

Commercial property: The onus is on solicitors

Recent decisions on the overpayment of rent and property search results, as well as changes in Land Registry practice, highlight the importance of the property practitioner's role, write **Anthony Goodmaker**, **Emilie Hobday**, and **Miri Stickland**



Anthony Goodmaker, pictured, Emilie Hobday, and Miri Stickland are solicitors at Forsters @ForstersCRE www.forsters.co.uk

In December 2015 the Supreme Court handed down its highly anticipated judgment in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another* [2015] UKSC 72. The case saw the court unanimously confirm that rent payable and paid in advance is not apportionable, so, unless there is an express provision in the lease to that effect, tenants are not entitled to a refund of amounts overpaid on lease termination.

M&S was a tenant under a lease for a term expiring on 2 February 2018, with the rents payable in advance on the usual quarter days. M&S exercised its option to break the lease as at 24 January 2012, having paid the December quarter's rents in full. Initially, in the High Court, M&S was successful in obtaining a refund of the rents – the annual rent, insurance rent, and car-parking licence fees (a dispute over the service charge having been disposed of between the parties) – paid for the period after the break date to the end of the quarter. Notwithstanding that the lease did not expressly provide for this, the High Court implied a term into the lease to that effect.

This was subsequently overturned by the Court of Appeal, and the Supreme Court was then called upon to consider the principles by reference to which a term should be implied into a contract.

In his leading judgment, Lord Neuberger stated that a term should not be implied into a detailed commercial contract merely because it appears fair, or because one considers that the parties would have agreed it, if it had been suggested to them.

Lord Neuberger's judgment stressed that the

lease in question was a 'very detailed document' entered into between 'two substantial and experienced parties', which had been 'negotiated and drafted by expert solicitors'. Other negotiated contingencies in the break clause led the court to conclude that the parties had carefully and fully considered their rights in relation to the sums payable (or repayable) on the exercise of the break. Therefore, it would have been 'inappropriate for the court to step in and fill in what is no more than an arguable lacuna'.

The Supreme Court reaffirmed the long-established law on the non-apportionability of rent. Note that here, as is usually the case, the rent was payable in advance, but the same principle applies to rent payable in arrears. Accordingly, the parties should have included an express apportionment provision, if that was what was intended.

This decision unequivocally places the onus on solicitors acting for tenants to ensure that leases provide expressly for the repayment of rents in such circumstances. Consideration should also be given to the date of the break itself, which should ideally fall towards the end of a quarter, rather than on or immediately after the rent payment date, in order to minimise the sums to be repaid.

Overseas companies

Since the coming into effect of the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, the Land Registry has accepted execution by an overseas company in one of three ways, namely execution under common seal, in a manner permitted by local law, or by the signature of authorised persons. >>

>> Where an overseas company is party to a transaction, it is usual practice for the other party to require the provision of a legal opinion from a lawyer qualified in the appropriate jurisdiction. In general terms, the opinion letter will confirm that the company exists and has validly executed the transactional documents, and that these will be enforceable in that jurisdiction.

Until recently, such a legal opinion was acceptable evidence for the Land Registry's purposes of the corporate status of an overseas buyer, tenant, or mortgagee. Such evidence is required to be provided on an application by an overseas company to be registered as the proprietor of a registered estate or charge, whichever of the three methods of execution is adopted.

However, Land Registry practice guide 8, which deals with the execution of deeds, has recently been amended to provide that this evidence must now consist of either a certified copy of the constitution of the corporation (i.e. the memorandum and articles of association) or a certificate in form 7 provided by a qualified lawyer practising in the territory of incorporation.

Similarly to a legal opinion, a form 7 certificate essentially confirms that the company is incorporated with its own legal personality and has no limitations on its powers to hold, mortgage, lease, and otherwise deal with, or to lend money on a mortgage or charge of, land in England and Wales. The form of certificate cannot be amended and there is already some debate over whether overseas lawyers will be prepared to give this unqualified confirmation. Note that you won't find the form 7 certificate on the Land Registry's website – but the specified form is set out in schedule 3 of the Land Registration Rules 2003.

The practice guide confirms that this applies to all corporations 'outside the UK', so to any companies registered elsewhere than England, Wales, Scotland, and Northern Ireland.

Public highway

In *Chesterton Commercial (Oxon) Ltd v Oxfordshire County Council* [2015] EWHC 2020 (Ch), a local authority was held to be liable to a purchaser for an incorrect reply given in a local authority search result. The reply stated that an external area forming part of the property was not highway maintainable at public expense, rather than signalling the local authority's ongoing investigations into its status.

This raises the question of what further steps

property practitioners can take to protect clients against the risk of incorrect search results – especially in the case of development properties, where a loss of potential development space could be costly. These steps include:

- **Intention to develop:** Confirm with the client whether they have any development plans for the property, however remote, and indicate to the local authority that the search is being carried out on that basis. In *Chesterton*, the local authority was held liable for the difference between the price paid and the real value of the asset, on the basis that it was entirely foreseeable that, if the search result was wrong, a purchaser might proceed at a higher price. However, it was held that loss of development profit would be too remote to be recoverable, as the buyer had not told the local authority it was buying to redevelop and sell. If you are raising enquiries directly, ensure you indicate this in your covering letter or in the property description on the CON29 form. Alternatively, search providers should have either a box in which you can enter the purpose of your search or a tick box option to indicate that a property is being acquired for development purposes. This information is then sent to the local authority;
- **Search index map:** It is best practice to obtain an index map search of an area extending beyond the property being purchased. This should include access roads or walkways so that you can then analyse whether there may be potential issues regarding access to the property, such as a small ransom strip, unregistered areas of land, or a mapping issue which requires rectification by the Land Registry;
- **Highways search:** A separate highways search will go beyond simply confirming which roads are adopted. A plan will be provided to show the extent of the adopted highway and the location of any public footpaths. Highways plans should always be analysed carefully against the title plan to ensure that any small areas where access problems can arise are identified; and
- **Inspection:** Finally, a physical inspection of the site may reveal signs that the land is (or was in the past) a public highway or that the local authority's responses do not entirely fit with the situation on the ground. If a physical inspection is not possible, Google Earth can also be a useful tool in this regard. **SJ**



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