

Highlighting developments and
issues in the real estate industry

Summer 2012

In this issue:

Abolition of Distress	1
Events and Announcements	2
New Lawyers	3
Cases	6
Transaction Focus.....	7

Abolition of Distress

The Ministry of Justice recently ended consultation on a paper entitled “Transforming Bailiff Action”. The aim of the paper and any legislative changes that arise from it is, it is said, to provide more protection against “aggressive bailiffs” who use “intimidating and threatening behaviour”.

The proposals in the paper that are likely to be of key interest to readers of *OI* are those regarding the much delayed bringing into force of provisions in the Tribunals, Courts and Enforcement Act 2007.

The 2007 Act contains provisions for the abolition of the common law right of landlords to distraint against their tenants for arrears of rent. It provides for the right of distraint to be replaced by a new regime called Commercial Rent Arrears Recovery (“CRAR”) which involves a similar procedure for seizure and sale of goods to satisfy arrears. However, there are gaps in the provisions which need to be “fleshed out”. Until this is done, the CRAR regime cannot be brought into force.

The consultation paper, which was released back in February, now provides the detail needed and, if the government follows through with its proposals, we should know by the end of the year the timings for the implementation of CRAR.

If it is eventually brought into force, and not substantially changed in the interim, the new regime will only be available in respect of commercial premises. Where a property is let or occupied wholly or partially for residential purposes, CRAR will not be available. Further, CRAR will only be available for the recovery of pure rent; it will not be available for the recovery of service charges, insurance or any other sums even if they are reserved as rent.

It will only apply to leases in writing or evidenced in writing, so oral tenancies are excluded. Under the CRAR regime, it is proposed to retain a right similar to that currently contained in section 6 of the Law of Distress Amendment Act 1908 which enables rent arrears to be recovered from subtenants.

CRAR will only be exercisable if the following conditions as to rent are satisfied:

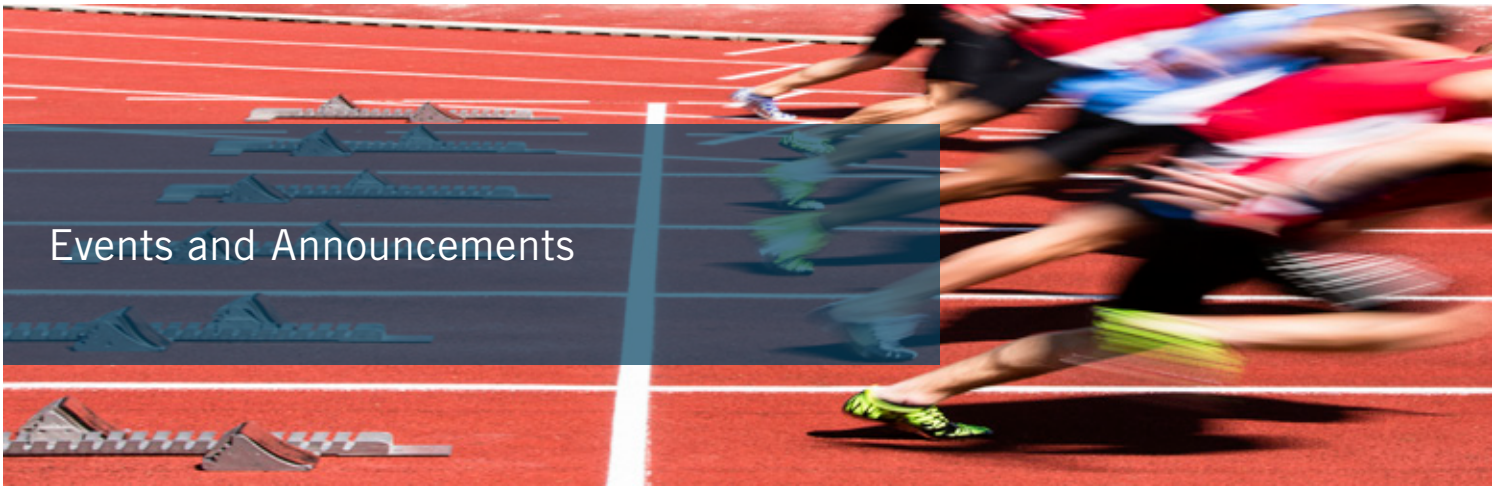
- It is due and payable before notice is given;
- It is certain or capable of being calculated with certainty; and
- It is above a minimum of seven days’ net rent.

In order to seize goods, a landlord must first serve a “notice of enforcement” on the tenant with a minimum period of notice being 14 clear days.

On the service of a notice, the tenant may ask the court to intervene and the court may make an order setting aside the notice and/or an order that no further steps be taken under CRAR without further order.

There are very detailed provisions as to the procedures to be adopted in respect of the seizure and sale of goods.

Any contract or lease that seeks to amend or avoid the CRAR provisions will be void.



Events and Announcements

Real Estate Team of the Year—2012

The K&L Gates real estate team recently received another nomination for “Real Estate Team of the Year” by UK Lawyer Magazine. The team have now been shortlisted four times in 2011/12 by Legal Business, Legal Week and UK Lawyer Magazine.

Real Estate Breakfast Seminar in September

We will be hosting our annual real estate breakfast seminar on Tuesday 18th September 2012. Further details will shortly be posted on our website, www.klgates.com, or please contact the editors.

The Green Agenda and Sustainability Initiatives—PERE/SPR/K&L Gates Seminar

On 9 July K&L Gates hosted a seminar and book promotion/launch with Private Equity Real Estate (PERE) and the Society of Property Researchers (SPR) for “Sustainable Investment in Real Estate” edited by Paul McNamara, Head of Property Research at PRUPIM, and published by PERE.

In this book, a line-up of high calibre experts collaboratively provided their views on the issue of sustainability and how the implications for the functioning and pricing of property assets are rapidly evolving. Various authors of this book, who are all leaders in the field of Responsible Property Investment, shared their views on the issues of sustainable investment in real estate and its implications for property research and researchers. They also provided insight and guidance on the changes on property markets and making property investments sustainable.

The event was chaired by **Steven Cox** and **Bonny Hedderly** and the speakers included **Paul McNamara**, Head of Property Research, PRUPIM, **Louise Ellison**, Head of Sustainability, Quintain Estates and Development, **Christina Cudworth**, Global Head of Sustainability, IPD, **Tatiana Bosteels**, Head of Responsible Property Investment, Hermes Real Estate and **Anthony O’Connor** from PERE.

K&L Gates Real Estate Lawyers Participate in Olympic Volunteering

The Olympic Games are finally upon us and in 2012 London will be hosting the Games for the first time since 1948. The firm was keen to offer very real support to both lawyers and support staff who wanted to become involved in this event, acting as ambassadors for both the Olympic Games and for the firm. In 2010 Boris Johnson kicked off the search for a London “Olympic army” in the biggest peacetime mobilisation of volunteers in British history. Applications to become one of the 8,000 London volunteers for the Games Committee began and applicants were interviewed in the summer of 2011. Those lucky enough to be selected were required to commit to participate for 6 consecutive days between 27 July and beginning of September 2012. Whilst there were a number of volunteers across the firm, two of our London real estate lawyers, Bonny Hedderly and Laura Ludlow will be participating. Laura Ludlow commented, “It is very exciting to be involved in such a wonderful event and we are both proud to represent the firm in this way”.



New Lawyers

2011/12 has been a busy year in terms of new office openings and also new lawyers joining the real estate/structured finance practice group. In the last issue of *O* we reported on our new Milan office opening and we are now pleased to announce the recent arrivals of real estate and finance lawyers, Francesco Sanna and Andrea Pinto to our Milan Office. Additionally we welcome Andrei Soukhomlinov to our Moscow Office and a new structured finance team arrive in London.

New London, Milan and Moscow Team Members

We are pleased to welcome Sean Crosky, Matthew Duncan, Paul Matthews (London), Francesco Sanna, Andrea Pinto (Milan) and Andrei Soukhomlinov (Moscow).



Sean Crosky

Sean Crosky is a partner in the firm's London office. He is a structured finance lawyer with experience in a wide variety of financing transactions including debt capital markets, structured products, receivables financings, restructurings and Islamic finance. Sean has advised on a variety of transactions including securitisations of trade receivables, auto loans, residential mortgages, commercial mortgages, insurance contracts, portfolios of loans and transport assets as well as transactions involving asset backed commercial paper, conduit financing and covered bonds.



Matthew Duncan

Matthew Duncan is a partner in the firm's London office. He is a highly experienced finance lawyer across a wide range of banking, capital markets and derivatives matters. He has significant experience of advising institutions and other entities that operate, invest in, or deal with businesses providing financial services and products to the consumer sector in the UK as well as other jurisdictions. This covers the entire life cycle from setting up origination platforms to warehousing to portfolio sales and purchases to term capital markets financings as well as developing new retail financial products. He also has experience in an array of financings involving commercial mortgage loans, leases, insurance contracts and other receivables/assets.



Paul Matthews

Paul Matthews is a partner in the firm's London office. He focuses on the application and integration of derivatives and derivatives technology in structured finance transactions, working with clients to meet their specific risk management, funding, regulatory capital and investment driven objectives. In particular, he has been actively involved in the European credit derivative and synthetic securitisation markets since their inception.



Francesco Sanna

Francesco Sanna is a partner in the firm's Milan office. He focuses his practice on real estate investment and development as well as on engineering and construction matters, including the structuring and negotiation of PFI and PPP project contracts particularly in the energy and health care sectors.



Andrea Pinto

Andrea Pinto is a partner in the firm's Milan office. He focuses his practice on advising both lending institutions and borrowers in real estate finance, project finance, acquisition finance and restructuring matters.



Andrei Soukhomlinov

Andrei Soukhomlinov is a partner in the firm's Moscow office. He concentrates his practice on real estate and construction law and has advised a variety of international and domestic clients on real estate acquisitions, the structuring of investment and development projects, including allocation of land for construction, zoning and construction permits, real estate financing, commercial leases and property management. He has significant experience in representing both developers and contractors on complex construction projects.

LONG | HARBOUR |

K&L GATES LLP

acted for Long Harbour LLP in relation to the creation and implementation of the structuring to provide 477 new homes to the London Borough of Barking and Dagenham.

Barking and Dagenham fully manage these homes, set the rents and have full nomination rights in respect of these homes.

Closed on 17 February 2012

£78m

For further information contact:




Neil Logan Green
Partner
London
+44.20.7360.8332
neil.logangreen@klgates.com



Christian Major
Partner
London
+44.20.7360.8232
christian.major@klgates.com



Paul Beausang
Partner
London
+44.20.7360.8100
paul.beausang@klgates.com



Cases

Damages for Trespass

A landowner licensed a hoarding company to erect an advertising hoarding on its land. The hoarding was, however, erected in part on the neighbouring local authority's land without the authority's consent. The hoarding company admitted trespass but disputed that anything other than nominal damages should be paid to the local authority as the hoarding could have been erected wholly on the landowner's land.

The court held that the starting point was the fact of the admitted trespass, and it awarded damages of £16,000 based upon a notional licence fee.

Comment: The court adopted the hypothetical negotiation approach to assess the notional licence fee.

Enfield LBC - V - Outdoor Plus, CA

Rent Reviews

A tenant held premises that were over-rented. The tenant entered into a sublease which provided for the subtenant to pay a rent that was lower than the headrent but, after rent review, once the rents in the headlease and sublease became aligned under mirror rent review clauses, the subtenant was to take an assignment of the headlease. However, that formulation only worked in a rising market which did not in fact materialise. The tenant sought to establish a construction of the

sublease that would force the subtenant to take an assignment of the headlease or, alternatively, to have the sublease rectified to achieve that end.

The court, however, construed the sublease in the subtenant's favour and refused rectification.

Comment: The court said that the parties recognised that there was a risk that rent alignment might not happen.

Scottish Widows Fund - V - BGC International, CA

Business Tenancies

An intermediate landlord of business premises, due to its short reversionary interest, ceased to be "competent landlord" in respect of its subtenant. However, prior to expiration of its lease, it obtained from the freeholder a new 15 year lease and so became the competent landlord once more. It then sought to oppose the grant to the subtenant of a new sublease on the basis of section 30(1)(g) of the 1954 Act, i.e., that it intended to occupy the premises for its own use.

It was held that, although the intermediate landlord was always the landlord, the 5 year interest rule contained in section 30(2) of the 1954 Act required that the intermediate landlord have been "competent landlord" for the whole period before ground (g) could be used, and so its claim failed.

Comment: The court was split in its decision with the dissenting judge expressing the view that 5 years as "landlord", competent or otherwise, was sufficient.

Frozen Value - V - Heron Foods, CA

Break Clauses

A lease of premises contained a break clause which allowed the named tenant, A Limited, to terminate the lease if A Limited had substantially performed the covenants at the break date. A Limited assigned the lease to GP Limited who subsequently sought to break the lease. In response to the landlord's objections that the break was personal to A Limited, GP Limited argued that the break was assignable because a word like "only" had not been used.

The court determined that, despite the word "only" not having been used, the break remained personal to A Limited.

Comment: The court said that the drafting of the break clause was clear and deliberately different from other parts of the lease which referred to the "Tenant" and "Assignee", and not "A Limited".

Gemini Press - V - Parsons, QBD



Break Clause

A lease provided for the payment of rent quarterly in advance on the usual quarter days. It contained a break clause which was to take effect 12 days after the September 2010 quarter day but which was conditional upon all rents having been paid up to the break date. The tenant sought to break the lease and paid rent, not for the full September quarter, but for the 12 days to the break date.

The landlord contended that the break condition had not been satisfied. The court agreed with the landlord and said that the full quarter's rent should have been paid on the quarter day.

Comment: The tenant tried to argue estoppel, but the landlord had demanded the full quarter's rent and had not deviated from that stance.

PCE Investors - V - Cancer Research UK, ChD

Insolvency

A nightclub operator was the tenant of a number of premises in respect of which it covenanted to pay rent quarterly in advance. The tenant fell into arrears with its rent payments. Subsequently, administrators were appointed in respect of the tenant's business. A dispute arose as to the rents that were due to be paid by the administrators as an expense of the administration.

The court set out the following points of principle: (a) Where rent is payable in advance and falls due for payment prior to the commencement of the administration, then it is provable but not payable as an administration expense; (b) Where rent payable in advance becomes due during the period when the administrator is retaining the property for the purposes of the administration, then the whole sum is payable as an administration expense; (c) Where rent is payable in arrears and accrues during the period when the administrator is retaining the property for the purposes of the administration, the administrator will be liable to pay as an administration expense at least the rent that accrues from day to day so long as he retains possession of the premises for the purposes of the administration.

Comment: The earlier decision on this point in *Goldacre (Offices) - V - Nortel Networks UK* (2009) was applied.

Leisure (Norwich) II - V - Luminar Lava Ignite (in administration), ChD

Transaction Focus – Akelius

K&L Gates Advises Akelius Property in £75m UK Portfolio Purchase

London real estate partner Piers Coleman led the K&L Gates group that advised Akelius Property on a transaction, which involved the acquisition of 574 homes in London/South East for a purchase price of £75m+ from Terrace Hill Residential PLC. Akelius currently owns 34,000 homes in Sweden and Germany and has declared an intent to create one of the UK's largest residential rental portfolios at a cost of approximately £2bn. The team also included real estate partner Chris Major, tax partner Paul Beausang, and senior associate Marianne Clark.

For further information contact:

Steven Cox steven.cox@klgates.com T: +44 (0)20 7360 8213

Bonny Hedderly bonny.hedderly@klgates.com T: +44 (0)20 7360 8192

K&L GATES

Anchorage Austin Beijing Berlin Boston Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg
Hong Kong London Los Angeles Miami Milan Moscow Newark New York Orange County Palo Alto Paris Pittsburgh Portland Raleigh
Research Triangle Park San Diego San Francisco São Paulo Seattle Shanghai Singapore Spokane Taipei Tokyo Warsaw Washington, D.C.

K&L Gates includes lawyers practicing out of more than 40 fully integrated offices located in North America, Europe, Asia, South America, and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information about K&L Gates or its locations and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2012 K&L Gates LLP. All Rights Reserved.