

January 2011

Welcome

Welcome to the Real Estate Focus.

In this edition we look at how the VAT increase will effect rent deposits, we examine the Community Infrastructure Levy and we look at the changes to the Carbon Reduction Commitment Scheme. We consider the recent “Good Harvest” case and the impact that this has had on landlords and we focus on the changes to the Competition Act and how this effects land agreements.

I hope that you find this newsletter interesting and informative. We are always keen to hear from you if there are any topics that you would like us to cover so please feel free to email me with any suggestions.

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Kind regards

Jonathan Kay
Partner



Landlords: Top up Your Rent Deposits

As most of us are aware, the VAT rate goes up to 20% on 4th January 2011. However, what does this mean from a property perspective?

Well, for a start, this will impact on:-

- Rent payments that span the rate change

The December quarter’s rent will attract VAT at 17.5% provided an invoice is issued or the rent is paid before 4 January 2011. If the VAT invoice is not issued and payment is not received before 4 January 2011, VAT will be chargeable at 20% on the entire rent for the quarter unless the landlord agrees to apportion the rent for the two VAT rates.

- SDLT calculations

If VAT is payable on the rent, SDLT is calculated on the VAT inclusive figure (yes, you do pay tax on a tax!).

- Rent deposit arrangements

If you are a landlord who charges VAT on the rent and have taken a rent deposit from your tenant, you will have added VAT to that rent

deposit. From 1st January, the rent deposit will be short by 2.5% so you should get your tenant to top up the rent deposit by the amount of the additional VAT.

Community Infrastructure Levy to be retained

The Community Infrastructure Levy (CIL) has survived the change of government. The CIL came into force in April 2010 and allows local authorities in England and Wales to raise funds from property developers. The money raised can be used to fund a range of infrastructure needed as a result of any development by the property developer.

The new government believes the tariff-based approach provides the most satisfactory framework to fund new infrastructure but it is to make changes which will hand more power to councils and committees to decide what the CIL will fund.

Watch this space for further details.

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CRC – a tax in disguise!

We have commented on the new Carbon Reduction Commitment Energy Efficiency Scheme (CRC) in previous editions of Real Estate Focus. The CRC is a mandatory “cap and trade” emissions trading scheme for large businesses and public sector organisations. It came into force on 1st April 2010 and was intended to be revenue neutral to the government. However, October’s Comprehensive Spending Review included a significant change to the CRC which escaped the mainstream media’s attention.

The first allowance sales are now to take place in 2012 instead of 2011. However, there will now be no recycling payments, with revenues from allowance sales (totalling £1 billion per year by 2014-15) to be “used to support the public finances...rather than recycled to participants”.

Rather than reducing the cost burden on businesses as suggested in the Spending Review, the CRC will now impose a carbon tax on

business. Building owners are likely to look closely at leases to see whether they will be able to pass this “tax” on to occupiers. Occupiers are likely to try to resist this and should keep an eye on their service charge bills to make sure their landlords are not simply putting the costs through the service charge account.

Could this be the incentive that landlords and tenants need to cooperate with each other in economising on energy consumption?

Tenants’ covenant strength comes under scrutiny

The recent “Good Harvest” case in the High Court has made landlords think again about granting a lease to a newco subsidiary with the parent company or directors standing as guarantors.

In that case, the judge found that a landlord cannot extend a guarantor’s liability under the terms of a lease beyond a lawful assignment of the lease by requiring the guarantor to guarantee the tenant’s obligations under an authorised guarantee agreement.

This basically means that if a landlord accepted a newco as tenant relying on the covenant

strength of the guarantor, on an assignment of the lease, the landlord loses that covenant strength and the authorised guarantee agreement will be worthless.

Landlords are now reconsidering assignment clauses in leases and may be less willing to agree to the tenant being any company other than the main trading company.

If you are a landlord, you should also consider asking for guarantees and/or a rent deposit from a proposed assignee.

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Competition Act – land agreements no longer excluded

From 6th April 2011 the exclusion of land agreements from the Competition Act is revoked. From that date, agreements such as the following may come within the Chapter I Prohibition of the Act:-

- freehold covenants restricting use of land
- developer/landlord agreements restricting the use of certain parts of new developments
- restrictions on assigning leases to assignees whose use does not accord with the landlord’s tenant-mix policy

The Chapter I Prohibition prohibits anti competitive agreements

Not all agreements of this nature will be prohibited but an assessment will need to be made as to whether an agreement is compatible with competition law. The main question will be whether the agreement has an appreciable affect on the prevention, restriction or distortion of trade in the relevant market.

For more information on any of the matters raised in this focus please contact Jonathan Kay, Caroline Hanratty or Jennifer Lewis using the details overleaf.