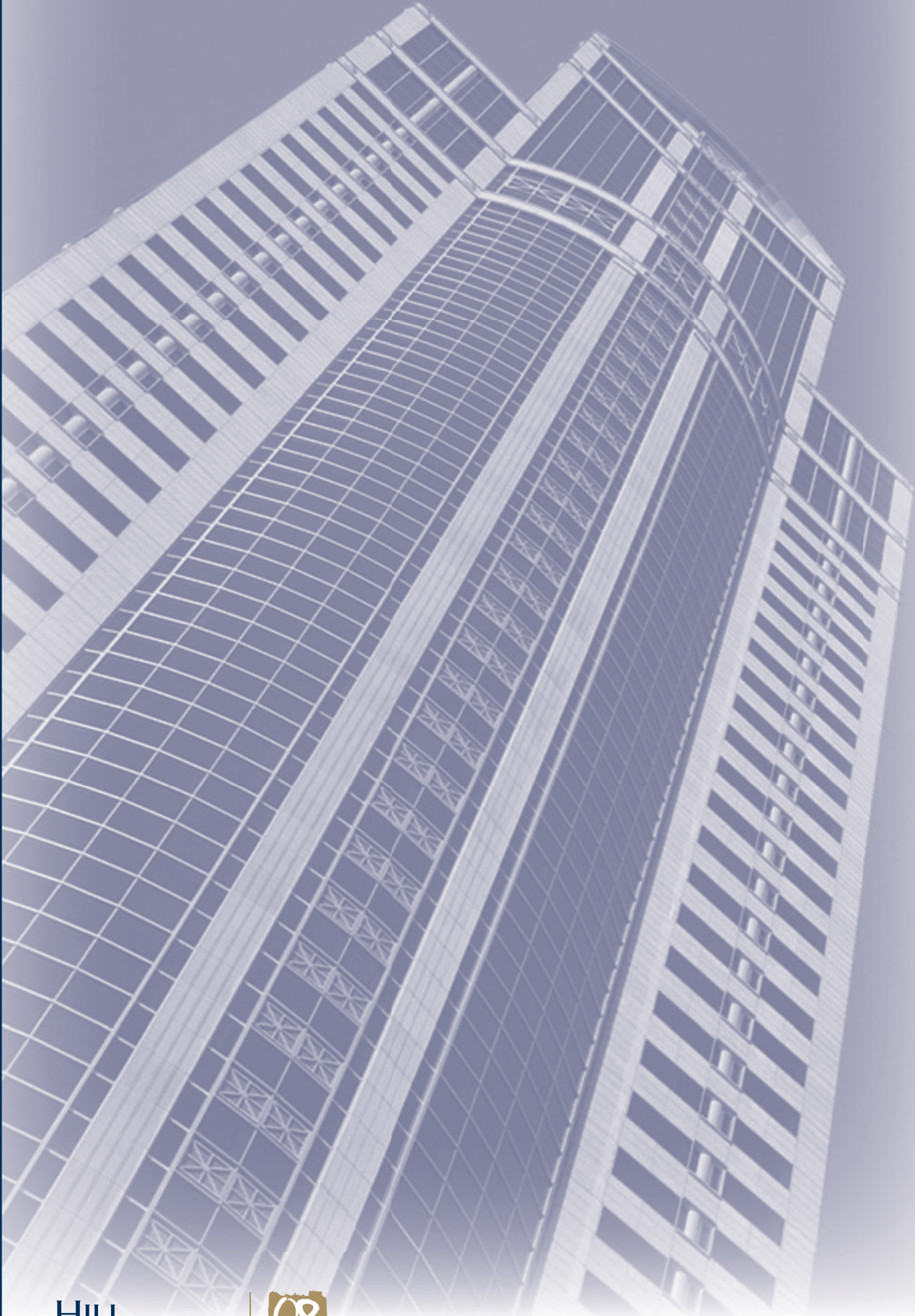


May 2007

HILL DICKINSON

Commercial Property Newsletter



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Welcome

We are delighted to announce that as from 1 May 2007 the Property and Construction Divisions have joined together to form a single Practice Group with more than 80 fee earners.

It had become increasingly apparent over recent years that the two Divisions work closely together and in a number of instances share developments and clients. The new Practice Group will enable us to build more effectively on some key strengths and to provide an enhanced commercial service to all our clients.

We are also delighted to follow up the recruitment news from the last edition by announcing the arrival of Philippa Hipwell as an Associate. Philippa joined us in March from Hewitsons in Northampton and brings with her over 13 years' experience in the full array of development, funding, landlord and tenant and wider property support matters.

We finish this edition's welcome with another piece of good news. On 10 May, Hill Dickinson luminary Peter Bullivant was honoured with the Lifetime Achievement Award at the Insider Liverpool Professional Awards 2007.



The award recognises outstanding contribution and achievement by an individual throughout their career to business life in the city. Peter has been instrumental in the growth of Hill Dickinson's property practice to its status as one of the largest and most successful in the UK following the merger with Bullivant Jones in 2004. Although Peter semi-retired in February this year, he continues to work for the Firm as a consultant on property and private client matters. On behalf of Members and Colleagues, we would like to take this opportunity to congratulate and thank Peter for his dedication throughout his influential and distinguished career.

Pamela Jones & David Swaffield
Joint Heads of the Property and Construction Practice Group

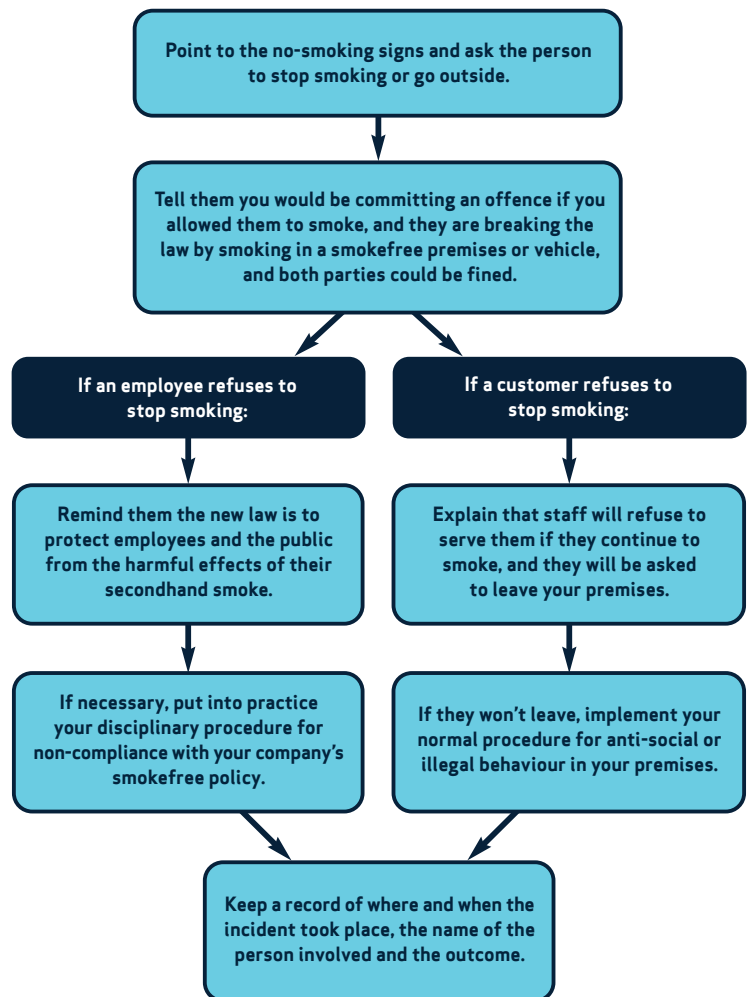
Stubbing it out

When England becomes the last of the home nations to go "smoke free", the way we live and work throughout Britain will have been revolutionised. But, as Bill Chandler explores below, the new regime also imposes additional duties and liabilities on those who own, control and/or occupy commercial property. Are your properties in Wales, Scotland and Ireland compliant and are you ready for the start of "Smoke Free England" on 1 July?

At 6am on Sunday 1 July 2007, no fewer than five sets of Regulations will come into effect in England to implement the smoke free legislation originally enacted in Part 1 of the Health Act 2006. England will take its place alongside Scotland (smoking ban introduced 26 March 2006), Wales (smoking ban introduced 2 April 2007) and Northern Ireland (smoking ban introduced 30 April 2007) as a smoke free nation. This article looks at the implications for those who own, control and/or occupy commercial property in England or Wales.

HOW TO DEAL WITH SMOKING IN A SMOKEFREE PLACE

If you are in charge of smokefree premises and/or vehicles, you will have a legal responsibility to prevent people from smoking in them. If someone does smoke in any premises or vehicles you are responsible for, here are some practical steps you might take to deal with them.



If physical violence is threatened by a person smoking, we suggest you notify and/or seek the assistance from the police.

Figure 1 - Smoke Free England flowchart



Figure 2 - English sign



Figure 3 - Welsh sign

England

The smoke free legislation will apply to virtually all “enclosed” and “substantially enclosed” public places and workplaces in England. The Regulations clarify the meaning of these terms but basically premises are “enclosed” if they have a ceiling (or roof) and walls, and are “substantially enclosed” if they have a ceiling (or roof) and walls but the walls have openings (excluding any doors and windows which are capable of being closed) not exceeding half the total area of the walls. Smoking rooms will no longer be permitted and temporary structures such as tents and marquees are also within the ambit of the new regime.

Whilst this newsletter is of course primarily concerned with commercial property issues, it is worth noting in passing that the new regime will also apply to vehicles (e.g. buses and trains) as well as buildings.

Those who occupy and/or manage affected premises will have a legal duty to display “no smoking” signs which meet minimum standards set out in the Regulations (fig 2):

- a sign must be displayed in a prominent position at every public entrance to the smoke free premises;
- the sign must be at least A5 size (210mm x 148mm);
- the sign must contain the international no smoking sign (at least 70mm in diameter) together with the words “No smoking. It is against the law to smoke in these premises” in easily-readable characters.

A lesser sign simply consisting of the international no smoking sign (at least 70mm in diameter) may be displayed at:

- a staff-only entrance to smoke free premises (provided that there is at least one full A5 sign at the premises);
- the entrance to premises within larger smoke free premises e.g. a shop unit within an enclosed shopping mall.

But the new regime is not just about signs. Those who control or manage smoke free premises will also be under legal duties to make sure their staff, customers, members and visitors are aware that the law requires the premises to be smoke free and also to actually prevent persons there from smoking.

Enforcement will in most cases be the responsibility of local authorities. Employees and members of the public will be able to report suspected breaches by calling the free telephone number 0800 587 1667.

Penalties will include:

- a £200 fixed penalty notice for failure to display the correct signage (or a fine up to £1,000 if it goes to court);
- a £50 fixed penalty notice for smoking in smoke free premises (or a fine up to £200 if it goes to court);
- a fine of up to £2,500 for failure to prevent someone smoking in smoke free premises.

The Government is sending out information packs to all trading companies currently registered at Companies House, but that will by no means catch everyone who will assume duties and liabilities under the new regime.

The website www.smokefreeengland.co.uk contains much useful material, including:

- copies of the Regulations and all relevant guidance;
- advice on assisting employees to give up smoking;
- signage which can be downloaded and printed off, including suggested variants for different types of business and several bilingual versions;
- a flowchart on how to deal with those who breach the “no smoking” rule (fig 1);
- suggested smoke free policy for businesses to adopt.

Wales

The smoke free legislation in Wales came into effect on Monday 2 April 2007. The intent and practical effect (and the penalties) are the same as the position outlined for England, although the following differences to the signage requirements should be noted:

- the signs must be flat and rectangular and at least 160mm x230mm;
- the international no smoking sign must be at least 85mm in diameter;
- the wording “Mae ysmygu yn y fangre hon yn erbyn y gyfraith/It is against the law to smoke in these premises” must be included (fig 3);
- there is no reduced requirement for staff-only entrances or units within larger smoke free premises.

The national Smoke-Free Compliance Line to report suspected breaches in Wales is 0845 300 2525, with calls charged at the local rate.

The website www.smokingbanwales.co.uk is the equivalent of the Smoke Free England website and contains much useful material, including a slightly different flowchart for dealing with those who breach the “no smoking” rule.

Conclusions

The Government believes that in both England and Wales the smoke free regime should largely police itself, as it has in other countries where similar policies have been adopted, and a supportive enforcement policy is promised, at least in the early days. But complacency must be avoided and all those who own, manage and/or occupy property are advised to familiarise themselves with the new obligations and to prepare themselves, their properties and their staff to comply with the new legislation.

Cracking the Code

In the November 2006 edition we discussed the new RICS Code of Practice for Service Charges in Commercial Leases. The new Code for Leasing Business Premises has now been unveiled and Bill Chandler considers its implications and whether the new Code is likely to enjoy any greater success than previous versions.



When the Code for Leasing Business Premises was unveiled at 11am on 28 March 2007 by the Minister for Communities & Local Government, Yvette Cooper, it represented the third and possibly final attempt by the property industry to regulate itself in the light of continued threats of legislation to outlaw the perceived abuse of commercial tenants by their landlords. The first version of the Code was published in 1995 and the second in 2002, but both have been largely ignored in practice. In fact, a research paper published in 2005 monitoring the effect of the Code found that only 20% of commercial tenants were even aware of its existence.

Elements of the new Code

The new Code comprises 3 separate documents:

- Landlord Code
- Occupier Guide
- Model Heads of Terms

Copies of the Code documents may be downloaded from www.commercialleasecode.co.uk or www.leasingbusinesspremises.co.uk.

Landlord Code

The Landlord Code is a simple 2 page document which sets out how landlords should conduct lease negotiations and also suggests the position which should be adopted on specific matters, including:

- Minimal pre-conditions on tenant break clauses
- Offering on request alternative rent review treatment, on a "risk-adjusted basis"
- Limited pre-conditions for licence to assign and no automatic obligation on outgoing tenants to give an Authorised Guarantee Agreement
- Sublettings to be at market rent at the time of subletting
- Internal non-structural alterations should generally not require landlord's consent
- Landlords to supply a schedule of dilapidations at least 6 months prior to lease expiry
- Tenants to yield up the premises in the same condition as at date of grant
- Rent suspension provisions should apply to uninsured risks as well as insured risks

Occupier Guide

The Occupier Guide is a 6 page document which gives advice to tenants on what they should expect from a landlord in lease negotiations and providing a series of "tips" to make sure that tenants understand the major issues and ask the right questions of their potential landlord.

The Occupier Guide would be of greatest use to a prospective tenant who is not legally represented and the challenge is to increase awareness of the new Code so that those tenants know it exists. Surveyors and other professionals who are acting for prospective commercial tenants (particularly those tenants who are not accustomed to entering into commercial leases and/or who are not going to be instructing solicitors to act on the grant of the lease) should consider bringing the Occupier Guide to the attention of the prospective tenant.

Model Heads of Terms

The Model Heads of Terms are very comprehensive and are designed to ensure that all major issues are identified and agreed in principle at the negotiation stage. Whether or not the landlord intends to adopt the Code, use of comprehensive heads of terms is always to be encouraged, flushing out and resolving any areas of contention at an early stage and providing a sound basis on which the solicitors can proceed once instructed.

Interaction with the Service Charge Code

It goes without saying that the Code for Leasing Business Premises is designed to work in conjunction with the Code of Practice for Service Charges in Commercial Leases (which itself came into effect on 1 April 2007), and the Lease Code requires the provisions of the Service Charge Code to be observed in drafting and operating leases.

So, can it work?

Possibly...

The new Code is endorsed by more major players within the property industry than previous versions (including RICS, The Law Society, the British Property Federation and the British Retail Consortium, as well as the English and Welsh Governments) and the threat of legislation if the new Code fails means that the industry has a vested interest in ensuring that it is a success.

But for as long as both the Lease Code and the Service Charge remain voluntary, many landlords will question whether it is in their best interest to volunteer use of the Codes, especially when faced with a small business tenant likely to take whatever terms the landlord forces on him. It is, after all, precisely that type of tenant that the Government wishes to protect. It is also crucial that such tenants are aware that the Code (and particularly the Occupier Guide) exists, and raising awareness will be a challenge in itself.

And, since adoption of the Codes could prejudice the landlord's position throughout the term of the lease, landlords' solicitors, surveyors and managing agents should not give effect to the Codes in drafting or operating commercial leases without specific instruction from the landlord itself.

Join the debate

What are your views on the Code for Leasing Business Premises and the Code of Practice for Service Charges in Commercial Leases? If you are a landlord or you act for landlords, will you be adopting the Codes? If you are a tenant or act for tenants, will you be requiring your landlords to adopt the Codes? Do you expect anything to change in practice? Please write or email either to your usual Hill Dickinson contact or to Bill Chandler (confirming whether you are happy to be quoted or would prefer your comments to remain non-attributable) and in the next edition we will summarise the responses received.

Bill Chandler
bill.chandler@hilldickinson.com

Tenancy Deposit Schemes

Simon Felce reviews the requirement introduced on 6 April 2007 that any landlord who wishes to take a deposit from a tenant on the grant of an Assured Shorthold Tenancy must safeguard that deposit within a Tenancy Deposit Scheme (“TDS”).

Tenancy Deposit Schemes have been introduced under the provisions of Sections 212 – 215 of the Housing Act 2004, with effect from 6 April 2007. The purpose of the TDS is to prevent (or at least reduce) the risk of a tenant’s deposit being misappropriated by the landlord or its agent.

The obligation applies to all new Assured Shorthold Tenancies where a deposit is taken, whether by the landlord or its agent, even if it is not called a “deposit”. Any deposit paid prior to 6 April 2007 need not be safeguarded by a TDS. If a tenant remains in their existing rented property after the end of the term then if a replacement tenancy is entered into (re-using the deposit paid over on the grant of the original tenancy) a new Assured Shorthold Tenancy will be created and TDS will apply to the original deposit. But if the original tenancy continues without a replacement tenancy being entered into then since no new Assured Shorthold Tenancy is being created no TDS will be required.

Under TDS, once a landlord receives a deposit (even if prior to the creation of the tenancy) it is required to give the following information to the person paying the deposit within 14 days:

- which TDS scheme applies to their deposit;
- how the landlord has complied with the TDS’s initial requirements; and
- how the Act applies to their deposit.

Until the above is done the landlord is prevented from regaining possession of its property using the common “notice only ground” for possession under Section 21 of the Act, although the landlord can still utilise the “fault based” grounds for possession.

As a further sanction for enforcement, if the landlord fails to strictly comply with the above requirements or the deposit paid is not being held in an authorised scheme, a Court must on the application of the tenant require the landlord to pay the tenant within 14 days a fine of three times the deposit. In addition, the Court must either order the landlord to repay the deposit to the tenant or to pay the deposit into one of the schemes.

Landlords are prohibited from taking non monetary deposits and the provisions of the Act cannot be contracted out of. A landlord may however rely on third party guarantees rather than an actual deposit, in which case TDS does not apply.

The Government has set up two types of TDS (and it is for the landlord to decide which he uses):

- A single “custodial scheme” and
- Two “insurance based schemes”

Custodial scheme

Under the Custodial Scheme (the Deposit Protection Service, operated by Computershare) the deposit is paid by the tenant to the landlord who then pays the same into the scheme. At the end of the tenancy, if the landlord and tenant agree how the deposit is to be divided they advise the scheme administrator accordingly who returns the deposit to the relevant parties. If there is dispute, the scheme administrator retains the amount until the relevant dispute resolution service or the courts decide how the deposit is to be dealt with.

There is no fee to join this scheme, but the interest which accrues on deposits paid into the scheme will be utilised for paying the running costs with any surplus being used to offer interest to either the tenant or the landlord as appropriate. The Chartered Institute of Arbitrators provides the alternative dispute resolution (ADR) service under this scheme.

Insurance based schemes

The two insurance based schemes have been set up with:

- Tenancy Deposit Solutions Limited (operated by the National Landlords Association and Hamilton Fraser Insurance, with the Chartered Institute of Arbitrators providing the ADR service); and
- The Tenancy Deposit Scheme (operated by The Dispute Service Limited, who will provide their own ADR service).

A fee is payable to join either of these two schemes.

Under either insurance based scheme the tenant pays the deposit to the landlord, who retains the deposit and pays a premium to the insurer. At the end of the tenancy, if the landlord and tenant agree how the deposit should be divided the landlord simply returns the deposit or the relevant part of it to the tenant. If there is a dispute the landlord must hand over the disputed amount to the scheme administrator for safekeeping whilst the dispute is resolved. If for any reason the landlord fails to comply, the insurance arrangements will ensure the return of the deposit to the tenant if it is entitled to it.

Dispute resolution

All TDS schemes require the deposit to be returned within 10 days of agreement or determination by ADR or the Court. ADR (free of charge for both landlords and tenants) is the default position so far as resolving any dispute is concerned, although its use is not compulsory. One area which will undoubtedly cause difficulty in practice is how the dispute resolution actually works. Whilst it should be relatively simple for a landlord to show that rent has not been paid and the deposit should be utilised to pay it, proving that the whole or part of the deposit should be utilised due to damage allegedly caused by the tenant to the property or fixtures and fittings may well be difficult. It is therefore advisable (for both landlords and tenants) that the tenancy should include a Schedule of Condition and an inventory of fixtures and fittings included within the tenancy.

Transfer of the reversion

Another area which has caused an initial difficulty in practice is what happens if the landlord sells its reversionary interest subject to the tenancy. Whilst the Government guidance envisaged that the deposit would remain protected in this common situation – either within the custodial scheme or by the insurance based schemes – the initial rules for the TDS schemes failed to reflect this. The rules of the custodial scheme have now been amended to allow the landlord to notify the scheme in these circumstances (although the buyer from the landlord would need to register with the scheme first if not already a member), but the position under the insurance based schemes remains less clear-cut, particularly if the buyer from the landlord is not a member of the same scheme.

Simon Felce
simon.felce@hilldickinson.com

Are Your Contractual Adjudication Rules Valid?

Adjudication under the Housing Grants, Construction and Regeneration Act 1996 (“the Act”) is now a well established dispute resolution process within building and construction projects, maintaining the trickle down effect of cash-flow in such projects by giving all parties to construction contracts the right to refer a dispute to adjudication and to obtain a decision from the appointed adjudicator within 28 days of the date of the referral (or longer if agreed). But, as construction specialist Nick Warrington analyses below, problems can arise if the adjudication provisions in the contract do not comply with the mandatory requirements of the Act.



Sections 108(1) to (4) of the Act set out the provisions which a contract must contain in respect of the parties’ right to adjudicate and the conduct of that adjudication. Under section 108(5) of the Act, where a contract does not comply with the provisions of s108(1) to (4), then the adjudication provisions set out in the Scheme for Construction Contracts (England and Wales) Regulations 1998 (“the Scheme”) are to apply.

HHJ Richard Havery QC has recently considered the effect of contractual non-compliance with section 108 of the Act in the cases of Epping Electrical Company Limited -v- Briggs and Forrester (Plumbing Services) Limited [2007] EWHC 4 (TCC) and Aveat Heating Limited -v- Jerram Falkus Construction Limited [2007] EWHC 131 (TCC). Both cases related to the difference between the wording of the adjudication provisions set out in the contract and those required by s108 of the Act.

S108(2)(c) says that the contract shall “*require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred.*”

In Epping, adjudication under the contract was to be in accordance with the Construction Industry Council (“CIC”) procedure current at the time of the adjudicator’s appointment. Paragraph 16 of the 3rd Edition of the CIC procedure reflects the requirements of s108(2)(c) of the Act. However, paragraph 25 goes on to state:

“If the Adjudicator fails to reach his decision within the time permitted by this procedure, his decision shall nonetheless be effective if reached before the referral of the dispute to any replacement adjudicator.”

Aveat was under the GC/Works sub-contract conditions. Clause 38A.5 of the contract contained a similar provision to paragraph 25 of the CIC procedure set out above, therefore allowing the adjudicator to make his decision out of time.

In both instances Judge Havery decided that the requirement of s108(2)(c) was mandatory and as such, in the absence of an extension of time for making the decision being agreed (either by the referring party alone for up to 14 days and thereafter by the consent of both parties), the adjudicator was required to make his decision within the time allowed for by the Act. Judge Havery decided that the CIC and the GC/Works contract procedures were therefore inconsistent with the mandatory requirements of the Act. Judge Havery held that as a consequence this meant that, pursuant to s108(5) of the Act, the adjudication provisions of the Scheme applied in place of the contractual provisions.

It is important to note that Judge Havery made it clear that **all** of the contractual adjudication procedure was replaced and not merely those parts which were incompatible with the Act.

In response to these judgements, the CIC published the 4th Edition of its adjudication procedure on 23 March 2007, modifying the offending paragraph 25 to comply with the mandatory requirements of the Act.

What are the practical effects of these judgments?

- If you have an existing contract which either incorporates the 3rd Edition of the CIC adjudication rules or contains its own adjudication procedure using a term similar to that set out above, the Scheme will apply instead. If your contract provides, as in Epping, that the CIC procedure current at the time of appointment applies, the publication of the 4th Edition of the CIC procedure makes it unlikely that any further action is required.
- If your contract contains a defective provision, you may consider agreeing with the other party to amend or delete any such defective provision.
- If you are about to start or are currently involved in an adjudication incorporating defective rules, the Scheme should be used instead.
- There is the risk that a decision made under an invalid adjudication procedure may be unenforceable. For instance, the adjudicator’s decision in Epping was adjudged unenforceable as it was out of time under the Act and Scheme. Conversely, in Aveat, the adjudicator’s decision was upheld (save in relation to the adjudicator’s decision on an award of inter parties costs) because it was otherwise in accordance with the Scheme.
- Where you are in the process of negotiating either a standard form or bespoke contract you should identify whether it contains a provision which is the same or similar to paragraph 25 of the 3rd Edition of the CIC procedure and if so amend it accordingly.
- If you have recently received an adjudication decision, you should consider whether the procedure complied with the Act. If not, you may have grounds to resist enforcement. As mentioned above, this may be of particular benefit where the defective procedure allowed the adjudicator to award inter parties costs. The Scheme does not confer this power on an adjudicator and Aveat suggests that this part of the decision at least is likely to be unenforceable.

Nick Warrington
nick.warrington@hilldickinson.com

Forfeiture – Waving Goodbye to Waiver?

Reform of the law of forfeiture has been on the legal horizon for over 20 years. However, with a Law Commission report and draft Bill before Parliament, the prospect of change is closer than ever before. Property litigation specialist Matthew Forrest reviews the Law Commission proposals, which the Commission believes will bring about 'greater transparency' and replace a regime which it considers 'excessively technical and unnecessarily complicated'.

Archaic? – The problem with forfeiture...

Forfeiture as we know it is based on the doctrine of re-entry. It is a doctrine which has been increasingly restricted. As recently as the Commonhold and Leasehold Reform Act 2002, the powers of re-entry continued to be statutorily diminished. It is a law littered with artificial concepts, not least the concept of waiver. The distinction between covenants such as:

- "Rent" -v- "Non-rent"
- "Remediable" -v- "Irremediable" and
- "Continuing" -v- "Once and for all"

have become complex issues, the necessity of which is unclear. Other areas of the existing law have become obsolete - such as the requirement for the formal demand of rent - whilst the presence of verbose forfeiture clauses goes against modern thinking. Whilst many of the proposed reforms seek to simplify matters, there is also a significant strengthening of the landlord's powers in circumstances of persistent tenant breach.

What is recommended?

- The abolition of forfeiture and its replacement by a statutory termination procedure which will offer two routes to termination. Landlords will no longer be able to terminate tenancies using the law of forfeiture or by peaceable re-entry.
- No more forfeiture clauses. Parties could agree to specific exclusions for certain tenant defaults. However tenants would be served with a notice detailing the consequences of default.
- New notice procedure to deal with tenant default. Default would trigger the service of a default notice detailing the breach, remedial works and timescales. The notices must also be served on parties with a 'Qualifying Interest' which will include mortgagees and sub-tenants.
- The doctrine of waiver will not apply.
- It is made clear that the intention of the notice procedure is to provide a period of time for the tenant to remedy any default. The intention is also to encourage negotiation between the parties. As such the minimum period of time between service of a notice and any other action would be seven days.
- Failure to deal with a notice would entitle the landlord to commence termination proceedings. However the issuing and service of proceedings will no longer prejudice the fact that the tenancy continues.

- The Court will have a wide discretion as to the orders it could make including: injunction, specific performance, damages, possession or a remedial order.
- Remedial orders will set out the details of what is required of the tenant and set a deadline for the accomplishment of those matters. Again, the tenancy will continue throughout that period. The claim for termination will be stayed automatically for three months from the deadline set for the tenant. The Landlord can then apply to lift the stay at any time during that three month period if the tenant is still in default and seek a further order. However, the Court will then still have full discretion as to the order it makes and will not necessarily grant a termination order.
- Parties with a 'Qualifying Interest' in the tenancy could also seek an order transferring the tenancy to them or granting them, or a third party, a new lease of all or part of the Property.

Summary termination

This is the second route to termination proposed under the new regime. The Law Commission sees the Summary Termination route as the replacement for peaceable re-entry.

The procedure would be available only in limited circumstances. It would not apply where:

- there is an unexpired term of 25 years or more; and/or
- someone lawfully resides at the premises; and/or
- the tenancy was granted for a term in excess of seven years and three or more years remain unexpired and the default is a breach of repairing covenant.

A tenant would have one month to respond to a notice by applying to the Court to discharge the notice. An application would suspend any termination in the interim period.

In the six month period following summary termination the tenant would have the right to seek a post termination order. The Court would not have the power to revive the tenancy but could grant a new one or order the payment of compensation.

The future

Whilst the draft Bill has been placed before Parliament, it is unclear when we can expect the new regime to be introduced.

It is undeniable and unsurprising that the proposals are tenant friendly, even though most landlords will welcome the demise of waiver as a troublesome concept. The Law Commission admit that there is also the potential for the new regime to be increasingly Court based. As such there must be a fear that landlords will find themselves engaged in regularly battling against the 'discretion' of the Court, who could easily shy away from the ultimate sanction of termination at every possible opportunity.

Matthew Forrest
matthew.forrest@hilldickinson.com

About Hill Dickinson

Hill Dickinson offers a comprehensive range of legal services from offices in Liverpool, Manchester, London and Chester, and its associated firm Hill Dickinson International has offices in London and Greece. Collectively the firms have 152 partners and a complement of more than 1000 staff.

Hill Dickinson is a major force in insurance and is well respected in the company and commercial arena. The firm's marine expertise is internationally renowned and it has one of the largest marine practices in the UK following a merger with Hill Taylor Dickinson on 1 November 2006. The firm has an award winning property practice and is widely regarded as a leader in the fields of commercial litigation, employment, intellectual property, NHS clinical/health related litigation and private client.

Hill Dickinson LLP:

Liverpool Office

Pearl Assurance House
2 Derby Square
Liverpool L2 9XL

T: +44 (0)151 236 5400
F: +44 (0)151 236 2175
DX 14129 Liverpool

Manchester Office

50 Fountain Street
Manchester
M2 2AS

T: +44 (0)161 817 7200
F: +44 (0)161 817 7201
DX 14487 Manchester 2

London Office

Irongate House
Duke's Place
London EC3A 7HX

T: +44 (0)20 7283 9033
F: +44 (0)20 7283 1144
DX 550 City of London

Chester Office

34 Cuppin Street
Chester
CH1 2BN

T: +44 (0)1244 896600
F: +44 (0)1244 896601
DX 19991 Chester

Hill Dickinson International:

Greek Office

2 Defteras Merarchias St.
Piraeus, 185 35
Greece

T: +30 210 428 4770
F: +30 210 428 4777

London Office

Irongate House
Duke's Place
London EC3A 7HX

T: +44 (0)20 7283 9033
F: +44 (0)20 7283 1144
DX 550 City of London

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www.hilldickinson.com

For further details please contact:

Pamela Jones

Joint Head of Property and Construction
pamela.jones@hilldickinson.com

David Swaffield

Joint Head of Property and Construction
david.swaffield@hilldickinson.com

Peter Barlow

Liverpool Office
peter.barlow@hilldickinson.com

Michael Blakey

Manchester Office
michael.blakey@hilldickinson.com

Richard Taylor

London Office
richard.taylor@hilldickinson.com

Robin Jones

Chester Office
robin.jones@hilldickinson.com