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# Property @ction
## Review

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# Introduction

Welcome to the 12th Edition of the Quarterly Review from the Squire Sanders' Property@ction Team. In this issue we will look at the following:

(i) "No good deed is lost"

(ii) Industrial Spotlight – North West England

(iii) Land Development Agreements: Important UK procurement decision

(iv) Landlord's Intention

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

# "No good deed is lost"

## Introduction

It is now mandatory for unregistered land to be registered when it is purchased, mortgaged or leased, with the result that today over 20 million titles to land in England and Wales have been registered.

However, there are still plenty of unregistered titles in existence, largely because there is no general obligation to register title to land until the landowner wants to transfer/mortgage it. In most cases all that is required for title to be registered is for the landowner's solicitor to send the title deeds to the Land Registry along with the relevant application forms. The registration of title to land is made significantly more complicated when one or more of the deeds to the property have been lost or destroyed.

## Registration when one or more deeds have been lost

An account should be obtained of how the deeds came to be lost. This is in the form of a statutory declaration or statement of truth made by a person with actual knowledge of the events. More than one account may be required – for example, if the deeds were posted to the landowner by his solicitor but never received, both the solicitor and the landowner will need to provide an account. The accounts should state who had the deeds and why and how they came to be lost, what steps have been taken to recover them and whether the property has been mortgaged. The landowner will also need to state whether he is in actual possession of the land, or collecting rents from the land, and should certify that he is entitled to apply for registration.

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Once the events leading up to the loss have been dealt with, title should be reconstructed as far as possible. The best documents to evidence title are drafts or copies of the conveyance to the landowner, plus any further copy title deeds/abstracts of title that remain in existence. These are most commonly found in the custody of:

- A lender, under the terms of a mortgage;
- If the property is mortgaged, the solicitor who acted for the landowner and/or lender on the grant of mortgage;
- The solicitor who acted for the landowner on purchasing the land and/or the seller's solicitor;
- The former deeds registries of Middlesex or Yorkshire, if the property is located in either county. These are the only two counties to have set up deeds registries, and their records cease in 1938 and 1970-74 respectively, but in theory, all land transactions from the early 1700s up to those dates should have been copied to, or noted in, the deeds registries;
- If the unregistered interest is leasehold, the landlord may be able to provide a copy of the counterpart lease. If not, he should still be able to assist by providing details of the lease and confirming who has been paying the rent.

A statement of truth is then provided setting out the chain of ownership of the land, stating whether the deeds were examined by a solicitor prior to the loss, the source of any copies, and confirming that the conveyance to the landowner was properly executed and stamp duty paid.

Finally, the landowner will generally need to provide proof of identity.

## Class of title

The type of title the Land Registry will grant depends upon the amount of evidence available. If the Land Registry is provided with originals or copies of the vast majority of the title deeds required for registration it is likely to register the property with absolute title; however, in cases where there is less information it may only register possessory title. The title may also contain one or more notes protecting easements and restrictive covenants, and/or confirming that the Land Registry has not seen the original deeds.

## Conclusion

It is not always fatal to an application for first registration to have lost one or more of the title deeds. However, whilst it is still possible to register title, it takes a degree of detective work, and a little good luck, to track down the necessary documents, and the title granted may be of a lower class than would otherwise be the case.

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# Industrial Spotlight – North West England

Following the seismic shock of the recent crash, the market outlook as a whole remains challenging and expectations for 2012 are for a subdued and fragile recovery. Occupiers remain cautious as we remain under recessionary pressures and the influence of the latest Euro debt crisis.

Notwithstanding, certain trends have emerged over the past 18 months and there has been a "Flight to Quality" by occupiers which we expect to continue. Take up levels for quality space in prime locations is expected to improve, with secondary space and secondary locations continuing to struggle creating a polarized market.

DTZ latest quarterly research shows that industrial occupier take-up across the UK fell by 1.9m sq ft to 5.8m sq ft compared with the previous quarter.

However, with speculative development a distant memory and a lack of any sizeable space coming to the market availability fell by 1.5%, a fall for the sixth successive quarter.

Not a huge drop! However on closer analysis the continuing dwindling availability of quality accommodation should be of genuine concern to occupiers and heartening fillip for developers and investors as supply is squeezed. This is most starkly demonstrated in the world of big box logistics units over 100,000 sq ft. Availability of Grade A stock across the country fell by 12.5% to 22m sq ft as prime take-up remained strong.

The **North West** led the field and defies the overall national picture as take up rose to 1.7m sq ft, 20% higher than the regional quarterly average. Just 1.2m sq ft of Grade A space remains in the region and, given current take-up levels, very little is expected to remain past the summer.

The 'availability squeeze' in Grade A accommodation will manifest in a hardening of landlords' negotiation stance and occupiers' sourcing:-

1. **Land and pre-let transactions** - as demonstrated by Evander Properties in Chorley who have just secured planning for 300,000 sq ft of warehousing space which will facilitate the development of 120,000 sq ft for Parcelforce Worldwide.

   This follows previous large scale deals in the region to Waitrose and ASDA in the last 6 months accounting for over 1m sq ft of new build distribution space.

2. **Better quality second hand space** - as shown by recent transactions at Stretton Distribution Centre in Warrington at TDG's former 145,000 sq ft unit and earlier deals as demonstrated by Torque logistics - Wigan 99,000 sq ft and Comfy Quilts at Stakehill 204,191 sq ft.

Where occupiers have had a free run of available units and been spoilt in terms of rental deals, short term leases and frequent breaks the landscape is now changing. Those seeking quality accommodation must now reassess their expectations and expect to compromise either on quality, location or price.

Under current market conditions funding remains a real issue and any new development will necessitate a return to more traditional institutional lease terms of 10 to 15 years and an end to the tenant-friendly market in this sector. This is certainly the case in pre-let buildings and this trend will continue to a lesser extent through the second-hand markets as demand permeates through the quality strata.

Whilst highlighting the dearth of Grade A space there remains a glut of poor secondary and tertiary accommodation. Better quality secondary space will enjoy its "day in the sun" against a backdrop of limited supply of existing alternatives but tertiary space will become increasingly obsolete and require landlords to remain pragmatic in disposals.

Looking forward, the automotive sector is asserting its influence on the region specifically in and around Jaguar Land Rover where they have secured the 'Phoenix' warehouse at Ellesmere Port (405,000 sq ft) on a temporary basis to facilitate expansion of its current plant at Halewood.

A series of smaller supplier requirements are also seen in the market as a direct result of increased production and the continued success of JLR's Evoque car.

In a double coup for the automotive sector in Ellesmere Port General Motors have underpinned their support of the Vauxhall Plant where production of the new Astra will begin in 2014.

This all bodes well for the North West Industrial market and we expect to see a number of notable landsales/pre-let deals over the coming 12 months and who knows, a return of speculative development in 2014 – stranger things have happened!

**Anthony O'Keefe**
Director
DTZ

He leads the North West Industrial Agency team and has over 15 years experience in real estate consultancy.

He has advised leading occupiers, funds and developers on a series of industrial projects throughout the country and has developed a specialist knowledge of the logistics sector.

Current projects include UK Coal's 212 acre Cutacre project at Bolton which will deliver 4m sq ft of logistics accommodation and National Grid's sale of 67 acres at Voltage Park, Partington.

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# Land Development Agreements: Important UK procurement decision

The recent High Court decision in *R (Midlands Co-operative Society Limited) v Birmingham City Council*[1] is the latest case concerning the application of the public procurement rules in the context of land development agreements.

The case is significant as it is the first to consider the concept of "public works contracts" under the Public Contracts Regulations 2006 since the important European decision in the case of *Helmet Muller*[2].

## The Facts

The case concerned the proposed sale of land near Birmingham city centre owned by Birmingham City Council (the "Council") for regeneration. Located on part of the site was a community centre and indoor bowls facility (the "Community Facility") that the Council required to be replaced as part of any redevelopment plan. Co-op and Tesco were the main interested parties and were both granted planning permission for the development of the site for a retail foodstore. The Council underwent three separate tender processes:

**First tender -** The first two tender processes were limited to Tesco and Co-op only. Both Tesco and Co-op were invited to tender to purchase the site, including obligations to replace the Community Facility. Tesco were successful, however the Co-op objected to the transaction on the basis that it constituted a public works contract that was caught by the public procurement rules.

**Second tender** - Faced with the prospect of challenge, the Council took legal advice and decided to undertake a second tender process. This time around the proposal put forward to the Co-op and Tesco was for a pure land sale of the Community Facility. Tesco submitted a bid but it did not comply with the Council's requirements and the Co-op decided against submitting a bid.

**Third tender –** As a result the Council decided to conduct an open tender process for the sale of the Community Facility. The only bid received was from Tesco, who were awarded the contract and entered into a new Section 106 agreement that imposed obligations on Tesco to replace the Community Facility but crucially these obligations would only be triggered if Tesco decided to carry out the development.

## Legal background: public procurement rules

All public authorities in the UK are required by law to comply with the E.U. Public Procurement Directives and the Public Procurement Regulations 2006 (the "Regulations") for the advertising and award of contracts.

Any agreement that constitutes a "public works contract" under Regulation 2(1)[3] must be subject to

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[1] [2012] EWHC 620(Admin)
[2] *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben* [2010] 3 CMLR 18
[3] A public works contract is defined as: *"… a contract in writing, for consideration (whatever the nature of the consideration)*

*(a) for carrying out of a work or works for a contracting authority [which includes local authorities]; or*

*(b) under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements…"*

formal tender process compliant with the Regulations. Following the decision in *Helmet Muller,* for a contract to constitute a "public works contract" it must contain a binding and legally enforceable obligation on the contracting party to carry out works specified by the contracting authority.

## Co-op's challenge

The Co-op brought judicial review proceedings challenging the Council's decision on the main ground that the transaction to sell the Community Facility to Tesco constituted a "public works contract" that was caught by the public procurement rules.

The Co-op also relied on other grounds in support of the application, including that the Council had failed to comply with its duty to achieve the best consideration available under Section 123 of the Local Government Act 1972.

## High Court decision

The Court rejected the Co-op's judicial review claim and determined that the transaction entered into with Tesco did not constitute a public works contract because there was no legally enforceable obligation on Tesco to replace the Community Facility at the time the transaction was entered into.

Whilst the Section 106 agreement entered into by Tesco did require it to replace the Community Facility, this obligation would only be triggered if Tesco decided to proceed with the development. The Court held that as there was nothing in the agreement to compel Tesco to proceed with the development, the obligation to replace the Community Facility was not legally enforceable and was not therefore a public works contract caught by the procurement rules.

The Court emphasised that the transaction must be looked at as a whole to determine whether a contracting party is under a legally enforceable obligation to carry out the works at the time the transaction is entered into. Although the Council in this case clearly intended to contract with Tesco to carry out the works, there was no binding obligation on Tesco to actually do so and therefore the contract was not caught by the procurement rules.

It is worth noting that the Court also rejected the other grounds relied on by Co-op in support of the judicial review claim. In particular, the Court accepted the valuation evidence put forward by the Council and held that there was no basis on which to conclude that the Council had failed to comply with its duty to achieve the best consideration available in entering into the transaction with Tesco.

## Case comment

This decision is significant as it re-affirms the basis on which agreements involving the sale and development of land entered into by local authorities will be caught by the public procurement rules.

The decision will no doubt be welcomed by many local authorities when considering the options available to structure a land development transaction, particularly where there are concerns that the potential costs faced by all parties in running a full public procurement competition may have an adverse impact on the commercial viability of a particular project.

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## *Latin Quarter - Contra Proferentem*

Literally meaning “against the person who mentions it”, the contra proferentem rule states that where the meaning or intended effect of a clause in a contract is ambiguous, it will be construed by a Court in the way that is less favourable to the party who seeks to rely on the clause. The contra proferentem rule only applies where there is genuine ambiguity in the clause, and may be excluded or limited in certain business-to-business contracts.

A good example of this is found in the case of *Ernest Beck & Co. v. K. Szymanowski & Co* [1924] AC 43. In this case, the claimant had ordered some 2,000 reels of cotton sewing thread. Each reel was meant to contain 200 yards of thread. The sellers’ standard terms contained an exclusion clause that stated: “The goods delivered shall be deemed to be in all respects in accordance with the contract…unless the sellers shall within fourteen days after the arrival of the goods at their destination receive from the buyers notice…that the goods are not in accordance with the contract”. Some eighteen months after delivery, the claimant discovered that the reels contained significantly less than 200 yards of thread and brought a claim against the sellers. The sellers relied on the exclusion clause to defend the claim.

The Court interpreted the clause contra proferentem against the sellers, to mean that it only applied to “goods *delivered*” and found that because the missing thread had never actually been delivered, the 14 day period in respect of that part of the order had not begun to run and the claimants could claim damages.

# Landlord's Intention

The Landlord and Tenant Act 1954 (**“LTA 54”**) provides that a tenant of business premises is entitled to a new lease after the current lease expires roughly on the same terms, at a market rent unless the Landlord of the property can establish one of the statutory grounds for opposing renewal of the lease under the LTA 54.

Ground (g) of Section 25 LTA 54 allows the Landlord to oppose renewal on the ground that it intends to occupy the premises for the purposes of a business to be carried on by it.

The Landlord must have a firm and settled intention to occupy and that intention must be proved at the date of the hearing.

The Landlord’s application will fail if there are too many hurdles to overcome, or if the Landlord has little control over those hurdles.

The court should not examine the financial viability of a Landlord’s genuinely held plans. All the court must decide is whether the Landlord intends to occupy for the purposes of business.

A purchaser/Landlord of the Landlord's premises must have owned the premises for five years before it can oppose renewal under ground (g) of the LTA 54.

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### *Humber Oils Terminal Trustee Limited v Associated British Ports*[4]

The tenant, Humber Oil Terminals Trustee Limited, was a joint venture company formed by two large oil companies.

Humber Oil held four leases of the Immingham Oil Terminal (the **"IOT"**). The Landlord was Associated British Ports. Each company in the joint venture owned nearby oil refineries which were serviced by the IOT.

The Landlord served section 25 notices under the LTA 54 terminating the tenant's four leases and indicated an intention to oppose any application for the grant of new tenancies on the basis of ground (g).

The Landlord wanted to occupy and manage the IOT itself to maintain supply to the nearby oil refineries. If the leases were to be renewed, then the Landlord proposed that the combined rent under the renewal leases should increase from £4.2m to £23.7m.

Humber Oil argued that the Landlord could not prove that it intended to occupy the IOT and applied to the High Court for the grant of four new tenancies under the LTA 54. Humber Oil pointed out that on termination of the leases, it would be entitled to remove its infrastructure from the IOT, which would cost around £10m. It would cost the Landlord a further £60m and take about two years to replace the equipment.

The High Court decided that the Landlord did have the necessary intention to occupy the IOT. The court was convinced by the Landlord's evidence that it was genuine in its motivation to obtain better value for the port facilities and to expand competition in the port and attract third party customers.

The tenant's suggestions that the Landlord's plans were merely aspirational were rejected. The court was satisfied that the Landlord was a major port operator with substantial financial backing and that it would be able to carry out its stated objectives on the termination of the leases.

It was not for the court to decide whether the Landlord's approach was commercially sensible, provided that the proposals had a reasonable prospect of being completed.

[4] [2011] EWHC 2043 (Ch)

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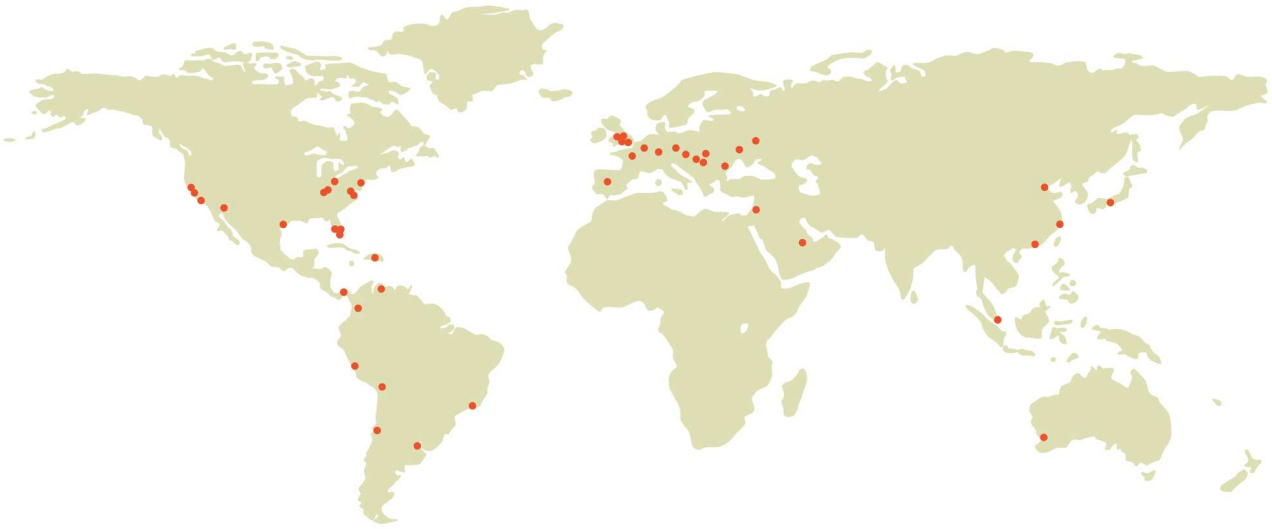
# Worldwide Office Locations



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