

Practical And Professional Commercial Property Comment
From The Culshaw Partnership

Issue 36

Summer 2014

CP

THE CULSHAW
PARTNERSHIP

Contents

Costs of Holding
Over.

Page 1

Rent Reviews -
Evidence & Events.

Break Clauses.

Page 2

Business Rates
Administration.

How We Can Help.

Page 3

Business Rates
(cont).

Break Clauses
(cont).

C.P. Re-Branding.

Contact Details.

Page 4

Beware The Costs Of Holding Over

A tenant with the security of tenure protection of the Landlord and Tenant Act 1954 (the "1954 Act") has a number of decisions to make in advance of the end of its lease. If it decides that it wants to stay in its premises, a tenant will have to consider what action to take prior to the expiry of the lease if the landlord does not approach the tenant offering a new tenancy or serve a formal termination notice under section 25 of the 1954 Act. Does the tenant wish to formally or informally request a new lease, or would it prefer to simply continue business occupation beyond the contractual expiry date? If neither party takes any action to terminate the tenancy it will continue under section 24 of the 1954 Act. There are attractions to this. The tenancy will continue at the passing rent payable at the end of the original lease, unless the lease provides for a rent review at this time. If the property is under-rented it may suit the tenant to continue paying the lower sum. The landlord may subsequently apply for an interim rent to be fixed to cover this "holding over" period.

Sometimes the biggest attraction of holding over is flexibility. The tenant can terminate its tenancy on

three months' notice under section 27(2) of the 1954 Act.

SDLT liability

An additional downside to holding over has caught a few tenants by surprise recently. Allowing matters to drift may give rise to additional SDLT liabilities if the original lease was subject to SDLT. This will be the case for most leases entered into on or

after 1 December 2003 but, because many commercial leases in 2003/04 were granted for 10 years or more, the impact of this has only recently been felt.

Under the stamp duty regime no action was required if a lease held over.

That remains the case in relation to leases granted before 1 December 2003. Although the lease is treated as being extended by HMRC, there is no further stamp duty, or any SDLT, to pay, although there may be if the lease is otherwise varied. If a lease that was subject to SDLT is held over for even one day following the expiry of the contractual term the original lease is deemed extended for one year for SDLT purposes. The tenant may have additional tax to pay. If the tenant is still holding over at the end of the first year the term is deemed to have been extended by another year, and so on. If the tenancy does not

automatically continue beyond its contractual term, because it was contracted out of the 1954 Act or the tenant lost its right to renew, the tenant will be trespassing if it remains in occupation. The landlord may allow the tenant to stay while a new tenancy is negotiated under a tenancy at will or contractual licence. None of those circumstances give rise to liability for additional SDLT. However, if the actions of the parties create a new implied tenancy that will have SDLT implications.

Estates Gazette - 24th May 2014

C.P. Comment :

Tenants like to hold over because this in effect grants them a rolling 3 month option to break and there is usually no provision for a rent review to take place so the tenant remains at the passing rent which could be 5 years old. When the letting market is depressed landlords tend to support holding over as it avoids a costly void period while marketing, although once a tenant has been found the landlord may find the process involved to either gain possession or to force their tenant to take a new lease too time consuming for many prospective tenants.

Rent Reviews - Evidence and Events

Things are looking up. Rents are rising in nearly all areas of central London and lease consultants are calling themselves rent review surveyors again.

In the past, at this stage in the cycle when rents are rising, there were debates as to what evidence could be taken into account and how much weight should be placed on it. Similar arguments are emerging now, as surveyors compete to do the best they can for their clients. *Sumner v Costa Ltd [2014] EWHC 96 (Ch); [2014] PLSCS 55* focused on whether a comparable letting, which occurred seven months after the review date, should be taken into consideration. *Sumner* questioned whether the arbitrator had given the parties an opportunity to comment on whether post-review date evidence should be taken into account and, if he hadn't, whether the award should be remitted as a result. As is nearly always the case, the court held that it should not interfere.

Lettings and rent reviews

Open-market lettings and rent review agreements that take place before or after the review date are both admissible. It is well known that pre-review date agreements are the foundation of the comparable valuation method, as they show what an actual landlord and tenant were willing to agree for comparable premises. In relation to post-review date agreements,

the position remains as set out by Staughton J (as he was then) in *Segama NV v Penny Le Roy Ltd [1984] 1 EGLR 109*:

"If rent of comparable premises had been agreed on the day after the relevant date, I cannot see that such an agreement would be of no relevance whatever to what the market rent was at the relevant date itself."

This point remains of great importance as it affirms the power of an arbitrator or expert to determine the relevance and importance of rents agreed post-review date in the making of his award or determination.

A separate issue arises as to what weight that evidence should be given, bearing in mind the lapse of time from the review date and the effect of any post-review date events on the particular agreement.

Awards and determinations

The leading case on the admissibility of arbitration awards remains *Land Securities plc v Westminster City Council [1992] 2 EGLR 15*, in which Hoffman J (as he then was) held that:

"An arbitration award ... is an arbitrator's opinion It is therefore not direct evidence of what was happening in the market. It is the arbitrator's opinion of what would have happened."

He concluded that the award was inadmissible. The decision has been said to apply to both pre-and post-review date arbitration awards and expert determinations. However, pre-review date awards or determinations may still be

admissible due to the effect they have on the market. This so-called "secondary effect" (as referred to in *The Handbook of Rent Review*, Guy Featherstonehaugh QC and Kirk Reynolds QC, Sweet & Maxwell) exists where the award or determination is known in the market and it is thought to affect the thinking of a hypothetical landlord and tenant on the review date. Hoffman J held that post-review date awards or determinations are not thought to have the same effect since they were not in existence at the review date.

Events

Events which take place after the review date are inadmissible because they cannot have been in the minds of the hypothetical parties at least grant. Conversely, if occurring before the review date, they can be taken into account.

Estates Gazette - 31st May 2014

C.P. Comment:

Rent Reviews are a complex area and require expert advice.

Landlords will be happy that there is some rental growth to support rental increases. If there is, then Rent Review surveyors on both sides of the fence will be grateful for the activity.

Justin Fowler

Break Clauses

Lord Justice Lewison advised tenants only recently that: "If you want to avoid expensive litigation, and the possible loss of a valuable right to break, you must pay close attention to all the requirements of the clause .. And follow them precisely."

The dangers of conditional break clauses have been clearly exposed

in recent years. The general rule is that the tenant must pay a full quarter's rent up front on the rent payment day before the break date, even though the tenant's lease will end midway through the following quarter. This is because rent payable in advance is not apportionable at common law, or under the Apportionment Act 1870. In addition, if the break

right is subject to conditions that have yet to be satisfied, the parties cannot be certain whether the lease will continue or terminate.

Careful consideration of the provisions of break clauses and of the requirements for service of the notice is required. Where a lease stipulates the form of break notice

(Continued on page 4)

Business Rates Administration

In the Autumn Statement last year the chancellor promised a review setting out “options for longer term reform to business rates administration which maintain the aggregate tax yield.”

The devil is in the detail....

The paper seeks views on: how and how often property is valued; how rates bills are set; how business rates are collected (including back-dating); and how information about ratepayers and business rates is used.

The questions about how property is valued set out possible alternatives to the current system of an individual valuation for each property. The paper looks at banding values; applying a system of geographical zones of value for different uses; indexing values; and carrying out rolling revaluations - which would involve valuation of either classes of property or geographical areas separately from one another. These rather blunt processes carry with them elements of “rough justice” when compared with the present system of individual property values. While ratepayers might be prepared to accept a broad-brush approach to valuations if the tax rate is relatively low, it seems unlikely that, with the uniform business rate now close

to 50p (ie 50% of rateable value), ratepayers would accept such crude valuation approaches.

The question on how often property is valued canvasses views on annual, two-yearly, or three-yearly revaluations instead of the normal five-year revaluation cycle.

This will no doubt re-ignite the debate about the government’s postponement of the 2015 revaluation until 2017. However, the paper makes clear that any changes will only come after 2017. Other countries revalue for local property taxes more frequently than the UK. However, their tax rates are generally lower meaning that volatility between revaluations is less important. It will be interesting to see if ratepayers are prepared to support more frequent revaluations.

There is a series of questions focusing on how rates bills are set. These look at the application of rates reliefs and how clearly these are explained to ratepayers and set out on rates bills. The terms of reference for the review make it clear that it will not look at what reliefs are granted or the amount of those reliefs; it is simply interested in how clearly these are explained and understood. This is an opportunity missed as the system suffers from a complex plethora of supplements, reliefs and exemptions

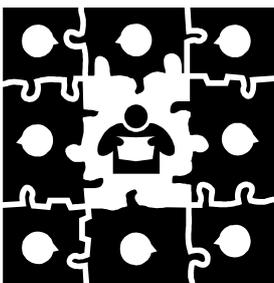
which are inconsistently applied and are not clearly understood by ratepayers. One of the principles set out in the paper is that the review should make business rates “simpler to understand and easier to comply with”. However, if the present mess of supplements, reliefs and exemptions is outside the scope of the review, it is difficult to see how any significant improvements will result.

...but does it go far enough

The review looks at some important areas that can certainly be improved on. However, its terms of reference mean that it ignores two significant matters. First, at close to 50% business rates are currently the highest level of corporate tax in the UK and local property taxes are a significantly heavier burden than in other EU countries. Secondly, for most of business rates’ long history the UK economy has been firmly based in real property - which is what is taxed by business rates. However, over recent years, the growth of e-commerce has meant that real property represents a declining proportion of overall economic activity. Despite this, the structure of business rates means that the yield from the tax increases year-

(Continued on page 4)

How We Can Help You



The Culshaw Partnership
one company for all your
property needs

Property Management

Rent Reviews/Lease Renewals

Investments ~ Sales & Lettings

Dilapidations ~ Rating

Planning ~ Survey & Valuation

Landlord & Tenant Disputes

The services we offer are listed here please contact us to see if we can be of assistance with any property issues you may have. See page 4 for all our contact details .

Business Rates Administration (continued)

(Continued from page 3)

on-year in money terms and, between revaluations, remains the same in real terms. At some point this structural problem with the tax will require review in order to set the rate at a level that represents the significance of real property to the overall UK

economy. The current review is not it.

Estates Gazette - 31st May 2014

C. P. Comment :

It seems that there is little appetite to grasp the real issues at play here. These being the overall

level of the Business Rates Tax, the complexity of the system and the increased volume of business generated in the 'virtual' world that avoids this tax altogether.

Justin Fowler

Break Clauses - Continued

(Continued from page 2)

to be given, failure to comply with those requirements - however trivial - will mean that the notice is invalid even if the intention of the notice is clear.

Conditions to the operation of a break clause must be strictly complied with. So if it is a precondition to the operation of the break clause that there are no arrears of rent, the tenant will need to consider the definition of "rent" in the lease - it often

includes not only annual rent, but also service charges, insurance, VAT and possible any interest on payments for which they may be liable.

Estates Gazette - 31st May 2014

C.P. Comment :

From a landlords point of view it is always beneficial for a tenant's option to fail - the lease and its obligations continue and there is no need to market. Even if the

landlord is desirous of regaining possession in the event the break is invalid he will be in a strong position to negotiate a surrender on his own terms. Always send out the usual quarterly demands, never prompt the tenant during the final quarter if they pay part only or haven't remitted the full service charge or insurance premium. In short allow a care-less tenant to invalidate the break.

John Tookey

C.P. RE-BRANDING

Those of you who are still awake will probably (hopefully) have noticed a change to our branding with our new logo.

The Culshaw Partnership, or CP to our chums, has gone sleek, monochrome and minimalist in an attempt to persuade clients and the public alike that ours is a business for the 21st century. Not before time I hear you say. Amen to that.



Contact :

Partners: John Tookey or Justin Fowler

**The Culshaw Partnership
29 High Street East
Uppingham
Rutland
LE15 9PY**

Tel : 01572 822791

Fax : 01572 821653

**E-mail : john@cpship.co.uk
justin@cpship.co.uk**

Website : www.cpship.co.uk