

## Totaland Law

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# When is a tenant's business lease surrendered by operation of law?

The Court of Appeal's recent decision in *QFS Scaffolding v Sable* [2010] provides useful guidance to landlords who are eager to fill empty business premises when a tenant becomes insolvent.

Landlords must ensure that all legal formalities required to bring an insolvent tenant's lease to an end are dealt with before they start negotiations with a new tenant. In *QFS Scaffolding*, Mr and Mrs Sable leased a builders' yard to London Demolition Co (LDC) in 2001 for a 21 year fixed term. In 2006, LDC was placed into administrative receivership. A related company, QFS Scaffolding, moved into the yard and began trading. QFS started negotiations with the Sables for a new lease. LDC's receivers were aware of these negotiations and made it clear they did not want anything to do with LDC's lease nor did they accept liability to pay rent. Negotiations between QFS and the Sables broke down, so QFS took an assignment of LDC's lease from the receivers. The Sables acted under several misapprehensions:

- they assumed the appointment of the receivers had brought LDC's lease to an end by way of a surrender by operation of law (i.e. both parties treating the lease as at an end)
- they believed they had granted a mere tenancy at will (which can be ended by either party at any time) to QFS whilst negotiations for the new lease continued.

When negotiations broke down, the Sables obtained a possession order against QFS from the County Court, but QFS successfully appealed to the Court of Appeal to be permitted to remain in occupation.

The Court of Appeal held that for a tenant like LDC to surrender their lease by operation of law, the conduct of both the Sables and LDC had to be unequivocally inconsistent with the continuation of the lease. The Court found no such evidence of an implied surrender and accepted LDC's lease had been assigned to QFS. Landlords must be careful not to make assumptions when dealing with insolvent tenants and should seek advice at an early stage before negotiating with new tenants. **John Spence** T 01892 701376 john.spence@ts-p.co.uk.



### From the Editor

Welcome to the November 2010 edition of *Totaland Law*, Thomson Snell & Passmore's newsletter highlighting some key issues and topical news affecting those involved in property and land-based organisations.

If you would like any further advice on any of the issues covered, please contact Sarah Easton.

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Developers should take note of this important case and ensure they seek expert advice where there is potential for infringement of another's right to light before embarking on costly works.

### Light is a right

A recent decision of the High Court in *HKRUK II v Heaney* (2010) will cause alarm bells to ring for developers of commercial property.

The accepted view is that it is difficult to obtain an injunction (a court order preventing continuation of an action or requiring an action to be taken) in relation to commercial buildings, especially where development has been completed. However, in this case an injunction was held to be the appropriate remedy for the loss of light, not an award of damages.

The owners of a Grade II listed former bank were advised that the proposed development of a neighbouring building would cause an actionable

loss of light to the bank. Although correspondence was entered into, the development was completed without legal proceedings being issued. Nevertheless, the court held that an injunction should be granted. Damages would have been assessed at £225,000 but the cost of removing the offending extra floors is estimated to be £1-2 million.

Developers should take note of this important case and ensure they seek expert advice where there is potential for infringement of another's right to light before embarking on costly works.

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## Restrictions imposed by land agreements may be anti-competitive, unenforceable and illegal

From 6 April 2011, The Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 comes into effect.

The change means that land agreements which prevent, restrict or distort competition within the UK are prohibited.

This Order makes land agreements (including contracts and other commercial arrangements of non-residential property, including leases and property sales) subject to UK competition law.

Previously such agreements were exempt. This change to the law is partially as a result of the Competition Commission's recent enquiry into grocery retailing which found that restrictions in land agreements can prevent competition and therefore harm consumers.

The change means that land agreements which prevent, restrict or distort competition within the UK are prohibited. All land agreements, whether agreed before or after 6 April 2011, will be subject to competition law under the Order. This change will affect many common restrictive provisions and is likely to have particular impact in retail sectors.

The property industry will have to self-assess the compliance of land agreements to the UK's competition laws.

Restrictions imposed by land agreements which breach the prohibitions of the Act, and are deemed to have a significant effect on UK competition are not legally enforceable. Restrictive covenants making it more difficult for certain businesses to access a given market or

which are aimed at market-sharing are most likely to be prohibited.

The presence of prohibited restrictions in a land agreement may mean the whole agreement is void. Third parties adversely affected by the agreement can claim damages for any resulting loss and, in addition, the Office of Fair Trading may impose fines of up to 10% of the offending group's annual world wide turnover as a penalty. At the very least, the offending restriction will be unenforceable.

It is essential that restrictions imposed by land agreements are very carefully considered. Consideration must be given to the particular product and geographic market that the land agreement affects. This assessment will be complex.

It is crucial that the effect of the land agreement is considered both at the time it is entered into and subsequently. Evolving markets may mean that an agreement once self-assessed to be compliant with competition laws, could become anti-competitive in the future.

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## Buying forests and woodlands

The new coalition Government has recently announced that it proposes to sell off woodland owned and managed by the Forestry Commission, Britain's largest land manager. There are advantages to owning woodland providing buyers are aware of landowners' responsibilities.

The sale is part of the Government's 'Big Society' push to give individuals more say in the environment.

The Forestry Commission, part of the Department for Environment, Food and Rural Affairs (DEFRA), was set up after the first world war to preserve the source of timber, promote forestry, develop afforestation, and make grants to private landowners. The Commission says that the sale is part of the Government's 'Big Society' push to give individuals more say in the environment and that it is committed to ensuring that woodlands continue to be protected from development.

Potential buyers can find advice on how to manage woodland sustainably and responsibly from the Commission website at [www.forestry.gov.uk](http://www.forestry.gov.uk).

### Advantages to owning woodland

- Woodlands are currently exempt from inheritance tax.
- Grants for properly managed woodlands and forests can be obtained under the Commission's English Woodland Grant Scheme.
- They provide habitats for plants and animals and sporting game cover.
- Increasingly woodland is a sustainable source of timber for biofuel boilers in the form of logs, sawdust pellets and offcut woodchip.

### Landowners' responsibilities

- Buyers should ensure that there are adequate access rights for machinery for thinning, coppicing and removing felled timber.
- Landowners must also ensure that they have a felling licence under the Commission's licensing system and that this is carried out by a properly qualified person.
- The Countryside and Rights of Way Act 2000 established additional public rights of way through existing woodland to allow public access. Owners of woodland will

have to ensure that any public rights of way are not obstructed and that the routes are free from hazards to avoid liability to the public under the Occupiers Liability Act 1957.

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### Planners and developers unite in protest against new local planning strategies

The Government's decision to revoke command led 'Soviet' style regional planning strategies has led to a rare show of unity between planners and developers.

As part of the drive towards localism, the Department for Communities and Local Government announced in the summer that planning authorities could ignore housing targets and land allocations set for their areas. Coupled with powers to stop 'garden grabbing', the intention is to put planning decisions at the heart of the local community.

However, the Royal Town Planning Institute argues that conventional strategic planning is not a barrier to economic recovery, and developers fear that abolishing existing strategies without putting transitional arrangements in place has created a vacuum which will disrupt house building for the foreseeable future.

Indeed, national homebuilder Cala Homes has successfully challenged the lawfulness of the Government's decision and guidance from the Planning Inspectorate has just been issued.

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## How does the Equality Act affect property owners and occupiers?

Most of the provisions of the Equality Act 2010 ('the Act') came into force on 1 October 2010. The Act restates existing legislation but also introduces some new duties that will affect property owners and occupiers.

When disposing of a property (selling, letting, assigning or subletting an existing lease) the Act prohibits:

- discriminating by not disposing of the property to a certain person
- discriminating by treating that person differently.

The Act also prohibits harassment of any person who currently occupies the property or harassment of any person who applies to occupy the property and a person must not be victimised with regard to the terms of the disposal. A person whose permission is required for the disposal of property is also prohibited from discrimination, harassment and victimisation when he or she gives or refuses that permission.

A person who manages premises must not discriminate, harass or victimise anyone. Examples of breaches to the Act would be:

- restricting a tenant's access to a communal garden because the tenant is undergoing gender reassignment while allowing other tenants unrestricted access

- responding more slowly to requests for maintenance work because a tenant has a learning disability.

The Act imposes the following duties on landlords:

- to make reasonable adjustments to assist disabled people in existing tenanted properties, premises which are to be let and the common parts of residential and mixed use buildings (including changing how things are done, changing a physical feature and providing an auxiliary aid)
- to make reasonable adjustments to common parts of buildings that contain residential units. (There is an exception for small premises). If the duty applies, it only relates to making reasonable adjustments to the physical features of the common parts which could include permitting the installation of a stair lift.

The Act sets out a procedure for disabled tenants of residential properties to apply for landlord's consent to make improvements. If the landlord refuses consent he must give a written statement setting out the reasons. The Act deems consent to have been given if the Landlord refuses to give consent within a reasonable time.

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## Focus on... agricultural and rural sector

Thomson Snell & Passmore has a long history of providing clear, practical legal advice to landed estates and trusts, farming and food production businesses and families. In September we hosted a stand at the Weald of Kent Ploughing Match at Frittenden, an agricultural and country show for the farming and rural community. Many thanks to all those who paid us a visit.

Our experienced Agricultural and Rural team cover all aspects of work for individuals and businesses. Their work spans business and employment issues, funding, development land, farms and agricultural tenancies, environmental issues and diversification projects, as well as wills, trusts and tax and succession planning. Members of the team work closely together and will talk to your accountants, lenders, agents and consultants to ensure that our advice to you is considered and comprehensive. Details of the Agricultural and Rural team can be found under the Commercial Property page of our website at [www.ts-p.co.uk/our-services/commercial-property-and-development](http://www.ts-p.co.uk/our-services/commercial-property-and-development). Sue Lister T 01892 701394 sue.lister@ts-p.co.uk



Although this newsletter highlights some key issues relating to property and land law, it should not be considered comprehensive and is not a substitute for seeking professional advice on a specific issue.