

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**.

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VAT increase - reminders for landlords and tenants

The standard rate of VAT will increase from 17.5% to 20% on 4 January 2011. This has some consequences when dealing with leases where the landlord has opted to tax the premises.

Apportionments: Any periodic rent payment due before 4 January may be invoiced at 17.5% for the whole of that period, but the first invoice after 4 January must apply 20% VAT. So the whole of the December 2010 quarter may be invoiced at 17.5%.

Rent deposits: If taking a rent deposit equivalent to 6 or 12 months rent to include VAT, remember to factor in the increased VAT for rent due after 4 January when calculating the deposit required.

Calculating SDLT on rent: When calculating SDLT on a new lease the requirement is to add VAT at the rate of 17.5% on rent payable to the day before the first rent day falling after 4 January 2011 and at 20% from that rent day for the rest of the term. So there is also an increase in SDLT as a result of the VAT rate change. If claiming overlap relief on surrender and regrant or renewal the tenant will pay 2.5% more SDLT on the regrant than it will get in relief. It seems this will also apply when SDLT has been paid because the tenant has been allowed into occupation under an agreement for lease. When the lease is subsequently completed SDLT will be calculated taking into account the VAT increase and credit will be given for the amount already paid on the agreement. So, in the absence of any indication



from HMRC to the contrary, if completing a lease pursuant to an agreement entered before October upon which the tenant has already paid SDLT, it should expect to pay an additional SDLT charge on the lease.

Anti forestalling (group lettings): Anti-forestalling legislation will be introduced to counter arrangements that purport to apply the 17.5% VAT rate to goods or services to be delivered or performed on or after 4 January 2011, where the supplier and customer are connected parties.

In certain circumstances there will be a supplementary charge to VAT of 2.5% but this will not apply to prepaid or invoiced rentals of land, buildings or other assets if the period concerned is a year or less, and the prepayment, or the issuing, of an advance invoice is normal commercial practice. So there should be no problem unless rent is invoiced more than 1 year in advance.

For more information please contact **Nigel Popplewell**, Head of Corporate Tax on tel: +44 (0) 117 902 2782 or email: nigel.popplewell@burges-salmon.com.

No Competition?

The exemption of land agreements from certain elements of competition law will be revoked with effect from 6 April 2011.

Action Now

The law will apply to any existing arrangements, not just new agreements. So before next April organisations should assess their existing land agreements for compliance with competition law.

The sort of provisions which might cause problems include:

- tenant's covenants in a lease restricting their commercial

activities - what exactly they may sell at the premises and for what price;

- landlord's covenants in a lease or agreement for lease not to let neighbouring premises or premises within a local geographical area to a competitor of the tenant;
- restrictive covenants in a transfer of freehold land not to sell or let that land or neighbouring land to a competitor of one party or the other; and

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- exclusive rights for retail outlets, restaurants or refreshment kiosks at events or venues.

Such provisions are not necessarily outlawed, if for example:

- the parties hold below 10 - 15% of market share (although the extent of the market in question may be difficult to assess - is it a particular shopping centre or the wider region?);
- there is no real impact on competition as there are plenty of other suppliers of the goods or services in the locality;
- they give economic or consumer benefits - eg. the anchor tenant in a shopping centre.

Consequences of Breach

The agreement will be void and unenforceable. It may also attract a fine of up to 10% of annual turnover of the offending party and potentially expose an organisation to

claims for damages by customers, suppliers or aggrieved competitors. At the most serious end of the scale, any restriction involving price fixing or market sharing (for example, between landlords) is a "cartel offence" which carries a potential penalty of up to five years imprisonment and disqualification from acting as a company director. Both parties to an agreement are subject to those penalties - not just the party for whose benefit the restriction was imposed.

If you would to discuss any particular document or agreement in the light of this change in the law, please get in touch with your normal real estate contact at Burges Salmon or with **Ross Polkinghorne on tel: +44 (0) 117 902 6683 or email: ross.polkinghorne@burges-salmon.com.**

For general competition law advice please contact Marc Shrimpling in our competition law unit on tel: +44 (0) 117 902 2221 or email: marc.shrimpling@burges-salmon.com.

When can a landowner be liable for flooding to neighbouring property?



"It is established authority that a landowner has a measured duty of care to its neighbours to abate a nuisance even though the nuisance is naturally occurring."

The Court of Appeal decision in *Lambert v. Barratt Homes* provides further clarity on the circumstances in which a landowner can be liable to its neighbour for damages caused by naturally occurring events. In *Lambert*, residents adjacent to a new development were flooded because rainwater falling on a playing field owned by a local authority was now channelled onto their properties. In the High Court, the developer was held liable because its works had interfered with the existing drainage provisions, and the local authority was also held liable because the rainwater originated from its land and it had not taken sufficient steps to alleviate the problem. The local authority appealed.

The Court of Appeal was asked to consider whether it was fair, just and reasonable to hold the local authority liable on this occasion. It is established authority that a landowner has a measured duty of care to its neighbours to abate a nuisance even though the nuisance is naturally occurring. The question for the Court of Appeal was the extent of the duty in these circumstances. The Court of Appeal considered that the duty of the local authority on this occasion did not extend to paying for the entire relief works but it did have a duty to allow access

to its land and co-operate with the other parties in devising and implementing the relief work.

This case is one of a series holding landowners liable for nuisances which arise on their land through no fault of their own and, although the case provides useful guidance on the extent of the duty upon that landowner, there remains uncertainty for any landowner who finds itself in such a position. The duty will depend on the facts of the case and the financial means of the landowner. Legal liability for flooding is a complex area of law and developers and landowners should take expert advice at an early stage to avoid the prospect of expensive litigation over the cause of the flooding and the extent of the duty to alleviate or abate the nuisance.

Burges Salmon's specialist environmental litigation team has extensive experience in flood risk and flooding litigation. If you have any questions or would like to discuss these issues in more detail then please do not hesitate to contact **Michael Barlow on tel: +44 (0) 117 902 7708 or email: michael.barlow@burges-salmon.com** or **Simon Tilling on tel: +44 (0) 117 902 7794 or email: simon.tilling@burges-salmon.com.**

New Law

Equality Act 2010

This Act came into force in part on 1 October 2010 and consolidates all existing anti-discrimination legislation.

In relation to property, the Act now covers:

- **Duty not to discriminate on sales or lettings.** Previously the Equality Act 2006 imposed a duty not to discriminate on grounds of religion, belief or sexual orientation against potential buyers or tenants when selling or letting property, or against tenants or other occupiers when managing let premises.
- **Duties to make reasonable adjustments for and not to discriminate against disabled tenants.** Under the Disability Discrimination Act (DDA) 1995 service providers must make reasonable adjustments to premises visited by the public to accommodate disabled customers and landlords must not unreasonably refuse consent to DDA requests for alterations. Property owners and managers must not discriminate against, victimise or harass disabled occupiers in relation to selling, leasing or managing premises.
- **Duty to change practices or provide auxiliary aids to help disabled tenants.** The DDA 2005 imposed a further duty on landlords and property managers to change building management policies or practices, and to provide auxiliary aids to accommodate disabled tenants (but not to remove or alter physical features).

The new Act also includes provision for a new duty on landlords to make reasonable adjustments to common parts of buildings containing residential units where requested by a disabled tenant, but this is not yet in force.

For more information please contact Anne Poole on tel: +44 (0) 117 902 7754 or email: anne.poole@burgessalmon.com.

Bribery Act 2010

This Act will come into force in April 2011. It redefines bribery more widely to include lavish hospitality and “grease” payments, and provides for increased penalties on conviction.

The new definition of bribery is to promise a financial or other advantage to induce someone (not necessarily the recipient) to act improperly, or as a reward for acting improperly in carrying out their functions. The breach may be of a public nature or connected with a business trade or profession, but it must be one where there is an expectation the person would act in good faith, impartially or in a position of trust. It is also an offence to be bribed. The potential penalties for an individual are up to 10 years imprisonment or an unlimited fine.

Corporate Offence

This new legislation will impact on most organisations, as it introduces a “corporate” offence. An organisation may be prosecuted if an employee, agent or even joint venture



partner of theirs bribes another person. The penalty is an unlimited fine and the organisation will be strictly liable unless it can prove it had adequate anti-corruption procedures.

Draft guidance has now been published on what would be “adequate procedures” to avoid a conviction under the Act, should an employee or agent be party to bribery in the course of the organisation’s business. This guidance suggests that adequate procedures would be demonstrated by:

- regular assessment of the risks of corruption in the company’s business
- demonstrable board level commitment to anti-corruption policies
- evidence of checking business partners/employees’ backgrounds for corruption risks
- clear anti bribery policies which are published and easily accessible to staff
- evidence of implementing these policies
- periodic monitoring of the effectiveness of these policies with updating where necessary

So organisations may wish to carry out a risk review to see what policies should be introduced or amended and then train staff on changes. Areas to consider include: gifts and hospitality; vetting agents and suppliers; new employees; financial controls and audits.

Corporate Hospitality

Corporate Hospitality would only amount to bribery if it were proved to have been offered to induce the recipient to act improperly. Clearly, the more lavish the hospitality the more likely a magistrate or jury would be to conclude it was offered to induce improper conduct. Routine or inexpensive hospitality should not present a risk, but a clear policy on what could be offered or accepted by way of hospitality may help avoid problems.

For more information please contact David Hall on tel: +44 (0) 117 902 2798 or email: david.hall@burgessalmon.com

“This new legislation will impact on most organisations, as it introduces a “corporate” offence.”

Carbon Reduction Commitment

The registration deadline passed on 30 September for those organisations affected by this emissions trading scheme – essentially any which consumed 6000mwh electricity through half hourly meters in 2008. Although there are financial penalties for non-registration, many organisations have failed to register in time, possibly due to the complexity of the scheme.

It was announced in the Coalition Government's recent Spending Review that the first allowance sales for 2011-12 emissions will now take place in 2012 rather than 2011 and

revenues from allowance sales totalling £1bn a year by 2014-15 will be used to support the public finances, rather than recycled to participants. While this will reduce the complexity of the scheme for business overall, it leaves CRC as simply a tax on energy use. We understand that the Government will launch a consultation on additional ways to simplify the CRC scheme in due course.

For more information please contact Georgie Messent on tel: +44 (0) 117 902 7732 or email: georgie.messent@burges-salmon.com.

Enforcing Standard Securities in Scotland: The English Experience?

In the recent downturn we have seen all of the banks, building societies and lending institutions either enforcing, or looking to enforce, their securities over real estate and real estate companies across the United Kingdom.

The enforcement process happens in a different way in Scotland than in England & Wales.

In England & Wales a lender will, most often, exercise their rights contained in their fixed charges, and granted to them by the Law of Property Act 1925, to appoint a "Fixed Charge" receiver, aka an LPA Receiver.

Whilst the LPA receiver is appointed with a view to selling the charged property and/or collecting the rental income from it for the lender, the fixed charges in England & Wales also contain a number of additional asset management powers which can be delegated by the lender to the LPA receiver. This asset management opportunity allows any lender to contemplate longer term holds and development (such as enhanced, or alternative, planning opportunities), whilst collecting the rent to service the loan and pay any management fees.

In Scotland it is much more difficult to contemplate a similar opportunity as the enforcement mechanism for standard securities, which are Scottish versions of fixed charges, is geared towards either the sale of the property concerned or foreclosure (i.e. taking ownership of the property).

The second option of foreclosure is impractical, unwieldy and unattractive to most lenders as it ties up capital in a specific asset and exposes the lenders to the liabilities of ownership not to mention that the process takes a long time to complete.

The first option of sale has served everyone well until the downturn in the market exposed its weakness - if there are no buyers, what can you do?

The lender can either appoint an administrator (if the corporate security is there to support it) or work and use the full scope of the remedies available to fixed charge holders in Scotland. These allow the lenders, following default, to call

up their charge and hold the property for up to 5 years. However, in doing so it is important to make the Scottish process as close as possible to the appointment of the LPA receiver, both for economies of scale and because the lender will have more of an appetite for an opportunity it already understands. In many cases, replicating the LPA receiver structure in Scotland is more cost effective than proceeding by way of administration.

As the law does not require lenders to sell properties following enforcement of their standard securities, but allows lenders to hold the charged assets for up to five years, active management of those properties in the interim is required. Management is more than just collecting the rents, as a lender holds the called up property on behalf of their borrowers and therefore has a positive duty to obtain best value (which is not always the same as price) for the borrower not just itself.

This active management requirement means it is important for the banks to work with property agents to understand the asset management opportunities that may be available and to appoint a professional to manage the asset. This may be either on a sub-agency from the LPA receiver (so the lender only has to deal with one person) or, if there is a national practice already on board, by involving their Scottish practice. The lender can then assess whether it has the appetite for that opportunity or if it just wants to sell the property taking the current return.

The obvious benefit to the lender in opting to manage the property is increased returns and recoveries from avoiding a fire sale and/or depressing values by putting a number of properties on the market at once. The less obvious benefit is the lower cost base associated with the LPA receiver rather than administration.

Our cross-practice Corporate Turnaround and Insolvency team is used to advising on such matters. **In the first instance please contact our head of Scottish Real Estate, Euan Bremner on tel: +44 (0) 117 939 2282 or email euan.bremner@burges-salmon.com for further details.**

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