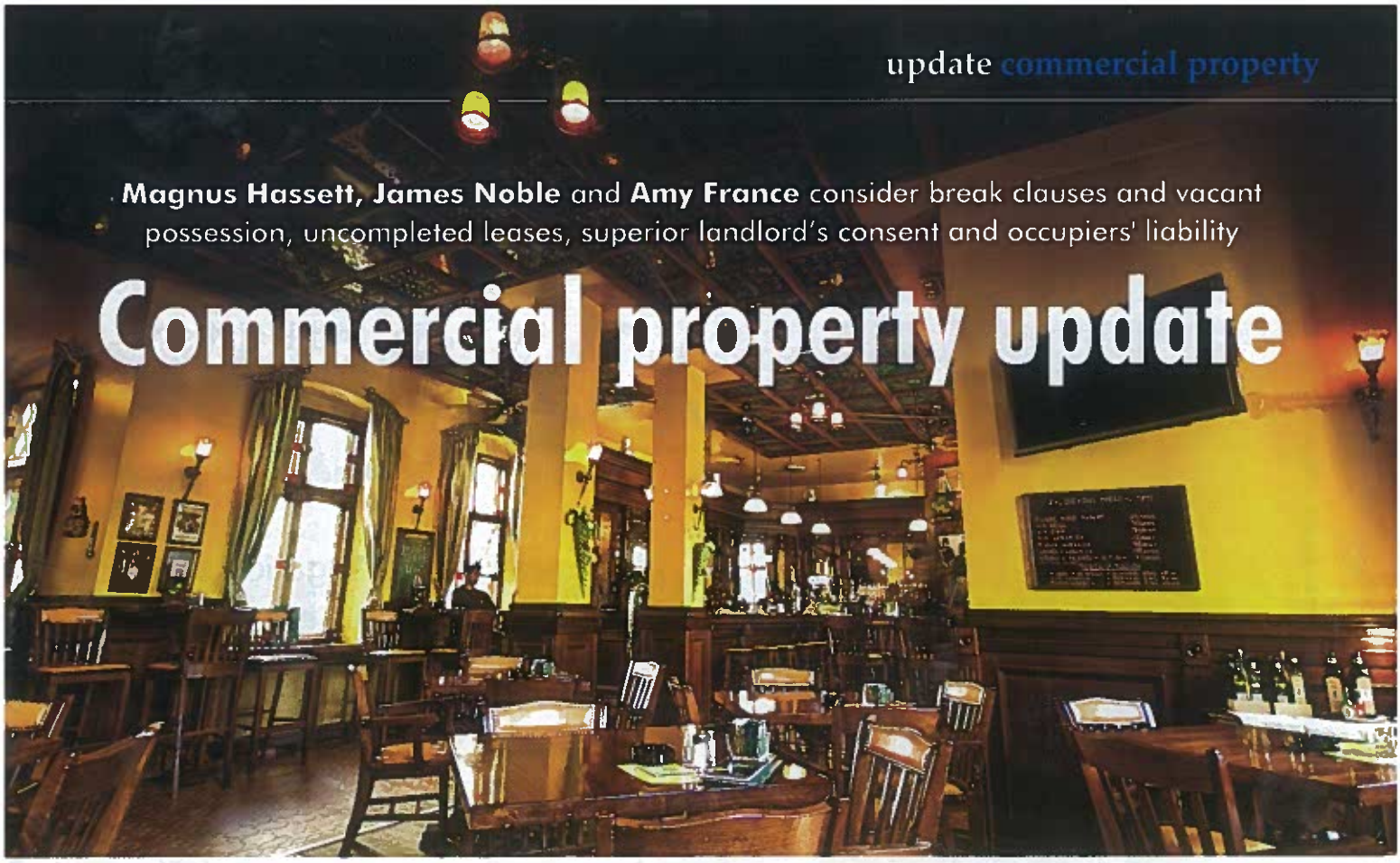

Magnus Hassett, James Noble and **Amy France** consider break clauses and vacant possession, uncompleted leases, superior landlord's consent and occupiers' liability

Commercial property update

Vacant possession

The operation of break clauses in leases remains a fruitful source of potential disputes. Tenants looking to bring their leases to an end may find themselves up against landlords who, in a difficult letting market, try to find reasons to keep their tenants on the hook. From a tenant's point of view, strict compliance with any conditions attached to a break option remains essential.

A condition that is often attached to the exercise of a tenant's break is the giving of vacant possession. The Court of Appeal has recently again made it clear that, in order for such a break option to be effective, a tenant must strictly comply with such an obligation.

The case of *NYK Logistics (UK) Ltd v Ibrend Estates BV* [2011] EWCA CIV 683 concerned a tenant that had exercised its break but which then remained in occupation for a week after the break date to finish off works required under a schedule of dilapidations. Before the break date, a meeting had been held between the respective parties at which the tenant had suggested a week's extension to the lease to allow for completion of the works and had offered to continue to pay for security guards for that period, although no formal agreement was ever recorded.

The necessary repairs were completed a week after the break date and the tenant moved out but the landlord argued that the conditions of the break clause had not been complied with, in that vacant possession had not been provided by the break date and that the lease had not been effectively determined.

The Court of Appeal upheld the decision of the judge at first instance and found for the landlord. The tenant had not given up vacant possession of the warehouse by the break date and the landlord had not waived the requirement for vacant possession by accepting a return of the keys to the premises from the tenant after the break date.

The Court of Appeal also set out its understanding of 'vacant possession', which helps clarify the matter in the light of recent cases that had inferred that vacant possession was a more stringent test than previously understood. The Court of Appeal stated that, if the property was empty of people, the landlord was able to assume and enjoy immediate and exclusive possession, occupation and control, and, if it was empty of any chattels that "substantially prevented or interfered with the enjoyment of the right of possession of a substantial part of the property", then vacant possession was given.

In this case, the tenant's failure to substantially move out of the premises by midnight on the break date meant that it had failed to comply with the relevant condition of the break clause.

The case provides useful direction for both landlords and tenants when contemplating break clauses. As a tenant, it is clear that, even if there are ongoing discussions in relation to repair works and dilapidations, if the tenant does not want to risk failing to comply with the conditions of the break clause, it is essential that it moves all employees out of the premises by midnight on the break date, returns the keys to the landlord or its agents and informs the landlord of the situation in respect of repairs, so that the landlord and tenant can come to an agreement as to carrying out the repairs following the termination of the lease.

For landlords, this case has usefully indicated that waiver of a break condition is a difficult thing for a tenant to prove.

Uncompleted leases

The recent Court of Appeal case of *Haq v Island Homes Housing Association* [2011] EWCA Civ 805 is a useful reminder to landlords and tenants (and their advisers) that they must be careful to ensure that property documentation is not left in abeyance after a tenant has taken occupation.

Mrs Haq was a tenant operating a family convenience shop business who, on a lease renewal, had contacted her local authority landlord to discuss expanding the business by taking a lease of some adjoining premises. The parties agreed heads of terms in 2001 for a new tenancy, including

the additional premises, on favourable terms to the tenant in recognition of the expenditure required on the extension. The conveyancing process was a stop-start affair that took place over a number of years and the lease was never properly completed. The tenant had in the meantime taken occupation of the additional premises and started works, incurring considerable expenditure, on the understanding that the documents, though not completed, were in agreed form.

In December 2005, the local authority landlord sold the whole building (including the tenant's premises) to a new owner who sought to reopen negotiations with the tenant and claimed they were not bound by the terms that the tenant had agreed with the council, because the law requires any agreements relating to an interest in land to be in writing and signed by the parties.

The tenant claimed that she was entitled to complete the lease on the previously agreed terms on the basis of proprietary estoppel, arguing that the previous landlord had allowed access to the additional premises and had allowed works to start without any formal documentation and it had therefore waived the requirement for the tenant to complete the letting documents in the usual way.

In the first instance, the court was sympathetic to the tenant and ruled in her favour but, on appeal by the landlord, the Court of Appeal supported the new landlord's argument: there had been no representation by the previous landlord that it had waived the requirement for formal documentation to be entered into.

The message is clear: particularly in circumstances where events on the ground overtake the conveyancing process, practitioners must be careful to ensure that transactions are properly documented, even where the parties involved seem content to allow matters to be left in abeyance. Circumstances can change, particularly where one of the parties is replaced by a successor in title. The tenant would not have been left in such a difficult position if the parties had pushed ahead with the agreed documents in 2002/03.

Superior landlord's consent

The recent case of *British Telecommunications v Rail Safety and Standards Board* highlights how precise the draftsman must be. The case concerns an agreement for the grant of an underlease, completion of which was conditional on obtaining 'superior landlord's consent'. It highlights the need to be very clear about what the parties regard as constituting 'consent' when a transaction is conditional: is it consent in principle to entering into the requisite licence or is there no consent until the licence is actually completed?

In this case, the judge examined the drafting of the agreement for lease and found that consent had been obtained by the mere giving of consent in principle rather than completion of the licence. Although it was clear from the definition of 'superior landlord's consent' that the parties contemplated that there would be a licence to underlet, this did not necessarily mean that the parties contemplated that consent would not exist until there were was such a licence.

"Practitioners must be careful to ensure that transactions are properly documented, even where the parties involved seem content to allow matters to be left in abeyance"

Many practitioners would have been forgiven for assuming that consent in these circumstances would be deemed not to have been obtained until given by way of a completed licence. The case suggests that great care should be taken to properly define what will constitute the giving of consent in agreements for lease.

Occupiers' liability

A number of recent cases provide welcome guidance for landowners considering the extent of their obligations owed to visitors under the Occupiers' Liability Act 1957. Although in each case, on the facts, the landowner escaped liability, the cases do not amend the law or lessen the obligations on landowners to take reasonable steps to ensure that visitors are kept reasonably safe.

Geary v JD Wetherspoon Plc [2011] EWHC 1506 (QB) involved a claimant who suffered a catastrophic injury while sliding down a banister at a Wetherspoon pub in Newcastle. The banisters were lower than normal height and the pub had had problems in the past with customers sliding down them and hurting themselves. Mrs Geary sued Wetherspoon for not taking steps to prevent such an incident occurring. She claimed the incident was readily foreseeable in the context of the previous accidents but – in an honest admission praised by the judge – also acknowledged that she knew what she was doing was risky. In the light of this concession, the court dismissed her claim because the law does not protect people who voluntarily accept an obvious risk.

In a similar fashion, *Grimes v Hawkins* [2011] EWHC 2004 (QB) concerned a woman who was attending a late-night party at a private dwelling and was left with serious injuries after diving into the occupier's swimming pool. The judge found that the householder was not obliged to ensure that visitors to his house were prohibited from diving into the pool. The claimant had voluntarily accepted the risk by diving into the pool and had simply misjudged the depth of the water. The claimant's case failed.

Bowen et al v The National Trust [2011] EWHC 1992 (QB) was the tragic case of a group of school children on a visit to a National Trust property, who had taken shelter underneath a tree during rain. A branch fell from the tree while the children were sheltering under it; one child was killed and a number of others suffered serious injuries.

The claimants brought a claim, arguing that the landowner was in breach of its duty of care to ensure that the children were reasonably safe. The court examined the steps that the National Trust had taken to ensure the safety of its visitors – for example, the regime of tree inspections that were in operation at the property – and concluded that such inspections were adequate and that the tree inspector's most recent assessment of the tree could not have been expected to identify the weakness of the fallen branch. Although the court had great sympathy for the claimants, it found that the National Trust had discharged its duty of care and was neither negligent nor in breach of its occupier's duties.

The case is a helpful reminder to both landowners and potential claimants that landowners must ensure they are actively taking steps to comply with their obligations under the Occupiers' Liability Act and that it is helpful to have an adequate paper trail of such compliance.

Magnus Hassett (pictured) is a partner and James Noble and Amy France are solicitors in the commercial property group at Forsters LLP

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