

# TOP STOREY

## Welcome

Welcome to **Top Storey**, our commercial property update. We aim to keep you informed of developments relevant to you and your business. Feel free to suggest topics for future issues.

If you would like further information on any of the topics covered in this issue please contact **Rick Read** on **0117 902 2797** or **richard.read@burges-salmon.com**.

To receive your own regular copy of **Top Storey**, or to have it sent to a colleague, or if you would prefer to receive it by email, contact **marketing@burges-salmon.com** or subscribe via our website.

Back issues are available on our website.

## Inside information

- Focus on restructuring & recovery *cont* p2
- UK real estate debt - "APS" to the rescue? p2
- Batman returns p3
- Social housing p3
- Planning Law update p4
- Green Leases update p4

## Focus on restructuring & recovery

### Working with tenants in financial difficulties

One of the most notable features of the current economic climate is the way in which landlords have been leading the way in embracing flexible and innovative solutions presented by tenants who cannot fully meet their rental commitments.

This is most noticeable in the retail sector which has been badly hit by a slowdown in consumer spending. High profile company voluntary arrangements ("CVAs") in recent months, such as JJB Sports and most recently Focus DIY (agreed in August) are prime examples of this new approach.

However many within the property industry consider that the "turnaround" culture underlying the current insolvency legislation can tip the balance too far in favour of the insolvent at the expense of the creditor. In particular the British Property Federation is calling for tighter control of CVAs and pre-pack administration (see below) to stop landlords being effectively held to ransom and to promote greater transparency. A recent case shows the importance of reflecting these types of arrangement when agreeing surrenders of leases.

### Use of CVA's – key aspects for landlords

A CVA allows a company to come to an arrangement with its creditors over payment of debts. The creditors are notified of the proposals and then vote. If 75% of creditors by value approve the CVA, the CVA binds all of the company's creditors even if they voted against it (with some minor exceptions).

Where a landlord is bound by a CVA all rent arrears will be caught by its terms, as will the tenant's liability for all other sums due under the lease, including future rent. The parties may further compromise the landlord's claim against the tenant, but once bound by a CVA a creditor cannot take any step against the company to recover any debt that falls within the scope of the CVA.

The advantage of the CVA is that it costs less than administration and provides creditors with an opportunity to



recover more money that would be expected in a liquidation. The Focus DIY deal is seen as a step towards achieving transparency, the controls remain to come.

### Pre-pack administration – guidance for landlords

Pre-pack administration is a fast track administration where a purchaser is lined up to take over the profitable parts of a business with the company going into administration simultaneously. The benefit is that the goodwill of the company will not be eroded over time.

The use of pre-pack administration has increased, which has led to concern that a third of the pre-pack administrations do not comply with the Statement of Insolvency Practice 16 ("SIP 16"), which sets out the standards required of insolvency practitioners. This means landlords often do not know the intentions of the new occupier in relation to their property.

Following a spate of high profile pre-packs, including Allied Carpets, the British Property Foundation has launched a pre-pack questionnaire so that landlords can uncover information regarding the identity of the buyer, its intentions for the property and whether the tenant's lease has been assigned to the buyer without landlord's permission. The questionnaire is based on SIP 16 and contains many

**Continued on page 2**

Visit our website at [www.burges-salmon.com](http://www.burges-salmon.com)

**Continued from page 1**

questions an administrator should be expected to answer, the hope being that it provides the level of disclosure that landlords are entitled to, thus creating greater transparency.

### **Landlord's right to future rent in a CVA after surrender**

In the recent *Cotswold* case (*Cotswold Company Limited (in company voluntary arrangement) [2009] EWHC 1151*), Cotswold vacated the property of which it was tenant and instigated proposals for a CVA.

The Landlord submitted a claim for debt which included unpaid future rent and payments in lieu of Cotswold's unfulfilled lease obligations. In order to mitigate its loss and attempt to re-let the property, the Landlord entered into a deed of surrender with Cotswold. The supervisor of the CVA was prepared to admit such of the Landlord's debt as had accrued up to the date of the deed of surrender, but not the

future loss, arguing that the deed extinguished Cotswold's obligations under the lease.

The Court held that, since the deed set out that the Landlord was accepting the surrender in order to mitigate its future loss and reserved the "right to claim within the CVA", the right to claim was preserved for future losses, even though the deed effectively ended Cotswold's future leasehold obligations. This highlights the importance of properly documenting a surrender so that it reserves the necessary rights to pursue tenants for claims for future loss.

**For more information on these or other issues of tenant default or corporate rescue or recovery please contact Colin Ligman on (0117) 902 2789 (email: [Colin.Ligman@Burgess-Salmon.com](mailto:Colin.Ligman@Burgess-Salmon.com)) or Nicola Klinkenberg on (0117) 902 7790 (email: [nicola.klinkenberg@burgess-salmon.com](mailto:nicola.klinkenberg@burgess-salmon.com))**

---

## **UK real estate debt - "APS" to the rescue?**

*"The general consensus is that APS will mean that the banks continue to hold assets and work with borrowers rather than calling default."*

In February this year the government announced details of the Asset Protection Scheme ("APS"), which aims to remove uncertainty about the value of banks' past investments and to increase lending. Questions remain as to what banks are doing in terms of their "bad loans" and what effect this will have on the commercial property market and the banks' ability to lend in general.

Commercial property values have fallen by about 40% since 2007, creating a situation where most of the equity has gone from the majority of loans. It has been suggested that as much as 75% of all loans secured against UK commercial property are in breach of the LTV (loan to value) covenant.

Banks generally wish to avoid crystallisation of losses where properties are worth less than the debt secured against them. They are reluctant to sell in a falling market and the lack of available financing makes it difficult to find new buyers. So it is unlikely the market will be flooded with forced sales and banks are currently content to work with borrowers, for example by amending the terms of the debt, asking for some of the loan to be repaid and also raising interest rates and fees. According to a De Montford University study, there is evidence that the banks are extending loan maturities (for a fee) in preference to calling in property loans. The increase in refinancing may be adding to the property market stagnation - more refinancing means there is the less debt available for new deals.

The APS aims to motivate participating banks to lend by offering protection against future credit losses on the participants' riskiest assets. The two participating banks, RBS and Lloyds Banking Group, will pay a fee for access to the scheme and must enter legally binding agreements to

increase the amount of lending they provide. The scheme is expected to last at least 5 years and has been described as a "giant insurance policy". The banks pay a "premium" to insure against future losses. If, however unlikely, these future losses do not occur then the taxpayer will have the benefit of the premium.

Participating banks will receive protection for a proportion of their balance sheets on nominated assets. The banks will absorb the first loss of around 10% on assets protected by the scheme and the Government will absorb the rest. The 10% loss will remain with the banks as an incentive for them to manage the assets prudently and protect the interests of the taxpayer. The assets in the APS will also be subject to higher regulatory control in terms of their management and governance.

The general consensus is that APS will mean that the banks continue to hold assets and work with borrowers rather than calling default. However, insuring against excessive losses means that the banks will not have to hoard as much capital and will, the thinking goes, increase lending. The downside is that there is little political incentive for this lending to be to investors. It is instead likely to be aimed at homeowners and small businesses. In such circumstances, whether the APS will have a marked impact on the commercial property market remains to be seen.

**For more information please contact Nicola Klinkenberg on (0117) 902 7790 (email: [nicola.klinkenberg@burgess-salmon.com](mailto:nicola.klinkenberg@burgess-salmon.com)) or David Oeppen on (0117) 939 2234 (email: [david.oeppen@burgess-salmon.com](mailto:david.oeppen@burgess-salmon.com))**

## Batman returns

The presence of protected species such as bats on your development site is an issue which can very easily be overlooked with drastic consequences – namely that if the developer and planning authority have not engaged with the statutory system for their protection, any planning permission granted may be subject to challenge.

This was recently highlighted in the case of *R (on the application of Simon Woolley) v Cheshire East Borough Council and Millennium Estates Limited*. It involved demolishing a building – which was accommodating a bat colony – and redeveloping the site with apartments. The planning permission stated that it had an acceptable impact on protected species, noting the need to obtain a licence from Natural England to move the bats prior to demolition.

A neighbour challenged the grant of planning permission and amongst the grounds for judicial review was failure by the local planning authority to apply the Habitats Directive. The strict protection that is accorded to bat breeding sites and their resting grounds can only be derogated if there is no satisfactory alternative or for reasons of public health and safety.

The court expected the planning authority to have more regard for the protected bats than merely noting their existence. It wanted the authority to engage with the provisions of the Directive before derogating from the duty to protect them. This would mean considering whether there were satisfactory alternatives to the proposed development and whether the grant of permission was justified against the



*“The court expected the planning authority to have more regard for the protected bats than merely noting their existence.”*

test for derogation. The authority did not discharge its duties under the Directive merely by making it a condition of the planning permission that Natural England provide a relocation licence. The court ruled the authority had failed in its statutory duty, so the grant of planning permission was rendered unlawful and was quashed.

**For more information on this or other planning issues please contact Fergus Charlton on (0117) 902 7705 or email [fergus.charlton@burges-salmon.com](mailto:fergus.charlton@burges-salmon.com)**

## Social housing

### Housing Associations and Human Rights

Housing Associations are assessing the impact of the recent Court of Appeal Judgment in the case of *London & Quadrant Housing Trust v R (app Weaver) and the Equality & Human Rights Commission*. The effect is that they may now be treated as public bodies and fall under the ambit of the Human Rights Act, so that tenants may be able to seek judicial review of decisions taken by Housing Associations.

This is of particular concern in relation to housing allocation and management decisions including evictions. There is a further concern that the decision could have implications for funding, if Housing Associations find themselves subject to public body borrowing restrictions.

London & Quadrant have indicated that they intend to appeal against the decision to the House of Lords (now the Supreme Court). In the meantime Housing Associations need to review their practices and procedures to minimise the risk of challenge.

### **CML Guidance on S106 Agreements (Affordable Housing Restrictions)**

The Council of Mortgage Lenders has issued a briefing aimed at preventing some of the barriers which are being

created to the financing of low cost home ownership.

The main hurdle identified by the CML is the continued use of inappropriate restrictive covenants in section 106 agreements. These covenants often restrict the use of the property for the purposes of affordable housing only, without the appropriate mortgagee protection clauses. Such restrictions effectively limit the mortgagee's ability to realise their security where there is a default on the loan. As a result, few lenders would be willing to lend on such low cost homes.

The CML is seeking to overcome this problem by providing a section 106 Agreement template addressing their concerns, which can be found on their website. In the event that this template is not adopted, local authorities and developers alike need to consider whether the terms of such agreements will be acceptable to lenders, as varying such agreements at a later date can prove difficult and cause delay.

**For more information on this or any other social housing issue please contact Anne Poole on (0117) 902 7754 (email: [anne.poole@burges-salmon.com](mailto:anne.poole@burges-salmon.com))**

# Planning Law update

**Planning law and practice continues to evolve – some of the most recent developments are:**

## Major Infrastructure Projects

The Infrastructure Planning Commission (IPC), which will deal with nationally significant infrastructure projects (including major transport and energy projects) will be operational from October and will be ready to receive its first applications in Spring 2010. These major applications will have to be consented by the IPC instead of under the current planning regime. The relevant procedural regulations will come into force later this year. Notably, the Conservatives indicated that they will abolish the IPC in favour of establishing a specialist major projects division of the Planning Inspectorate to handle applications for these projects.

## CPO Compensation

The House of Lords has given new guidance as to the valuation of land when assessing compensation due as a consequence of CPO. *Transport for London v Spireose Limited* involved compulsory purchase of premises for the construction of the East London Line Extension. Spireose had not been able to obtain a certificate of appropriate alternative development due to an unfavourable UDP policy on the relevant date. However the Lands Tribunal found, on the balance of probabilities, that planning permission for mixed use development would have been granted by the time of the appropriate date for valuation and it therefore

valued the land as if it had planning permission. The House of Lords has now held that since planning permission would only have been granted on the balance of probabilities it was not a certainty, and thus the valuation should have been discounted to reflect the possibility that permission might not have been granted.

## Community Infrastructure Levy

The draft CIL regulations have now been published and are due to come into effect on 6 April 2010.

According to the draft, charges will be based on a cost per square metre of floor space and will be linked to an inflation index. For non-residential development there will be a *de minimis* level of 100sqm below which no CIL will be payable. The amount of the charge will be calculated on the grant of planning permission but will not become payable until the implementation of the development. If the person responsible for paying the CIL is not identifiable at that time, the landowner will be liable in default. In terms of enforcement, the CIL will be a local land charge and the planning authority will have the powers to issue stop notices and to add interest and surcharges.

**For more information on this or any planning matters please contact Jim Ryan on (0117) 902 6689 (email: [jim.ryan@burges-salmon.com](mailto:jim.ryan@burges-salmon.com)) or Sophie Traylen on (0117) 307 6966 (email: [sophie.traylen@burges-salmon.com](mailto:sophie.traylen@burges-salmon.com))**

# Green Leases update

The concept of a "Green Lease", being a lease including provisions designed to limit environmental impact and encourage sustainability, continues to increase its profile in the commercial property market.

## Green Leases

There is no set definition of what constitutes a Green Lease, but commonly it will address some or all of the following issues:

- Obligations on the landlord and tenant to share data relating to energy usage and wastage;
- Provisions for the implementation of an "Environmental Management Plan" to ensure the building is run in a way which limits environmental impact;
- Sympathetic alterations provisions which allow the parties to make environmentally-friendly alterations but restrict works which adversely effect the energy efficiency of the building;
- Restricting the landlord's ability to call for reinstatement of lawful tenant's alterations which improve the energy efficiency of the premises';
- Adapting the standard rent review assumptions and disregards, as regards the rental treatment of "green" improvements; and

- Adopting for a robust dispute resolution clause.

## Memorandum Of Understanding

In addition to the Green Lease, the market has recently seen the development of the concept of a "Memorandum of Understanding" between landlord and tenant. This document can be entered into alongside a Green Lease or alternatively can be used as a relatively straight forward way of "greening" an existing lease.

A Memorandum of Understanding will, broadly speaking and to a simpler degree, cover some or all of the issues mentioned above. However, as it will usually not be legally binding on the parties or their successors, instead emphasising the need for collaboration and co-operation, it allows greater flexibility. As such it may, in the immediate future at least, be perceived as a more readily accessible instrument for those parties seeking to "green" their landlord-tenant relationship.

**For more information on green leases please contact David Oeppen on (0117) 939 2234 (email: [david.oeppen@burges-salmon.com](mailto:david.oeppen@burges-salmon.com))**

<sup>1</sup> From the landlord's point of view, the potential for the tenant to claim compensation under Section 1 of the Landlord and Tenant Act 1927 should be considered before agreeing any such provision.

Narrow Quay House  
Narrow Quay  
Bristol BS1 4AH  
Tel: +44 (0) 117 939 2000  
Fax: +44 (0) 117 902 4400

Chancery Exchange  
10 Furnival Street  
London EC4A 1AB  
Tel: +44 (0)20 7685 1200  
Fax: +44 (0)20 7685 1266

[www.burges-salmon.com](http://www.burges-salmon.com)

This newsletter gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

© Burges Salmon LLP 2009.

All rights reserved.

Top Storey is printed on 75% recycled paper.

Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting [marketing@burges-salmon.com](mailto:marketing@burges-salmon.com)

Burges Salmon LLP is a Limited Liability Partnership registered in England and Wales (LLP number OC307212) and is regulated by the Solicitors Regulation Authority.

A list of members, all of whom are solicitors, may be inspected at our registered office: Narrow Quay House, Narrow Quay, Bristol BS1 4AH.