SLAUGHTER AND MAY

REAL ESTATE

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NEWS

The heat is on

Government publishes MEES guidance

The Government has published guidance on the minimum energy efficiency standards (MEES) that are due to come into force in April 2018. The guidance gives an indication of how MEES will be applied, what energy efficiency improvement works are required to be carried out by a landlord and the application of the exemptions. The Non-Domestic Private Rented Property Minimum Standard: Guidance for landlords and enforcement authorities on the minimum level of energy efficiency required to let non-domestic property under the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 is available at www.gov.uk. The minimum level of energy efficiency is currently set at an EPC rating of band E. Any property with a rating below this is a substandard property and the following prohibitions on renting may apply:

- from 1 April 2018, landlords may not grant a tenancy of non-domestic private rented properties to new or existing tenants if a property has an EPC rating of band F or G
- from 1 April 2023, landlords must not continue letting a non-domestic property that is already let if that property has an EPC rating of band F or G.

The prohibition on the letting of substandard property is something that all landlords need to be aware of and energy efficiency improvement works may need to be carried out if a new lease is to be granted or, with effect from 2023, the premises are to continue to be let. It is important to consider whether a landlord is able to claim an exemption, for example where all improvements have been carried out and the rating is still below band E. Landlords must register any exemption on the PRS Exemptions Register. If a landlord lets a property or continues to let a property in breach of the Regulations, there is a risk of enforcement action being taken. The prohibition on letting does not apply where a property does not need an EPC. For example, industrial sites, workshops or agricultural buildings with low energy demand, temporary buildings with a planned period of use of two years or less, listed buildings where compliance with MEES requirements would unacceptably alter their character or appearance, and furnished holiday accommodation.

Relevant energy efficiency improvements that a landlord may choose to install to raise the EPC rating of a substandard property are energy efficiency improvements set out in a recommendations report accompanying an EPC, a report prepared by a surveyor or a Green Deal advice report. Details of the types of improvements are set out in appendices to the guidance. The landlord is only required to carry out works with an energy efficiency payback of seven years or less. In other words, the expected value of savings on energy bills over a seven-year period should exceed the cost of the relevant works. The guidance offers examples of how the relevant energy price should be calculated.

Where a superior landlord's, tenant's or other third party's consent is required for the energy improvement works, an exemption may be available if that consent is refused. In addition to the third party consent exemption, there is also a five-year property devaluation exemption where the improvement works would reduce the market value of the property and a six-month exemption may apply in certain circumstances where a person has recently become a landlord. Nothing in the Regulations affects the tenant's right to security of tenure under the Landlord and Tenant Act 1954. In the case of mixed-use properties, the landlord must

determine whether the relevant premises fall within the domestic or non-domestic category. Where a landlord has the benefit of an exemption, that exemption will not automatically pass to a purchaser of the landlord's interest. The new owner will either need to carry out the relevant energy efficiency improvement works or itself register an exemption. MEES applies to all tenancies (including sub-leases) but does not apply to short tenancies (not exceeding six months) and long tenancies (99 years or more).

CASES ROUND UP

She's in fashion

Condition to rent concession was invalid as a penalty

Vivienne Westwood Limited v Conduit Street Development Limited: [2017] EWHC 350

This case relates to a side letter providing a tenant with a rent concession on the grant of the lease, the termination provisions of which were held to operate as a penalty and were unenforceable. Vivienne Westwood held a 15-year lease of a shop on Conduit Street granted in 2009. The initial rent was £110,000 per annum, subject to upwards-only review to the open market rent every five years, in 2014 and 2019. However, as part of the original deal, the original landlord had provided a side letter that reduced or capped the rent payable for the first ten years of the term. The capped rent was stepped for the first five years and could not be more than £125,000 following the first rent review. The concession was expressed to be personal to Vivienne Westwood. In addition, the side letter provided that the concession would cease if there was a breach of "any term of the lease", in which case the letter would end with immediate effect and the full rent would apply with retrospective effect, as though the concession had never existed. With effect from the 2014 rent review, it was established that the market rent was £232,500 per annum. In 2015, the landlord purported to terminate the side letter on the grounds that the rent had been paid a few days late. Vivienne Westwood argued that the termination for breach of the lease provision operated as a penalty. The landlord claimed that the concession had ended and an annual rent of £232,500 was payable.

The High Court found in favour of the tenant. The Supreme Court in *Cavendish Square v Makdessi* restated the law in relation to penalties. A penalty can only arise where a secondary obligation is imposed upon the breach of a primary obligation and, if that is the case, it imposes a detriment on the party in breach that is out of proportion to the value of any legitimate interest of the non-defaulting party or that was exorbitant, extravagant or unconscionable in comparison with the value of the legitimate interest. The High Court decided that the primary obligation was to pay the rent at the reduced level and the secondary obligation was to pay the full rent in the event of any breach of the lease. The secondary obligation applied to all breaches, including trivial breaches, and the requirement for the tenant to pay the full rent as a result of a trivial breach of the lease was not the commercial deal between the parties. Payment of the full rent would be exorbitant in comparison with the value of the landlord's legitimate interest in ensuring that the tenant complied with its obligations in the lease, as varied by the side letter. The landlord also retained the usual remedies under the lease for the late payment of rent. The termination provision in the side letter was unduly harsh and penal in nature. It did not reflect the deal agreed when the lease was granted and was unenforceable as a penalty.

Burning down the house

Premises undergoing refurbishment had nominal rateable value

Newbigin v SJ & J Monk: [2017] UKSC 14

The Supreme Court has overturned the Court of Appeal's decision regarding the physical state premises are assumed to be in when valued for the rating list. In this case, the ratepayer was carrying out redevelopment works to its office premises. The premises were the first floor of a block of offices and, following the surrender of the occupational lease, the appellant landlord carried

out works for the renovation and improvement of the premises to make them more adaptable for a future letting of whole or part. The premises were stripped back to shell and core. All internal elements of the premises were removed, including lighting, power, fire alarm system, suspended ceiling and all sanitary fittings and drainage. The new works would replace these elements and rebuild the premises as three separate lettable areas. The ratepayer sought to alter the rating list to classify the building as "building undergoing reconstruction" with a nominal rateable value of £1. This was on the basis that the premises were not capable of beneficial occupation on the material day. Under the Local Government Finance Act 1988, the rateable value of vacant non-domestic property is assessed based on the annual rent reasonably obtainable on the valuation date, on the assumption that the property is in a state of reasonable repair, excluding any repairs a reasonable landlord would consider uneconomic. The Court of Appeal held that the normal statutory presumption that the premises were in repair should apply, even where the premises were not capable of occupation, and a rateable value of £102,000 should remain. This decision meant that the VOA could refuse assessment deletions other than in cases where the building had been demolished.

The Supreme Court unanimously overturned the Court of Appeal decision and reinstated the long-established "principle of reality". The premises should be valued based on their physical state on the date of appeal. In determining whether a rateable unit exists, there is no need to override reality and make any assumptions regarding repair. The premises were undergoing reconstruction on the material day and the rating list should have been altered to reflect that reality. During the redevelopment, the building was not capable of beneficial occupation and had only a nominal value. The decision is good news for property owners carrying out redevelopment works. If the premises are not capable of beneficial occupation the statutory presumption that they are in reasonable repair does not apply.

Making plans for Nigel

Copyright remained with planning permission plans

Signature Realty Ltd v Fortis Developments Ltd and another: [2016] EWHC 3583

The claimant property developer obtained planning permission for the development of a block of student flats in Sheffield. The permission was granted on the basis of plans prepared by its architects. The drawings were published on the Sheffield planning portal. The claimant was unable to secure finance to acquire the site and it was sold to the defendants. The defendants carried out the development in accordance with the planning permission and the issue was whether they had infringed the copyright in the original architects' plans.

The High Court pointed out that there was no statutory or intellectual property right in a planning permission. However, copyright did subsist in the architects' drawings. Although the defendants had engaged their own architects, there had been some instances of infringement in their use of the original plans. The defendants had used the original plans, for marketing, tendering and estimating purposes. Also, although they would have had to make their own measurements, they would have relied on the original plans as their plans had to comply with the planning permission. The judge did not assess quantum but ruled that additional damages under S97(2) of the Copyright, Designs and Patents Act 1988 could not be awarded because there had been no instances of flagrant use of the copyright materials. The case indicates that when relying on a planning permission attached to land, care needs to be taken to ensure that the copyright in the plans attached to the permission is not infringed.

Leave home

Guardians occupied under a tenancy

Camelot Property Management Limited and another v Roynon: [2017]

Bristol City Council owned a former care home that was empty. For security purposes, the Council

engaged a management company to allow individuals to occupy the premises as property guardians at a low rent. The occupiers entered into a written agreement, which was expressed to be a licence to occupy and not a tenancy. The defendant was one of the occupiers who occupied two specific rooms and had access to a communal kitchen, washing facilities and living area for £247 a month. The management company purported to terminate the agreement and the occupier claimed to have an assured shorthold tenancy. The court was required to determine the nature of the occupation.

The County Court held that the defendant had an assured shorthold tenancy that had to be determined in accordance with the Housing Act 1988. Although the agreement was labelled as a licence, the agreement did not reflect the reality of the defendant's occupation. Although the agreement entitled the management company to designate rooms, the reality was that the defendant had exclusive possession of two rooms, to the exclusion of the other occupiers. The Management Company did not enter the rooms on a regular basis and did not provide services. The defendant guardian occupied under a monthly assured shorthold tenancy.

OUR RECENT TRANSACTIONS

We advised Equinix on the purchase of a UK data centre in Slough from IO.

We advised Aquis Exchange on its new London headquarters at 75/77 Cornhill.

We are advising Everton in connection with the development of its new £300 million stadium at Bramley Moore Dock.

We advised Minerva, a joint venture between clients of Delancey and Ares Property Partners, on the sale of Nestlé House and Queen's Square in Croydon to R&F Properties for circa £60 million.

AND FINALLY

Lawyer, lawyer, your pants are on fire…

A defence lawyer felt the heat when his trousers caught fire as he delivered final arguments in an arson case. Witnesses told The Miami Herald that smoke started billowing from Stephen Gutierrez's trousers when he was arguing that his client's car spontaneously combusted. He quickly left the court and later blamed a faulty e-cigarette battery.

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