Birketts

WELCOME TO THE SUMMER 2019 EDITION OF

Room With A View

IN THIS ISSUE

Welcome to the summer 2019 edition of Room with a View.

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IN THIS ISSUE

"Plus ca change, plus c'est la meme chose". Not my words (credit for that goes to Jean-Baptiste Karr who wrote them 170 years ago) but perhaps equally apposite to where we find ourselves since the last *Room with a View*. We are still waiting to see when (and if) we will manage to leave Europe under the stewardship of a new Prime Minister (at the time of writing still to be selected from a final two). Until then I'm pleased to report that neither we nor our clients have been sitting on our hands. We have just passed another record-breaking year end in which we have seen sustained growth in both the quantity and quality of new instructions which we have been able to support with a number of significant new hires. I'm delighted to report that our efforts in delivering a high quality, innovative, legal service have been recognised in the wider market. We have recently won *The Lawyer* magazine award for Regional Law Firm of the Year and more recently (and specifically in property) been nominated in *Estates Gazette* for Legal Team of the Year. As a firm we'd like to thank all of you for your support in helping us to achieve these. There is no doubt that headwinds continue but overall we believe there is still cause for optimism, and both we (and our clients) continue to look for new opportunities amongst the threats.

So what can you expect in this summer 2019 edition of *Room with a View*? Louisa Saunders provides answers to some commonly asked questions about Charities Act surveyor reports – what are they, what do they do, and should buyers be concerned about what they say? Alice Harris provides an overview of the Tenant Fees Act 2019 which will have significant impact (and add more regulation) to the residential lettings market. Continuing the landlord and tenant theme, and by way of response to an article in the last edition, Laura Jones takes a look at some tricks and tips for tenants taking a new commercial lease. Finally we have a guest submission from one of our commercial colleagues, Kitty Rosser, who reports on a recent case relating to the use (and misuse) of confidential information by employees.

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Charities Act surveyor's reports: what exactly are they and why are they needed?

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On a sale of charity land charity trustees are usually advised that they must obtain a written report from an independent surveyor.

This requirement often causes confusion. Trustees are often genuinely concerned about the cost of professional advice which they may feel is not necessary. Buyers, who may not be familiar with the legal requirements for charities, may misinterpret the trustees' motives as being over-cautious, an attempt to delay matters or just to get more money out of the transaction.

This article aims to dispel some myths about the procedure and to clarify some key points.

Why is a Charities Act surveyor's report needed on a sale of charity land?

1. It is a requirement of the law.

   Section 117 of the Charities Act 2011 requires that before committing to a sale (or other relevant disposal) charity trustees must have obtained and considered a written report from a qualified surveyor acting exclusively for the charity and have decided, having considered that report, that the terms of the sale are the best that can reasonably be obtained for the charity.

2. If trustees do not comply with the law they may be personally liable.

   If it is found that the sale was not the best course of action for the charity, and the trustees failed to comply with the requirements of the Charities Act, then they may be personally liable for any losses the charity suffers as a result. Whilst charity trustees are usually entitled to an indemnity from the charity's assets for any liabilities they incur in the exercise of their duties, this depends on their having acted properly.

3. To protect the charity's assets.

   The provision is designed to ensure that the value of charity assets is maximised and trustees do not make unwise decisions.

> *"The report must be obtained before the charity is contractually obliged to enter into the sale...*

What is a Charities Act surveyor's report?

1. It is not a valuation report.

   A Charities Act surveyor's report differs from an ordinary valuation report because the surveyor is required to give guidance on many different issues, not just price.

2. It has to contain the advice points set out in the 1992 Regulations.

   The regulations set out exactly what issues the surveyor should cover. These include whether the value of the property could be enhanced by making alterations or seeking planning permission. The surveyor should also advise on the terms for the sale, such as whether it might be appropriate to include covenants or overage provisions.

> *If it is found that (...) the trustees failed to comply with the requirements of the Charities Act, then they may be personally liable for any losses the charity suffers as a result.*

When is it required?

1. As early as possible.

   The report must be obtained before the charity is contractually obliged to enter into the sale but the surveyor should really be consulted at the very outset of the process in order for the trustees to get the best benefit from their advice. One of the things the surveyor must comment on is how best to advertise the property for sale.

2. At appropriate stages.

   Some complex transactions may require more than one report, at intervals during the process or as terms change.

Who can write one?

1. A member of the Royal Institution of Chartered Surveyors.

   This is the current requirement although the Law Commission is consulting on expanding the category of advisers who can provide Charities Act reports.

2. Independent and objective.

   Trustees often ask if they can instruct the selling agent to carry out the Charities Act report. It may be possible for a surveyor in the same firm as the selling agent to prepare the Charities Act report but consider whether the selling agent is independent and objective. If it is not possible for a surveyor to act independently and objectively a surveyor completely unconnected with the relevant transaction should be instructed. It is the trustees' responsibility to appoint the right surveyor.

It may be possible for a surveyor in the same firm as the selling agent to prepare the Charities Act report but consider whether the selling agent is independent and objective.

How much do they cost?

1. It varies.

   It very much depends on the nature of the property involved but these reports start at something like £500 for a very straightforward transaction. A more complicated report may cost considerably more. As the aim of these provisions is to ensure that trustees take advice, it is extremely unlikely they would be criticised for paying for it. On the other hand, the consequences of failing to commission a report could be severe.

2. The Charity Commission may issue a waiver where the cost is disproportionate.

   It is possible to apply for a waiver of the requirement for a Charities Act surveyor's report where the cost of obtaining one would genuinely be disproportionate to the benefit. However, the Charity Commission will only do this when there is a very good reason and it may take significant time for a waiver to be issued.

Does the buyer have to check that the charity trustees have got a report?

1. As long as the buyer is paying 'money or money's worth' - no.

   If the transfer deed contains a certificate in the prescribed form that the trustees have complied with the Act then the buyer benefits from a statutory presumption that the facts stated in the certificate are true. Even if a certificate is not included, a buyer who is paying 'money or money's worth' and who is also acting 'in good faith' will still be protected.

2. But, buyers should proceed with caution.

   If the buyer is not paying 'money or money's worth', knows, or ought to have known, that the trustees have not complied with the requirements, or if a certificate is not included in the documents then ultimately the sale could be vulnerable to being set aside by the Charity Commission if subsequently found to have been a bad deal for the charity. The issues can be complex and therefore it is very important that buyers take specialist advice before proceeding.

For further information or advice please contact Louisa Saunders from our Commercial Property team.

The Tenant Fees Act 2019 – the key facts

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The Tenant Fees Act 2019 (the Act) was brought into force on 12 February 2019.

The aim of the Act is to make renting fairer and more affordable for tenants by restricting the fees and charges landlords and agents can charge tenants and licensees.

The Act prohibits landlords and agents from charging privately renting tenants and licensees any other fees in connection with a tenancy except those that are 'permitted payments' under the Act.

What can you charge?

You can charge tenants and licensees permitted payments which are:

- the rent
- a refundable tenancy deposit (capped at five weeks' rent where the annual rent is less than £50,000)
- a refundable holding deposit (capped at one week's rent)
- payments to change the tenancy (capped at £50)
- payments associated with early termination of the tenancy
- payments in respect of utilities, telephone/broadband costs, TV licence and council tax (so far as the landlord pays any of these costs and then charges them back to the tenant)
- a default fee for late payment of rent or replacement of a lost key.

> *"The restrictions apply for all new tenancies from 1 June 2019.*

What you cannot charge?

You cannot charge any payment that is not one of the permitted payments listed above. Any charge that is not a permitted payment is a 'prohibited payment' and is banned by the Act.

For example, a common clause in tenancy agreements is to require the tenant to pay for the property to be professionally cleaned at the end of the tenancy. Under the Act, this would be a prohibited payment. A tenant can be obliged to clean the property to a professional standard but they cannot be required to pay for a professional clean.

Any charge that is not a permitted payment is a 'prohibited payment' and is banned by the Act.

What happens if you do charge a prohibited payment?

It is a civil offence to charge a prohibited payment and you could be liable for a fine of up to £5,000. If you commit a second offence within five years, this will be a criminal offence and you could be liable for an unlimited fine.

Furthermore, if a prohibited payment is charged or unlawfully retained, you will not be able to serve a s.21 notice to terminate the tenancy until the prohibited payment is returned to the tenant. In practice we expect this to be the most effective sanction as it will delay getting back possession of the property at the end of the term, even if the landlord would otherwise be entitled to possession.

Who will enforce the Act?

Local authority trading standards officers have a duty to enforce the Act. Tenants and licensees can also seek to recover unlawfully charged fees through the First-Tier Tribunal.

When will the Act apply?

The restrictions apply for all new tenancies from 1 June 2019.

If a tenancy was entered into before 1 June 2019, you can still charge fees (even if they are prohibited payments) under the terms of the tenancy until 31 May 2020.

From 1 June 2020, the restrictions will apply to all tenancies and licences no matter when they were entered into.

...if a prohibited payment is charged or unlawfully retained, you will not be able to serve a s.21 notice to terminate the tenancy until the prohibited payment is returned to the tenant...

What should you do now?

You should review your tenancy agreement and make the necessary changes to ensure that the terms of the agreement do not request prohibited payments from the tenant or licensee.

The Government has also produced a series of guidance notes on the Act for landlords and tenants which you can find here. More recently it has published more specific guidance on making (and defending) applications under the new Act.

The content of this article is for general information only. If you would like to discuss the Tenant Fees Act 2019 further please contact Alice Harris or another member of our Property Litigation Team.

Top five tips for tenants taking commercial leases

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It is a common misconception amongst tenants of commercial space that there is an underlying legal framework to protect them from unfair terms, much like the regulatory protections afforded to residential tenants. Unfortunately, this is far from the reality.

It is crucial tenants are aware of the potentially disproportionate liabilities they could be signing up for, and that they enter into negotiations with their eyes open to the pitfalls, particularly given the relatively short-term interest they will be taking on with the premises.

Here are our top five considerations for tenants taking a commercial lease:

1. Repair

Investor landlords often push for full repair and insurance, or 'FRI' leases, to maximise their returns. The starting position is often a full tenant's repair obligation, which can include putting premises into a state of repair where they were in disrepair at the date of grant.

> *...if a deal has not been put in place by the end of the term, the tenant will need to vacate, or will otherwise be a trespasser liable to pay damages...*

This liability can be substantial, particularly where tenants are responsible for the structure of the building itself. This often comes as a surprise to tenants, and it seems unfair that they should be required to improve the state of premises where the underlying investment value remains with their landlord.

To afford tenants some protection, we recommend limiting repair liability to the condition at the start of the lease, as evidenced by a schedule of condition.

Tenants should be aware that, whilst a schedule of condition will go some way towards reducing their liability for disrepair, where the condition of the premises worsens as a result of pre-existing issues shown in a schedule, they will still be responsible for bringing the property up to the state of repair as at the lease start date.

Any failure to put the premises into the required state of repair at the end of the term can result in the tenant being served with a hefty terminal dilapidations claim.

Tenants often fail to start negotiations far enough in advance of lease expiry, and can find themselves ransomed to landlords...

2. Rights to renew

Landlords usually insist on 'contracting out' of the Landlord and Tenant Act 1954, the statute which gives commercial tenants the right to renew their lease on similar terms when it expires. This can be a valuable right, especially where the tenant invests in building goodwill in a particular location. Having that 'security of tenure' may increase the rent cost, but may be a price worth paying. However, some landlords are reluctant to give up the flexibility to let to the highest bidder and tenants may find themselves with little choice.

Where there is no right to a new lease, if a deal has not been put in place by the end of the term, the tenant will need to vacate, or will otherwise be a trespasser liable to pay damages for the period the landlord is unable to let in the open market.

Tenants often fail to start negotiations far enough in advance of lease expiry, and can find themselves ransomed to landlords where they want to remain in occupation and need to ensure business continuity.

Tenants should consider at the heads of terms stage the most appropriate term length to suit their business needs, and the flexibility of break options or contractual rights to renew, but should also ensure that renewal discussions are raised well in advance of term end.

3. Break options

Where it is agreed that the tenant will have an option to end its lease early, it is important that any conditions imposed upon such right are carefully scrutinised.

Break conditions are strictly construed, meaning that any uncertainty surrounding compliance with the same may enable a landlord to frustrate the tenant's break option. In the worst case this can leave a tenant paying rent on a property it no longer needs, even after it has moved out.

For this reason, an unconditional break is the ideal position for a tenant. Any conditions which are agreed should be definite, and obligations to give vacant possession, or to pay 'all sums due' (even if they haven't been invoiced or might not be quantified), should be strongly resisted.

4. Assignment and subletting

Rights to underlet or assign a lease are crucial in order to give businesses options to streamline their property liabilities where circumstances change during the course of a lease (especially where a break clause is not on offer or the date has already passed).

Tenants should ensure that such dealings are permitted, but should be aware that they are unlikely to be off the hook in the event the rights are exercised. It is usually a requirement of the landlord permitting an assignment that the outgoing tenant gives a guarantee of

performance of the covenants (including payment of rents and dilapidations sums) by the new tenant. That guarantee will remain in place until the assignee transfers the lease on again, or the end of the lease, whichever comes first.

5. Service charge

A landlord's discretion to carry out maintenance (...) under a lease and recharge the costs to tenants (...) is generally broad.

Tenants are wary of responsibility for payment of unknown sums, and a landlord's discretion to carry out maintenance, or even improvement works, under a lease and recharge the costs to tenants via the service charge is generally broad.

To ensure that they can budget for such expenditure, and are not hit with unexpectedly high service charge bills, tenants may want to negotiate an inclusive rental figure or service charge cap. This will be a particular issue where they have not carried out a survey to identify any pre-existing issues with structural parts or plant and machinery repaired by the landlord.

Carve-outs for items the tenant does not benefit from, and is not expecting to contribute towards, should also be considered,

6. Conclusion

Ultimately, the world of commercial leasing is a minefield of unexpected liabilities for unsuspecting tenants, who should seek professional legal and surveyors' advice early in negotiations to protect the long-term interests of their business.

The content of this article is for general information only. For further information please contact Laura Jones or a member of Birketts' Commercial Property Team.

Who 'needs to know'? Employee fined for improper use of business' information.

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A recent enforcement action by the Information Commissioners Office (ICO) against a former customer services officer at Stockport Homes Limited (SHL) serves as a timely reminder to landlords (and others) to ensure that their staff are using personal data available to them in the course of their work appropriately.

The former employee of Stockport Homes Limited accessed SHL's case management system 67 times during 2017 to look at antisocial behaviour cases despite the fact that she was not authorised to view such content and had no business need to do so. The offences were revealed during an audit of the former employee's access to the case management system undertaken in light of concerns regarding her performance. The former employee resigned from SHL and was charged with unlawfully accessing personal data under section 55 of the Data Protection Act 1998. She pleaded guilty at Stockport Magistrates Court on 6 June 2019 and was ordered to pay a £300 fine, £364.08 in costs and a victim surcharge of £30.

Mike Shaw, Group Manager (Enforcement) at the ICO, said *"People have the absolute right to expect that their personal information will be treated with the utmost privacy and in strict accordance with the UK's data protection laws. Our prosecution of this individual should act as a clear warning that we will pursue and take action against those who choose to abuse their position of trust".*

This is the fifth reported criminal prosecution of an individual who has misused personal data accessed in their work capacity so far this year. This case was brought under the Data Protection Act 1998 because the offences to which it related were carried out in 2017; offences occurring on or after 25 May 2018 would be prosecuted under equivalent provisions set out in section 170 of the Data Protection Act 2018.

Whilst there was no suggestion that SHL itself fell short of the required standards under data protection legislation, this incident serves as a timely reminder to all landlords to ensure that they have appropriate data protection policies and procedures in place and that these are monitored and enforced where necessary. In particular, landlords must ensure that they provide all staff with data protection training both as part of their induction procedure and periodically throughout their employment. Landlords

> *"Landlords should also review internal arrangements for staff access to data and apply technical and organisational measures to limit access...*

Landlords [must] ensure that they have appropriate procedures in place and supply data protection training to staff periodically, well beyond induction.

should also review internal arrangements for staff access to data and apply technical and organisational measures to ensure that access to personal data by staff is given on a need to know basis.

Birketts offers a highly-rated standard data protection training course for staff which can be tailored to meet the needs of the individual business and can assist with preparing appropriate policies and procedures. If you would like to discuss your data protection requirements further please contact Kitty Rosser.