



June 2009

## PROPERTY NOTEPAD

### 1. Dealing with applications for Landlord's Consent

Landlords, and their surveyors and agents, should proceed with great caution when faced with any tenant application for permission or consent. This applies irrespective of the subject matter of the application (eg. assignment, subletting, alterations, change of use etc).

The problem is that even a seemingly innocuous reply might in law amount to the grant (or unreasonable refusal) of consent. For example, the High Court recently ruled that correspondence qualified by the words "in principle" was nonetheless sufficient to grant consent to an assignment, and thereby render a conditional contract unconditional (*Alchemy Estates v Astor* (2008)). Once consent is deemed granted, a landlord will often be unable to insist on completion of collateral arrangements, such as the provision of a rent deposit or even signature of a formal licence document.

The safest course of action is for landlords to reply that they are immediately referring the application to their solicitors for advice. This will create the opportunity for all factors to be considered, and for a suitable reply to be given within the framework and timetable created by the terms of the lease, and by law.

### 2. Impact of Bank failures on residential service charge funds

The meltdown in the banking sector has created huge problems for those with money on deposit. One such problem arises in relation to funds held in service charge accounts, which can frequently run into hundreds of thousands of pounds.

The Financial Services Compensation Scheme protects individual depositors up to a limit of £50,000, but residential service charge funds are typically held by a residents' company, managing agent or similar, and therefore appeared not to qualify for protection under the scheme.

To address this concern, the Government has published guidance to the effect that residential service charge funds will be treated so that each individual tenant will be able to claim protection up to the £50,000 limit. Although this guidance does not yet have the force of law, it seems clear that all but the most lavish of service charge funds should be fully protected by the Compensation Scheme.

### 3. Stamp Duty Land Tax – Disclosure of Avoidance Schemes

On Budget Day, 22 April 2009, HMRC issued a consultation document setting out proposals to extend the tax avoidance scheme disclosure rules as they apply to SDLT. Currently, only SDLT schemes in respect of non-residential property with a value of at least £5 million are required to be disclosed. It is proposed that the disclosure obligations will be extended so that:

- They will apply to SDLT schemes in respect of residential property with a value of at least £1 million; and
- Arrangements will be introduced to enable HMRC to identify users of all disclosed SDLT schemes for both residential and non-residential property.

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Responses to the consultation document have been requested by 15 July 2009.

Speculation that Budget announcements would include proposals for an indirect SDLT charge on the use of SPVs to mitigate SDLT liability in high value residential transactions has so far proved unfounded.

#### 4. Easements – Can the landowner be compelled to sign a deed?

A recent court decision has highlighted the importance of ensuring that the obligations of the grantor of an easement are set out clearly in the Deed of Grant.

In *William Old International v Arya* (2009), a developer with an easement to lay services across third party land sought to compel the third party land owner to sign a Deed of Grant in favour of a utility company. The developer claimed an implied obligation for the landowner to sign the deed, and alleged that failure to do so amounted to “derogation from grant”, i.e. doing an act detrimental to the existence of the easement

The court disagreed and the developer failed. In the absence of an express obligation, the landowner could not be required to grant rights to another party and no such obligation could be implied.

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