June 2011

# Review

## Property@ction

Welcome to the Eighth Edition of the Quarterly Review from Squire Sanders Hammonds' Property@ction Team. In this issue we will look at the following:

(i) Land agreements now challengeable under competition law

(ii) How does summary judgment work in contested lease renewal claims?

(iii) Mitigating rating liability

(iv) Can expert witnesses be sued?

(v) Personal Break Clauses: The impact of the Linpac Mouldings Case

We welcome all contributions to this review and if you would like to discuss this further please contact any of the editorial team.

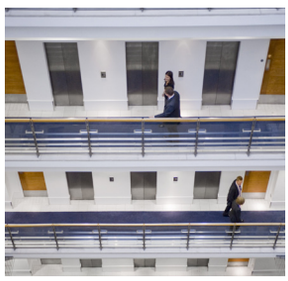
# Land agreements now challengeable under competition law

On 6 April 2011 "land agreements"[1] became subject to the UK's competition rules. Prior to this change, such agreements had been exempt from the prohibition in chapter I of the Competition Act 1998 (the **Chapter I Prohibition**) and the change means that any restriction within a land agreement that prevents, restricts or distorts competition will be void and unenforceable and will be open to challenge. As such, parties to land agreements must now self-assess the competitive impact of existing and future agreements.

The Office of Fair Trading (**OFT**) has published guidance on the application of the Chapter I Prohibition to land agreements (the **Land Agreements Guidance**), which includes the following factors that should be considered when undertaking the self-assessment.

- **Agreement is sufficient.** The OFT may take enforcement action even if the party benefitting from a restriction is not actively enforcing it. That is, agreeing to a restriction is, in principle, capable of infringing the Chapter I Prohibition (however, see **Prioritisation** below).
- **Restrictions**. The OFT has sought to explain the types of restriction that are more likely to be considered capable of infringing the Chapter I Prohibition and those that do not generally give rise to competition concerns.
  - *Competitors and restrictive object*. Where parties to a land agreement are competitors and the object of a restriction is for the parties to share markets by territory or customer the agreement will "almost invariably" infringe the Chapter I Prohibition.

1 i.e. agreements between businesses which create, alter, transfer or terminate an interest in land



- *Market power*. If any party to an agreement has some degree of market power[2], and the agreement contributes to creating, maintaining or strengthening that market power, the following restrictions may fall within the Chapter I Prohibition. Generally, the following restrictions make it more difficult for competitors to enter the market where the land is used, or protect a party from competition.
  - *Exclusivity*. A lease involving a restriction whereby the lessor agrees not to allow a competitor of the lessee to operate on the land, or on other land owned by the lessor, may protect the lessee from competition and 'foreclose' competitors of the lessee.
  - *Leasehold user restrictions*. In most cases, a permitted or restricted user clause is unlikely to restrict competition. However, if a land-owner is, for example, active in related markets and seeks to limit the availability of land to downstream competitors, this may restrict competition.
  - *Freehold restrictive covenants*. In most cases, a freehold covenant restricting the use of land to the benefit of another party's land will not restrict competition. However, if the clause involves the land-owner stipulating, for example, a type of use in order to limit the availability of land to competitors in a related market, this may restrict competition.
- *Duration*. The OFT recognises property investment can involve varying costs and risks and the commitment of a particular lessee to sign up to a lease may depend on conditions (i.e. exclusivity) being offered. Accordingly, the OFT has not set down an 'appropriate' duration of a restriction.

- **Prioritisation**. Generally, the OFT assesses which cases should be investigated according to published Prioritisation criteria[3]. Whilst the OFT has not excluded the possibility of prioritising a case involving a land agreement that was entered into prior to 6 April 2011, the Land Agreements Guidance states it is likely that cases involving a restriction that is being actively enforced are more likely to meet the Prioritisation criteria. A case is less likely to meet the Prioritisation criteria (and therefore be less susceptible to a prioritised OFT investigation) where a party has not taken steps to enforce the restriction and has taken steps to amend/modify the land agreement; or if amendment is not possible, where a party has recorded in writing that a restriction will not be enforced.

  The OFT is unlikely to take action if none of the parties to the agreement has (or as a result of the agreement obtains) a share of the market which exceeds 30%, although it may decide to investigate where there are significant negative effects on competition.

- **Penalties**. A breach of the Chapter I Prohibition has a number of possible consequences including financial penalties, unenforceability of an agreement, private damages actions and director disqualification. Where a party has used best endeavours to amend or remove a clause in breach of the Chapter I Prohibition and has not sought to enforce it, the OFT may consider this to be a mitigating factor.

The OFT recognises there are many legitimate reasons for restrictions regarding the use of land, and it expects only a minority of restrictions will infringe competition law. However, the OFT will not give legal advice[4] on the application of UK competition law to land agreements, and businesses must consult legal advisers on agreements that may raise competition law concerns and consider whether alteration or amendment is required.

**Diarmuid Ryan**
Partner - Regulatory Group
T: +44 (0)20 7655 1310
E: diarmuid.ryan@ssd.com

2 This can often involve a complex legal and economic assessment, in particular, a detailed consideration of the specific characteristics of the market in which the agreement operates.
3 http://www.oft.gov.uk/news-and-updates/press/2006/146-06
4 However, the OFT may consider providing a Short Form Opinion regarding a land agreement if the necessary criteria are met (which include publication of the opinion).

# How does summary judgment work in contested lease renewal claims?

The recent case of *Somerfield Stores Limited v Spring (Sutton Coldfield) Limited (in Administration)*[1] addresses the question of whether a tenant in contested lease renewal proceedings can use summary judgment as a tactical weapon to reduce the time available for a landlord to prove its ground of opposing the grant of a new lease.

Under Part II of the Landlord and Tenant Act 1954 (the "Act"), business tenants are entitled to be granted a new lease at the expiry of an existing one. However, in certain circumstances a landlord can oppose this. To succeed the landlord must satisfy one of a number of statutory grounds[2]. One such ground is that on termination of the current tenancy, the landlord intends to demolish or reconstruct the premises, or a substantial part of those premises, or carry out substantial work of construction on the let premises or a part of them and that he could not reasonably do so without obtaining possession of those premises[3].

In order for a landlord successfully to establish the above ground of opposition, it must demonstrate that it has a genuine, firm and settled intention to demolish or reconstruct, which goes beyond the landlord simply asserting that it intends to do this. Also, the landlord's intention must exist at the point at which the hearing of the landlord's ground of opposition takes place[4]. Where this is dealt with as a preliminary issue, the landlord must prove its intention at the preliminary issue hearing.[5] However, what had not been clear until Somerfield was whether a tenant could make a summary judgment application and thereby force a landlord to prove its intention to demolish or reconstruct at an earlier date than would otherwise have been the case. If this option was open to a tenant then it would be a powerful tactical weapon with which to pressurise a landlord in lease renewal proceedings.

Somerfield Stores Ltd ("SSL") was the tenant under three leases of a supermarket and adjoining land in Sutton Coldfield. Spring (Sutton Coldfield) Limited ("SSCL") was the landlord and had purchased the freehold of the property intending to redevelop it. Shortly before the end of the leases, SSL served notices on SSCL under s26 of the Act requesting new tenancies. SCCL served counter-notices indicating that it opposed the grant of new leases on the ground set out in section 30(1)(f), in other words that it intended to demolish or reconstruct the property. SSL issued a claim for a new lease and directions were given with a view to a trial in June/July 2008. The parties were negotiating terms and so did not comply with those directions. In February 2009, SCCL went into administration and SSL applied for permission to continue its proceedings, which was granted. A new directions timetable was set with a view to holding a trial between March and May 2010, but instead of waiting for that trial, SSL made an application in July 2009 for summary judgment dismissing SCCL's ground of opposition.

At first instance, it was held that in an application for summary judgment the tenant was required to establish clearly that the landlord would be unable to prove its ground of opposition either at the date of the summary judgment hearing or in a reasonable time thereafter. It was held that SSL had failed to satisfy this test.

SSL appealed to the High Court. HHJ Cooke considered the nature and purpose of the summary judgment jurisdiction. He confirmed that this was to determine whether a party has a real prospect of establishing his cause of action (or defence) at a future trial date. This should mean a test of whether the landlord has a reasonable chance of proving his intention at the later hearing rather than a test of whether the landlord's intention exists at that point in time. HHJ Cooke went on to state that in answering this question the court is entitled to consider evidence which may reasonably be expected to emerge in the period between the summary judgment hearing and the final hearing.

HHJ Cooke also noted that summary judgment hearings are usually conducted in writing and without cross-examination. This, he concluded, would not allow questions to be asked of the landlord and would be an inappropriate method of settling matters of contested fact. Furthermore, if the case were to proceed to an additional hearing this would raise the question of how intention should then be assessed – would it still be as at the date of the summary judgment hearing or would it be re-examined as of the new hearing date? It would seem ludicrous that any evidence that had emerged since the initial hearing would be inadmissible, but equally allowing a re-assessment would mean that the substantive question would be different to that which was assessed at the initial hearing.

For reasons of certainty, consistency and clarity it was held that the date of the hearing at which the landlord's intention must be shown to exist is always the date of the substantive trial of its ground of opposition. This could be a trial of a preliminary issue, but not a summary judgment hearing.

1 [2010] EWHC 2084 (Ch)

2 Landlord and Tenant Act 1954, s30

3 Landlord and Tenant Act 1954, s30(1)(f)

4 Betty's Cafes Limited v Phillips Furnishing Stores Limited [1959] AC 20

5 Dutch Oven Ltd v Egham Estate and Investment Co Ltd [1968] 1 WLR 1483

# Mitigating rating liability

Empty properties are a growing concern for landlords. The potential tax burden on owners has risen and some landlords are starting to consider extreme steps to minimise their liability. But what really can be done to mitigate this liability?

## Background

Empty rates reforms were introduced under the Rating (Empty Properties) Act 2007 and the Non-domestic Rating (Unoccupied Property) (England) Regulations 2008. In summary, the changes from the previous regulations are as follows:

| Status of Building | Rates Status | |
|---|---|---|
| | Before April 1 2008 | After April 1 2008 |
| Unoccupied commercial building (eg, retail unit) | Exempt for three months, then 50% of occupied rate payable | Exempt for three months, then 100% of occupied rate payable |
| Unoccupied industrial building (eg, warehouse) | Exempt | Exempt for six months, then 100% of occupied rate payable |
| Building occupied by charity | 10% payable; possibility of discretionary relief | Exempt |
| Listed building | Exempt | Exempt |
| Building occupied by insolvent company | Exempt if company in liquidation | Exemption extends to companies in administration |

## Mitigation Strategies

### Short-term lettings

Owners of void or potentially void properties will need to budget for their additional liability and consider ways to reduce it, such as short-term letting. A tenancy for at least six weeks, if genuine, allows the owner to claim a further period of relief if the property becomes empty again. However, there is potential for dispute with the local rating authority.

### Use of premises by owner

The owner may wish to occupy the empty premises (eg, for storage purposes) for a period of at least six weeks. Upon vacation, this will trigger a new empty rates holiday. However, two factors must be considered. First, the owner must notify the local authority of the precise period during which it occupies the empty property and ensure that the period of occupation is at least six weeks; otherwise, it will fail to qualify for further relief when it vacates the property. Second, the owner must ensure that its use is consistent with the building's permitted planning use.

### Charities

Registered charities are liable for only 20% of full business rates while in occupation and local authorities may exercise their discretion to award up to 100% relief. Moreover, registered charities are exempt from liability for empty rates. Allowing a charity to use a building, even on a rent-free basis, is an effective means of avoiding empty rates liability. Landlords can even make a charitable contribution equivalent to the 20% rates bill incurred by the charity, which can be offset against tax. Such an arrangement may have the added benefit of fostering a good public image for the landlord.

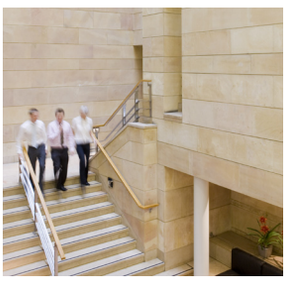
### Demolition or vandalism and anti-avoidance provisions

The most obvious and dramatic consequence of the rating reforms is that many property owners are knocking down buildings - especially older industrial properties - to avoid incurring empty rates.

A comparably drastic solution to which some landlords may yet resort is termed 'constructive vandalism', as business rates are payable only on property which is capable of beneficial occupation. However, this strategy is fraught with danger, efforts to have properties rating assessments reduced or deleted through 'soft stripping' have met with strong resistance from the Valuation Office Agency, the Government's guardian of the rating list.

**Appealing rateable values**

The increase in empty rates liability has led many property owners to challenge the rateable value of their property by appealing the assessments set by the Valuation Office Agency.



**Unfinished buildings**

As rates are payable only on buildings capable of beneficial occupation, unfinished buildings do not qualify for rates. Thus, developers could consider deferring practical completion until occupiers for the units have been secured. A complication is that local authorities have the power to serve completion notices in respect of new developments that are within three months of practical completion. Developers therefore should seek professional advice in order to avoid an earlier than anticipated liability.

Our guest contributor this issue is:

**Ken Whittington FRICS IRRV – Director and Head of Rating at Eddisons**

Ken has over 35 year's experience of the commercial property market and was elected as a member of the Royal Institution of Chartered Surveyors in 1974 and a Fellow in 1984. In 1990 he was elected as a member of the Institute of Revenues, Rating and Valuation and a member of the Rating Surveyors Association in 2008.

Prior to joining Eddisons in 1987 as Head of Rating, Ken has worked for the Valuation Office Agency as a valuer in the Leeds and Bradford offices and for the Burtons Group where he was responsible for Landlord and Tenant matters throughout the UK.

# Can expert witnesses be sued?

In a landmark decision, the Supreme Court has found in *Jones v. Kaney*[1] that (save for defamation cases) the immunity that expert witnesses have enjoyed from claims based on breach of duty in relation to their participation in court proceedings should be abolished.

## Facts

The facts arose from a road traffic accident in which the expert had initially expressed the view that Mr Jones was suffering from post traumatic stress disorder ("PTSD"), but then went on to sign a joint expert's statement (prepared by the opposing expert) stating that PTSD had not been suffered. The simple reason for the change of heart was that the expert had felt pressured to agree to the joint statement, even though it did not reflect her views. Unfortunately, the Court would not permit Mr Jones to instruct a new expert and so he had to settle his claim arising from the accident for less than he otherwise would. Mr Jones therefore tried to sue the expert for negligence but his claim was struck out in the High Court due to the expert's immunity. Given the importance of the issue, however, the judge gave permission for an appeal to be heard by the Supreme Court (thus leap frogging the Court of Appeal).

## Issues

In the lead judgment, Lord Philips considered the purpose, scope and effects of the immunity. It originally took the form of an absolute privilege against a claim for defamation and then negligence and extended to all who took part in legal proceedings: judges, counsel and witnesses alike (both of fact and experts). The primary reason identified was the "chilling effect" that the risk of claims arising out of the conduct of legal proceedings would have. Claimants would be reluctant to litigate and witnesses reluctant to testify or, at least, to do so freely and frankly. Expert witnesses, in particular, might be reluctant to act if the evidence given was contrary to the client's interests, leading to a risk of being sued. The possibility of a multiplicity of actions, whereby the value or truth of witnesses' evidence might be tried all over again, was also potentially undesirable.

1 [2011] UKSC 13

### Supreme Court decision

Lord Phillips considered that the onus lay with the expert to show why the immunity should continue. The suggestion that experts would be reluctant to provide their services if the immunity was abolished was not justified: anyone who provides professional services involving a duty of care will, in any event, have a risk of being sued and can take out insurance to cover that risk.

Further, the suggestion that an expert needs immunity, in order to give full and frank evidence to the court, was also rejected. Experts have a duty to give their honest opinion, even if this is adverse to the case of the expert's client. If an expert has initially given advice which later proves to have been overly optimistic, then his duty to the court is to concede that change of view. However, such a change of view should not, in Lord Phillips' view, translate into experts fearing being sued: the change of mind, even though adverse to the client's case, merely amounts to the performance of the expert's duty to the court. Therefore, while an unsuccessful litigant might pursue a negligence claim, actually mounting a credible case would not be easy. Diligent experts were unlikely to be harassed by vexatious claims by their clients for breach of duty.

### Opening views

Out of the seven Supreme Court judges giving judgment, five were in favour of allowing the appeal and thus abolishing expert's immunity and two favoured dismissing the appeal and keeping the immunity intact. The two dissenting voices pointed out that the rule granting immunity to witnesses was longstanding and the removal of immunity would run counter to the authorities over many years. Further, it was pointed out that the justifications advanced for removal of immunity in civil cases would not necessarily extend to experts in other jurisdictions, particularly in criminal or family/child care cases, where the instruction of experts would not necessarily be by the client himself.

### Conclusions

Overall, however, the majority favoured the abolition of expert's immunity. It was perhaps Lord Brown who summed it up most succinctly: "….. the gains to be derived from denying [experts] immunity… substantially exceed whatever loss might be thought likely to result from this…… The most likely broad consequence of denying expert witnesses the immunity….. will be a sharpened awareness of the risks of pitching their initial views of the merits of their client's case too high or too inflexibly lest these views come to expose and embarrass them at a later date".

I for one would welcome this as a healthy development.

# Personal Break Clauses: The impact of the Linpac Mouldings Case

The recent Court of Appeal decision in *Norwich Union and Pensions v Linpac Mouldings Ltd* [1] reinforces the principle that, once a tenant with the benefit of a personal break clause assigns a lease, in the absence of very clear wording to the contrary that break clause cannot later be exercised by the former tenant even if the lease is subsequently re-assigned to him.

### The Facts

Linpac Mouldings Ltd ("Linpac") took an assignment of two leases at full rack rent, with an upwards only rent review every seven years. As part of the licence to assign, Linpac negotiated an option to break the lease on 1 December 2010. The option was expressed to be for the benefit of "the Assignee (meaning Linpac Mouldings Ltd only)".

In 2005, Linpac was granted a further lease by the landlord, Norwich Union Life and Pensions ("NU"). This lease also contained a break option for 1 December 2010, expressed to be for "Linpac Mouldings Ltd as original tenant" or group companies of Linpac.

1 [2010] EWCA Civ 395

Linpac assigned all three leases to a group company, which shortly afterwards left the group, changing its name to Ecomold, and became insolvent. NU sought to recover rents from Linpac in its capacity as the previous tenant. Ecomold re-assigned the leases to Linpac (without NU's consent) and Linpac served notice on NU purporting to break the leases.

### The Decision

The issues before the Court in relation to the operation of the break option were:

- Did Linpac's right to break the leases continue even once it had assigned the leases; and
- If not, did the re-assignment of the lease to Linpac operate to revive the right to break the lease?

The High Court's decision was that:

1. It made "no commercial sense" for Linpac's right to break the lease to continue after assignment. Accordingly, Linpac's right to break the leases ceased when it assigned them to Ecomold; and
2. Once a personal break clause has lapsed it cannot be revived by re-assignment to the tenant who had the benefit of the clause (following *Max Factor Ltd v Wesleyan Assurance Society*[2] *and Equinox Industrial (GP2) Ltd v Sketchley Ltd*[3]).

Linpac appealed the decision on the first point. The Court of Appeal endorsed the findings of the High Court, stating that it would be "extraordinary" for a lease to allow a former tenant to exercise a break option when the lease was not vested in them, and that there was no clear indication that this is what was intended in the wording of the leases. However, it was conceded that it may be "technically possible" to provide for a personal break clause to continue even after assignment.

### Principles

The possibility of a personal break clause continuing after assignment has not been finally ruled out. However, it is evident from the Court of Appeal's decision that the Courts will be very unwilling to find, in the absence of "unambiguously clear" wording, that a personal break option will continue in this way. Any party seeking to rely on such a clause in future cases will have an uphill struggle to succeed in the light of this case.

In any event, should a party be able to rely on a subsisting personal break clause, they may face substantial difficulties in complying with the terms of the break clause. This was specifically pointed out in the High Court judgment. The judge considered that ensuring vacant possession on termination, especially where the current tenant had the protection of Part II of the Landlord and Tenant Act 1954, would prove problematic. In addition the former tenant would also struggle to ensure that other conditions of the break clause, such as the payment of rent and compliance with repairing obligations, were complied with. In practical terms the former tenant would need to enter into an agreement with the tenant in possession, however such an agreement may in itself fall foul of the anti-avoidance provisions in clause 38 of the Landlord and Tenant Act.

In practical terms, this case further supports the view that once a tenant has assigned a lease with a personal break clause, that clause is unlikely to be operable. If a tenant wishes to retain their personal break option whilst passing possession of the premises to another then a far less problematic solution (where possible) would be to sub-let the property and exclude the underlease from the provisions of the 1954 Act.

2 (1997) 74 P. & C.R. 8
3 [2003] EWHC 2 (Ch)

## Latin Quarter

**Quicquid plantatur solo, solo cedit**

This literally means “whatever is planted in the ground, belongs to the ground”. It comes from Roman law, where its application was mostly to determine that trees and crops were sold with and formed part of the land.

In English common law it is used to mean that anything attached to land becomes part of it and thus to distinguish between fixtures and fittings and chattels. Loose bricks are chattels but if you cement them together to build a wall, then that becomes part of the land and ownership of the wall will pass with a sale of the land.

The law has however developed away from a strict literal interpretation of this rule. The question now is one of fact and depends in particular on the degree of annexation of the item to the land and the purpose of that annexation.

### FURTHER INFORMATION

For further information please contact:


**Patrick Walker**
Director for Advocacy
T: +44 (0)113 284 7566
E: patrick.walker@ssd.com

**Sally Lodge**
Partner
T: +44 (0)113 284 7102
E: sally.lodge@ssd.com

**William Lawrence**
Partner
T: +44 (0)20 7655 1551
E: william.lawrence@ssd.com

**Nick Armitage**
Partner
T: +44 (0)113 284 7025
E: nick.armitage@ssd.com

**Helen Hoath**
Senior Associate
T: +44 (0)161 830 5068
E: helen.hoath@ssd.com

**Caroline Wort**
Senior Associate
T: +44 (0)121 222 3405
E: caroline.wort@ssd.com