



December 2016

Have your Christmas cake and eat it

This Christmas, we look back on some of the key changes to law and practice in the real estate sector in 2016, and consider what 2017 might bring.

KEY CASES FROM 2016

You can't assign a lease to a guarantor

In *EMI Group Ltd v O&H Q1 Ltd* [2016] EWHC 529, a tenant went into administration and, with the landlord's consent, assigned its lease to its guarantor ("EMI"). EMI then sought a declaration from the High Court that, although the lease had been validly assigned, the tenant covenants in the lease had been stripped out (leaving merely a "shell of a lease") because the assignment was voided by section 25 of the Landlord and Tenant (Covenants) Act 1995. The Court decided that this was the wrong extrapolation of the statutory anti-avoidance provisions; instead:

- the whole assignment, not just the tenant covenants in the lease, was rendered void;
- the lease remained vested in the original tenant; and
- EMI was still bound as guarantor of the original tenant's obligations under the lease.

This judgment has been criticised for being uncommercial and for reducing parties' abilities to structure their property transactions in the way which suits their respective business interests. An appeal has been scheduled for May 2017.

"The guarantor is absolutely precluded from becoming the assignee, on an assignment by the tenant whose tenant covenants he is guaranteeing. As is clear from the K/S Victoria Street case, the fact such a conclusion is unattractively limiting and commercially unrealistic is neither here nor there."

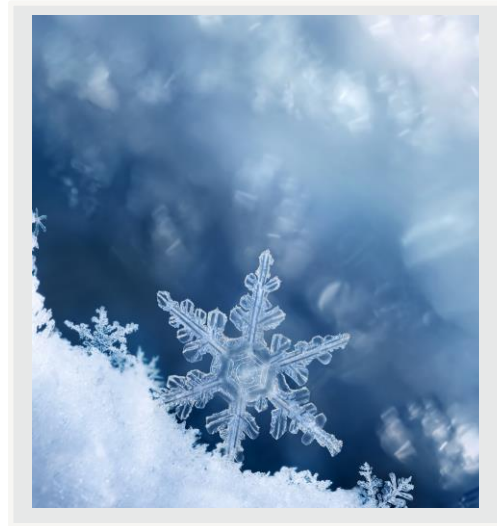
Amanda Tipples QC



Don't leave the kitchen sink behind!

In *Riverside Park Limited v NHS Property Services Limited* [2016] EWHC 1313, a tenant served notice to break its lease halfway through its 10 year term. The break right was expressed to be dependent on the tenant giving vacant possession on the break date. The landlord argued that the tenant had not effectively given vacant possession because when it vacated it left behind some items it had installed (including some partitioning, kitchen units, floor coverings, blinds, an intruder alarm, and water stand pipes), kept some keys given to it by the landlord and had not deactivated the intruder alarm.

The judge decided that the standard non-demountable stud partitions were chattels rather than fixtures, because they were not fixed to the structure of the building, were intended to benefit the tenant rather than to improve the premises, might deprive the landlord of the physical enjoyment of the premises and might deter potential new tenants. He therefore held that vacant possession of the premises was not given on the break date and the lease now continues until 2018.



This case reminds us that "vacant possession" means empty of people and chattels. Partitioning will not always be deemed to be chattels, and the presence of some chattels will not always preclude the giving of vacant possession; each case depends on its own facts. However, the message to tenants is clear:

- Plan ahead before exercising a break right. Check all leases and licences to alter and decide which items (whether fixtures or chattels) need to be removed. If there is any uncertainty, remove them.
- When negotiating a new lease, try to avoid agreeing to give "vacant possession". Instead, agree to deliver the premises back to the landlord free of all occupational interests.

Reminder of the registration gap

In *Stodday Land Ltd v Pye* [2016] EWHC 2454 a landowner served notice to quit on an agricultural tenant shortly after buying some land, before its application to the Land Registry had been completed. The High Court decided that the notice was ineffective as at common law a notice to quit must be given by the legal owner of the reversion. This case is a reminder that, where it is anticipated that management activities in relation to informal tenancies will need to be carried out during the period between completion of a purchase and completion of the registration process, a buyer should procure a power of attorney from the seller, together with obligations to pass on all communications received from tenants and not to exercise any landlord functions unless requested to do so by the buyer.

LEGISLATIVE CHANGES IN 2016

More Stamp Duty Land Tax ("SDLT") changes

There have been a number of changes to SDLT during the course of 2016 including:

- from 17 March 2016, a new SDLT rates structure for sales of new leases of commercial and mixed-use property. For sales, the "slab" system (where SDLT was charged at a single rate on all the chargeable consideration) was replaced with the "slice" system (where the consideration is split into bands which are each taxed at the relevant rate). For leases, the nil rate band is now available on lease premiums including those with an annual rent of £1,000 or more; and
- from 1 April 2016, a supplemental 3% SDLT charge on purchases of additional residential properties.

2017 AND BEYOND



- An appeal in the *EMI* case has been scheduled for May 2017.
- The Digital Economy Bill 2016-17 contains the long-awaited new Electronic Communications Code. Its second reading in the House of Lords will be on 13 December 2016 with a view to enactment in 2017.
- Lord Justice Jackson will by 31 July 2017 report on introducing fixed recoverable costs. This regime is likely significantly to reduce the ability of the successful party in property disputes worth up to £250,000 to recover its costs. Parties to property agreements will increasingly consider the use of ADR provisions.
- The restriction of finance costs on residential properties to the basic rate of income tax will be introduced gradually from 6 April 2017 and will take full effect from 2021.

The “right to rent” regime

The Immigration Act 2014 introduced the “right to rent” regime from 1 February 2016, under which all landlords of privately rented accommodation in England must check the immigration status of their tenants. Various types of accommodation are excluded from the regime including social housing, care homes and student lets. From 1 December 2016, the Immigration Act 2016 introduces criminal offences for landlords and agents who do not carry out these checks and/or take measures to evict any offending occupiers. There are also new provisions to ease the eviction process.

People with Significant Control (“PSC”) regime

From 6 April 2016, unlisted UK companies are required to identify individuals who have significant interests in their shares, and publicly disclose their details in a new PSC Register.

Modern Slavery Act 2015

The Modern Slavery Act 2015 consolidates a number of pre-existing offences relating to trafficking and slavery and in addition, from financial years ending on or after 31 March 2016, businesses with a turnover of more than £36 million must make an annual statement of the action they have taken to ensure that their business and supply chains are slavery-free.

From the perspective of a tenant with the requisite turnover, if the landlord has entered into development obligations or provides ongoing services (such as security or maintenance services under service charge arrangements) the tenant should raise a pre-contract enquiry regarding the landlord's compliance.

From the perspective of a landlord with the requisite turnover, the tenant is unlikely to be supplying any services to the landlord and is therefore probably not part of its supply chain. However, all landlords should consider checking their tenants' compliance statements prior to granting leases, in order to reduce the risk of reputational damage. The tenants' “compliance with statute” covenants should provide some protection during the term.

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