

MANCHES

LAND MARKS

LEGAL NOTES ON PROPERTY

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“2010 has been quite a year. We are seeing signs now that things are picking up, with really good value to be had for those with cash but bank finance still really hard to come by. Happy New Year, and best of luck for 2011 to all our readers.”

**Louis Manches**

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## Maintaining rights of access

In the case of **EDF Energy Networks (EPN) Plc v BOH Ltd & Ors (2009)**, EDF purchased the freehold of a plot ("Plot 2") in 1993, on which stood the back up supply sub-station for Wembley Stadium. Previously, EDF had occupied Plot 2 as a tenant under a 42 year lease which also included two other plots of land immediately north and south of Plot 2, known as Plots 31 and 26. This lease granted the right to run cables over a fourth piece of land, Plot 20, which lay between Plot 26 and the road, and was a vital means of connecting the sub-station to supplies.

As a result of various transactions the reversion to the lease became split between several owners. The first defendant, BOH Limited, owned the freehold to Plots 20 and 31. The second defendant, Layhawk, owned the freehold to Plot 26. Whilst EDF had acquired the freehold to Plot 2, the leasehold title remained open at the Land Registry.

EDF intended to become the primary supplier of electricity to Wembley Stadium by upgrading the sub-station on Plot 2. This required the laying of additional cables over Plot 20, together with continuous access rights.

The question for the Court was whether EDF's 42 year lease subsisted in respect of Plots 2 and 26. Only under this lease did EDF have the benefit of easements over Plot 20 allowing them the rights of access required to connect their sub-station to the main supplies. The freehold interest in Plot 2 did not have the benefit of such easements.

The defendants sought to show that the EDF had no such rights over Plot 20 and that they could effectively hold EDF to ransom.

The Court found that whether EDF's lease subsisted depended on the validity of a Section 25 notice that the then freeholder of Plot 2 had served in 1993. This notice opposed a renewal under the Landlord & Tenant Act 1954. EDF had responded with a counter notice. However, following subsequent negotiations EDF purchased the freehold of Plot 2.

The defendants argued that EDF had failed to apply to Court for a renewal lease following the service of the Section 25 notice - meaning the leasehold interest in Plot 2 had ended. EDF successfully argued that the Section 25 notice was not valid as it had not been served by all the freehold reversioners. Further, the Court decided that EDF had not waived the defect in the Section 25 notice by serving a counter notice. The Judge concluded that the landlord had simply not been entitled to serve the notice in the first place.

Having established that the 1954 Act had operated to continue the lease, the Court turned to the final question as to whether, when EDF acquired the freehold, the interests in the leasehold and freehold had merged.

The Court found no evidence of an intention to merge the freehold and leasehold titles. When EDF registered the freehold transfer, they did not apply to merge the titles. Furthermore, the Court held that a merger would have been against EDF's interests since they would have lost the benefit of the easements they enjoyed over Plot 20.

Landlords should exercise caution when breaking up a reversion or they may restrict their ability to oppose a tenant's application for a new lease in the future. Tenants must consider carefully what rights they require effectively to make use of the property in question and ensure that such rights are sufficient for their purposes.

## Break Notices - More Pitfalls

Break notices must be given by the correct person and served on the correct recipient otherwise they will be invalid. The recent cases of **Hexstone Holdings Limited v AHC Westlink Limited (2010) (Hexstone)** and **Ibrend Estates BV v NYK Logistics (UK) Limited (2010) (Ibrend)** are stark reminders that there is very little margin for error when submitting notice of intention to break. Landlords and tenants must be aware that a failure to serve in the correct form may well lead to litigation. These cases indicate that even an apparently minor oversight may render a break notice invalid.

**Hexstone** concerned a dispute between Hexstone, the landlord, and AHC Westlink, the tenant. Shortly before serving the break notice upon Hexstone, AHC Westlink had undergone a merger with the Eddie Stobart group of companies. The tenant expected it would subsequently change its name to Eddie Stobart Limited, and notified the landlord of this. The landlord then sent rent invoices to, and was paid by, Eddie Stobart Limited. Both parties knew that Eddie Stobart Limited had effectively taken control of the tenant. But crucially the name change was never formalised and the tenant as stipulated in the lease remained AHC Westlink.

The tenant gave notice to terminate the lease on the specified break date but the break notice was stated to be "for and on behalf of Eddie Stobart Limited" on notepaper that bore that company's name and number. The landlord challenged the break notice on the grounds that it had not been given by the tenant under the lease.

The court rejected the tenant's argument that Eddie Stobart Limited was acting as an agent for AHC Westlink. The Judge also rejected the tenant's argument that the "reasonable recipient" test (the principle in **Mannai Investment Co Ltd v Eagle Star Life Assurance Co Limited (1997)**) would apply because it was one of the formal requirements of the break clause that it should have been given by the tenant. The notice was bad and the lease continued.

In **Ibrend** the exercise of the break clause was conditional on the tenant giving vacant possession at the break date. The tenant served notice to implement the break. The landlord served a terminal schedule of dilapidations some months before the break date but it was not until three days before the break date that the schedule of works were agreed.

The tenant arranged for its workmen to complete the outstanding work within a further week (which would extend beyond the break date). The landlord subsequently objected to the validity of the break notice as vacant possession was not given on the break date.

The Judge held that neither the presence of a security guard nor some of the tenant's chattels contravened the provision of vacant possession, but retaining workmen on the premises did mean that vacant possession had not been given. The break was invalid and the lease continued.

These cases demonstrate that the element of flexibility introduced by the "reasonable recipient" test has limitations. Certain areas including the correct names of the giver and recipient of the notices will require strict compliance. The break notice must comply exactly with the requirements of the relevant clause in the lease and any conditions imposed. Be warned that even apparently trivial breaches or oversights may be sufficient to invalidate a break notice.

## Extensions of time in the JCT

The Scottish Court of Appeal has provided some useful guidance on the interpretation and working of the Joint Contracts Tribunal (JCT) extension of time machinery.

Some of the most contested cases in the constructions industry involve arguments about entitlements to extensions of time. In projects that use JCT contracts the process involves the contractor giving notice of delay to the employer/contract administrator citing the reasons for the delay as being one or more "relevant event". The employer/contract administrator then decides whether the delay notified by the contractor is likely to delay, or has delayed, completion of the project. If it has the employer/contract administrator must award a "fair and reasonable" extension of time.

The first instance decision in **City Inn Limited V Shepherd Construction (2010) (City Inn)** dealt with the issue of concurrent delays. City Inn employed Shepherd Construction to build a hotel in Bristol. Shepherd applied for various extensions of time and after a number of adjudications was awarded a total of five weeks. City Inn disagreed and issued proceedings for a declaration that Shepherd was not entitled to any extension to the contract completion date.

After a detailed review Shepherd was awarded a nine week extension and City Inn was ordered to repay liquidated damages previously deducted. City Inn appealed.

The Scottish Court of Appeal unanimously endorsed the decision of Lord Drummond Young and put forward five clear and concise propositions regarding the proper approach to be taken when deciding on a party's entitlement under JCT to an extension of time:

1. For an extension of time claim to succeed it must be shown that the delay was caused by a relevant event and that, as a result, completion of the project has been, or is likely to be, delayed.
2. When deciding on whether a relevant event actually caused the delay to completion of the project, the decision maker should apply the principles of common sense rather than engage in complex analysis.
3. In deciding causation, the decision maker can have regard to any factual evidence available. In this regard it may be that a critical path analysis is used and, if it is soundly based, it can be useful.
4. If a dominant cause can be identified as a cause of a particular delay in the completion of the works, effect will be given to this by not considering causes that are shown not to be material.

5. In a situation where there are two causes that are operative, one which is a relevant event and the other an event of contractor culpability, and neither can be described as the dominant cause, the claim for an extension of time will not necessarily fail. In this situation the decision maker can apportion the delay in the completion of the project as between the relevant event and the other event. In doing so, the decision maker must approach the issue in a fair and reasonable way and bear in mind the fact that there may be an entitlement to liquidated damages rather than a claim for an extension of time.

At a first glance it might look like parties looking for an extension of time can do away with detailed critical path analysis but this is not the case. It is still open to a party defending an extension of time claim to put forward a negative and positive defence to an extension of time claim. In other words, it is open to a party defending an extension of time claim to say, firstly, that the events complained of did not cause a delay because they were not on the critical path and, secondly, that there was some other reason for the delay for which the contractor is responsible. In this situation it will be up to the decision maker to use principles of common sense to decide on causation and, if necessary to apportion such delay between the two events in a fair and reasonable way.

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## What damages for trespass?

The Court of Appeal considered the appropriate basis on which to calculate damages for trespass in **Stadium Capital Holdings (no 2) Limited v (1) St Marylebone Property Company Plc and (2) Clear Channel UK Limited (2010)**.

The case concerned an advertising hoarding and platform attached to a building at 279a Finchley Road. The hoarding had been erected by St Marylebone in 1976 and a platform added in front of it in 1986. They extended into the airspace over an adjoining development site. In 2004, Stadium's predecessor requested the removal of the hoarding. A dispute ensued, and the hoarding was finally removed in 2008. Stadium, which had acquired the development site in 2008, claimed damages for trespass for the period from the date when removal of the hoarding was requested until it was actually removed.

The High Court awarded damages based on the entire fee income which St Marylebone, as the owner of the building wall, had received from advertising licences during that time, a total of £313,972.70. In other words, the damages awarded were the entirety of the income earned by the owner from the operator.

St Marylebone argued that to award damages on that basis was excessive and punitive.

There are cases in which damages for trespass have been awarded on the basis of what would have been a reasonably negotiated fee for the use of the land (or, in this case, the airspace) on which trespass has been committed. The Court of Appeal noted that the parties had not included this basis of damages in their arguments in the High Court nor provided any evidence about what such a fee might have been. The judge had not been given enough material to reach an appropriate conclusion. The appeal was allowed, and the case remitted to the High Court for further argument about the proper level of damages.

Mr Justice Peter Smith, giving the main judgement in the Court of Appeal, did not think it appropriate for the Court of Appeal to decide on what basis damages should have been assessed, but gave a pretty strong hint by describing the damages awarded in the High Court as "at the very top end of the basis of awarding damages on a restitutional basis".

Lord Justice Sullivan gave an even stronger hint, arguing that all the decided cases to which the Court of Appeal had been referred in the area of trespass in which damages had been awarded on a restitutionary basis had proceeded on the basis of a hypothetical licence fee which, by definition, would not amount to 100% of the profits from the trespass, and that the judge in the High Court had been "wrong in principle simply to have accepted the headline figure which he did."

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## Problems for developers when buyers fail to complete

In the current economic climate, the prospect of buyers failing to complete is all too real a possibility. The knock-on consequences for the disappointed developer are equally real.

In a straightforward property transaction, in a rising market, where there is a relatively short time between exchange and completion, calculating damages relating to failure of completion is fairly simple. The Defendant must pay the Claimant the difference between the contract price and the market value of the property at the completion date. Credit must be given for the deposit. However, the equation becomes rather more complex where the property market is less buoyant, and the seller is an intermediary relying on the monies from the sub-sale to fund the purchase from the original developer.

The case of **Strategic Property Limited v Daragh O'Se and Thomas Moriarty (2009)** dealt with such a situation. Strategic Property Limited ("Strategic") was purchasing 100 flats from a developer, Telford Homes ("Telford"), with the intention of sub-selling these flats on to prospective purchasers. Unfortunately, the Defendant purchasers, O'Se and Moriarty, along with a large number of others, failed to complete.

As a consequence, Strategic also failed to complete under its own contract with Telford because it was relying on the funds obtained from the purchasers on completion to do so.

Strategic sued for the loss of profit it had expected to make by selling the flats on to O'Se and Moriarty. On seeking summary judgment, Strategic was successful as to liability; but failed to win any damages.

The Judge held that Strategic could not recover its loss of profit on the back-to-back purchase and sale because the loss of profit was not foreseeable by the purchasers: that it is reasonable to assume that parties would not normally breach contracts. O'Se and Moriarty could not have contemplated that Strategic would fail to fulfil its own contractual obligations with Telford if they breached their contract with Strategic.

This seems in some ways a commercially naïve decision, and one that is perhaps unduly harsh on intermediary purchasers who are left in a risky position. Such purchasers have facilitated development of mixed use schemes by allowing developers to leverage cash flow by disposing of a large chunk of the residential element at an early stage in the development process. That structure looks likely to be less viable in the future. Property developers will keenly await further guidance from the Court on this issue.

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## Five Things You Didn't Know About TOGCs

TOGC stands for the transfer of a business as a going concern and accordingly it is only a partially successful acronym. When a property is sold as part of a TOGC there is generally no VAT chargeable on the sale price. This is usually good news because (a) there is no VAT to pay, and (b) there is no SDLT to pay on the VAT. SDLT is a fully successful acronym standing for stamp duty land tax.

But did you know all (or any) of the following facts about TOGCs?

1. TOGC treatment is compulsory. If a property sale satisfies the conditions for TOGC relief, the seller cannot charge VAT to the buyer on the sale price. If the seller gets this wrong he must cancel any VAT invoice issued. If he does not do so HMRC can recover the VAT from the seller even though it was not chargeable. The buyer cannot generally reclaim the VAT as input tax and will be left trying to seek recovery of it from the seller.
2. TOGC treatment only applies if the property is used by the buyer to carry on the same kind of business which the seller carried on. An Indian restaurant is the same kind of business as an Italian restaurant. A wholesale business is probably the same kind of business as a retail business. However, running a pub is not the same kind of business as letting a pub to tenants.
3. A TOGC can exist even when the seller has not opted to tax the property. If the seller has not opted to tax, the sale of the property would normally be exempt for VAT purposes, meaning no VAT need be charged on the price, but also meaning that the seller cannot recover the VAT it pays on the sale costs. However, if the TOGC conditions are satisfied, though no VAT is still chargeable on the sale price, the seller may be able to recover some or all of the VAT it pays on sale costs as a general overhead of its business.
4. When the seller is VAT registered, TOGC treatment only applies if the buyer is already VAT registered or is liable to register immediately as a result of the purchase. The buyer will be liable to be registered immediately if the turnover of the seller's business exceeded the annual threshold (£70,000) in the year prior to the sale or if the buyer expects the turnover to be above this limit in the year following the purchase. If neither of these applies, and the buyer is not already VAT registered, TOGC treatment is not available and VAT must be charged on the sale price.
5. TOGC treatment is not generally available where the buyer is buying as nominee for a third party (because the nominee will not carry on the same kind of business as the seller, since it will not itself carry on any business). In such a case, the seller, the buyer and the third party have to elect in writing for TOGC treatment to apply. Otherwise it will not.

Watch out for "Five more things you didn't know about TOGCs" in the next issue of Land Marks!

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## Renewal of business tenancies where a Landlord intends to redevelop

Where Part II of the Landlord and Tenant Act 1954 ("the 1954 Act") applies to a commercial tenancy, the tenant will have a statutory right to renew its tenancy at the end of the term.

A landlord can only oppose renewal on certain limited grounds, which are set out in Section 30 of the 1954 Act. One such ground is the landlord's intention to redevelop ("ground (f)").

The case of **Somerfield Stores Ltd V Spring (Sutton Coldfield) Ltd (2010)** considered at what point during the renewal process a Landlord had to show the requisite intention to redevelop.

It has been established that a landlord's intention to redevelop the premises at the termination of the tenancy must be demonstrated at the time of the "hearing" of the application. The key question in **Somerfield** was what is considered the hearing for this purpose?

The claimant was the Tenant of a supermarket and adjoining land under leases which were due to expire in 2008. The defendant acquired the freehold of the site in September 2006 with a view to redevelop.

In 2007, the Tenant served notices on the Landlord requesting new tenancies. The Landlord served counter-notices, indicating that he would oppose the grant of new tenancies on ground (f). The Tenant applied to the Court for the grant of new tenancies.

There were various delays in the litigation, most notably as a result of the Landlord going into administration in February 2009. However, a timetable was eventually set with the trial window to be between March and May 2010.

Rather than waiting for trial, the Tenant applied for summary judgement on the ground (f) point. The judge dismissed the application as the Tenant could not demonstrate that the Landlord would not be able to prove its ground of opposition at the date of the summary judgement hearing. The Tenant appealed to the High Court.

Dismissing the appeal, the High Court held that the requisite intention to redevelop must be demonstrated at the date of the final hearing.

The purpose of a summary judgment is to determine whether a party has a real prospect of success at trial. This means that on a summary judgement on the ground (f) point, the court should ask itself whether the Landlord has a real prospect of forming, and proving he has formed, the requisite intention at an anticipated trial date.

This decision provides clear authority on the timing of the landlord's requisite intention to redevelop. The decision also

provides relief to landlords as it discourages tenants from making an early tactical application for summary judgement on the ground (f) points in order to pressurise landlords to formulate proposals for redevelopment at a very early stage. Landlords will be allowed time to prepare their case for trial and not be pushed for early judgement in the manner attempted in **Somerfield**.

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## Guarantee Stripping - is it fair?

Company voluntary arrangements (CVAs) operate as a rescue procedure for companies in financial difficulties. By entering into a CVA company is allowed to come to an arrangement with its creditors over the payment of debts.

Since the economic downturn, CVAs have become prevalent particularly amongst relatively high profile retailers. They have been met with varying degrees of success. Companies have attempted to use CVAs to enable their guarantors (often a parent company) to avoid liability under their guarantees provided to creditors. A practice known as "guarantee stripping".

Guarantee stripping has been the source of much debate over recent years. However, recent decisions in the cases of **Prudential Assurance Company Ltd & others v PRG Powerhouse Ltd & Others [2007]** ("Powerhouse") and **Mourant & Co Trustees Limited and Anor v Sixty UK Limited (in administration) and Ors [2010]** ("Miss Sixty") have taken a tough stance towards the use of CVAs by tenants with the consequence that the use of CVAs may become limited in future.

In the High Court decision of **Powerhouse**, the judge decided that the CVA put forward by Powerhouse was unfairly prejudicial to the landlords. This CVA proposed removing the landlords' rights against Powerhouse's parent company, which had guaranteed Powerhouse's lease obligations. However, the question of whether guarantee stripping could ever be fair was left open.

The more recent decision of **Miss Sixty** reinforced the decision in Powerhouse and further limited the circumstances in which a CVA can be said to 'fairly' release guarantors.

In deciding whether Mourant had been unfairly prejudiced by the CVA, the Court compared Mourant's position with (a) other creditors in the CVA and (b) how Mourant would have been treated in an administration or liquidation. Upon making these comparisons it was clear that other creditors had been treated more favourably in the CVA. It was also clear that Mourant's position would have been far more favourable in a liquidation or administration where it would retain its rights to make a claim against Sixty's guarantor.

The Court revoked the CVA ruling that it unfairly prejudiced Mourant and that the sum offered to Mourant as compensation was inadequate. The Court went further in stipulating that it could not envisage any circumstances where a CVA would operate fairly to release a guarantor unless the creditors agreed to such a release, and that it was hard to see how payment of a stipulated sum would be adequate compensation as the value of a guarantor's obligations will always vary depending on market conditions.

Furthermore, the Court found that Sixty's administrators had acted in a reprehensible way by essentially allowing Sixty's guarantor to dictate the terms of the CVA, including the proposed compensation to be given to Mourant. The practitioners were reported to their regulatory body, a consequence which should not be ignored.

These decisions will be welcomed by creditors and landlords who may face prejudicial CVA proposals from their debtor tenants.

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## Boundary disputes - all part of the plan?

The recent cases of **Bowler v Wallis (2010)** and **Huntley v Armes (2010)** highlighted the Court of Appeal's differing approach to the use of title deeds and plans in the resolution of boundary disputes.

In **Bowler**, the dispute concerned two neighbours ("B" and "W") and whether railings on top of a wall between the two properties fell within B or W's ownership. The wall in question was apparently built on B's side of the boundary, slightly to the left of the centre line of a lower party wall.

The original conveyance of the property stated that "all walls separating the respective houses... shall be placed equally on the ground of the respective properties... and deemed party walls".

The judge at first instance held that, having regard to common sense and safety considerations, the disputed wall and railings belonged to W's property. B appealed the decision, pointing out that the judge's decision resulted in a "kink" in both the horizontal and vertical planes of the boundary line.

The Court of Appeal held that the first instance judge's view simply failed to take into account the terms of the conveyance. It was held that it was clear from the conveyance that the boundary between the properties lay along the centre line of the party wall. That which was to the left of the centre line was within B's ownership and, as the railings and disputed wall were to the left of the party wall, they were within B's freehold.

It was also noted that the judge's decision at first instance produced a line of division which was not vertical, with the result that a flying freehold was created. Whilst legally possible, this could not be commendable on the evidence.

**Huntley** concerned a dispute over a planned fence between adjacent driveways. The claimant (H) relied on the straight boundary line (the "red line") shown in a 1980's conveyance plan attached to the defendant's (A's) title deeds. H claimed that A had encroached upon the land in recent years, moving the uneven physical boundary, ("green line"), away from the red line.

A argued that the physical boundary had not been moved before, or during, his period of ownership and that the green line was the boundary line.

The first instance judge considered the conveyance plan but held that the evidence showed that the boundary line was that of the current physical boundary (the green line). H appealed the decision arguing that the judge had failed properly to apply the conveyance plan to the dispute.

The Court of Appeal held that although the conveyance plan should be taken into account, the judge at first instance was entitled to draw the conclusion he did based on the evidence. Furthermore, the evidence indicated that the original developers had erected a fence along the green line in 1935 and, as A's predecessors had been in exclusive possession of the disputed land from 1935 onwards, they had acquired the disputed section of land by adverse possession in the 1950's.

The cases highlight the danger of over-reliance on title deeds and land registry plans in the resolution of boundary disputes. Historical evidence should be obtained at an early stage from a variety of sources; including maps, photographs and discussions with previous owners. Appropriate advice should then be sought from a specialist boundary surveyor before any claim is issued.

## **Dilapidations and valuation evidence.**

What price dilapidations? This question is at the heart of an upsurge in landlord and tenant claims currently before the Courts. In the current economic climate, landlords are increasingly opting to upgrade properties rather than embark on major redevelopment. Litigation over dilapidations has boomed as a result.

The test used by the Courts to assess how much a Landlord can claim is set out in the **Landlord and Tenant Act 1927 (the Act)**. Section 18 of the Act caps the amount the landlord can recover for breaches of the tenant's repairing obligations at the amount by which the value of the landlord's reversionary interest in the property has been diminished by the breaches.

There is a further aspect to this test; if by the date of the termination of the lease, a decision has been made to demolish or to undertake works which would render the repairs worthless, there will be no award of damages.

Much will depend on the valuation of the landlord's reversion at the expiry of the tenant's lease, as this is when the covenant to hand back the property in repair takes effect. The basis of the valuation is always the open market value of the property. The starting point for the valuer is to produce two valuations of the reversion; one in repair and one out of repair.

The difference in value between the premises in repair and out of repair provides evidence of the decrease in the value of the reversion. This is then compared with the cost of making good. If the cost of making good is less than the diminution in the value of the reversion, the landlord will be awarded the "making good" costs in full. But if the making good costs are greater than the diminution in value, then the landlord's damages are capped at the diminution.

In deciding the level of damages to award, the Court must consider whether it is reasonable in all the circumstances for the landlord to undertake the works. Courts will seek to avoid awarding "a gratuitous benefit" i.e. damages greater than the actual cost of making good the dilapidations.

When preparing schedules of dilapidations the parties need to bear in mind the Dilapidations Pre-Action Protocol which requires both parties' valuers to take full regard of the landlord's intentions for the property, the extent of work required to comply with the tenant covenants in the lease, and whether costs quoted for the works are reasonable. The protocol also sets out the steps which the parties need to take in the event of a dispute.

If one or more underleases have been granted of all or part of a property, the head tenant will need to check if there is any shortfall in the sub-tenant's repairing and reinstatement obligations and the obligations they must fulfil under the head lease.

The superior landlord should check if their immediate claim against the head tenant is supplemented by direct covenants in licences for works granted to the sub-tenant.

In all cases, landlords and tenants should consider the issue of dilapidations earlier rather than later, and in particular, a head tenant should consider taking action to protect their position if it appears the subtenant is failing to fulfil its repairing obligations. Otherwise when the underlease term ends, there may only be 2 or 3 days before the end of the headlease leaving the head tenant facing a full dilapidations claim.

As ever, forewarned is forearmed. Landlords and tenants facing a potential dilapidations battle should seek specialist legal advice at the outset. Landlords will need to produce detailed evidence of the cost of making good along with a formal section 18 valuation. Tenants will need to obtain and disclose a surveyor's valuation report. Litigation tactics and the choice of valuation experts will be of critical importance.

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## Competition Act - New Rules for Land Agreements

Chapter I of the **Competition Act 1998 (Competition Act)** prohibits agreements which may affect trade and restrict competition in the UK.

The **Competition Act** (Land Agreement Exclusion and Revocation) Order 2004 (Exclusion Order) currently operates to exclude Land Agreements (such as leases) from the prohibition in Chapter I of the **Competition Act**. In effect, by enacting the **Exclusion Order**, the UK Government recognised that most land agreements do not give rise to competition concerns.

The **Exclusion Order** will be revoked from 6th April 2011. From that date, companies will have to self-assess land agreements to ensure they comply with UK competition law requirements. In the case of leases, this will almost always be the responsibility of the tenant.

The revocation of the **Exclusion Order** will not necessarily mean that leases will automatically be in breach of the **Competition Act**. Companies will however need to carry out an assessment exercise prior to April 2011. It should also be borne in mind that the revocation of the **Exclusion Order** will be retrospective; existing as well as new agreements will need to be considered.

Each agreement or lease needs to be looked at individually in light of the facts and circumstances applicable; having regard in particular to the economic and commercial effect of the provisions contained in the agreement. It is probable that exclusivity provisions or letting restrictions will be of most

concern as a result it is suggested that thought be given to the following issues:

Is the lease provision in fact caught by the **Competition Act**? The lease provision in question (e.g. an exclusivity clause) will only infringe the **Competition Act** if it has an appreciable effect on the relevant market. To consider whether the **Competition Act** bites, it is necessary to consider the products concerned, and the relevant market.

Does the 'de minimis' rule apply? Agreements and leases where the parties' market share is below a 10% to 15% threshold, will be regarded as 'de minimis' and therefore outside the scope of the **Competition Act** altogether. Once again, each agreement will need to be looked at by reference to the relevant market in which it operates.

Do any exemptions apply? If it is concluded that the agreement is caught by the **Competition Act** it may still be exempt from the **Competition Act** prohibition if it can be argued that the provision in question contributes to improving the production or distribution of goods, while allowing consumers a fair share of the resulting benefit.

If an agreement is found to breach the prohibition in the **Competition Act**, it will be void and unenforceable. If the relevant clause of an agreement or lease can be 'severed' from the other provisions in the document, then only that clause will be unenforceable. The OFT will also have the power to impose sanctions. For example it might modify the agreement or lease in question, impose a fine, or (in the case of serious breaches) take proceedings for an injunction or damages.





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