

LEGAL ALERT

PROPERTY BULLETIN

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TERRORISM AND PROPERTY INSURANCE

The events of September 11th have brought into sharp focus the need to check property insurance cover. In the case of leasehold premises the owner of the freehold is often obliged to insure the premises against specified risks to the full reinstatement value of the premises and with the right to recover the cost of the insurance from his tenants. The rents payable by the tenants may be suspended in the event that the premises are unfit for occupation and use due to damage or destruction caused by an insured risk. The rent suspension period may be limited in time and a three year maximum period is not uncommon.

It is important for both the landlord and tenant to be aware of what risks are insured against and whether the amount of cover is adequate. It should be established in any given circumstances who should be responsible for making up any shortfall in the insurance monies that will be available following any damage or destruction. The existing policy terms should be reviewed regularly and consideration should be given to taking out additional cover where appropriate.

There is a compensation scheme already available in the United Kingdom (and a separate scheme which operates in Northern Ireland) which provides compensation where premises are damaged or destroyed as a result of terrorist activity. There is a fund of insurance monies that is used in such situations and the government effectively acts as the insurer of last resort to guarantee the position. Cover against acts of terrorism is only available if insurance cover is taken out against fire and explosion as well.

In taking on any new property commitment serious consideration should be given to insurance issues and professional help should be sought in order to establish the areas of concern and what practical measures can be taken to minimise the problems that will follow as a result of any terrorist action.

DISTRESS FOR RENT AND THE HUMAN RIGHTS ACT 1998

When the Human Rights Bill was being considered by the experts it was widely believed that one of the most important impacts in the law of property would be that the ancient remedy of distress would become obsolete.

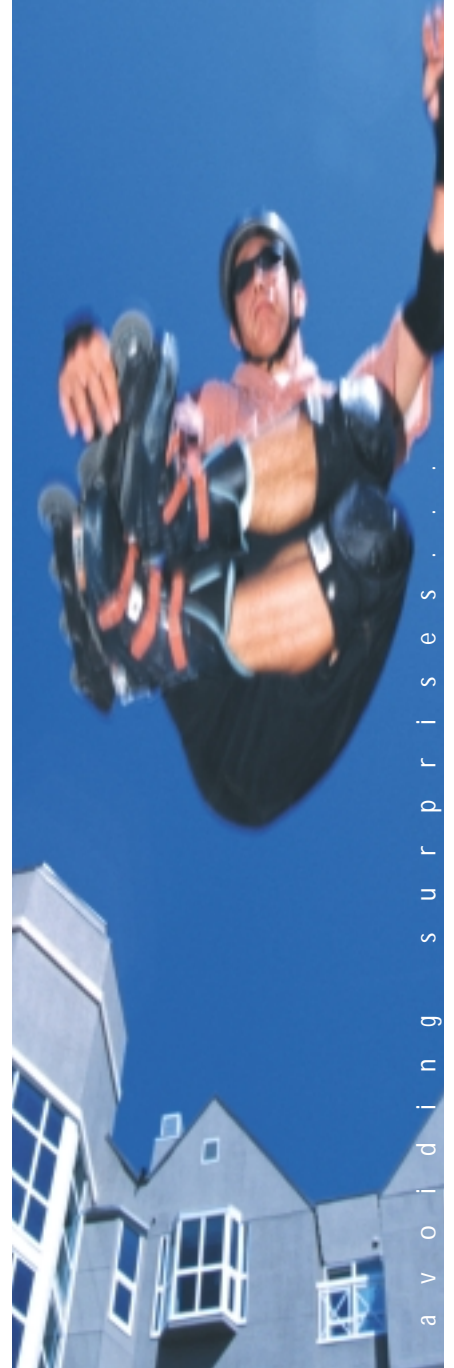
Distress is historically one of the key remedies available to a landlord who is owed rent by a tenant. Most modern commercial leases endeavour to categorise all or most payments to be made by a tenant (such as service charges and insurance payments) as additional rent to ensure that for distress purposes the landlord could distrain against the tenant's goods for arrears of these charges. Distraint is effectively carried out by a Bailiff who attends the premises to either take away tenant's goods on the premises or to claim walking possession. This prevents those assets affected from being disposed of by the owner until the debt due has been discharged and the assets released.

The Bill became The Human Rights Act 1998 and whilst landlords still do distrain for rent it is felt that

The Human Rights Act renders distress potentially contrary to the provision of that Act.

However, rather than distraint disappearing from the landlords armoury after many centuries the Government is proposing to change the law of distress. It is understood that this will no longer apply to residential premises but will be an option for landlords to consider in respect of business premises. The likelihood is that it will now only be for pure rent arrears and not for the additional rents commonly reserved such as service charges and insurance. It may only be permitted for a maximum of three months arrears of rent.

There may also be a requirement for the tenant to be given 72 hours prior notice of the intention to bring distress. If this is enacted in that way, how often will a Bailiff turn up at premises only to find them cleared of valuables? The proposals are that the distress could only be conducted by Certified Bailiffs.



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LANDLORD AND TENANT - REPAIR AND SERVICE CHARGES

A recent case has given some useful guidelines upon how landlords might be restricted in their ability to recover costs expended in repair of a building that might otherwise be presumed to be recoverable from the Tenant under a general service charge provision.

In **Fluor Daniel Properties Limited -v- Shortlands Investments Limited** the lease contained a covenant on the part of the Landlord "... to uphold maintain repair amend renew cleanse decorate and otherwise keep in good and substantial condition..." the fabric and common parts of the building and the lease obliged the Tenant to reimburse the costs expended in that work. The Landlord was also entitled to recover other costs reasonably expended where the Landlord considered the expenditure to be "reasonably desirable". In this case the Landlord had proposed very substantial works to the air conditioning system and the Tenant had challenged the Landlord's right to recover the cost of that work.

The judge decided that the wording of the repair clauses in the lease permitted works that would be beyond the normal ambit of repairs, but indicated that there should be a precondition that there had been some defect or malfunction to justify that work. In this case the air conditioning was not defective, although it was beyond the age where it was recommended for replacement by independent maintenance engineers.

The test suggested by the judge was that, for a charge to be recoverable, the item concerned had to be no longer reasonably acceptable, having regard to

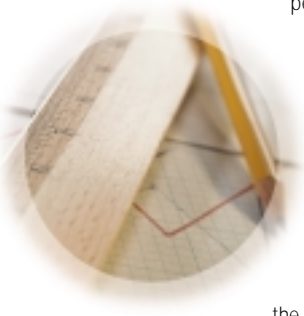
the age, character and locality of the premises, to a reasonably minded office tenant of the kind likely to take a lease of that building. In this case the work was not justified because the air conditioning remained reliable and had not suffered from increased maintenance costs. The magnitude of the cost involved was also relevant to the decision made, in this case more than £300,000.

The judge however rejected the Tenant's contention that it was the Tenant, and not the Landlord, who could nominate the means of performance of the Landlord's repairing covenant. The Landlord retained the key interest in ensuring that the building was properly maintained, but could not force the Tenant to pay for additional works going beyond what was properly defined as maintenance or repair. However, provided it had used its best endeavours to act reasonably, the Landlord could not be criticised merely because it could be shown that the materials, works or services could have been provided or performed at a lower cost.

As always, these cases are decided upon their facts and the actions of the specific parties, which will differ from other similar circumstances. It is clear though that significant costs expended by a landlord must have justification in some clear benefit to the tenant, either by rectifying a defective situation or effecting some improvement which the reasonable tenant would find acceptable, given the type of premises and the business carried on from it.

COPYRIGHT IN PLANS AND DRAWINGS

The purchase of land with an existing detailed planning permission for a new housing development is something of a prize, but can produce its own complications to trap the unwary. Many house builders will be aware of the potential danger to their planning permission in seeking an apparently uncontroversial change (such as a revision of house types to their own preferred designs) but if they decide to implement an existing permission, and construct the dwellings without change, they cannot assume that they can use the existing designs and drawings without consent.



In most cases the copyright in the drawings will rest with the architect who prepared them for his original client.

Remember therefore, if you propose to use the plans and designs of dwellings you obtain when buying development land, always get permission from the copyright holder to use them! Failure to do so may result in an expensive action against you for breach of copyright.

INFORMATION

If you have any queries on any aspect of Property Law please contact:

**Martyn Justice at Hull on (01482) 323239
Carol Bailey at York on (01904) 625790**

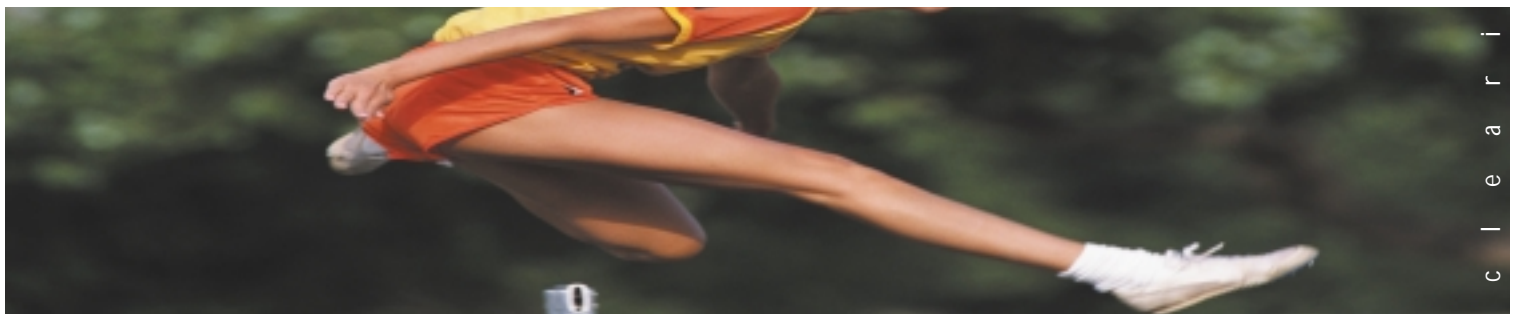
This Bulletin is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice.

The law is stated as at 1 December 2001.

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