

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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Burges Salmon plays leading role on the country's first two PAIFs

Burges Salmon's real estate investment practice has further enhanced its reputation in the market by securing leading roles on the country's first two Property Authorised Investment Funds ("PAIF"). PAIFs are a new form of tax transparent real estate investment vehicle, benefitting from many of the tax efficiencies which Real Estate Investment Trusts enjoy but without the requirement to list on the main stock exchange. Many institutional funds are considering using the structure for new or existing funds at the moment.

The first PAIF, The Piccadilly UK Commercial Property Income Fund, received its FSA authorisation in February 2010 and Burges Salmon played a leading role in the set up of the fund, acting for the fund manager Premier Asset Management on the structure and negotiations with HMRC and the FSA.

Mahrie Webb, head of fund structuring, said

"We have worked with Premier for many years on the set up of FSA regulated funds – the challenge here was finding a structure which met the commercial objectives of the parties whilst satisfying the applicable tax rules and FSA requirements. Constructive engagement with the FSA and HMRC together with the positive and constructive approach taken by all parties helped ensure the successful launch of this innovative fund."

Two weeks after FSA authorisation of the Piccadilly UK Commercial Property Income Fund, the CB Richard Ellis UK

Property fund received its FSA authorisation, and Burges Salmon are pleased to announce that they have been appointed sole property advisors to this fund. Richard Clark, head of Real Estate said *"This appointment, combined with the work we have done on the fund structure for Premier, demonstrates that we really are at the cutting edge of UK Real Estate Investment. We are delighted to be involved in both projects and look forward to contributing to their success."*

If you would like more information about fund structuring, please contact Mahrie Webb.

If you would like more information about our real estate investment and asset management services please contact Richard Clark or Rick Read.



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Corporate Real Estate rebranding Corporate Occupier

The Corporate Real Estate unit of the Property Department – the part of the department that services clients' own commercial property requirements – is rebranding as Corporate Occupier. Rick Read, who is overseeing the rebranding, said

"Corporate Real Estate covers a multitude of disciplines, but it doesn't really identify with client and non-property

lawyer needs. Corporate Occupier does, and we think the new name will help us grow this part of the practice."

If you have any questions or want more information on the Corporate Occupier Unit, please contact any of the Corporate Occupier partners – Rick Read, Richard Walford, Stephen McNulty and John Dunn.

Visit our website at www.burges-salmon.com

Planning process not optional

Cala Management Limited v The Firm of Messrs A&E Sorrie (2009)

A recent decision of the Scottish Courts highlights that the requirements of the planning process must be properly reflected in contractual agreements relating to the development of land.

Cala Management Limited (“Cala”) signed two separate option agreements with a landowner, on similar but not identical terms, with a view to developing land in Inverurie, Aberdeenshire for residential and commercial use. The options could be exercised once planning permission was obtained.

Cala submitted its planning applications and the local planning authority resolved to approve both, subject to the planning authority, landowner and developer entering into a section 75 agreement (the Scottish equivalent to a section 106 agreement) securing planning gain contributions (including financial payments and affordable housing).

The landowner, however, refused to sign the section 75 agreement, which prevented the grant of the planning permission and therefore the exercise of the options. With the options due to expire, the developer sought a court order compelling the landowner to sign.

On the face of it the developer had a compelling case. The option agreements placed the landowner under an obligation to provide all reasonable assistance to the developer in securing planning permission, including an obligation to enter into the section 75 agreement “at the reasonable request” of the developer. The landowner had also conceded that the obligations contained in the section 75 agreement were not unusual and that the agreement had been based on the local planning authority’s standard draft, which had been used many times in the past.

Despite both of these points, the landowner persuaded the Court that they were entitled to refuse to sign the section 75 agreement. Although the Court stressed that the decision turned on the particular facts of the case, some aspects of the decision may have wider implications in both England and Scotland:

- The option agreements allowed the developer to acquire

the land in stages. However, this was not reflected in the section 75 agreement, which (unusually) imposed joint and several liability on the owners of the entire development site, irrespective of which party was responsible for a breach of the section 75 agreement. The Court accepted that it was reasonable for the landowner to refuse to sign an agreement that exposed them to liability for matters over which they had no control.

- The section 75 agreement restricted in perpetuity the use of parts of the site to affordable housing and landscaping. The developer was entitled but not obliged to purchase these areas. The landowner had not been involved in negotiations with the planning authority and had not agreed to these restrictions. The landowner argued that the developer had created a situation whereby they could purchase the land identified for open market housing, and leave the rump of the land with the landowner.
- The section 75 agreement also sought to bind land that was not covered by the option agreements but was owned by the landowner. This had come about as a result of a failure to ensure the redline boundaries of the two planning applications corresponded with the option agreements. The Court held that the landowner was not required to bind land not under option.

Interestingly, the developer’s argument that the landowner was really complaining about the terms of the option agreements, not the section 75 agreement, was rejected. In essence, the Court held that although the situation may have arisen as a result of the landowner striking a bad bargain in the option agreements, this did not give the developer carte blanche to exploit the landowner where they still had some discretion over signing the section 75/section 106 agreement.

Beware - the developer in this case spent approximately 10 years promoting the site through the local development plan and obtaining a resolution to grant consent for residential and commercial development, all at their own cost. The option agreements expired when the Court issued its decision, leaving the landowner free to re-market their land ...with the benefits of the enhanced planning position!

“Interestingly, the developer’s argument that the landowner was really complaining about the terms of the option agreements, not the section 75 agreement, was rejected.”

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Business rates review

April 1 marked the five-year revaluation for rateable values across the UK, with many businesses facing increased ratings demands from their local finance officers. With the exception of Wales, transitional rates relief mean that substantial increases in rates following revaluation are effectively 'phased in', but some businesses may still face a heavy burden in trying times. If you think the rateable value of your property is wrong, it is a relatively straightforward process to submit an appeal to the Valuation Office. Appeals can be based on "material change in circumstances" which you feel affects the value of your property, such as:

- a change in its physical state such as adding to or demolishing part of it,
- a change in its use,
- a physical change in the locality, or
- a change in the use of a neighbouring property.

Recently we have been assisting clients in securing rates reliefs and reductions for large industrial premises which are in the process of decommissioning or demolition. Often, by working closely with a valuation surveyor and the valuation officers, significant reductions can be achieved throughout

the run-down process as an industrial premises is gradually taken out of commission. There is an increased demand for advice in relation to decommissioning and demolition, particularly since the changes to Empty Property Relief in April 2008. The abolition of this relief has hit businesses hard, as the government's intention to encourage the use of empty commercial property led to a substantial increase in the rates burden. Businesses can, however, still benefit from 3 months' relief (6 for warehouse or industrial premises) and it is important to take advantage of this.

Recognising the need to support small businesses and start-ups, Alastair Darling's March Budget saw an increase in the scope of small business rates relief, including a one year exemption from rates for any properties with a rateable value below £6000, as well as an increase in the amount of business taper relief. As well as reliefs for small businesses, ratings can be relaxed for charities, certain non-profit organisations, and certain rural businesses with a rateable value of up to £14,000, provided they are within a defined rural settlement with fewer than 3,000 people.

For further information on Business Rates, including whether you could benefit from appeals or reliefs, please contact chris.pritchett@burges-salmon.com

"Appeals can be based on "material change in circumstances" which you feel affects the value of your property..."

Access for all

The case of *Allen v Royal Bank of Scotland Group Plc [2009] EWCA Civ 1213* confirms that service providers may have to make significant adjustments to their premises to ensure they comply with the Disability Discrimination Act 1995 ("DDA").

A bank customer who was wheelchair bound, was unable to use his local branch because the entrances had steps and the cashpoints were too high. The bank had considered installing a platform lift at the branch but ultimately decided not to as it would mean losing an interview room, reducing 8 interview rooms to 7. Mr Allen brought a claim against the bank under the DDA duty on service providers not to discriminate by refusing to provide a disabled person with any service provided to members of the public. He was successful – the bank were ordered to install the platform lift at the branch. The Court confirmed that internet and telephone banking were not alternative ways of making branch services available. If they were, it was unlikely RBS would maintain about 2,300 branches around the Country for the public at large.

The case highlights that service providers must give careful thought to the needs of all their customers to ensure equal access to their services is provided to each and every one.



The onus is on them to prove compliance with the legislation and maintaining evidence of that compliance will be key in heading off potential claims.

For further information on this case please contact Richard Walford on +44(0)117 939 2295 or email richard.walford@burges-salmon.com

No limit on option periods after 6th April

The Perpetuities and Accumulations Act 2009 came into force on 6th April 2010.

Prior to the Act, the rule against perpetuities was a legal device which set a time limit, or **perpetuity period**, within which future dealings with property had to take place. The perpetuity period varied depending on the dealing in question and breaching the rule possibly meant a gift or a right was invalid. The rule applied to many commercial dealings with land which had nothing to do with the family settlements that the rule was designed to control. As a result it sometimes thwarted freely negotiated property transactions which fell foul of it or forced parties to enter more complex arrangements, simply to avoid it. In particular, an option to acquire an interest in land had to be exercisable within 21 years, unless it was an option to acquire the reversion contained in a lease.

The Perpetuities and Accumulations Act 2009 abolishes all existing perpetuity rules in respect of documents executed on or after 6th April. It imposes a single, mandatory perpetuity period of 125 years which only applies to future estates and interests in property **held on trust**. So from 6th April the rule will no longer apply to commercial interests such as future easements (to be granted only if development takes place), options to purchase or lease land and rights of pre-emption or first refusal.



In particular it is now possible to grant options over land lasting for more than 21 years which will permit more flexible longer term contractual arrangements concerning land with the potential for development.

For more information on the Perpetuities and Accumulations Act 2009 please contact Matthew Sims on +44(0)117 902 6681 or email matthew.sims@burges-salmon.com

Recent ruling confirms rent is an expense of liquidation

The recent High Court decision in ***Goldacre (Offices) Limited v Nortel Networks UK Limited (In Administration) [2009] EWHC 3389 (Ch)*** provides that if a company in administration uses leasehold property for the benefit of its creditors, and the rent falls due for payment during that period of use, the Administrator must pay rent under the lease as an expense of the administration. This applies whether or not the Landlord seeks payment. Previous cases suggested an element of discretion and so the most common approach by Administrators prior to the Goldacre decision, would be to balance the interests of creditors against those of the Landlord, very much on a case by case basis.

What constitutes "use" is key. Nortel only occupied part of the premises in the case but the Administrator was ordered to pay the full rent. Whilst there is no direct authority on the point, it also seems logical that the premises are being "used" where the Administrators have allowed a purchaser of the business and assets of the insolvent company into occupation under a Licence to Occupy, or where assets are kept at the premises to achieve a better sale price.

Much also turns on timing. Administrators will be keeping a

keen eye on rent payment days. If rent falls due before the company in administration starts using the premises for the benefit of its creditors, it will not rank as an expense. Administrators will therefore be looking for administration appointments to take effect the day after rent falls due under a lease. If the decision has been taken that the company in administration vacate the premises, or that the lease be assigned to a purchaser, the Administrator will be pressing hard to complete before the next rent payment day.

The case will not help a Landlord in circumstances where the Administrators are unable to pay the rent because they do not have sufficient funds. It does however strengthen the commercial position of a Landlord faced with a Tenant in Administration who continues to trade. Expenses of the Administration will rank ahead of both preferential creditors and the holders of floating charges who a Landlord (as unsecured creditor) would normally rank behind.

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