Commercial property – Update

Christopher Cant 27th June 2013

1. **Non-domestic rates** – the Court of Appeal has recently confirmed in Woolway v Mazars LLP [2013] EWCA Civ 368 that for the purposes of rating a single hereditament can comprise different floors in a single building occupied by the same person for the purposes of the same business even though the floors are not contiguous. The VOA had contested the case as a matter of principle arguing that the floors had to be contiguous to be a single hereditament. In that case Reynolds Porter occupied the 3rd, 4th and 5th floors as a single hereditament whilst Mazars occupied the 2nd and 6th floors of Tower Bridge House with movement between those two floors by way of a swift lift in the common parts. They had previously been registered as separate hereditaments and Mazars proposed successfully that the two be merged into a single hereditament.

   By merging hereditaments it allows the possibility that the occupier may argue for a reduction in rateable value. The value of the combined floors may be less than the aggregate of the value of the individual floors. This is due to (i) a quantum allowance being appropriate in some cases as a result of the greater size of the hereditament if considered relatively large in the market; and (ii) substantial inconvenience due to separation. The latter argument for Mazars succeeded before the Valuation Tribunal for England but failed on appeal to the Upper Tribunal (Lands Chamber).

   Important point - In cases in which businesses are divided between different floors which are not contiguous consideration should now be given to whether a rates reduction can be achieved by a proposal to merge the hereditaments.

2. **Overage** – the dangers of seeking to protect an overage arrangement by a restrictive covenant have been highlighted again by the decision in Cosmichome v Southampton CC [2013] EWHC 1378 (Ch). Southampton CC required the BBC to covenant that it would occupy a site in the City for the purposes of a broadcasting centre provided that this could be removed if a covenant is given that if planning permission was granted other than for a radio television studio then an overage of 50% of the uplift would be paid by the owner of the site for the time being.

   Blackburne J. held that the restrictive covenant did not benefit the adjoining or adjacent land owned by Southampton CC and was not intended to protect or preserve the amenity or value of that land. It was a money obligation.

Consequently it was not enforceable against a successor in title to the covenantor.

Important point - Chains of covenants are cumbersome but provide better protection for overage than restrictive covenants.

3. **Rent for period after break** – when a tenant exercises a break clause in a lease which is conditional on compliance with the tenants covenants a full rent quarter's rent has to be paid even if the beak occurs during a quarter (Canonical UK Ltd. v TST Millibank LLC [2012] EWHC 3710 (Ch)). Morgan J. has held in Marks & Spencer plc v BNP Paribas Securities [2013] EWHC 1279 that there can be an implied term that the rent falling after the break should be repaid. It was also his view that if the break was unconditional then the tenant only need pay rent up until the break.

Important point – any breaks by a tenant in the last six years should be reviewed to consider whether a claim to the repayment of rent exists.

4. **Community Infrastructure levy** – liability notices are taking some developers by surprise. Some points to bear in mind:-

(i) The time limit for appeal runs from that notice and not the review decision. It is 60 days and there is no power to extend it.

(ii) No appeal is possible if the development has started.

(iii) No appeal can be made unless a request for a review has been made.

(iv) The appeal must be made even if the review decision has not been received within the 60 day time limit.

(v) Once an appeal is made if the development is started before a decision the appeal will lapse.

(vi) The liability notice does not trigger the liability to pay CIL. The start of the development does that.

(viii) Notice of intended commencement of development must be given prior to the start.

(ix) Failure to give that notice and/or late payment may result in stiff surcharges.

<u>Important point</u> – service of a liability notice triggers the running of a very tight timetable for appeals and developers need to take advice promptly.