REAL ESTATE

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NEWS

Love me or leave me

MEES guidance on exemptions published

The Government has published its guidance on the Private Rented Sector (PRS) exemptions and the Exemptions Register. The PRS Exemptions Register is for properties that are legally required to have an EPC but that cannot be improved to meet the minimum standard of EPC band E for one of the specified reasons. Any relevant exemption must be registered by the landlord on the Register and the benefit of the exemption will not pass to a new owner of the property. The new owner must register the relevant exemption if it applies. When registering an exemption, the landlord must provide the address of the relevant property, specify the exemption, provide appropriate evidence to establish the exemption and include a copy of a valid EPC for the property. Most exemptions will last for five years.

The main exemptions are: the no-funding exemption for domestic property, which is available where a recommended measure to improve the energy efficiency of the property cannot be wholly financed at no cost to the landlord; the seven-year payback exemption for non-domestic property, which applies where the cost of the relevant energy efficiency improvement cannot be recovered by way of energy savings over a seven-year period; the all improvements made exemption, where all the relevant energy efficiency improvements for the property have been made (or there are none that can be made) and the property is still sub-standard; the third-party consent exemption, where a third-party consent is required for the improvement works, such as planning permission or the consent of a superior landlord, mortgagee or tenant, if the landlord has sought to obtain the consent and it was refused or granted subject to a condition that the landlord could not reasonably comply with; and the devaluation exemption, which is available where an independent surveyor has provided a report indicating that energy efficiency improvement measures would result in a reduction in the value of the property or building it forms part of by more than 5%. A temporary six-month exemption may apply in certain circumstances where the relevant person has suddenly become the landlord of a property, including where the grant of the lease is due to a contractual obligation, the lease has come into effect by operation of law and the new lease has been granted under the Landlord and Tenant Act 1954. In addition, when the minimum standard applies to existing leases, the landlord will have a temporary six-month exemption when it becomes the landlord as the result of the purchase of the property.

CASES ROUND UP

Words don't come easy

No oral modification clause was effective MWB Business Exchange Centres Ltd v Rock Advertising Ltd: [2018] UKSC 24

The Supreme Court has considered whether a no oral modification clause is effective to prevent an oral variation of the terms of the contract. The case concerned a contractual licence to occupy business premises that expressly provided that a variation to the agreement had to be in writing and signed on behalf of the parties. The licensee was in arrears and the parties agreed orally a revised payment schedule allowing the arrears to be spread over the remainder of the licence period. The agreement was made with an employee of the licensor who was found to have authority to make the variation. The licensor challenged the validity of the variation. The Court of Appeal held that the

oral agreement to vary the payment schedule also amounted to an agreement to dispense with the no oral modification clause.

The Supreme Court allowed the licensor's appeal and held that the oral variation fell foul of the no oral modification provision and was invalid. Accordingly, the licensee remained liable for the arrears in accordance with the original payment schedule. The Supreme Court confirmed that the law should and did give effect to a contractual provision requiring specified formalities to be complied with for a variation of the contract. No oral modification clauses were often used in written agreements and there were good business reasons for doing so. The need for a written variation provided certainty, helped avoid disputes about whether there had been a variation and introduced a level of formality that helped parties to comply with internal rules in relation to authority and risk management. There was no mischief in no oral modification clauses and they did not frustrate or contravene any policy of the law. It did not follow that parties who had agreed an oral variation despite the existence of a no oral modification clause must have intended to dispense with the clause. Lord Sumption accepted that this could lead to injustice but added that estoppel might be available to help the injured party. Lord Briggs dissented in part and considered that a no oral modification clause was binding only until the parties expressly or by strictly necessary implication agreed to do away with it. However, even applying that test, the outcome of the present case was the same and the oral variation to the payment schedule was invalid.

Up on the roof

Demised premises included airspace

Ralph Kline Ltd v Metropolitan and County Holdings Ltd: [2018] EWHC 64 (Ch)

The issue in this case was whether a long lease granted in 1970 of blocks of flats and garages in Hampstead included the airspace above part of the demised premises. In 2001, a lease was granted of certain areas of airspace above parts of the demised premises to the claimant. The defendant was the tenant of the premises under the 1970 lease and objected to the registration of the airspace lease on the basis that it was entitled to possession of the airspace under the 1970 lease and the airspace lease was reversionary to its interest. The claimant planned to develop in the airspace and argued that the 1970 lease did not include the airspace and, therefore, it was entitled to possession.

The court found in favour of the defendant. A lease includes the airspace directly above the land demised unless a contrary intention appears in the lease. Although the demised premises were defined by reference to a specific set of buildings, that description did not confine the demised premises to only the internal parts of those buildings. If the intention had been that the 1970 lease should be internal only, it would have been spelt out in the description of the premises. There was no wording specifically excluding the structural or external parts of the buildings. The reservation of rights in favour of the landlord over the airspace served to confirm that it was intended that the airspace was included in the demise. The 1970 lease included the airspace above the buildings and the airspace lease was granted subject to and with the benefit of it.

Down down

Lease of maisonette did not include subsoil

Gorst and another v Knight: [2018] EWHC 613 (Ch)

The parties were the landlord and tenants of a maisonette in London held under a long lease. The maisonette formed part of a house that had been divided into two units. The tenants' property comprised the ground floor and cellar. The landlord was the freeholder and also owned the first and second floor unit. The tenants planned to convert the cellar into habitable accommodation and needed to dig down into the subsoil to achieve sufficient ceiling height. Planning permission was obtained, but the landlord opposed the plan and sought a declaration that the tenants' lease did not

extend to the subsoil beneath the house. If the lease did not include the subsoil, any excavations would be a trespass and the conversion works would not be able to proceed without the landlord's consent.

The court had to construe the lease by ascertaining the objective meaning of the language used. The court had to look at what was contemplated by the parties when the original lease was granted in 1992. The general principle was that a conveyance of land included the surface and everything below it unless there were exceptions from the grant, such as mines and minerals. The issue was whether the landlord had demised the subsoil to the tenant of the maisonette. The lease referred to the maisonette on the ground floor of the building and did not include the subsoil because that was not part of the building. The lease reserved rights for the landlord to run services under the demised premises and the word "under" indicated that there was a lower limit to the maisonette. In 1992, extensions downwards were not uncommon and the subsoil could have been demised for that purpose had the parties intended to do so. The subsoil was not included in the demise and any extension would be a trespass without the consent of the landlord.

Electricity

Landlord was responsible for the electrical system under an implied term

J.N. Hipwell & Son v Szurek: [2018] EWCA Civ 674

The parties had entered into a three-year lease of commercial premises that the tenant operated as a café. The lease contained an entire agreement clause and also stated that the tenant was not relying on any statement or representation made by the landlord and would have no claim in respect of any such statement or representation. The tenant experienced operational difficulties at the premises caused by the electrical wiring and she was forced to close her business. The tenant sought to recover damages from the landlord based on a representation made to her that the premises had been rewired and had passed an inspection. The tenant alleged that the misrepresentation entitled her to rescind the lease. She also argued that a term should be implied in the lease to the effect that the landlord was responsible for maintaining and repairing the electrical installations at the property and that the landlord was in repudiatory breach of that obligation. The County Court held that the landlord was in repudiatory breach of an implied obligation as to the safety of the electrical system at the premises.

The Court of Appeal dismissed the landlord's appeal. In the absence of a fraudulent misrepresentation, the non-reliance limb of the entire agreement clause prevented the tenant from making a claim based on reliance on a representation by the landlord. Accordingly, the tenant's case depended on the implication of a term in relation to the electrical system. A term could be implied where it was necessary to give business efficacy to the contract and the entire agreement provision did not affect the implication of such a term. In the present case, there was a legitimate basis for implying a term making the landlord responsible for the installation and maintenance of the electrical wiring system. The obvious gap in the drafting should be plugged by implying a covenant on the part of the landlord in relation to the installation and safety of the electrical installation.

My name is

Court of Appeal rules on advisers' liability for property fraud

P&P Property Ltd v Owen White & Catlin LLP and **Dreamvar (UK) Ltd v Mischon de Reya**: [2018] EWCA Civ 1082

The Court of Appeal considered the liability of solicitors and estate agents for losses caused by identity fraud in a property transaction. In both cases, a fraudster had posed as the legal owner of the property and the claimant purchasers had lost the purchase monies when they were released to the fraudster without a genuine completion of the sale of the property taking place. The Court of Appeal considered the relevant issues and decided

that both the sellers' and the buyers' solicitors were liable for the buyers' losses.

The Court of Appeal confirmed that a solicitor's obligation to check a client's identity did not amount to a warranty that they were acting for anyone other than their client. In addition, the Court of Appeal confirmed that neither the buyers nor their solicitors had a claim against the sellers' solicitors under the Money Laundering Regulations 2007 in respect of their identity checks. However, the sellers' solicitors had given an undertaking that they would have the seller's authority to release the completion money on completion. The reference to "seller" was to the owner of the property named in the contract and not the solicitor's client. Accordingly, the sellers' solicitors were in breach of undertaking. It was accepted in each case that the buyers' solicitors were in breach of trust for releasing the purchase monies otherwise than on a genuine completion of a sale and purchase of the property. The Court of Appeal held that the sellers' solicitors had also been in breach of trust by releasing the purchase monies to their client. Having established that both the sellers' and the purchasers' solicitors were in breach of trust, the Court of Appeal considered whether it should exercise its discretion to grant relief under S61 of the Trustee Act 1925. The Court of Appeal decided that relief should not be granted and further proceedings will be required to apportion the liability between the sellers' and the buyers' solicitors.

OUR RECENT TRANSACTIONS

We are acting for Shahid Khan in respect of his offer to purchase Wembley Stadium from the Football Association.

We advised UD Europe Limited on the sale of 265 Strand, London WC2 for just over £80 million.

AND FINALLY

Snake head

A Texas man had a lucky escape when he was bitten by the severed head of a rattlesnake that he had decapitated.

Garlic smuggling

Thailand's military has been enlisted to help tackle a surge in garlic smuggling from neighbouring countries.

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