LEASE RENEWALS: 
THE LONG & THE SHORT OF IT

Ros Cullis

If as expected, with the impending expiry of a number of long term leases granted in the late 1980’s, we are to see an increase in lease renewals, it seems likely that lease term will be a stumbling block between the parties. The flexible (i.e. short) terms which are currently often sought by tenants may be undesirable for landlords but the Landlord and Tenant Act 1954 imposes no restriction on the shortest term that can be ordered.

In such a challenging market for landlords, even if landlords can show the real detrimental effect of shorter terms, it is doubtful that the courts will take their side. To secure longer term deals, will we see any landlords willing to renegotiate other longstanding features of commercial leases such as the upwards only rent review?

ros.cullis@forsters.co.uk or +44 (0)20 7863 8383

RESTRICTIVE COVENANTS: 
CAUSING A NUISANCE

Ben Brayford

When reviewing title for a proposed development site it is not uncommon to find that the land in question is subject to a covenant not to cause a nuisance to nearby owners. It can be tempting to see such a covenant as fairly innocuous, particularly if it has been imposed by an old conveyance. A recent case, however, has highlighted the risk of taking this approach.

In Coventry School Foundation v Whitehouse (2012), land intended for the construction of a school building was subject to a covenant imposed by a 1931 conveyance not to use the land for any purpose which may be (or grow to be) a nuisance or annoyance.

Whilst the courts have in some cases interpreted nuisance covenants so as to restrict building works (for example in Shephard v Turner (2006)), in this instance the court found that the wording of the covenant related only to the use of the land rather than to any building works being carried out on it.

However, although the court held that a breach of covenant would not arise on the grounds of noise alone, it was held that the traffic issues caused by the opening of the school (such as noise, congestion and difficulty parking) were substantial enough that the development of the school would be in breach of the nuisance covenant.
This was despite the fact that planning permission had previously been granted for the new school buildings.

It is not the end of the story – the Foundation has appealed, with the case scheduled to be heard by the Court of Appeal in March. With a number of local residents who benefit from the covenant campaigning against it, however, the proposed development’s prospects do not look nearly as promising as they once did.

The decisions in cases of this type will depend on their specific facts - but this case is a clear reminder that nuisance covenants should not be disregarded since they have the potential to be used to damaging effect by those seeking to object to a new development.

ben.brayford@forsters.co.uk or +44 (0)20 7863 8427

DECC CONFIRMS SIMPLIFIED CRC IS HERE TO STAY

Hannah Kramer

In December 2012 the Department of Energy and Climate Change (‘DECC’) published its response to the public consultation on proposed changes to the CRC Energy Efficiency Scheme (‘CRC’) and confirmed that, despite significant criticisms, a modified CRC is here to stay.

The CRC is a mandatory UK-wide emissions trading scheme which applies to organisations which meet the qualification criteria based on electricity consumption.

After considering the responses received to the consultation, the DECC has announced the changes set out below.

From 1 June 2013:

- Performance League Table, which ‘names and shames’ energy inefficient participants, will be scrapped.
- Number of fuels covered will reduce from 29 to 2 – electricity and, when used for heating, gas.
- Deadline for surrender of CRC allowances, which participants use to cover their energy emissions, extended from July to the end of October.

From 1 April 2014:

- CRC compliance transfers to tenants of ‘building leases’ where tenant constructs the building and term is for 30 years or more.
- ‘Landlord and tenant rule’ otherwise remains the same so landlords remain liable for CRC compliance where they supply energy directly to tenants.
- Capped auctioning of allowances replaced with two fixed price sales in each reporting year – a cheaper forecast sale at the start, and a second more expensive ‘buy to comply’ sale after the end of each year.
- Removal of ‘90% rule’, requiring participants to demonstrate that at least 90% of their emissions are covered by the EU Emissions Trading Scheme, climate change agreements, or the CRC. Instead there will be a 2% de minimis threshold for gas used for heating.
- Trusts with a majority beneficial owner will group their energy emissions with that beneficial owner for CRC qualification and participation. All other trusts will group their emissions with the trustee, or operator where one is engaged to conduct regulated activity, for qualification purposes. They may then disaggregate for CRC participation.
- CRC will no longer apply to state funded schools in England.

These changes are intended to reduce the scheme’s complexity and the administrative burden (and associated cost) for participants. However, many landlords will be dissatisfied that the landlord and tenant rule remains largely intact despite widespread criticism for failing to reflect the reality of the commercial property market.

hannah.kramer@forsters.co.uk or +44 (0)20 7863 8514

This article offers general guidance only. It reflects the law as at February 2013. The circumstances of each case vary and this briefing should not be relied upon in place of specific legal advice.