

Case Update: An unnecessary planning obligation was still enforceable

Court of Appeal - Millgate Development Ltd v Wokingham Borough Council

Planning obligations are contained in either what is commonly known as a Section 106 Agreement or a unilateral undertaking. The obligations can restrict use or development, or secure financial contributions towards local facilities and infrastructure.

In this case the developer applied for planning permission to build 14 houses. The application was refused; one of the reasons given was that there was inadequate provision for the infrastructure. In response, the developer provided a unilateral undertaking to contribute approximately £170,000. On appeal, the developer was granted permission. In the appeal the planning inspector said that the planning obligation was not necessary, but was in any event enforceable. The developer appealed in the courts, the contribution was reduced to £140,000, but The Court of Appeal held that the undertaking was still enforceable.

Following this case, a good approach when submitting undertakings on appeal, would be to include a condition that the undertaking takes effect only if the planning inspector confirms that it is necessary to allow the development, or to submit a draft undertaking which is executed upon the inspector's request.

Case Study - Dino Dung!

Adrian White, partner in Henmans commercial property team recently acted for a large education provider in a high value acquisition of new premises in Cambridge.

The environmental search result revealed evidence of coprolite mining (fossilised dinosaur dung), which took place in the Victorian period in Cambridshire and other areas of the Country.

Increasingly environmental searches on property purchases are revealing the potential existence of naturally occurring or man-made cavities beneath, or close to, properties. The issue is one concerning the geological features, rather than contamination.

In this case it was not possible to obtain title indemnity insurance. However, the building insurer accepted the risk as a subsidence risk on the building insurance policy, and the acquisition proceeded.



Adrian White
Partner

Adrian specialises in property development work, particularly planning, construction and environmental issues. He advised that there are searches that can be carried out for coal mining and other forms of mining, but other than the environmental search there aren't any specific searches that cover all types of underground cavities, therefore the national cavity database is very useful. The information from the environmental search should be disclosed to your intended buildings insurer before you exchange contracts to ensure that the potential for such cavities can be covered before you are committed on your purchase.

New faces

Towards the end of 2011 we welcomed two new faces to our commercial property team.

Anna Power

Joined from: Lodders in Stratford-upon-Avon.

Expertise: Development work (commercial and residential), acquisitions, disposals and landlord and tenant matters.



Outside Work: Recently married and returned from honeymoon in Australia, Anna also plays the cello and enjoys cooking and wine.

Favourite Restaurant: The Mole Inn, Toot Baldon

Desh Patel

Joined from: Mayo Wynne Baxter based in Sussex.

Expertise: Landlord and tenant matters, investment property, and corporate support.



Outside Work: Desh enjoys playing sport, in particular football, cricket and golf.

Favourite Restaurant: Branca, Oxford

Testimonial

"absolutely great - the lawyers are efficient, diligent and turn things around quickly"

Chambers and Partners, A Client's Guide to the UK Legal Profession

Your Tenant hasn't paid the rent, what can you do?

The challenging economic conditions over the past few years, have left many tenants struggling to pay their rent. As a landlord, in these circumstances, there are a number of options available to you, including.

- **Negotiate different payment terms.** If the lease specifies quarterly payments, you could consider agreeing monthly payments to assist cash flow, or a small reduction of rent. Either of these should be for a fixed period, which can be terminated by the landlord and set out in writing.
- **Drawdown on a rent deposit.** Did you obtain a deposit from your tenant when the lease was granted? You may be able to withdraw money from the deposit to reimburse you for unpaid rent, service charge or even repairs to the property which the tenant has failed to do. Normally, you will be required to inform your tenant that you have withdrawn money and the tenant will be required to top up the deposit.
- **Call on a guarantor.** Did a guarantor enter into the lease to guarantee the performance of the tenant? You may be able to call on the guarantor to pay outstanding rents. If the guarantor is a company, it is a good idea to check the company's ability to pay before seeking to enforce the guarantee. This can be done by a simple company search. If you forfeit the lease (see below) or it is disclaimed because the tenant is insolvent, you may also be able to call on the guarantor to take a new lease of the property, or pay a lump sum of rent. To recover rent, notice must be served on the guarantor within 6 months of it becoming due and there are statutory procedures which you must follow.
- **Accepting rent from a third party.** If your tenant has sublet the property, it is possible to divert the undertenant's rent to you. Rather than the undertenant paying the tenant and the tenant paying you, as landlord, the undertenant's rent can be diverted directly to you. You can, in principle, also accept rent from a third party on behalf of the tenant. However, you should seek to establish the basis upon which the third party is paying and ensure that no relationship of landlord and tenant is created between you and the third party. In accepting the rent from the third party, you would be giving up your right to forfeit
- **Distress.** In practice this means instructing a bailiff to seize, impound and sell goods from the property, equivalent to the amount of rental arrears. Distress may not be appropriate if it is unlikely that you will be able to recover the full value of the arrears. It can also have a damaging effect on your relationship with the tenant. Therefore if a renewal

is imminent, you may want to consider other options. Exercising your right to distress will waive any rights to forfeit.

- **Surrender.** If both you and the tenant want to bring the lease to an end, you may be able to negotiate a surrender of the lease. By surrendering the lease, the tenant is, in effect, giving back the lease to you. If the lease does not contain a right for the tenant to bring the lease to an end, you should consider, during your negotiations, asking the tenant for a lump sum for agreeing a surrender, particularly if the property is not in good repair and you will need to carry out works before re-letting.
- **Forfeiture.** If you want to regain possession, or the other options have failed, forfeiture may be your best option. Your lease will specify when you can forfeit the lease, for example, if the rent is unpaid for 21 days or the tenant is insolvent. Forfeiture must be by peaceable re-entry, which is why bailiffs normally re-enter late at night when the property is empty. Forfeiture brings the lease to an end, allows you to regain possession, carry out any repairs and re-let the property. Forfeiture will also bring any sub-leases to an end. However, the tenant and any sub-tenant can apply to the Court for relief against forfeiture, which can be granted on terms it sees fit. If relief is granted, the effect is as though forfeiture was never exercised.
- **Court proceedings.** You could choose to bring a claim against the tenant to recover a debt. The proceedings will have a damaging effect on the relationship and because of the costs involved and the other options which are available, in practice this option is rarely used.

In deciding which option is best for you, you should consider what you want to achieve; for example do you wish to retain the tenant and their regular payment of rent, or do you want to regain possession of the property? You will also need to consider the solvency of the tenant. If the tenant is a company in administration, liquidation or has entered into a voluntary arrangement, your rights to exercise some of these options may be restricted. For example, if a tenant company is in administration you will need to obtain the administrator's consent, or permission of the Court before forfeiting or seeking to distress. Similar restrictions apply to bankrupt individuals.

Each of the options has advantages and disadvantages depending on the circumstances. If your tenant has failed to pay its rent, and you would like advice about what to do, please contact us to discuss which option is best for you.

Changes to Capital Allowances

Capital allowances enable you to account for depreciation in capital assets, by deducting a proportion of the cost of the asset, each year, as an expense when calculating income profits.

From April this year, the rates of capital allowances which you can claim will be reduced.

Competition –

Your chance to win a Henmans umbrella and bottle of champagne!



Have you seen the Henmans branded taxis around Oxford? The first person to email a picture of a Henmans taxi to anna.power@henmansllp.co.uk will win one of our fabulous Henmans umbrellas and a bottle of Champagne!