K&L GATES

OVERRIDING INTEREST

Summer 2016

Highlighting developments and issues in the real estate industry

IN THIS ISSUE

KEY CONTACTS

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BREXIT AND THE REAL ESTATE SECTOR—IMPACTS

BACKGROUND

On Friday, 24 June 2016, the result of the EU referendum was announced, and the Country woke up to the news that the majority of UK voters had elected to leave the EU.

In this article we outline some of the issues that are impacting real estate businesses, and the steps that they could be considering. The "leave" vote has led to much political uncertainty, and whilst we may now have a new government, as at the time of writing it is still very unclear as to how the exit process will be managed. The Firm has a Brexit page on **K&L Gates Brexit HUB** which includes timely updates. General as well as sector specific developments can be accessed via the **K&L Gates HUB**.

The shape that Brexit will take, and its effect on the real estate market generally, is not certain, but there is scope for real estate businesses to be involved, through the BPF, or other lobbying trade bodies, or local MPs, in influencing the outcomes of the EU/UK negotiations, in relation to the real estate sector. Staying informed, beyond the doom-laden headlines, and considering market balanced views on which the real estate market commentators, in both the residential and commercial sector have commented upon, is useful.

FACTORS

Market commentators in the real estate sector have indicated that there is likely to be an initial fall in both commercial and residential property prices. Whilst this may be felt initially as a short-term effect, there is expected to be a potential longer downturn in construction work and developments particularly. Existing developments may see purchasers trying to "chip prices" and we have already referred in our previous **Brexit Bite** to parties negotiating pre-Brexit "get out clauses" which became effective, once the leave result was announced. It is expected that the number of planning applications submitted may reduce, and UK infrastructure planning in particular may be adversely affected as there will be a loss of EU infrastructure project funding at some stage. However it is not all doom and gloom as other economic forecasters have suggested that a weaker pound itself provides good opportunities for inward investment.

Here at K&L Gates we have recently recruited a dual-qualified Chinese lawyer, **William Wu**, whose remit is to act as a conduit and strategic advisor for overseas investors from Asia/China particularly. He has reported an increase in investor enquiries since the Brexit vote. The difficulty though is that assessing values in a post-Brexit era is difficult. Sectors which rely on the free movement of people, such as student housing, the tech/start up sector in London's "silicon valley", and even healthcare, will be impacted, but how and to what extent, is still too early for valuers to say. Rent reviews, and property valuations, rely on market comparables, and in a market that is still reeling from a leave vote those comparables are just not evident right now. The next two years will be a crucial time for the market generally as well as the real estate sector.

LEGAL FORMALITIES ON PURE REAL ESTATE TRANSACTIONS

Pure real estate transactions are governed by UK law and as such the legal formalities and requirements which affect how land is owned and registered, how it is held, either freehold or leasehold, and the conveyancing process, such as taking security over land and property taxes such as stamp duty land tax and non-domestic rates, are largely unaffected by Brexit. However, that is also a somewhat simplistic view, as the majority of the larger more corporate real estate deals contain elements which are a mix of disciplines including planning, public procurement, employment and, perhaps most significant, environmental regulation. We have written previously about the regulations governing the energy efficiency of buildings, and on the forthcoming restrictions on letting commercial and domestic private property that do not meet minimum energy efficiency standards. These requirements mean that both landlords and tenants and owners/occupiers will be bound by regulations that are largely driven by the EU. Going forward unravelling these regulations will be difficult, but for now, it is business as usual as these EU regulations continue to apply.

REAL ESTATE FINANCE

The market initially was very volatile, with the value of sterling fluctuating, impacting ultimately on the cost of borrowing. The cost of borrowing is clearly important to the investment market, but the market is also governed by the principles of both supply and demand. There is a definite lack of supply, particularly in the residential sector, so any short term volatility may ultimately be short-lived. There are also increasingly many sources of new funding, including insurers and fund managers, so there does remain scope for more opportunistic lenders to take advantage of the market pressures. Investors are hopeful that the markets will ultimately adjust to the new normal, but at the current time there does still seem to be a "wait and see" approach which is limiting certain investors from buying and selling, until there is perhaps more political as well as economic certainty.

GOVERNING LAW CLAUSES

Our previous **Brexit Bite** referred to governing law clauses. We feel that the choice of English governing law for UK real estate transactions should be unaffected by Brexit and the same is broadly true in relation to jurisdiction clauses and the enforceability of English judgments. Where contracts were completed pre the Brexit vote, these should remain in full force and effect and we cannot see how these would be impacted—unless they are subject to the Brexit "get-out clauses" mentioned above.

CONCLUSION

Much of the commentary for real estate transactions for the longer term is more optimistic than some of the initial headlines. It is important to retain some perspective and remember that the UK has always been an attractive venue for both local and overseas real estate investment. Whilst London has clearly benefitted more than some of the provincial towns/Cities, there are always opportunistic investors, or distressed opportunities, which can keep the market moving. The legal system in the UK is, and remains one of the most transparent in the world; our leases are investor friendly, our proximity to the rest of Europe still remains an attractive factor, as does our rule of law, and highly transparent investment markets. These are factors which should ultimately prevail, despite the current period of uncertainty.

BREXIT TASK FORCE

At K&L Gates we have established a task force along with a dedicated hotline and email to assist our clients in responding to the potential legal and business issues arising from Brexit.

Our team, includes partners from real estate, finance, litigation, corporate, intellectual property, policy and regulatory and employment law practice areas.

We have Brexit Bites which feature short insights, decision trees and analysis from our partners covering all of the critical areas.

K&L Gates Brexit Resources

HOTLINE

BREXIT TASK FORCE

BREXIT BITES

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Brexit—What's Next?

For more information on our Brexit series please visit the K&L Gates Brexit **HUB**.

You can also contact the firm with any questions by email at brexit@klgates.com

FORFEITURE: THE RIGHT OF RE-ENTRY

These are uncertain times for landlords. Faced with rent arrears or tenant breach, landlords may not only be left with arrears and dilapidations to deal with, but they may also face the issue of finding a suitable tenant who is willing to take on a new lease.

The key for landlords and agents is to look out for indicators that tenants may be struggling and be proactive from the outset.

Sometimes both parties can come to a mutually beneficial arrangement and leave the tenant some breathing space until it gets back on track. The most obvious example of this is a landlord agreeing to a side letter allowing payment of rent monthly to help a tenant with cashflow.

Often however, a tenant's problems may run deeper and the landlord needs to look to other options, such as:

Surrender: the parties could agree a surrender to the landlord for a premium. However, if the tenant is in financial difficulties it is likely that they will not be in a position to make a realistic premium offer. Surrender is also unlikely to address rent arrears and dilapidations liability that the landlord will most likely have to deal with.

Rent Deposits: the landlord may be able to use a rent deposit to offset unpaid rent or other arrears, e.g. service charge or insurance rent. The rent deposit could also be used to offset other losses, such as having to repair the property if the tenant has not done so. Drawing on the rent deposit can allow the landlord to maintain its income stream whilst seeking a new tenant or exploring other options with the existing tenant. Always remember that the terms of a rent deposit deed must be complied with.

Guarantors: if a guarantor covenant was provided, the landlord may be able to call on this. This includes not only traditional guarantees given by a director or an owner, but also in relation to former tenants, assuming the former tenant provided an AGA on assignment of the lease. Complex rules apply in relation to AGAs and, to avoid losing the right to recover from the former tenant, formal notice must be served within a certain timeframe to avoid losing this right.

Commercial Rent Arrears Recovery: this procedure allows a landlord in certain circumstances to instruct an enforcement agent to remove goods from the premises to recover monies due. Whether this is useful will depend on the nature of the tenant's business. Conditions must be met and notices served before action can be taken.

Assuming the landlord has explored these other options, or assuming the nature of the tenant's difficulties are sufficiently serious, the landlord may want to consider forfeiture.

SO, WHAT IS FORFEITURE?

"The right of re-entry" or "right to forfeit" is a landlord's unilateral right to bring the lease to an end in the event of certain breaches by the tenant. Crucially, if a lease is successfully forfeit, all interests created out of it will also come to an end, including those of any subtenants or mortgagees. Depending on the market, forfeiture can be an unappetising prospect for a landlord, but may be appropriate if the landlord can find a new tenant for the premises relatively quickly.

This note provides a summary of how the right arises, the procedure to be followed, what relief may be available to tenants, and what the landlord can do following forfeiture.

WHEN CAN A LANDLORD FORFEIT THE LEASE?

A lease may only be forfeit if it contains a forfeiture clause, setting out the circumstances in which the right can be exercised. This clause is generally standard in commercial leases, but it should always be checked as the details do vary. A standard clause allows the landlord to re-enter where the rent is not paid for a specified period (often 14 or 21 days), any tenant covenant is breached (sometimes this is specifically a material covenant), or the tenant becomes insolvent (this includes various stages and steps being taken towards insolvency or bankruptcy).

1. Forfeiture for non-payment of rent

To forfeit for non-payment of rent, the landlord does not need to give notice to the tenant prior to forfeiting the lease. If the requirements for the landlord's right to forfeit in the lease are satisfied, and the landlord has not waived the breach, the landlord can forfeit by either issuing court proceedings seeking possession (and arrears of rent) or by peaceably re-entering the premises.

The specific rules relating to non-payment of rent cover all sums reserved as rent under the lease. The wording of the lease should be checked carefully here - if other sums, such as service charge or insurance rent, are not reserved as rent, if they have not been paid this will be treated like any other breach of covenant.

Many modern leases also state that a formal demand for payment of rent is not required in order to forfeit, all that is required is that payment has become due. Again the lease must be checked carefully - where the unpaid sums are service charge or insurance rent, it is likely that the lease will require these to be demanded before they fall due.

2. Forfeiture for other breaches of covenant

Where the tenant has breached a covenant other than the covenant to pay rent, the landlord cannot forfeit

unless it has first served a notice under section 146 Law of Property Act 1925. The purpose of this notice is to give the tenant the opportunity to remedy the breach within a specified reasonable period of time (what is reasonable depends on the facts).

If the breach is not remedied within the reasonable time specified, assuming there has been no waiver, the landlord may forfeit by peaceable re-entry or by court proceedings.

WAIVER

It is very important for landlords and agents to note that when a breach of covenant occurs, the landlord must decide to either determine the lease or allow it to continue. If following the breach the landlord commits any act that recognises the continuation of the tenancy after becoming aware of the breach (this includes knowledge held by an employee or agent), the landlord will lose his right to forfeit. The landlord's intentions are immaterial. Examples of waivers include:

- Demanding or accepting rent or other sums (acceptance of rent by an agent amounts to waiver even if the agent has been instructed not to accept rent)
- Giving notice of intention to enter the premises to repair
- Sending in bailiffs
- Granting any type of licence under the terms of the lease (e.g. licence to assign)

FORFEITURE—COURT PROCEEDINGS OR PEACEABLE RE-ENTRY?

"Peaceable re-entry" is a self-help remedy not involving court proceedings. Peaceable re-entry should not be used if any part of the property is residential (as this constitutes a criminal offence). The actual re-entry must be without violence; most re-entries take place either in the night or early morning, as it is best to only re-enter when the

premises are unoccupied. If violence is used there may be criminal liability, and/or the tenant may challenge the validity of the forfeiture. Due to the pitfalls associated with peaceable re-entry, we always recommend clients to instruct experienced bailiffs.

Although peaceable re-entry is potentially quicker and cheaper than court proceedings, as touched upon above there is a high chance of complication. The tenant may challenge the validity of the forfeiture, or it may make a claim for relief from forfeiture, both of which cause delay and uncertainty. Court proceedings are usually a safer option.

COURT PROCEEDINGS

Where forfeiture occurs by the issue of court proceedings, the forfeiture takes effect on the date of service of proceedings; the subsequent order for possession made by the court has retrospective effect back to the date of service. Normally a court hearing follows within 7 to 12 weeks, depending on the court's schedule.

Because the lease officially ends on the date of service of proceedings, the tenant becomes a trespasser once the order for possession is made, and it owes the landlord damages at a daily rate from the date after the forfeiture takes place until it moves out.

RELIEF FROM FORFEITURE

It is important to remember that relief against forfeiture may be available to tenants. This is a procedure whereby the courts have discretion retrospectively to cancel forfeiture action taken by a landlord.

Where the landlord forfeits by the issue of proceedings, the tenant (and also any affected subtenant or mortgagee) may apply for relief from forfeiture. Relief from forfeiture for non-payment of rent will automatically be granted if the tenant pays all arrears (including damages for trespass mentioned previously) including any costs, not less than 5 days before the court hearing. If this is not done, the court may make an order for possession to take effect not less than 4 weeks from the date of the order, but the tenant still has the chance to pay all arrears and costs by that date. Additionally, if the tenant does not qualify for this automatic relief and the lease is forfeit, it may still apply for relief within 6 months of the landlord obtaining possession.

Where the landlord has forfeit by peaceable re-entry, the tenant must make an application to court for relief without undue delay: generally considered to be within 6 months. The court has discretion whether to grant relief, but usually does so where the tenant has remedied the breach in question. Relief may also be granted conditional on the tenant remedying the breach in a specific time.

If relief is granted it is as if the lease was not forfeit; any subleases are revived. Even once the lease is forfeit and possession has been obtained, the tenant has potentially far-reaching rights to apply for relief from forfeiture, which if granted could reinstate not only the lease but any other subleases.

WHAT'S NEXT?

The landlord will usually want to deal with the property as soon as possible after securing possession, i.e. re-let it or sell with vacant possession - however, the landlord may still have a number of issues to consider.

CAN THE LANDLORD RECOVER OUTSTANDING SUMS DUE FROM THE TENANT?

We know that the landlord needs to be careful when demanding sums due prior to forfeiting the lease (as this may constitute a waiver); the landlord does not lose his right to claim these amounts after forfeiting. All sums due at the date of forfeiture remain due unless the lease states otherwise, including damages, arrears and dilapidations.

The likely success of the landlord's claim depends on the financial position of the tenant. If the lease has been forfeit for non-payment of rent it is likely that the tenant is insolvent and will be unable to pay any further sums.

WHAT ABOUT THE TENANT'S POSSESSIONS?

When the landlord regains possession of the property it may still contain the tenant's possessions. Whether the landlord can dispose of these items depends on their nature. Items that the tenant brings onto a property may be a landlord's fixture, a tenant's fixture or a chattel. The general principle is:

"Landlord's fixture" - an item that would cause substantial damage to the premises if removed is a landlord's fixture; it cannot be removed by the tenant at the end of the term.

"Tenant's fixtures" - items that may be removed without causing substantial damage to either the property or the item. Once the lease is forfeit the tenant's fixtures become part of the property and therefore become landlord's fixtures. The tenant loses its right to remove them. Please bear in mind that if the tenant is granted relief from forfeiture these tenant's fixtures revert back to the tenant for the remainder of the term.

"Chattels" - items not affixed or affixed very loosely to the land. These belong to the tenant even once the lease comes to an end, and the tenant should always be given an opportunity to collect them. The landlord has certain obligations towards these items, including not to deliberately or recklessly damage or destroy them. Leases often contain express wording about these items - this wording should be adhered to.

CAN THE LANDLORD RE-LET OR SELL THE PROPERTY IMMEDIATELY?

A landlord may have a new tenant lined up ready to take a lease or he may be hoping to sell it with vacant possession, but if a tenant is granted relief the lease will be reinstated - does this mean the landlord must wait 6 months before he can deal with the property?

If the landlord grants a new lease to a different tenant and relief from forfeiture is granted to the original tenant, the original lease is reinstated and the previous tenant is entitled to possession of the property. The new tenant's interests are then subject to the original lease. There is a risk that the new tenant has a damages claim against the landlord if it was unaware of the risk that relief from forfeiture may be granted. The new tenant will no longer have a right to occupy the property, although it will have the right to receive rent from the original tenant. Where the landlord sells his interest in the property, the new freehold owner will become the landlord of the reinstated lease and may have a damages claim against the landlord seller.

There are several things that landlords and agents can do to minimise the risk. The landlord should given written notice to the tenant (and others with a right to reply) that he intends to grant a new lease or sell the property and ask that the tenant applies for relief from forfeiture immediately if it intends to do so. This doesn't prevent the tenant from applying for relief subsequently, but it is a point potentially in the landlord's favour when the court exercises its discretion as to whether to grant relief. The landlord should be completely open with prospective tenants and purchasers of the freehold. The new tenant/buyer should be alerted to the fact that the tenant has a right to apply for relief from forfeiture, and it should be made clear that the new tenant/buyer may take subject to any such interest. Possible ways of getting round this could be to enter into an agreement for lease or agreement for sale conditional on relief not having been granted by a certain date, or to grant a lease with a tenant break if relief is obtained.

TO CONCLUDE:

A landlord has a number of options available to it when faced with a tenant in difficulty.

It is important for landlord and agents to look out for warning signs to maximise their chances of acting in time to take advantage of all the available options. For example, some forms of insolvency give the tenant extra protection; landlords will want to intervene before e.g. an administrator is appointed.

Even if a landlord exercises its right to forfeit, there is still a period of potential uncertainty during which the tenant has far reaching rights to claim relief from forfeiture.

A negotiated exit is nearly always the best option for the landlord.

AUTHOR

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NEW JOINERS

William Wu

London

William Wu is an associate in the firm's London office, where he is a member of the real estate practice group. William is very experienced in acting for Chinese clients and has advised on matters for major Chinese funds and commercial banks on their real estate investments.

Mayank Gupta

London

Mayank Gupta is a partner in the firm's London office. He focuses his practice in advising financial institutions and multinational companies on a variety of financing transactions, including leverage finance, corporate finance and sovereign lending.

Christopher Wille

Brisbane

Christopher Wille is a partner in the firm's Brisbane office and a leading Queensland real estate lawyer. He has experience in all aspects of commercial, retail and residential property including due diligence, acquisitions, disposals, development and leasing.

Brian Healey

Brisbane

Brian Healey is a partner in the firm's Brisbane office and has more than 20 years' experience dedicated almost exclusively to servicing clients in agribusiness and primary industries. Focusing primarily on agricultural property, water rights and investment in agribusiness, he has advised on some of Australia's most prominent rural transactions.

Piotr Łaska

Warsaw

Piotr Łaska is of counsel in the firm's Warsaw office. He focuses his practice on all aspects of commercial real estate matters.

Joon Kim

Seattle

Joon Kim is an associate in the firm's Seattle office. He focuses his practice on real estate matters. He has particular experience with leasing, financing, corporate, and development matters.

EVENTS

AFIRE (Association of Foreign Investors in Real Estate) Conference, Hamburg

On 15-16th June 2016, German real estate partners, Georg Foerstner and Rainer Schmitt, attended the AFIRE conference in Hamburg. AFIRE represents the "who's who" in the global real estate investment industry and provides a platform for top investors to communicate through global meetings in the US, Europe, and key cities around the world.

For more information please contact Georg Foerstner *(georg.foerstner@klgates.com)*

'Workplace strategy and how it relates to design, talented workforce, technology and wellbeing' Event, London

On 7th July 2016, Chiara del Frate took part in a Property Week think tank event entitled 'Workplace strategy and how it relates to design, talented workforce, technology and wellbeing'. The event was held at Capita's city offices.

Chiara joined 4 other VIP guests including David Parsley (Property Week's contributing editor) who chaired the event. Topics discussed, included, health & wellbeing, bespoke nature of the office – changing layout and scope, expectations from the modern employee, how high on the agenda is the suitability of the office/workplace in corporate occupier minds? and what will the future office look like?

For more information please contact Chiara del Frate *(chiara.delfrate@klgates.com).*

Cities Convention: City Regeneration, London

On 24th June 2016, we sponsored and hosted a BRE event at our London office, Cities Convention: City Regeneration, an all day conference that explored what brownfield land development means for planning authorities and developers. It examined issues around the financial viability and environmental risk of developments, as well as the effective use of data and mapping. Rebecca Daniels (who spoke at the event) and Steven Cox attended from our London Real Estate and Planning Team.

To view a video of the event, **click here**. For more information please contact Steven Cox *(steven.cox@klgates.com).*

Property Race Day

On 8th July 2016, the London real estate and finance team attended the Property Race Day at Ascot Racecourse. The Property Race Day is in its tenth year and has established itself as a key date in the property calendar. The principal aim is to fund-raise for selected charities and also it offers a perfect opportunity for networking within the sector whilst enjoying a day at one of the finest racecourses in the world.

For more information please contact Chris Major *(christian.major@klgates.com)*

ANNOUNCEMENTS

SYDNEY PARTNER SANDRA STEELE NAMED LAWYERS WEEKLY CONSTRUCTION AND INFRASTRUCTURE PARTNER OF THE YEAR

Sydney Partner Sandra Steele was recently named as Construction and Infrastructure Partner of the Year at the inaugural 2016 Lawyers Weekly Partner of the Year Awards. Sandra has more than 20 years' experience advising on contentious and non-contentious construction law matters. She has extensive experience in contract drafting and negotiation as well as litigation and alternative dispute resolution in the project management, construction, engineering and infrastructure project sectors. Sandra's civic activities include serving as the National President for the National Association of Women in Construction, a member of the Australian Legislation Reform Committee for the Society of Construction Law, the Law Society of New South Wales, and the Resolution Institute and is on the editorial panel of the Australian Construction Bulletin.

Please join us in congratulating Sandra on this well-deserved accolade!

The Lawyers Weekly Partner of the Year Awards recognise outstanding performance by partners in law firms across 21 practice area-based categories. The finalists represent the leading partners in their field and were selected by Lawyers Weekly from an overwhelming number of nominations. Twenty-two high-profile judges took on the task of choosing the winners.

K&L GATES OPENS MUNICH OFFICE

We are expanding our European presence with the opening of a Munich office, the firm's third office in Germany (along with Berlin and Frankfurt) and 46th worldwide, with the hire of investment management partner Dr. Hilger von Livonius. Dr. von Livonius is accompanied by two other professionals—Dr. Philipp Riedl and Michael Harris—in his move to K&L Gates from King & Wood Mallesons. K&L Gates' Munich office is expected to continue to grow in the coming months.

With approximately 20 years of experience, Dr. von Livonius concentrates his practice in the areas of banking, capital markets, asset management, and regulatory matters with a particular focus on investment funds and structured products. His practice includes advising financial institutions on the issuance of financial products and institutional investors on real estate and alternative investments.

SAVE THE DATE
Real Estate Breakfast Seminar London

Global Real Estate Trends, Brexit and Opportunities for 2016/2017

TUESDAY 20 SEPTEMBER 2016
08:00AM - 10:00AM

This seminar will include an analysis by Sabina Kalyan, Global Chief Economist at CBRE Global Investors, followed by a panel discussion covering:

- a review of lending decisions post-Brexit
- the real estate market perspective from Europe
- the U.S. real estate landscape and opportunities

PANELLISTS/SPEAKERS:

- **Steven Cox** (Chair), Of Counsel, K&L Gates, London
- **Sabina Kalyan**, Global Chief Economist and Head of EMEA Strategy & Market, CBRE / Global Investors
- **James Bretten**, Portfolio Controls, Commercial Real Estate Credit, RBS
- **Matt Norton**, Co-Practice Area Leader, Real Estate, K&L Gates, U.S.
- **Rainer Schmitt**, Partner, K&L Gates, Frankfurt

PROGRAMME:

8:00am - Registration and breakfast

8:30am - Seminar commences

10:00am - Seminar concludes followed by coffee/ networking

LOCATION:

K&L Gates
One New Change
London EC4M 9AF
(Watling Street entrance)

RSVP:

To register for this event or if you require further information, please email Robyn Duffy (eventslo@klgates.com) or call +44.(0)207.360.8248.

CASES

ASSIGNMENTS AND GUARANTEES

HMV was granted a lease of retail premises, which constituted a "new tenancy" under the Landlord and Tenant (Covenants) Act 1995 (the "Act"). EMI agreed to guarantee HMV's performance of its covenants under the lease. Subsequently, HMV went into administration and the landlord, HMV and EMI consented for the lease to be assigned from HMV to EMI. Following assignment, EMI contended that the covenants in the lease were unenforceable against it. The landlord disputed this and argued in the alternative that, if the covenants were not enforceable, the assignment was void. The Court held that, irrespective of any commercial benefit, a tenant could not assign a new tenancy to its guarantor because any such assignment would fall foul of the anti-avoidance provisions in the Act. Consequently, the assignment was void and the parties were returned to the original position before the assignment, leaving EMI liable as guarantor for the covenants of HMV.

Comment: In the wake of this decision and that in K/S Victoria Street v House of Fraser (Stores Management) Limited, the Property Litigation Association is consulting on proposals to reform the law on this subject.

EMI Group Ltd-v-O & H Q1 Ltd, ChD

EASEMENTS BY PRESCRIPTION

The owners of a fish and chip shop and their customers had regularly parked vehicles on a nearby car park historically owned by the Conservative Club Association and, from 2010, by Mr and Mrs Bennett. This use was in spite of a clearly visible sign in the car park until 2007 stating that use was reserved for patrons of the Conservative Club Association. When access to the car park was blocked, the shop owners claimed that a right to park vehicles on the car park had arisen by prescription. The question was whether use of the car park had been "without force". Due to the presence of the sign, the Court held that use was not without force. The Court stated that without force simply means being able to show that use was not contentious; physical or legal steps preventing use need not be taken.

Comment: The Court took a common sense approach in acknowledging that many people do not have the means to bring legal action preventing use, nor will they wish to be confrontational.

Winterburn-v-Bennett, CA

QUIET ENJOYMENT

The lease of a basement and first floor art gallery reserved the right of the landlord to alter or rebuild the building even if the tenant's use or enjoyment of the

premises was materially affected. The lease also expressly reserved the right of the tenant to quiet enjoyment of the premises. The landlord later commenced substantial works on the interior of the building from the first floor upwards. The tenant complained that such works were unreasonable. The Court held that the right to carry out the works was subject to the condition that the landlord takes all reasonable steps to minimise disturbance to the tenant taking into account a number of factors including whether the works were for the benefit of all tenants within the building and any financial compensation offered to the tenant for the disturbance. In this case, the Court found the landlord to have been acting unreasonably.

Comment: A landlord's right to carry out works will not override a tenant's express or implied right to quiet enjoyment.

Timothy Taylor Ltd-v-Mayfair House Corporation and another, ChD

VARIATION CLAUSES

The licensee of premises was unable to meet the monthly licence fees payable under a licence agreement. Consequently, the licensor exercised its right to lock the licensee out of the premises before claiming the arrears of licence fees. Notwithstanding an express provision in the licence agreement stating that any variation had to be signed and in writing, the licensee argued that the parties had reached an oral agreement to vary the licence fee payments and that it had therefore been unlawfully excluded from the premises. The Court determined that any clause requiring variations to be signed and in writing did not prevent a valid oral variation being made.

Comment: The Court was conscious that no self-imposed limitation should prevent two parties from freely contracting again.

MWB Business Exchange Centres Ltd-v-Rock Advertising Ltd, CA

CONTRACT EXECUTION

A contract for the sale of a property named a husband and wife as joint purchasers. However, only the husband signed the contract. He had no authority from his wife to sign the contract on her behalf nor had she ratified the contract. After payment of a reservation deposit and a further deposit of 25%, the balance payment could not be raised. The husband, therefore, rescinded the contract and forfeited the deposit. Importantly, the contract contained a clause stating that the obligations on the purchasers were joint and several. As a result, the Court determined that, whilst the wife was not bound by the contract, there was no reason why the contract should not be binding on the husband alone.

Comment: The Court acknowledged that the contract may not have been binding had the husband signed on the understanding that he would only be liable should his wife also be contractually bound.

Marlbray Ltd-v-Laditi and another, CA

MORTGAGE TERMS

A mortgage contract incorporated terms from a mortgage offer letter as well as the lender's standard terms and conditions. The offer letter stipulated that it would prevail over the conditions in the event of any inconsistency. The offer letter provided for a fixed rate mortgage for 25 years, which would subsequently track the Bank of England Base Rate. The conditions, however, stated that the lender could vary the interest rate and recall the loan on one months' notice. The borrower argued that these conditions were inconsistent with the offer letter and therefore did not form part of the contract. The Court agreed, holding that the offer letter and the conditions could not "fairly and reasonably" be read together. As a result, the inconsistency clause was triggered, the offer letter prevailed and the inconsistent conditions were not incorporated into the contract.

Comment: The Court said that, in the event of an inconsistency clause, one should not strive to avoid or to find inconsistency, but should instead approach the documents objectively.

Alexander-v-West Bromwich Mortgage Company Ltd, CA

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K&L Gates comprises approximately 2,000 lawyers globally who practice in fully integrated offices located on five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit klgates.com.