs. In particular, they should be aware that:

- No sale and purchase contract (or lease for a premium) should be silent on capital allowances unless all parties are satisfied that there has been no relevant expenditure on qualifying plant and machinery or the buyer does not wish to make any claims.
- Particular care should be taken in preparing and analysing replies to CPSEs in relation to capital allowances to ensure that meaningful replies are offered and that the parties and their advisers understand the answers.
- The changes are likely to lead to the greater use of capital allowances elections on transactions.
- If the seller could have claimed capital allowances (but did not, for example because of losses), the buyer cannot claim unless the seller has pooled the expenditure so, when acting for the buyer, warranties should be sought as to the seller having satisfied the pooling requirement. **SJ**

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