myerson

Commercial Property Round-up

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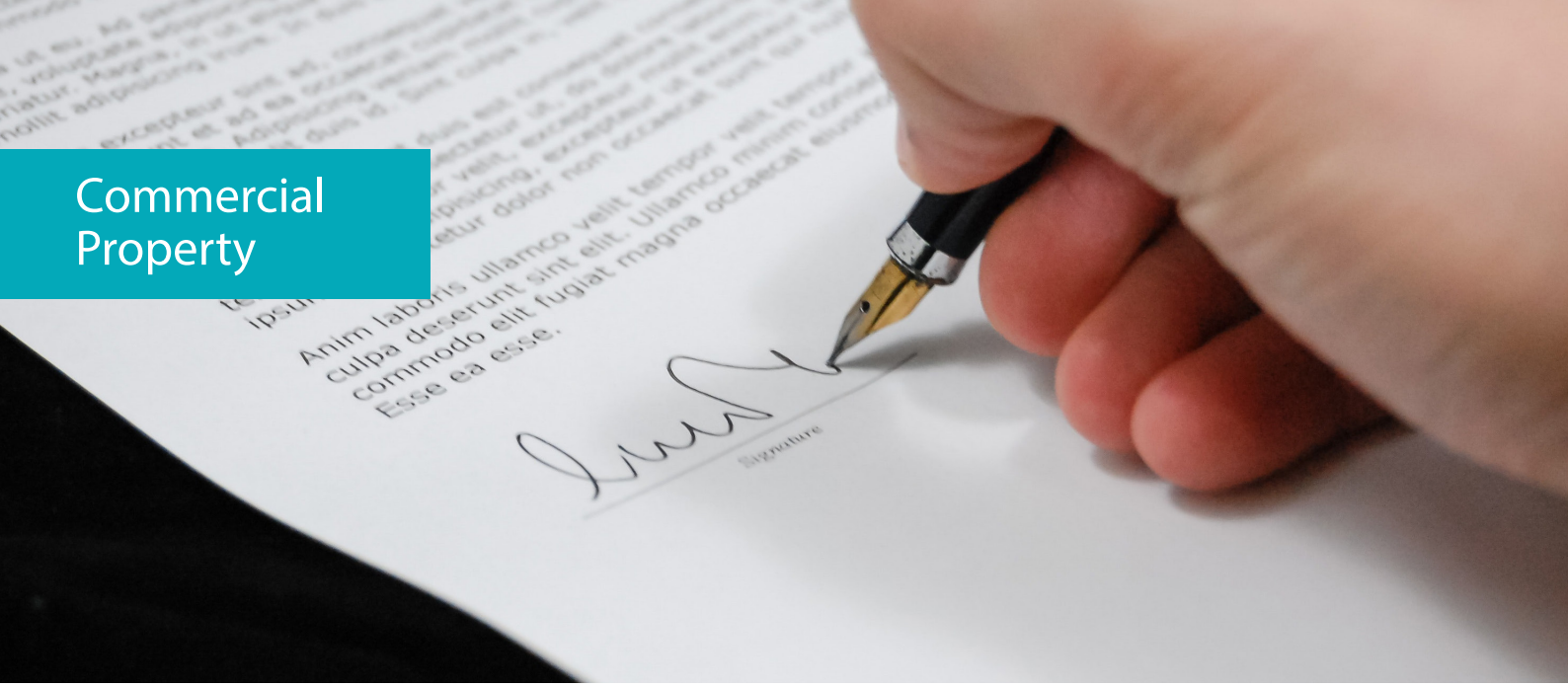
Welcome to Myerson's Commercial Property Round-up

At Myerson, we are proud to be an award-winning, Top Tier Legal 500 law firm who have been named amongst The Times Best Law Firms 2019.

Our expert commercial property solicitors are vastly experienced in handling the full range of commercial property related assignments.

The team also write blogs on topical stories from the commercial property industry. The most recent blogs are included in this issue where our experts explore the following:



Commercial Property

The danger of mistakenly granting a perpetually renewable lease

What is a perpetually renewable lease?

A perpetually renewable lease is a lease which contains a contractual right to renew on the same terms, including the right to renew, therefore the tenant will have an infinite right to renew the lease.

Consequences of granting a perpetually renewable lease

By operation of the Law of Property Act 1922 a perpetually renewable lease becomes automatically converted into a 2000 year lease and will be registered as such at the Land Registry.

Recent case law - Palo Alto Ltd v Alnor Estates Ltd

In this case the landlord had intended the lease to last one year, with the ability to renew the lease so that tenant could stay in the premises for a total of 3 years. The landlord preferred using "simple" leases and did not take any legal advice on the drafting of the lease. The landlord issued a short two page lease to the tenant, which was returned by the tenant with the following amendment (in square brackets):

"The tenancy granted for a period of one year with an option to renew at the end of the term [or a further one year on the same provisos and agreements as are herein contained including the option to renew such tenancy for a term of one year at the end thereof]".

The landlord accepted the amendment and following completion of the lease the tenant applied to register the lease at the Land Registry as a 2000 year lease. The lease had become a perpetually renewable lease because it permitted renewal and contained no restrictions on the number of times it could be renewed by the tenant.

The landlord objected to the registration and applied for rectification of the lease on the grounds that it was a unilateral mistake and that the parties had understood the reason for that amendment was only to allow for two renewals so that the tenant could stay in the premises for 3 years.

This case proceeded on appeal to the Upper Tribunal. The judge concluded that the lease should be rectified based on a unilateral mistake. He also added that dishonesty and sharp practice are not an ingredient of this cause of action (although he did agree that the tenant in this case had been dishonest). The tenant had actual knowledge of the mistake made by the landlord and this was sufficient for unilateral mistake.

This case serves as a useful reminder as to why proper legal advice should be sought if a party does not fully understand the effect of the drafting of a lease. Parties often use what they consider to be "simpler" leases for smaller properties or those with a low rent, or a short term and whilst this is tempting (especially to keep costs down) this can lead to problems further down the line. There is a need for professionally-drafted documents. Options to renew must always be considered very carefully and it is important that a landlord restricts the number of times a lease can be renewed in order to avoid granting a perpetually renewable lease.

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Overage uncovered

There's a lot of discussion about how complicated overage is. Mention of overage is often greeted with trepidation as to what it might entail. As a person contemplating entering into an overage arrangement, whether as a seller or a buyer, knowing what factors are important will help you in conducting your negotiations and allow you to anticipate where the bumps in the road may occur.

What is overage?

Basically it's a way in which a seller of potential development land can share in the uplift in value of that land once it has the benefit of planning permission. It is one of those possibilities for development land sales which goes on the same shelf as option agreements and conditional contracts. Buyers may want to agree to making an overage payment so that they can buy the land outright immediately, rather than waiting for the outcome of a planning decision (which is usually the delaying factor in options and conditional contracts).

Timing

Overage is usually operational over a finite period of time following the sale of the land to the buyer. It would be unreasonable to have an indefinite period of overage. It is usually linked to the time within which the parties believe it would be reasonable for the anticipated increase in value to be realised. You should think carefully about what is going to cause the anticipated increase in value and how long it is likely for that to take to achieve. That will be your starting point for negotiation of this point.

Triggers

Often a heated point of negotiation (and in the worst cases a point of confusion if the document has not been properly drafted) is what will be the trigger point for the payment to be made back to the seller? As a rule of thumb, sellers want the trigger to activate as soon as possible so they get their money quickly, buyers want it as late as possible. In particular, buyers will not want to agree to make payments where they have not made any realisations themselves. Where are they going to get the funds from to make the payments if they have not actually sold anything? On the other hand, what the seller needs to be careful of here is that the trigger actually falls within the period that the overage agreement will cover. In a recent case in which overage was payable on the sale of the final units on the development site, the buyer did not sell the final completed homes until the overage period had expired expressly to avoid having to pay the seller the uplift payment. In this case the court implied a term into the contract that the buyer should use "reasonable endeavours" to sell the final properties on the development within the overage period on the basis the clause was "so obvious it goes without saying". This saved the seller on this occasion, but it is better not to rely on the courts to get you out of these sorts of situation. The difficulty here for the seller is spotting the potential loopholes and trying to find ways of shutting them down.

How much and how will it be paid?

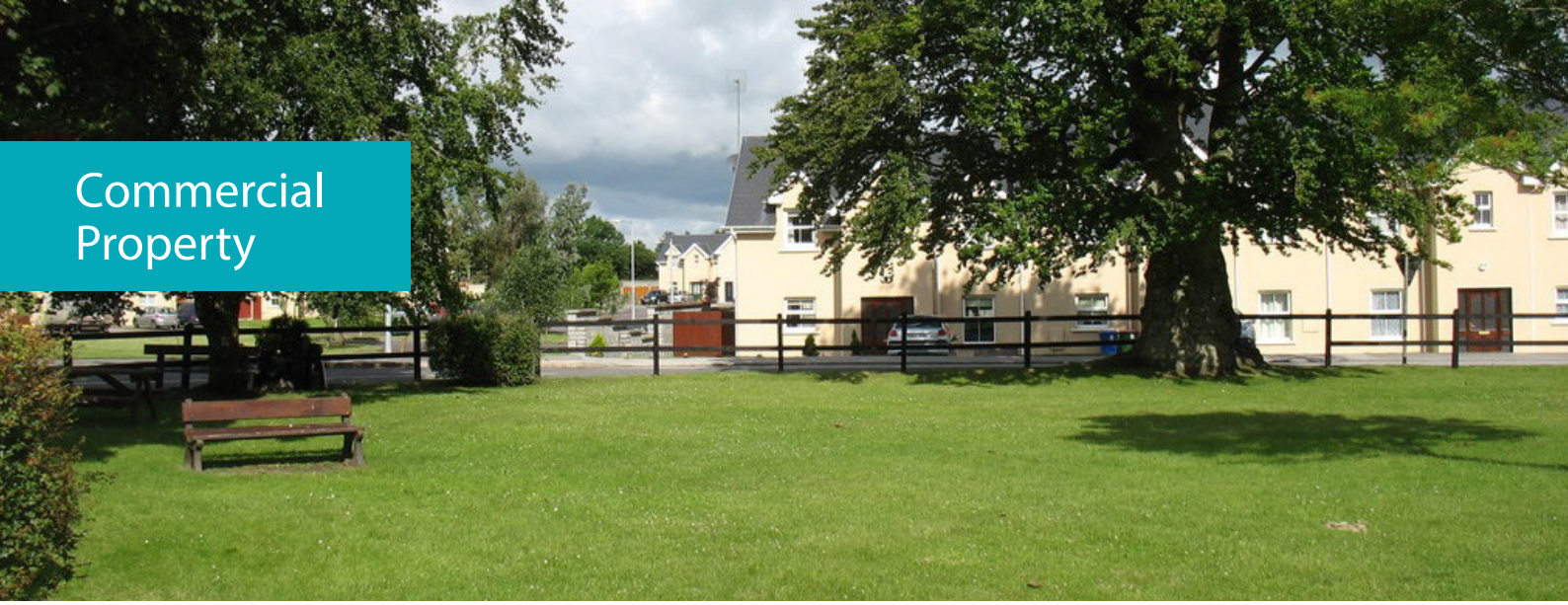
Calculation of the uplift can be tricky too. Are you going to agree to a fixed sum to be payable per unit on the site or a percentage of the uplift in value of the land or of the actual sale proceeds? Each method comes with its own intricacies: fixed sums are not inflation-proof, percentage uplifts on value require the parties to agree how the property will be valued, percentage uplifts on actual sale proceeds need confirmation that the best value has been achieved.

Once the mechanism of payment has been agreed there will also have to be a discussion as to whether payment will be made as a lump sum or on a drip-feed over time. Again, this will be largely dictated by the way in which the payment is to be calculated. Multiple payments made over time can cause problems with lenders and subsequent purchasers so you should take care if you choose this option.

Protection

How will you protect your additional payment? Possibilities include taking a guarantee from the buyer, keeping hold of a ransom strip on the land or taking a restrictive covenant on the land and registering it at the Land Registry. What is best will be dictated by the circumstances of each individual case.

In any event seeking professional advice before committing to an overage arrangement from a surveyor and your legal advisers will always assist in letting the matter go smoothly.



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Registration of land as a TVG: The effect on business use

The Court of Appeal has recently considered the effect of registration of a private quayside as a Town or Village Green (TVG) on the landowner's continued use of the land as a working quayside.

In TW Logistics Limited v Essex CC & Another [2018], the High Court held that part of the landowner's land had been properly registered as a TVG, but that the public's recreational use of the land did not displace or exclude and was not incompatible with the landowner's carrying on of commercial activities. The Court of Appeal upheld this decision, reiterating that there was a sensible co-existence between the two uses.

The landowner appealed to remove the quayside from the register of TVGs on two bases:

- The effect of TVG status criminalised his use of the land for commercial purposes and left him exposed to criminal prosecution under the Victorian statutes intended to protect TVGs; and

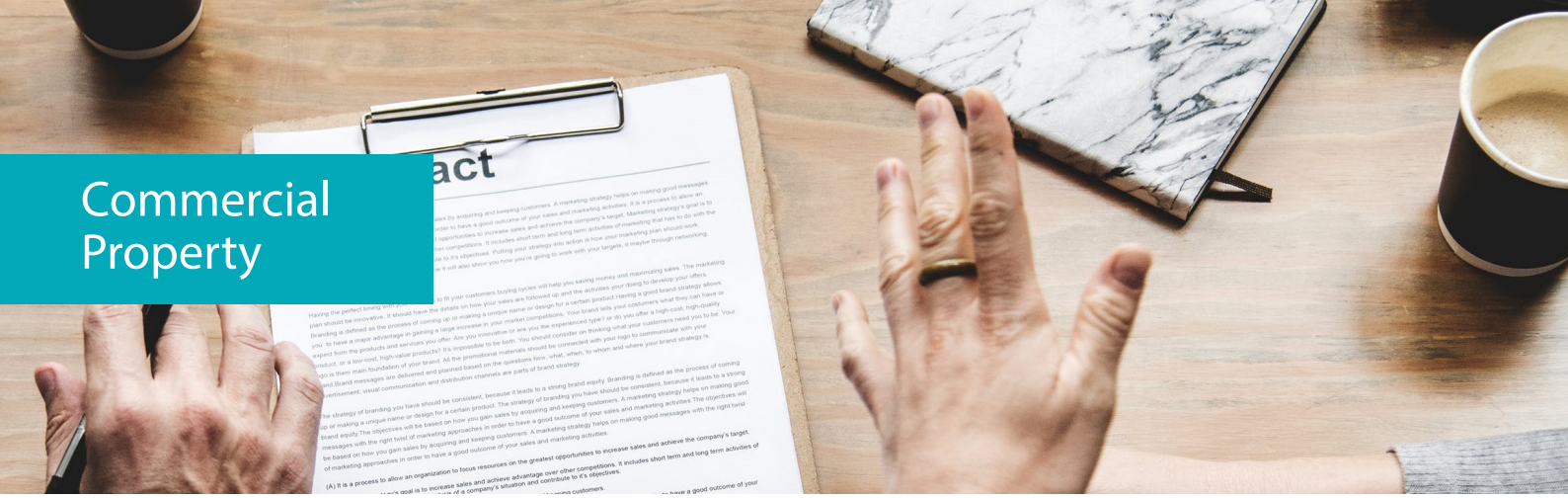
- The recreational use of the land did not qualify for registration as a TVG as it had been under the landowner's implied permission.

In dismissing point one, the court held that there is no suggestion in case law that the existence of the Victorian statutes affected the quality of recreational use required for land to be registered as a TVG. Further, the landowner's continued use of the land was permitted by the TVG registration scheme which gives the landowner a legal right to continue using the land as before where the use is not incompatible with recreational use.

In dismissing point two, the court held that there had been no implied permission by the landowner but that the use had been "as of right" in accordance with relevant requirements. Registration could not therefore be resisted on this ground.

Perhaps the more serious consequence of this decision for the landowner is that registration of the land as a TVG seriously restricts the landowner's freedom to alter or develop the land in the future. TVGs are often triggered by potential development on land and registration is a way that locals can protect the land and prevent development from happening.

This case serves as a useful reminder to anyone that owns land which is being used by the public to make sure that any use is only with the landowner's permission. Failing this, there may be serious consequences for what can be done with or on the land in the future. Recent case law has established that if a landowner does not permit the use of his land by members of the public, this can be easily dealt with by erecting clearly visible signs. This will be enough to prevent use by others being "as of right" and their use will, therefore, be unauthorised and not permissive.



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Honesty is the best policy

In a property transaction, Sellers may be tempted to keep their cards close to their chest in responding to the Buyer's pre-contract enquiries, wary of any potential issues which could lead the Buyer to withdraw. Although, of course, they are obliged to respond, they may seek to rely on exclusions of liability which ostensibly endorse that well-known conveyancing principle – "let the Buyer beware".

The recent case of First Tower Trustees v CDS Superstores emphasises the fine balance between a Seller relying on this principle and misleading the Buyer in their desperation to complete the sale.

The case serves as a reminder to Sellers that evasive responses seeking to rely on clauses excluding liability are likely to be viewed unfavourably by the Court.

First Tower entered talks to let premises in Darton, Barnsley to CDS in early 2015, with CDS's solicitors raising the usual pre-contract enquiries with First Tower's solicitors, who responded in February of that year.

The enquiries contained the usual disclaimers, namely that the Seller acknowledged its obligation to provide the Buyer with as much information as possible and, pending exchange of contracts, would notify the Buyer immediately if they were notified of anything which may contradict their previous replies.

CDS asked for details (so far as the Seller was aware) of the existence of any hazardous substances, including asbestos, and were flatly notified that "the Buyer must satisfy itself". They then asked for details of notices and correspondence relating to real or perceived environmental problems that affected the property, only for First Tower to respond that they were not aware of such documents, but the Buyer must satisfy itself.

The Buyer then asked for details of any actual, alleged, or potential environmental problems, only to receive the same response. On 16 April 2015 First Tower's agents received a copy of a report, which indicated that there was some asbestos in the premises.

On 20 April 2015 First Tower's agents received an email from a specialist firm that they had used, which reported a health and safety risk caused by asbestos at the premises. The aforementioned disclaimer conferred an obligation on First Tower to notify CDS on becoming aware of such information, yet the lease and agreement were completed on 30 April 2015 with the Buyer none the wiser.

CDS commenced High Court proceedings, with the Chancery Division finding First Tower liable, giving judgment against them for £1.4 million plus interest for their part in a "clear case of misrepresentation".

First Tower sought to rely on exclusion clauses in the lease, namely Clause 5.8 which stated, "the tenant acknowledges that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord."

Both the Chancery Division and Court of Appeal agreed that this exclusion was unreasonable, principally because it would be futile to raise pre-contract enquiries if the responses were immune from scrutiny due to a provision in the lease.

The substantial cost to First Tower affirms the importance of healthy, open communication between agents, solicitors and their clients, and the perils of obscure responses to any enquiries raised. Misleading the Buyer will negate any disclaimer, as it would be dangerous for the Courts to give primacy to such clauses if the effect was to exonerate the Seller for binding the Buyer to an agreement that they would not have entered into had they been aware of all the facts.

Our experienced and highly skilled commercial property team can be relied upon to ensure you provide the Buyer with proper responses to enquiries. Furthermore, our property litigation team can assist with any contentious matters stemming from pre-contract enquiries.

Further delay for the spatial framework?

Following a recent statement issued by the Ministry of Housing Communities and Local Government, Greater Manchester's Spatial Framework, the plan for development of commercial and residential space in the area, could be subject to further delay. The new governmental statement asks local governments to pay no attention to forecasts issued by the Office for National Statistics which suggested that future population growth would be lower than expected. Instead, it has directed councils to return to the previously-released higher forecasts which means that in Manchester, Council leaders will have to re-think the removal of 30,000 homes from the plan which were taken out over the summer. Commentary suggests there is a political motive behind this most recent directive from the Ministry following Conservative manifesto pledges on the construction of new homes from the last election.

Previous drafts have come up against much opposition due to their use of greenbelt land. When Andy Burnham was elected as mayor of Manchester in 2017, his manifesto pledge to see whether there could be "no net loss" of green belt land meant council leaders had to review what was then thought to be the final version. Since that time there have been more drafts and additional delays following which the plan was to be released this autumn. At the beginning of October, Mr Burnham released a statement saying it would be delayed due to "confusion" regarding population figures and housing targets. The new statement by the Ministry for Housing has confirmed that lower figures previously released by the ONS should be ignored meaning Manchester's 10 councils will have to re-insert 30,000 homes which they spent the summer taking out of the plan.

In the meantime, the plan for new commercial space which is tied into the whole framework also remains on hold.

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Can allowing a breach of covenant be a breach in itself?

A recent case in the Court of Appeal considered whether a landlord allowing a tenant to carry out works which would breach the terms of her lease, would in itself be a breach of the landlord's covenant given in the leases of other flats in the same building to enforce covenants if requested to do so by another tenant. The Court found that it could.

The landlord was a company owned by all the tenants collectively, which was willing to grant consent to an application from one of the tenants to carry out works which were not permitted by her lease. The lease also contained a covenant by the landlord that all residential leases of the building would contain similar covenants, and if requested (and funded) by another tenant the landlord would enforce those covenants.

The tenant who took issue with the application for works (the appellant) argued that if the landlord granted consent to the works and therefore allowed a breach of the lease to take place, it would not be able to comply with its own covenant to enforce the terms of the tenant's lease if requested to do so. It therefore argued that it was implicit that the landlord would not agree to something that prevented it from complying with its own covenant at a later date.

The landlord argued that it had the right to do as it pleased with its own property and would usually be free to consent to a request which would otherwise be a breach of a tenant's covenant, and that should not put it in breach of its own covenants. The lease did not say that the landlord was prohibited from consenting to something that would otherwise be a breach of the lease, and if the tenant was permitted to breach a covenant in advance of carrying out the works in question then no breach of covenant would actually take place – so there would be nothing for the landlord to enforce.

The judges agreed that the tenants were entitled to require the landlord to enforce the covenants contained in the lease in the event of a breach. It therefore made sense that the landlord should not be able to grant consent to something that would otherwise be a breach of covenant and in so doing, prevent itself from being able to adhere to other covenants given to other tenants. They acknowledged that if interpreted literally, the lease would prevent tenants from carrying out a range of normal activities such as installing recessed lights in a ceiling or rewiring a flat, but found that this was a fault of the way the lease was drafted and the fact that it contained an absolute prohibition on carrying out alterations to the roof, wall or ceiling within enclosing the demised premises. They suggested that if this covenant had been qualified and allowed the tenant to carry out such works with landlord's consent then the landlord would not be breaching the lease by granting such consent.

The judges, therefore, found in favour of the appellant and held that the landlord would be in breach of its covenant to the other tenants if it waived compliance with the appellant's covenants.

This case highlights the need for good drafting to minimise the risk of litigation further down the line.

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