



HEWITSONS

Commercial Property
Briefing
Summer 2009



How 'vacant' is vacant possession?

Kickstart housing delivery

Welcome



Welcome to the second Hewitsons Commercial Property Briefing of 2009. Our aim is to keep you up to date with the most important developments that could affect you. If there is anything in this

Briefing or any project you would like to discuss further, please contact me, Elizabeth Jones on 01223 461155 or email me at elizabethjones@hewitsons.com

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Consent 'in principle' gives the green light to assignment

It is often the case that parties to assignment or underletting transactions are champing at the bit to get formal consent from the landlord in order to complete.

Consent is usually granted by way of a licence, a deed which sets out the terms on which the consent is granted, and which is signed by all parties to the transaction. The aim is to ensure that there is no breach of the lease by parties gaining early access, and any additional requirements, such as costs, are dealt with and bind the relevant parties at completion.

Agents and landlords are often pestered for 'consent in principle' to be confirmed in writing in order to give the parties some comfort that the landlord is in fact willing to grant the licence. At this stage the parties can then make a reasonable assessment of the risks involved with going ahead before the licence is formally completed.

The decision in the case of *Alchemy Estates Ltd v Astor [2008]* should sound alarm bells to all landlords, agents and solicitors as it is now easier than ever to inadvertently grant consent before the licence is completed even though all parties are aware that a licence is almost always contemplated.

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The facts of the case centred on an email sent by the landlord's solicitors. The email read: "Our client in principle is prepared to grant its consent to enable the lease... to be assigned to Alchemy Estates Limited..."

The conditions attaching to the grant of such Licence are (a) the payment of our client's reasonable costs... and (b) such Licence is documented within the form of the attached draft Licence to Assign...

Please note that this correspondence does not constitute the provision of consent by our client. Such consent will only be provided on the completion and delivery of a formal Licence executed as a Deed..."

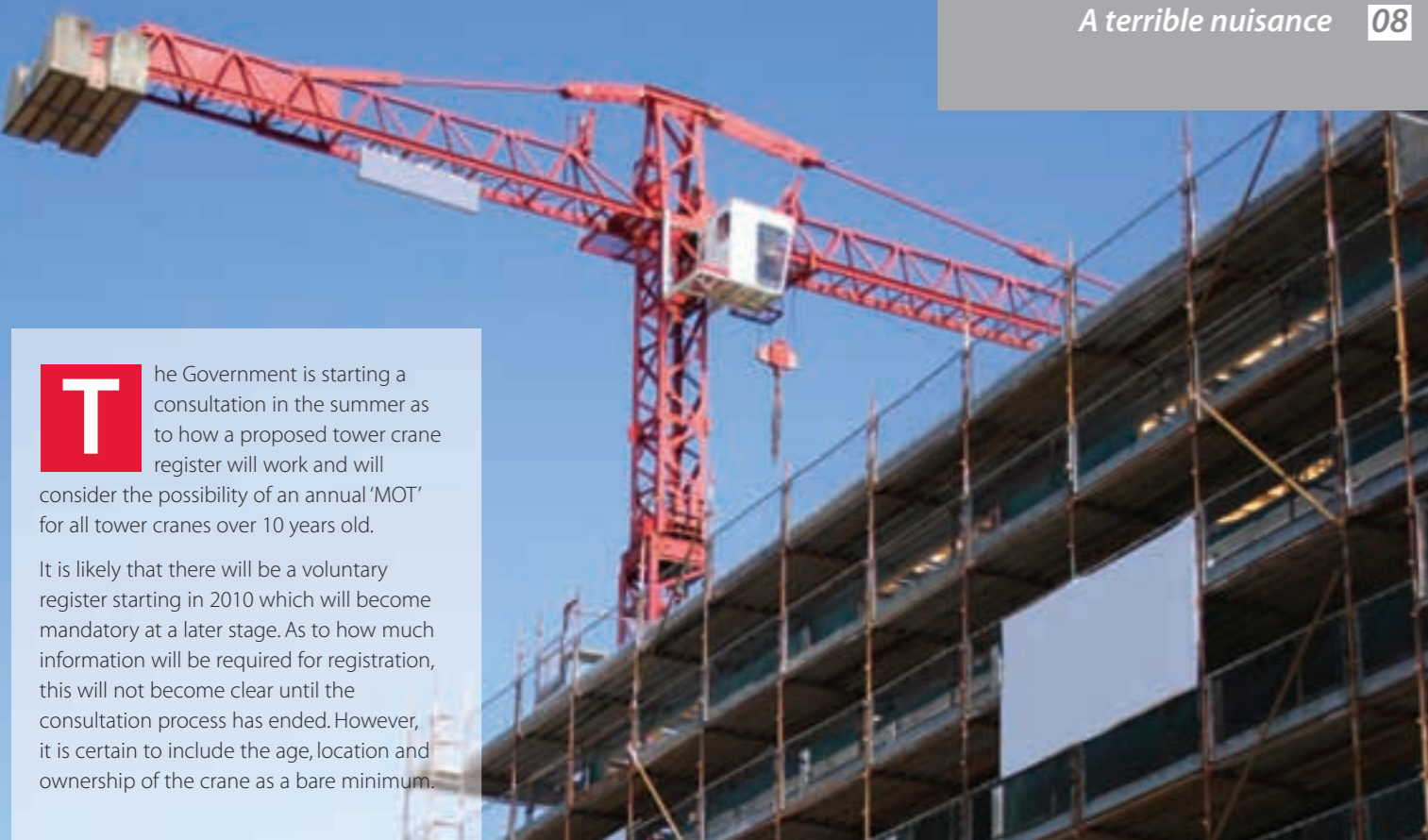
A couple of weeks later the engrossment lease was sent out for signature but in the meantime Alchemy sought to rescind the contract. The court held that by the landlord's solicitor's e-mail, consent had already been given to the assignment. The court relied on *Aubergine Enterprises Ltd v Lakewood International Ltd [2002]* in which the court held that any consent drawn from correspondence should, when viewed in the light of the surrounding circumstances (a) record the consent as required by the contract (b) be unconditional or subject only to reasonable conditions and (c) be unequivocal.

The court therefore felt that consent in correspondence marked 'subject to licence' did not 'qualify the plain indication of consent in the body of the letters so as to make it equivocal or uncertain'. The court felt that the same applied to the qualification 'in principle'.

There is no doubt that each case will turn on its own facts but it is clear that extreme caution should be exercised when drafting any such correspondence. Where necessary, agents should avoid giving any opinion in writing on the application in hand. It is also helpful when the lease is drafted that consent should only be given by deed and not just in writing.



Proposed tower crane register



The Government is starting a consultation in the summer as to how a proposed tower crane register will work and will consider the possibility of an annual 'MOT' for all tower cranes over 10 years old.

It is likely that there will be a voluntary register starting in 2010 which will become mandatory at a later stage. As to how much information will be required for registration, this will not become clear until the consultation process has ended. However, it is certain to include the age, location and ownership of the crane as a bare minimum.

Drainage connection

On appeal, the courts have held that a water/drainage undertaker cannot refuse a connection for any new development built in accordance with planning permission.

Nor is it entitled to refuse a connection at a different location from that originally envisaged by the planning consent. The only grounds for refusal relate to the mode of construction, or the condition of the connecting drain.

The undertaker cannot refuse a connection simply because the existing system would be overloaded. So, once planning consent has been obtained, a developer can insist upon the connection.

The court pointed out that the time for the water/sewerage undertaker to object on grounds such as overloading is when the local authority is deciding whether or not to grant planning. A local planning authority will



normally refuse consent if it is not satisfied that the drainage requirement can be met by the local drainage company.

In the case of substantial developments, there will often be an obligation within a condition attached to the permission, or the planning

agreement. This will support the consent requiring off site works, perhaps by way of upgrading the drain, to be carried out at the developer's expense.

The result of this decision has given much needed certainty for developers.

Kickstart housing delivery

In the 2009 Budget, the Chancellor announced a £400 million package to address the difficulties facing stalled housing developments which were ready to develop with planning permission in place.

The Homes and Communities Agency's (HCA) Kickstart Housing Delivery programme (KHD) will use investment support to address shortfalls in development finance due to current market conditions and provide funding for affordable housing and support for shared equity housing through its HomeBuy Direct programme.

The KHD programme is intended to facilitate immediate delivery of housing with starts on site no later than 31 March 2010 and housing completions between 2009 and 31 March 2011.

Principally, house builders, developers and registered social landlords are eligible to apply for funding under KHD. The HCA will be looking at alternative ways in which to support local authorities.

For a scheme to be eligible, the HCA will need to be satisfied that at the heart of its investment there will be deliverability and value for money. It must also be satisfied that the funded development will play an important strategic role in creating sustainable communities.

Details on the HCA assessment criteria for funding and the application process can be found at www.homesandcommunities.co.uk/kickstart_housing.htm



Guarantor's liability under an AGA survives disclaimer

In the recent decision of *Shaw v Doleman* [2009] the Court of Appeal has ruled that the liability of a guarantor under an authorised guarantee agreement (AGA) continues after the disclaimer of a lease by a liquidator of an insolvent assignee.

This reinforces a principle laid down by the House of Lords in the earlier case of *Hindcastle Limited v Barbara Attenborough Associates Limited* [1996], in which it ruled that while the disclaimer of a lease ends the liabilities of the tenant, the obligations of third parties, including guarantors, remain in force.

In the case of *Shaw* the former tenant argued that her liabilities under an AGA came to an end when the liquidator disclaimed the lease on the basis that the AGA was drafted as being limited to 'the period during which the assignee was bound by the tenant covenants in the lease'. The Court of Appeal rejected this argument and ruled that the former tenant remained liable notwithstanding the disclaimer.

The court noted that if the parties wanted the AGA to terminate on the disclaimer of the lease then they could have expressly provided for this in the AGA. In reality, however, it is unlikely that a landlord would agree to include such a provision.

First, in compliance with the contract the employer had issued to the contractor a notice setting out the amount it proposed to pay on the relevant certificate and having done that, the contract expressly provided that the employer would have to pay that sum.

Second, it would be contrary to the whole adjudication process if an employer could fail to serve a withholding notice but still be allowed to withhold payment.

Third, the amount 'properly due' was the amount included in the certificate as being due. Where there was no withholding notice,

the employer should pay the sum due without recourse to cross-claims or other argument. There was, generally, an exclusion of the right to set off from an Adjudicator's decision.

As such, the contractor was entitled to summary judgment for the interim payment, and the employer could not set off its counterclaim against sums due to the contractor.

No implied obligations from the grant of an easement

Can a landowner be forced into signing a deed of easement, in a form satisfactory to a statutory undertaker, where the owner's land is subject to a standard easement to lay services under that land?

The courts have said no as an easement is negative in character and does not imply an obligation on the landowner to enter into further documentation.

In the subject case the statutory undertaker was EDF which could have availed itself of a statutory procedure for the Secretary of State to grant the necessary way leave. Apparently, the developer was reluctant to do this out of concern that it would take too long and that it might have to indemnify EDF in respect of any statutory compensation payable to the landowner.

However, the court took the view that any compensation would have been insignificant given the existence of the easement and the developer could have obtained an electricity supply in this manner.

In future landowners will be required to enter into a covenant which obliges them to sign up to the form of easement required by the statutory undertaker. This will be secured by a further covenant not to dispose of the property without getting new owners to agree to the same obligations, so that future owners are also bound.

...landowners will be required to enter into a covenant...

How 'vacant' is vacant possession?

In the current economic climate, break clauses are very appealing to both existing commercial tenants, who may be considering exercising their break options to reduce costs, and to new tenants seeking to ensure they have the ability to break their leases in the future.

A break option in a commercial lease confers the ability on the landlord, the tenant or both parties, to terminate a fixed term lease before the expiry of the contractual term. Break options can be conditional upon the performance of certain criteria by the break date, common examples being the payment of all the rent and/or all other sums due to the landlord, compliance with lease covenants and procuring that vacant possession of the property is given. It is this final proviso which this article will explore in more detail.

Vacant possession is often understood as the ability for a property to be both legally and physically occupied and enjoyed by a specific date, such as on the termination of a lease.

Tenants of existing leases who are currently thinking of exercising a break option, should be aware of the potential scope of the obligation to yield up the property if there is a proviso to give vacant possession.

Vacant possession is often understood as the ability for a property to be both legally and physically occupied and enjoyed by a specific date, such as on the termination of a lease. However, the meaning of vacant possession is not entirely clear and ascertaining compliance seems to be very subjective.



In the case of *Cumberland Consolidated Holdings Limited*, the court held that if the tenant was still using the property for its own purpose and there is a substantial impediment to the landlord's use of the property, or a significant part of it, then the tenant has failed to give vacant possession.

This test has been applied in subsequent cases, such as *Norwich Union v Preston [1957]*, where the court held that leaving furniture, a car and other chattels behind in the premises meant that vacant possession had not been given.

Leaving furniture and blinds in a garage was also said to impede the use of the premises, and to constitute a breach of the requirement for vacant possession in *Smiths v Scott [1993]*.

In later years, the courts seemed to refer to the type and quantity of chattels left at the property when ascertaining whether vacant possession has been given such as *Scotland v Solomon [2002]*.

So, in the case of *Royal Bank of Canada v Secretary of State for Defence [2004]*, leaving a camera tripod, two briefcases and a quantity of electricity cable in a control room of a large commercial premises did not constitute a substantial impediment to the landlord's use of the premises.

And in the case of *John Laing Construction Limited v Amber Pass Limited [2004]*, the presence of security guards and security fences to protect the property from vandalism after the break date did not detrimentally effect the landlord's use of the property and so vacant possession was held to have been given.

The location of items left at the property also appears to be a relevant factor as in the case of *Hynes v Vaughan [1985]* when rubbish left

outside the property did not satisfy the *Cumberland Consolidated Holdings Ltd* test and therefore did not breach the requirement to provide vacant possession.

Interestingly, the Code for Leasing Business Premises 2007 recommends that break options should not be subject to a pre-condition for vacant possession. Instead, it advocates that the only break option pre-conditions in new leases should be that the tenant is up to date with the main rent, has given up occupation of the property and has left behind no continuing subleases.

The Code recommends that disputes about the state of the premises, or what has been left behind in them, should be settled after the break date, in the same way that they would following the expiry of the contractual term.

A landlord would have the usual contractual remedies in such cases. Some parties may find this an acceptable compromise, but many landlords are wary of the risk that the tenant walks away from a significant mess without the incentive of clearing up in order to ensure that its option to break has been validly exercised.

Tenants of existing commercial leases should seek legal advice prior to exercising a break notice to ensure they are aware of the extent of their obligations. Tenants currently negotiating new leases should try to resist this pre-condition altogether.

Inevitably, it will be a careful balance between the tenant's requirement to be able to end its obligation under the lease and the landlord's need to ensure that it can re-enter and use the property immediately without interference from subtenants or the presence of any chattels.

Planning Act 2008 update

In the last Commercial Property Briefing we outlined the main provisions of the Planning Act 2008. A number of important provisions of the Act came into force on 6 April 2009 by virtue of secondary legislation.

The Planning Inspectorate will now begin to exercise its new powers under s.319A of the Town and Country Planning Act 1990 ("TCPA 1990") to determine what appeal procedures should be followed in all planning and enforcement cases, such as local inquiries, a hearing, or written representations.

The appellant and the local planning authority will have the opportunity to put forward their views on their preferred procedure, but the ultimate decision will be made by the Inspectorate in accordance with certain specified criteria.

In addition, the costs regime will, for the first time, be extended to planning appeals dealt with by way of written representations. A revised Circular on Costs has been issued.

It will also no longer be necessary for the Inspectorate to obtain the appellant or landowner's written consent before correcting minor errors in appeal decision documents under the so-called 'slip rule', relating to minor errors that do not materially affect the decision.

Other secondary legislation issued on 6 April introduces a new procedure for so-called 'householder appeals' suitable for written representations, which is hoped to be expeditious. Any such appeal must be submitted within 12 weeks, rather than the usual six month timeframe.

This coincides with changes to the appeal rules with those for written representation completely replaced, and those for informal hearings and local inquiries amended. The changes are aimed at streamlining the appeal timetable. For instance, there are amendments to the hearings and inquiries rules to remove the right to submit final comments at the nine-week stage, although parties will still have the opportunity at the hearing or inquiry itself to make comments.

In addition, amendments to the inquiries rules now require the submission of Statements of Common Ground six weeks after the appeal has started, rather than four weeks before the inquiry itself as is the case currently.

There are also changes to Section 237 of the TCPA 1990, and equivalent provisions in other legislation, to allow easements, and other rights restricting the subsequent use of land, to be overridden where land is acquired or appropriated by a local planning authority for a planning purpose. This will allow development land to be acquired with a 'clean title' which will reduce development risk.

This is not the end of the story as far as the Planning Act 2008 is concerned. There are still a number of significant provisions to be implemented, not least those in relation to the Infrastructure Planning Commission and Community Infrastructure Levy. We can expect the introduction of further secondary legislation throughout 2009 and 2010.



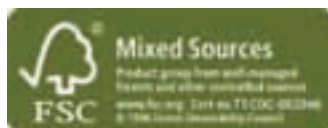
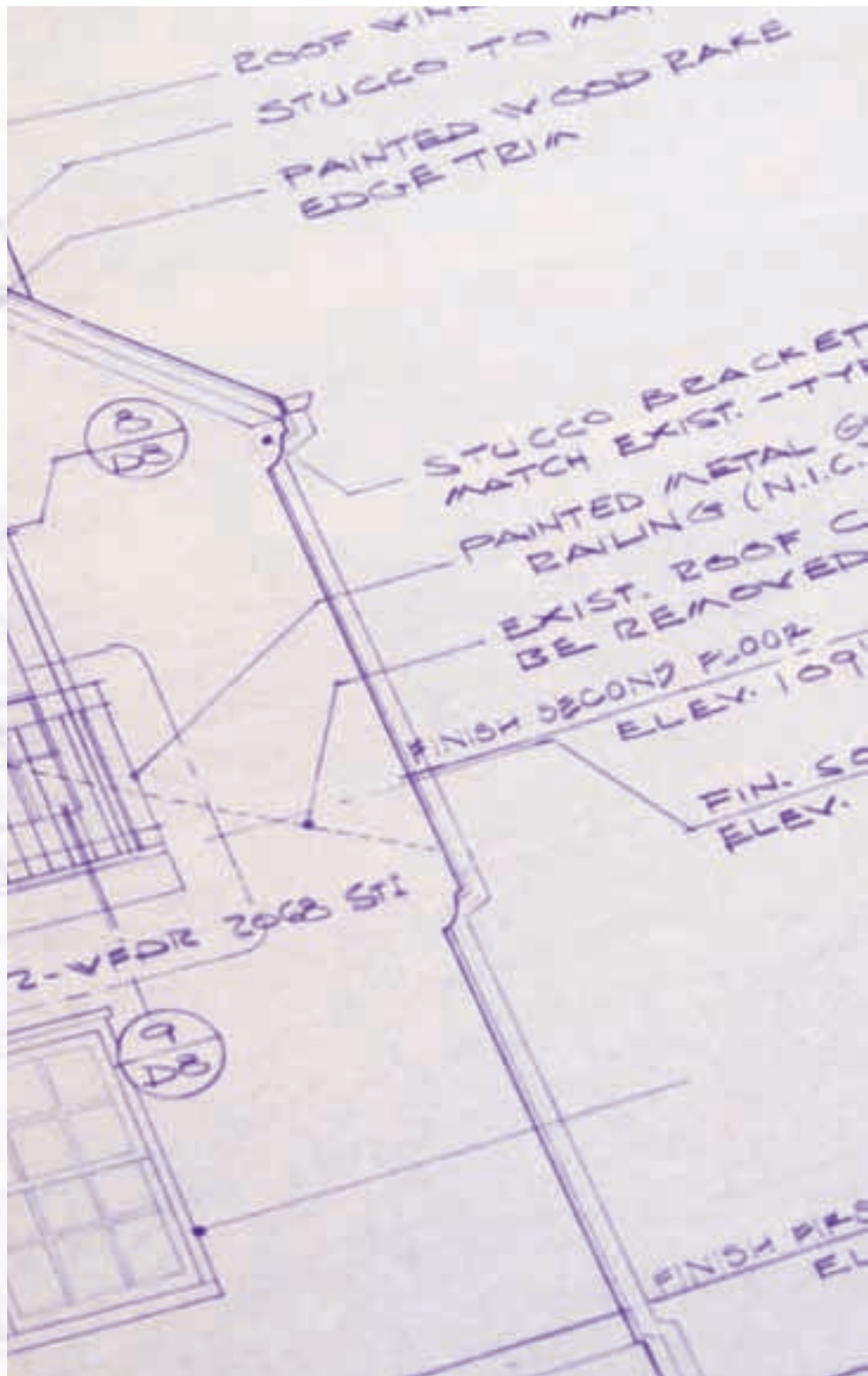
A terrible nuisance

Developers need to be aware that a covenant not to cause “nuisance or annoyance” may affect their ability to develop their land.

In the recent case of *Dennis v Davies* [2008], which could apply equally to commercial or residential development, neighbours enforced the benefit of a covenant not to cause nuisance or annoyance in order to prevent a three storey extension being built which would have partially obscured their river views.

The court considered that while the extension would not amount to a ‘legal nuisance’ it could amount to an ‘annoyance’. The court further considered that the test for ‘annoyance’ would be ‘whether reasonable people having regard to the ordinary use of a house for pleasurable enjoyment, would be annoyed or aggrieved’.

Developers should therefore be aware that the absence of a covenant not to build does not give them carte blanche to build, even where planning permission has been obtained.



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