SLAUGHTER AND MAY

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Commercial Real Estate

Legal and regulatory developments in commercial property

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Commercial

COMMON PEOPLE

Landowner had prevented 20 years' user "as of right"

Betterment Properties (Weymouth) Ltd v Dorset County Council and others: Lawtel 23rd November 2010

The applicant landowner had applied to cancel the registration of its land as a town or village green under the Commons Registration Act 1965. The land was surrounded by built-up areas and was crossed by two footpaths. Local residents had used the land for recreational purposes for a number of years. Based on this use, an application had been made to register the land as a town or village green in 1997 and registration was made in 2001. Under the Act, land could be registered as a town or village green if 20 years' user "as of right" could be shown.

The land in question had been let to farmers for grazing until 1980. Thereafter, members of the public had started to gain access to the land through holes in the fences and by straying from the footpaths. The then owner had not been happy with this and had put up numerous signs informing the public that the land was private to prevent such use. However, the public continued to gain access and, in 1984, the then owner effectively gave up trying to prevent it. The issue was whether the use by the public had been "as of right" for the requisite period. The test in *Smith v Brudenell-Bruce* was whether the owner had been doing everything, consistent with his means and proportionate to the user, to contest and interrupt the public's use. Until 1984, a reasonable person using the land would have appreciated that the owner objected to such use and was trying as far as possible to prevent the use from occurring by erecting signs, fencing and other physical obstructions. Accordingly, the user did not extend to a period of 20 years' user "as of right" and the register should be rectified by removing the registration. The landowner had taken sufficient steps proportionate to the use of the land and could not be taken to have acquiesced in the user just because he did not issue legal proceedings.

IT'S NOT FAIR

Guidance on the application of competition law to property

The Office of Fair Trading has provided draft guidance on the application of competition law to land agreements as a result of the repeal of the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004. With effect from 6th April 2011, land agreements will become subject to Chapter 1 of the Competition Act 1998 in relation to the prevention, restriction or distortion of competition. Note that the removal of the Chapter 1 exemption is retrospective and will apply to land agreements entered into before that date. The draft guidance is available from the Land Agreements Guidance consultation page at the OFT website.

The draft guidance is intended to help companies to understand whether any of their land agreements are anti-competitive. A land agreement, for these purposes, is an agreement that creates, alters, transfers or terminates an interest in land and includes transfers of freehold and leasehold land, the grant of leases, easements and licences. The Chapter 1 prohibition only applies to land agreements entered into between businesses and does not apply to individuals unless they are acting as a business. Despite the removal of the exclusion order, most land agreements that contain restrictive covenants relating to the use of the property will be for legitimate reasons in connection with the ownership of the respective property interests and will not amount to an infringement of competition law. However, if a provision is aimed at sharing markets or making it harder for a company to compete effectively in a market, consideration needs to be given whether the agreement is anti-competitive. To be anti-competitive, the relevant agreement must have the aim or effect of preventing, restricting or distorting competition. In addition, the actual or potential impact on competition must be appreciable. An agreement that is a horizontal agreement between competing businesses will not generally appreciably affect competition unless the aggregate market share of the parties exceeds 10%, or, if the agreement is not between competing businesses, the market share of each of the parties exceeds 15%. If an agreement is in breach of Chapter 1 it will be unenforceable and the relevant party may be subject to enforcement action including the payment of a significant fine. An agreement may qualify for exemption if it satisfies a number of criteria, for example if the agreement contributes to improving production or distribution and allows consumers a fair share of any such benefits achieved. Chapter 2 relates to the abuse of a dominant market position and continues to apply to land agreements. The guidance contains some examples of land agreements and the potential impact of the Competition Act together with a self-assessment flow chart to help determine whether a particular agreement may be susceptible to challenge.

Landlord and Tenant

THREE STEPS TO HEAVEN

Intra-group assignment was subject to conditions

K/S Victoria Street Limited v House of Fraser (Stores Management) Limited (1) House of Fraser (Stores) Limited and House of Fraser Limited (2): [2010] EWHC 3344

This decision relates to another preliminary issue arising in connection with the alienation provisions of a lease of House of Fraser's Wolverhampton store. In an earlier preliminary hearing, it had been decided that *Good Harvest* was good law and that a requirement for an existing guarantor to guarantee the obligations of an assignee was void and should be severed from the remainder of the provisions. The latest hearing considered whether the landlord's claim for specific performance of an obligation on the tenant to assign to a stronger covenant within the same group was effectively rendered futile by a clause in the lease relating to intra-group assignments. The lease in question had been granted as a part of a sale and leaseback transaction. The leaseback was granted to House of Fraser (Stores Management) with House of Fraser plc (now Limited) acting as guarantor. The agreement for lease provided that Stores Management, which was a dormant company,

would assign the lease to another House of Fraser company of a certain standing or, if this had not happened by 6th April 2006, to House of Fraser (Stores). In each case, the parent company would provide a guarantee of the assignee's liability under the lease. The lease contained a number of restrictions on alienation including an obligation to obtain the landlord's consent and to provide such sureties as the landlord reasonably required. There was also a net profits test for the assignee and the tenant was required to enter into an AGA. A further clause provided that, notwithstanding the provisions of the alienation clause, where the tenant was a House of Fraser group company consent was not required for an assignment to another group company provided House of Fraser Plc acted as surety. The assignment from Stores Management to Stores or another group company did not take place and the landlord sought specific performance of the obligation. House of Fraser raised a number of defences including one of futility. It contended that even if the lease was assigned to Stores, the group company provision allowed Stores to assign it back again immediately.

The judge considered whether the proposed reassignment back to Stores Management was lawful. The judge ruled that any such assignment would not be in compliance with the provisions of the alienation clause relating to the financial standing of Stores Management or the provision of a guarantor. Notwithstanding the provision allowing an intra-group assignment without consent, the remaining conditions to an assignment still applied. Accordingly, even in the case of an intra-group assignment that did not require the landlord's consent, the remaining hurdles to a lawful assignment remained. The judge felt that the word "consent" simply meant "consent" and did not include all the preceding restrictions on assignment. The purpose of the sale and leaseback was to ensure that the lease ended up in a House of Fraser Company with a sound financial covenant and the obligation for Stores Management to assign to such a company would be defeated if a reassignment were to be freely possible. This was the case notwithstanding the fact that the lack of a need for consent rendered the requirement for an AGA inoperable because an AGA can only be required as a condition of giving consent. The judge concluded that House of Fraser's threatened reassignment of the lease back to Stores Management would amount to a breach of the lease. House of Fraser has appealed this decision and the Landlord has appealed the earlier ruling on the *Good Harvest* point.

TAKE ME I'M YOURS

Court rules on time limit for compliance with tenancy deposit scheme

Vision Enterprises Ltd v Tiensia and Honeysuckle Properties v Fletcher: [2010] 46 EG 117 (CS)

Under the Housing Act 2004, a landlord of an assured shorthold tenancy must protect any deposit received from the tenant in an authorised tenancy deposit scheme. The landlord must also provide the tenant with certain information in relation to the scheme. The landlord is required to comply with its obligations within a 14-day period. The Court of Appeal considered two cases where the landlord had failed in each case to comply with the initial requirements within the 14-day period. The issue was whether compliance by the date of the hearing meant that the landlords were not subject to the sanctions prescribed by the Act. These include the payment to the tenant of a sum representing three times the deposit. In both cases, the landlord was seeking to recover arrears of rent and the tenant had counterclaimed for payment of three times his deposit.

In each case, the landlord had taken steps to protect the deposit and produce the required information before the date of the hearing. The tenants argued that the sanctions continued to apply because the requirements had not been complied with within the 14-day period. The Court of Appeal held that the important issue was whether the landlord had complied with the "initial requirements" and not whether it had complied with them in the 14-day period. Accordingly, provided that a landlord complies with the requirements before the date of the hearing, it will have satisfied its obligations under the Act.

Planning and Environment

I'M THE URBAN SPACEMAN

Regional planning policy and the CALA Homes saga

The Localism Bill was published by the Department of Communities and Local Government on 13 December 2010. In line with the Prime Minister's drive for a "Big Society", the Bill seeks to increase the powers of local authorities and communities. Key changes will be introduced by the Bill including delegation of new powers to local authorities and the introduction of a general power of competence, the creation of new rights for local people and communities, the return of decision-making powers on housing to councils, the creation of incentives for economic growth by giving councils stronger financial powers, the removal of Regional Spatial Strategies (RSSs) and the abolition of the newly created Infrastructure Planning Commission. Reaction to the Bill has been focused on the increased involvement of local communities. Concerns relate to the extent to which communities will have the requisite resources to participate effectively and there is a risk that a postcode lottery will be created.

The publication of the Bill follows the High Court decision in *R (on the application of Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government* where it was held that the Government's decision to unilaterally revoke Regional Spatial Strategies was unlawful. A number of developers were unhappy with the decision because the RSSs imposed ambitious housing strategies on local planning authorities and there was concern that future residential developments would be prejudiced. Cala Homes was seeking to develop a large site and had submitted a planning application for 2,000 homes.

The local planning authority considered that the Government's intention to abolish RSSs was a material consideration because the relevant strategy had supported Cala's planning application. Cala argued that the Government's decision prejudiced its application, which had been made in accordance with the strategy. The court ruled that the relevant planning legislation intended that regional strategy would be part of the planning system and the Government was not entitled to use its statutory powers to remove completely RSSs. The judge also opined that the Government's decision required a strategic environmental impact assessment. All RSSs had been subject to environmental impact assessments when they were introduced and their revocation also required such an assessment. Although RSSs remain part of the planning system until the Bill comes in to force, Cala Homes has recently failed to obtain a declaration that planning authorities are required to have regard to them until then.

Our Recent Transactions

We advised Grosvenor Liverpool Fund on the property aspects of its £385 million refinancing for Liverpool ONE.

We advised Westbrook Partners on the acquisition of a portfolio of four business parks to the west of London.

And Finally

ZOE

Renault has won the right to call a new model the Renault ZOE. Two families had sought to protect the dignity of a family member named Zoe Renault.

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