

## Property Newsletter

### Air conditioning systems – are you feeling the heat?

New laws have been introduced governing air conditioning systems, which will have an impact on property owners, occupiers and managers. They apply generally rather than on a property transaction – therefore it is important for those responsible for such systems to know of their application.

It is now a requirement for any air-conditioning system with an output of more than 12 kW to be inspected and assessed by an accredited energy assessor at least once in every 5 years. The first inspections must take place as follows:

- If the system was put into service on or after 1st January 2008, the first inspection must take place within 5 years of the date that it was put into service;
- If the system was put into service before 1st January 2008:
  - If the output is between 12kW and 250kW, the first inspection must take place by 4th January 2011;
  - If the output is over 250kW, the first inspection should have taken place by 4th January 2009.

Also, from 4th January 2011 if the

controller of the system changes and the new controller is not given an inspection report, the new controller must ensure that the system is inspected within 3 months of the day he assumes control.

The penalty (which may be enforced against an “end user”) for failing to comply with a request to provide a suitable air-conditioning inspection report when asked by the local authority is currently £300. This figure is likely to increase.

Landlords should check whether the inspection costs can be recovered from Tenants via any service charge provisions in their Leases. Tenants should also be aware of the costs and ensure that they are not responsible for paying any penalty where their Landlord retains control of an air-conditioning system.

*David Hextall*



### Repair and responsibilities – tenants beware

There are many things to consider if you are looking at taking a Lease. You will obviously be concerned with such things as the location, rent, rent reviews and break clauses – but don't forget that the physical condition of the Premises needs to be looked at carefully.

The Lease will set out the responsibilities of both the Landlord and Tenant, including who will maintain and repair what at the Premises. If the Premises do not form part of a larger building, you will normally have to maintain and repair all of the Premises, including the structure. However, if the Premises do form part of a larger building, you will normally only have to maintain and repair the inside of the Premises. The Landlord will be responsible for the maintenance and repair of any parts of the building that you use in common with others (such as staircases) along with the structure of the whole building. The Landlord will then normally recover the costs from the Tenants via a Service charge.

Whichever applies, you must ensure that you know exactly what you are responsible for and have to pay towards.

If possible, you should ensure that you are not responsible for putting the Premises



into any better condition than they are in when you take the Lease on. If you agree to “keep” the Premises in repair then you will actually be agreeing to “put” them in repair as well if they are in disrepair at the start of the Lease!

Therefore, if the Premises are in disrepair you may wish to agree a schedule of condition, recording the condition of the Premises at the start of the Lease, and then only agree to keep the Premises in no worse condition than shown in the schedule.

A Tenant should investigate the physical condition of the Premises (and anything else that it may have to contribute towards the upkeep of) thoroughly before taking on a Lease. If issues are identified at the outset, it is possible to negotiate and draft a way around these and other problems before it is too late.

*Chris Crystal*

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## Backing out of a purchase after excessive construction delays



### Would a serious construction delay give a buyer the right to back out of a contract that he has entered into to purchase a new property?

If a buyer goes about it the right way, this could be possible, as confirmed by the recent case of *North Eastern Properties v Coleman and Quinn*. However, in this instance the buyers slipped up and the Court held that the buyers could not back out.

In short, the contract in this case did not specify a deadline for the completion of the construction of 11 flats but the seller had told the buyers the date he was working to. Five months after this date, construction was still ongoing. The buyers then tried to back out by imposing a deadline on the seller. The buyers demanded completion within 10 working days, but the Court held that this was too short a deadline to impose. The works were finished one month later.

The seller's delay in constructing the flats was held to be a breach of an express contractual obligation to build with 'all due dispatch'. The Court held that a breach of this term could become so serious so as to give the buyers the right to back out. However, in this case the Court held that the breach was not so serious and the buyers were forced to complete the purchases. Although the initial estimated completion date given to the buyers was December 2007, no complaint was made about the delay until May 2008. This was when the buyers imposed the 10 working day deadline. The flats were then completed by the end of June 2008. According to the Court, the deadline imposed by the buyers did not allow the seller a reasonable length of time.

This case clearly gives hope to other buyers who are seeking to walk away from similar contracts where they have suffered the frustration of considerable construction delays and gives developers some cause for concern.

*Dawn Rusling*

## Leases: When can a landlord reasonably withhold consent?

In the current economic climate, assignment and underletting will be issues on the minds of both Landlords and Tenants.

A Tenant may want to assign a Lease or underlet to another occupier if its business is facing difficulties. A Landlord will be keen to ensure that a property remains let, primarily for the rental income but also so that it does not end up being burdened with business rates.

It is common for a Lease to provide that assignment and underletting are only permitted with the Landlord's consent, which cannot be unreasonably withheld or delayed. The question of a Landlord's consent is therefore becoming increasingly important.

The Landlord and Tenant (Covenants) Act 1995 allows a Landlord to withhold consent to an assignment when specific pre-conditions are set out in the Lease and they are not fulfilled. It is usual to see pre-conditions such as the following in a Lease:-

- The Tenant must be up to date with the Rent
- The assignee must appear to be able to comply with the terms of the Lease
- The Tenant must guarantee that the assignee complies with the terms of the Lease



If the Landlord refuses consent to an assignment for other reasons, the question of whether it has acted reasonably will depend upon the facts of the case.

The issue of delay is also extremely important. The Courts have taken the view that the clock starts ticking as soon as an application for consent is received by the Landlord. The Landlord must then act within a reasonable time frame, ideally within 2 weeks. If the Landlord has reasonable grounds to refuse consent, it

must tell the Tenant otherwise it may be held to have acted unreasonably, regardless of the merits of the application.

If the Tenant believes that the Landlord has unreasonably withheld or delayed giving consent, it will have three main options. First, it can proceed with the assignment or underletting – but obviously the risk is that the transaction is later held to be a breach of the Lease and this may have serious consequences. Secondly, it can apply to the Court for a Declaration that the Landlord has acted unreasonably and then proceed – but this could result in lengthy delays and the parties may not be willing to wait or incur the additional costs. Thirdly, a Tenant can seek damages from the Landlord for the loss that it is caused.

It is therefore important for a Landlord to understand the provisions in the Lease which relate to assignment and underletting and to seek legal advice as soon as any application for consent is received.

*Rachael Noton*

## Information

If you have any queries on any issues raised in this newsletter, or any property matters in general please contact: Neil Franklin at Hull on +44 (0) 1482 337250 or Douglas Oliver at York on +44 (0) 1904 688537

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The law is stated as at 19 November 2009.

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