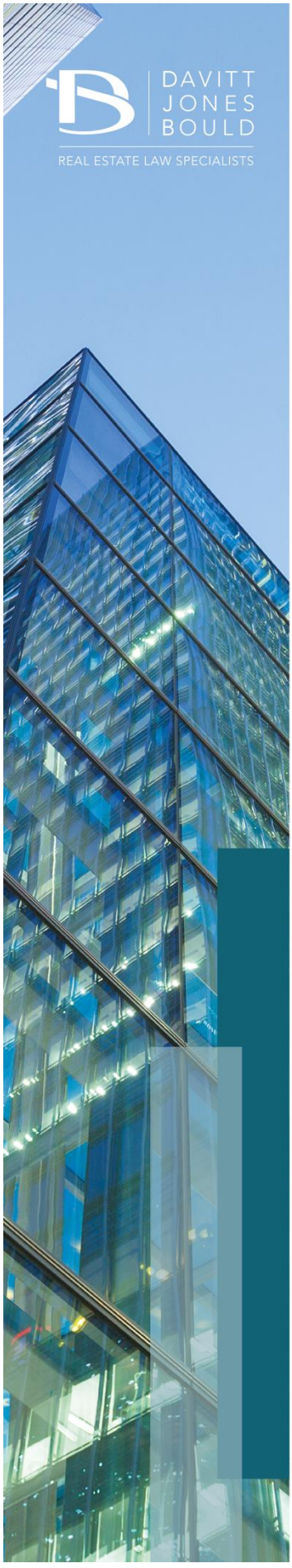


Commercial Leases Update: Part 2 of 2

Break clauses: conditions precedent

There have been a few cases coming to the fore in this area of late, but this is quite a bizarre one – usually landlords argue when things are left behind that vacant possession hasn't been given. In this case it was the other way around. In ***Capitol Park Leeds plc v Global Radio Services*** **(2020) EWHC 2750** a condition precedent as to vacant possession was held not to have been complied with when the tenant vacated removing ceiling tiles, window frames and grids which belonged to the landlord. The tenants claimed they were in the process of repairing them, but the court decided they hadn't given vacant possession because they took too much with them.

Misrepresentation

First Tower Trustees v CDS (Superstores International) Limited [2018] EWCA Civ 1396 This is a pretty fundamental case in the area of misrep. The case concerned a lease of two warehouses in Barnsley in South Yorkshire. The tenant's solicitors raised enquiries as to whether there were any environmental breaches. The landlord's solicitors replied that they "weren't aware of any". Just before completion the landlord was served with notices in relation to asbestos on the premises, but he did not notify the tenant. The tenant was faced with nearly £500,000 worth of remediation work and sued the landlord for misrepresentation. The landlord tried to rely on a non-reliance clause whereby the tenant was deemed not to have relied on any misrepresentations, but the court found the clause to be unreasonable, under s3 Misrepresentation Act 1967. The Court of Appeal has now confirmed this decision. This is significant because, even though they were two large companies in an arms' length transaction, the landlord was still liable. What we can take from this is that, when a buyer is raising enquiries, it is always better to respond by saying "rely on your own inspection or survey", than "we aren't aware of any".

Business Rates & Empty Properties

Business rates are not payable at the moment, as long as your property is occupied. If it is empty, however, you pay full business rates after 3 months except for in the case of empty industrial units and warehouses, which benefit from a longer, 6-month vacant period. Any period of occupation of at least 6 weeks' duration resets the clock and the empty property period starts again.

Consequently, businesses with empty premises have set about devising ways to get around the rule by putting temporary occupants in their buildings. Two cases in 2012 and 2013, respectively, set the tone for this. In ***Makro Properties Limited v Nuneaton & Bedworth Borough Council*** **[2012] EWHC 2250 (Admin)** the court accepted that storage of 16 pallets for 6 weeks every 3 months was sufficient to avoid business rates. Following on from this, in ***Kenya Aid Programme v Sheffield City Council [2013] EWHC 54 (Admin)*** it was accepted that occupation by a charity for storage purposes in two adjoining warehouses could avoid business rates liability even though only 25% and 30% of the floor area was actually occupied.

The Charity Commission subsequently warned charities that they should not be involved in avoiding business rates. It should be noted that the Kenya Aid directors were eventually disqualified.

And it seems there is no sign of the tide turning any time soon. In ***Principled Offsite Logistics Ltd v Trafford Borough Council [2018] EWHC 1687 (Admin)*****,** Principled Offsite Logistics were given 43-day leases to occupy premises for the sole purpose of avoiding business rates. They paid a peppercorn rent and received 20% of the avoided business rates. The judge held there to be sufficient occupation. He said that there need not be any specific purpose for that occupation, other than that it had to be for business purposes, and the tenants were in the business of avoiding business rates! The rates were avoided.

Rossendale Borough Council v Hurstwood Properties (A) Ltd & Others [2019] EWCA 365 (Ch) took a similar tack. In this case special purpose vehicle companies were set up with no assets. They then went into liquidation or were struck off the company's register for non-production of accounts and the lease went to the crown under bona vacantia. As both premises of companies in liquidation and the crown do not pay business rates on empty properties, no rates were payable. This case is going to the Supreme Court.

The Welsh Government intends to increase the length of occupation from 6 weeks to 6 months.

Landlord & Tenant Act 1954

Contracting Out

TFS Shops v Designer Retail Outlets Centre [2019] EWHC 1274. Here the landlord wanted to terminate the lease to TFS (The Fragrance Shop) and grant a new lease to their direct competitor, The Perfume Shop. The landlord served the notice on the tenant's solicitors, and the court held that the tenant's solicitors were agents for the tenants for service. The court held that the tenant's solicitor could receive the exclusion notice as agent for the tenant as his agency did not only extend to negotiating the lease. Furthermore, it was held that a retail manager for TFS could sign the declaration as he was sufficiently senior to act as agent and that there was no need for a specific date to be included in the notice. The court also found that generic reference to the term commencement date was sufficient in the notice. Perhaps unsurprisingly this case has been heard by the Court of Appeal. No decision has been made yet.

GROUND (f) – intention to demolish, reconstruct or carry out substantial work to the premises

Ground (f) is the most litigated ground of opposition under the 1954 Act and is becoming increasingly difficult to prove. The case of ***S Franses Ltd v Cavendish Hotel (London) Ltd [2017] EWHC 1670 (QB) [2017] WLR (D) 503 [2018] UKSC 62*** concerned a shop in German Street in central London. The shop, which specialised in fancy cloth and tapestry, had been there under a series of protected leases over some years. At first instance, the court accepted that ground (f) could be used even though the work of reconstruction was specifically planned in order to terminate the lease. However, as the work would not commence for 12 months, it was held that the intention was not sufficiently immediate.

The Supreme Court decided the case in December 2018 and reversed the first instance decision. In deciding whether ground (f) may be used the question is whether the landlord would have done the work *regardless of any intention to repossess*.

The Supreme Court decision is obviously welcome to tenants. However, landlords will have to ensure that they can prove that they would still do the proposed works if the property was vacant. The issue of whether the works need to be done soon after possession is obtained was not addressed by the Supreme Court.

Service Charge Liability

FirstPort Property Services Ltd v various long leaseholders of Citiscape LON/00AH/LSC/2017/0435 is one of several cases that have been decided post-Grenfell. It is a residential case, but the finding is equally applicable to commercial premises. Both residential and commercial service charges are likely to be greatly affected by these decisions, especially where the service charge provisions in the lease allow for the recovery of payments for improvements and, significantly, statutory works. In March 2018 First Port obtained tribunal rulings to the effect that tenants would be responsible for the replacement of aluminium cladding in a block of flats in Croydon, to the tune of £2m, including a bill of £4,000 per week to employ fire wardens. This amounted to an individual bill per flat holder of £31,300. In this case the developer, Barratts, stepped in and offered voluntarily to pay for the works. Others won't be so lucky.

In ***Criterion Buildings v McKinsey & Co (2021)*** the landlord successfully claimed £2.2 million plus interest of service charge arrears. The lease stated that the tenant would pay a "due proportion" of the service charge as determined by the landlord. The court decided that, as long as the lease covered the works done, the landlord's determination would be conclusive save in exceptional circumstances.

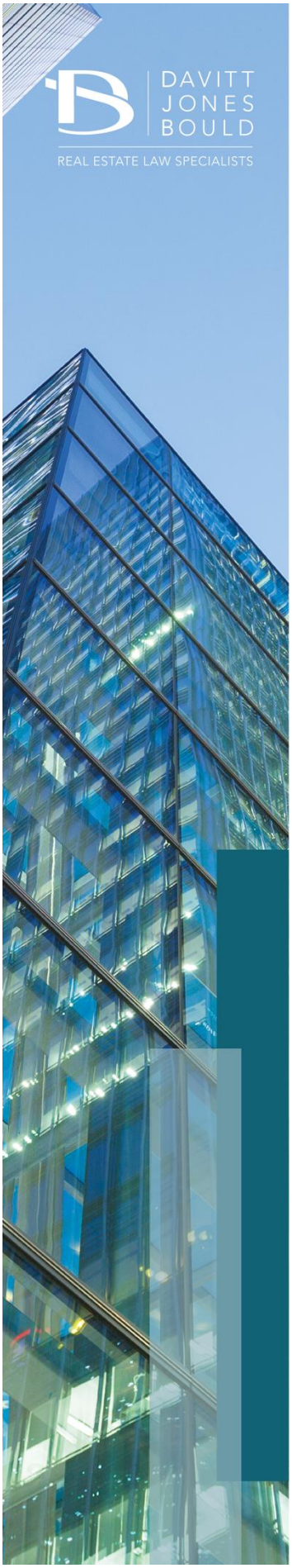
Fire Safety Bill 2019 – 2021

The Bill passed through Parliament on September 7th 2020 and is awaiting the Royal Assent. It will require that, if a building has two or more dwellings then, not merely communal areas, but also structure, external walls, doors and windows will have to be risk assessed for fire safety. The effect of non-compliance may vitiate building's insurance.

The EWS1 Form And External Cladding

Following the Grenfell disaster in June 2017, mortgage companies became reluctant to lend on flats in blocks which might have combustible cladding. The industry's response was the EWS1 (external wall survey) Certificate which was introduced in December 2019. A recognised property professional with the requisite qualification would carry out an inspection where deemed appropriate and would produce an EWS1 Certificate which would be required by the mortgage company. The certificate would last for five years and would only be required for multi-let residential properties of more than 18 metres (c. six storeys) in height, including mixed use premises as long as there are two or more dwellings. If the cladding was deemed safe then the mortgage company would proceed, it would require the cladding to be replaced, a process which can take a significant amount of time.

Unfortunately, in January 2020, the Department of Housing Communities and Local Government muddied the waters somewhat when it produced **Advice for Building Owners of Multi-Storey, Multi-Occupied Residential Buildings**. This suggested that the EWS1 may be appropriate in some multi-let premises of less than 18 metres in height and which *do not* have external cladding. This was apparently due to a type of high-pressure laminate causing some concern after it was found to contribute to a fire in a block of halls of residence in Bolton in November 2019.



As a consequence of the new advice, some mortgage companies have required the EWS1 on buildings with three storeys and where brick is the building material. This is surely not what was intended.

Add to this the fact that, in late 2020 there appeared to be only 300 qualified fire safety inspectors in the country, and the EWS1 is fast-becoming an unwelcome and unwieldy beast. Insurers are not prepared to allow other property professionals to carry out the assessments due to the potential level of liability where there is a claim. Estimates vary but at the higher end there may be up to 3 million flats which may be affected. The certificates can cost upwards of £10,000 and there are examples of landlords or agents (who commission the assessments) being quoted years for one to become available.

The EWS1 is undergoing review and this cannot come too soon for many. If changes are not made soon, some estimate that the level of negative equity in such premises will be greater than during the credit crunch of 2008-2011.

On 22 November 2020 the Department of Housing announced that they have reached agreement with the RICS and UK Finance whereby an EWS1 Certificate will not be required for buildings without cladding. At the time of writing, many mortgage lenders are saying that they know nothing about this. They are also pointing out that many brick buildings may have cladding behind the brickwork.
In January 2021 the RICS announced consultation to standardise when an EWS1 Certificate would be required by surveyors.

It should be noted that, on 13 January 2020 in Wales (27 November 2018 in England) cladding was finally banned in multi-let residential properties of more than 18 metres in height. If the building was completed under the 2018 Building Regulations the mortgage company should not require the certificate.

The Energy Act 2011

S49 of the Energy Act 2011 required the Secretary of State to introduce legislation on minimum energy performance standards by 1st April 2018 for rented property. This led to the **Energy Efficiency Regulations 2015 - Minimum Energy Performance of Buildings Standard**. Under the regulations, the minimum standard for rental properties is now an E rated building. The Government's aim is to reduce this to a C rating. It is estimated that around 20% of buildings of rented property will fail on this. The legislation will apply to all new leases, with existing lettings benefitting from a backstop date of 1st April 2023 when they will come within the legislation.

The Energy Efficiency of Buildings (Private Rented Property) (England & Wales) Regulation will apply to any commercial lease of more than 6 months and less than 99 years duration and to residential assured, assured shorthold and protected tenancies and to any other tenancy designated by the Secretary of State. The penalties will be a maximum fine of £5,000 or 5% of rateable value for commercial property where the breach has occurred for less than 3 months and a maximum £2,000 fine for residential property. The fine will be doubled after 3 months.

If a property continues to be let after 1st April 2023 with an F or G rated EPC then they may be faced with enforcement action and the leasing out of the premises will be unlawful. It is unclear how this affects the landlord and tenant relationship.

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