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REAL NEWS

SPRING EDITION 2017

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In this edition of Real News:

Rob Shaw, Nichola Donovan, Andy Gray and Tony Payne report on **Drones** and their use as a resource for real estate (page 03);

Dean Peachey looks at the recent case of *Vivienne Westwood Limited v Conduit Street Developments Limited* which considered whether **termination provisions** contained within a side letter are unenforceable as a **penalty** (page 07);

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Kaptuiya Tembo reports on the position that we are left in now that the **EMI case** has settled (page 15); and

Marc Harvey gets to grips with Fallopia Japonica (**Japanese Knotweed**) and reports on a recent decision that serves as a warning to land owners (page 18).

Please do get in touch with any requests for future content.

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DRONES
RESOURCEFUL USES IN REAL ESTATE

The use of drones across all sectors is increasing. Accountancy firm, PwC estimates that the emerging global market for business services using drones is valued at over USD 127 billion and the biggest slice of that market is most likely to be in infrastructure, including the ongoing supervision and maintenance of real estate.

There are without doubt huge opportunities for deploying this technology in the real estate sector, with a wide variety of potential uses to which drones could be put. However, at the same time there are numerous areas of law into which this technology can stray. It is therefore important that not only drone operators, but also those in the real estate sector who are considering using drones, have a clear understanding of their responsibilities and potential liabilities.

USES IN REAL ESTATE

1. **Construction** – drones can be used both before any building work commences to ensure accurate surveys of sites and mapping of intended structures, through to monitoring weather conditions during builds and delivering progress reports in real time (and there are suggestions that there are already drones being used to ensure projects keep to time and to record where slippages occur). Drones can reach places people cannot (or which can only be reached with large and expensive equipment) not only allowing them to survey hard-to-reach places but also to assist in the actual construction process, saving time, money and avoiding placing workers in potentially risky situations.
2. **Planning** – in addition to providing site surveys drones are being used to monitor compliance with planning conditions by councils and local residents and can be used by developers to provide accurate records of progress.
3. **Property marketing** – aerial photographs and films are the new weapon in an agent's arsenal (and can be produced without the need for expensive helicopters and crews). Evidence suggests that aerial videos and images are resulting in increased interest and enquiries. That potentially leads to more competition for properties, increased returns and deals closing more quickly as the buyer/tenant has a better idea of the property they are purchasing/leasing.
4. **Property maintenance** – drones can deal with the three Ds of robotics, that is, those jobs that are dirty, dangerous and dull (apologies to building surveyors!). Drones can quickly assess and report on the state and condition of a building, cost efficiently and without the need for weeks of expensive and unsightly scaffolding. They can ensure that issues are identified early and addressed quickly before they become more serious, hard to address and thus more expensive. In addition, when a tenant vacates a property drones can be used to prepare accurate and contemporaneous video or photographic dilapidations schedules for use either by a landlord, to identify any breaches of a lease, or by a tenant, as evidence of the state and condition in which the building was left.
5. **Energy efficiency** – with the implementation of minimum energy efficiency standards in the UK and an increased focus on a property's energy usage, drones can play an important part in identifying how and where energy is lost within a property. Companies such as Siemens are already looking at using infrared cameras attached to drones to map the specific areas where heat is emitted by buildings, allowing owners to identify more easily opportunities for renovation and upgrading.
6. **Retail** – drone usage in this sector is perhaps still waiting for "take off", although Amazon are running trials. Drones potentially provide faster deliveries in the ever competitive retail market place (especially last mile deliveries) and the ability for retail businesses to meet growing demands of consumers to receive goods instantaneously. Time will tell if this supplants or supplements existing methods of delivering goods and the impact it will have on retail and warehousing space.
7. **Telecoms** – mobile operator EE recently showcased their patent-pending balloon and drone "air masts". The aim of these is to connect the most remote parts of the UK and fill network gaps on a more permanent basis in places where traditional telecoms masts are less effective or telecoms companies have been unable to construct as yet due to ongoing negotiations with land owners.

LEGAL ISSUES

Drone usage in the real estate sector is not only subject to the usual elements of property law. The use of drones touches on various areas of law, all of which should considered both by drone operators and those employing their services, such as:

1. **Trespass and nuisance** – flying a drone into or over a property that does not belong to a drone operator risks being found to be a trespass for which the affected landowner or occupier could take civil action. A landowner has rights to airspace in the

lower stratum and, therefore, immediately above their land. Whilst historically it was considered that a landowner owned everything above their land "all the way to heaven", case law acknowledges that this will not be enforced all the way and an owner of land has rights in the air space above their land only to such a height as is necessary for the ordinary use and enjoyment of their land and the structures upon it.

That said, even where a drone is operating at such a height as to not trespass, persistent drone usage that causes an interference with the use and enjoyment of another person's property could be found to be a nuisance and/or an invasion of privacy.

2. **Data protection law** – the use of drones that are equipped with cameras may fall within the scope of data privacy legislation. This is particularly relevant if the drone has the ability to zoom in on a specific person, or if a person could be identified by the context of the surroundings. The potential for intrusion (even if unintentional) is high, because of the height from which drones operate and the vantage point this affords. As such drone operators will need to ensure that they are acting responsibly and have respect for the privacy of any individuals who may be recorded by the drone. Where images or other personal data are transmitted from the drone to the operator (e.g. a live feed of video footage), or are stored on the drone (e.g. via the drone's memory card) there is an added risk in relation to the security of the personal data. Appropriate steps should be taken to adequately protect any personal data against interception, loss, or unauthorised access by using, for example, encryption methods.

   Detailed privacy assessments should be undertaken to ensure that the drone use is necessary, proportionate and justifiable. In particular, operators should consider the capability of the camera (i.e. the ability to zoom), whether the flight plan of the drone presents any higher personal data risks, the implications of sharing images obtained from the drone's camera and the need to protect the images collected. Any data collected must be stored securely and retained only for the minimum time necessary for its purpose. Ensuring that the camera only operates when and where specifically required will help to keep compliance issues to a minimum.

3. **Health and safety law** – as with many technologies accidents can occur, but if those operating drones are not appropriately trained there is an even greater risk of personal injury to individuals on the ground and/or the risk of criminal damage to property. This carries not only the risk of having to pay compensation but also potentially criminal charges and imprisonment.

   In addition, health and safety considerations should always be at the forefront of a property owner or occupier's mind and whilst a decision may be taken to use drones to save humans having to undertake potentially risky surveillance and maintenance work, new health and safety issues will arise, such as ensuring the safety of those piloting the drones (who at present need to maintain a line of sight with the drone at all times) or simply those individuals on the ground beneath where the drone is operational.

4. **Aviation law** – the Civil Aviation Authority ("**CAA**") regulates UK airspace and the Air Navigation Order ("**ANO**") contains regulations in relation to the flying of drones.

   Where a drone is flown for non-commercial flights, the CAA has published a "Dronecode" confirming the relevant limits for flying drones safely and legally. In the event that a drone is used for the purposes of commercial operations or, is outside of the operating limits set out in the ANO, the operator must seek permission from the CAA (and, if received, must ensure that the drone is flown according to relevant limits for flying drones safely and legally). Accordingly, if a drone was required to carry out maintenance inspections of property, it would be required to have CAA permission to do so. If granted, the drone would be forbidden from flying over or within 150m of any congested area (which includes any area of a city, town or settlement which is essentially used for residential, industrial, commercial or recreational purposes) or within 50m of any vessel, vehicle or structure which is not under the control of the person in charge of the drone. More immediate uses are therefore likely to involve industrial premises and not those in populated areas.

   Larger drones (with an operating mass exceeding 20kg) are subject to additional requirements, and if an individual or business wishes to conduct regular flights with their drone, they will probably need to submit an operating manual to the CAA for a permanent approval.

Drones are one of the many new technologies that are disrupting the real estate sector and evidence suggests those involved in the sector are starting to deploy drones to provide new and creative ways of carrying out traditional tasks at reduced costs. It is unlikely to be a technology that proves to be a brief fad and property owners, occupiers and managers should consider exploring how drones can assist with the development and management of their portfolios. DLA Piper is on hand to advise on how to deploy successfully such technologies for real estate businesses.

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A FASHION FAUX PAS FOR LANDLORDS?

The recent case of ***Vivienne Westwood Limited v Conduit Street Developments Limited*** [2017] EWHC 350 (Ch) considers whether termination provisions contained within a side letter are unenforceable as a penalty.

KEY FACTS

Vivienne Westwood Limited was granted a lease of a retail shop, comprising the basement and ground floor of premises at 18 Conduit Street, Mayfair, London ("**Premises**") on 18 November 2009 ("**Lease**"). The Premises were demised for a term of 15 years at an initial yearly rent of £110,000 subject to upwards only rent reviews in 2014 and 2019.

Given the tenant's high profile within the fashion industry, the former landlord was keen to retain the tenant and the parties entered into a concessionary side letter ("**Side Letter**") under which, notwithstanding the terms of the Lease, the tenant would pay a reduced yearly rent. The rent was reduced for the first 5 years of the term, stepped from £90,000 up to £100,000. If a higher open market rent was determined on the first rent review in 2014, the yearly rent payable would be capped at £125,000 per year for the next 5 years. The Side Letter was expressed to be personal and contained a provision allowing the landlord to terminate the agreement on any breach by the tenant. If the Side Letter was terminated, the yearly rent would be immediately payable on the terms set out in the Lease, as if the Side Letter had never existed.

A number of changes in the ownership of the landlord's reversionary leasehold interest resulted in a delay by the tenant in paying the rent. By May 2015, Conduit Street Development Limited ("**Conduit Street**") had become the new landlord. As a consequence of a delayed payment in June 2015, Conduit Street served a notice terminating the Side Letter, entitling it to raise the yearly rent from £125,000 per year to the market rent of £232,500 from November 2014. The obligation to pay the higher rent was in addition to compensating Conduit Street for any loss caused by the breach itself.

The tenant argued that:

- its primary obligation was to pay rent at the lower rate agreed under the Side Letter and that its obligation to pay the higher rent in the Lease was a secondary obligation, which was triggered by Conduit Street terminating the Side Letter; and
- the termination provisions contained in the Side Letter operated as a contractual penalty and were unenforceable.

Conduit Street argued that:

- there was a legitimate interest in ensuring there was no breach of any term of the Lease and that a tenant in breach would affect the value of its reversionary interest; and
- the additional rent was not "exorbitant".

LAW ON PENALTIES

The law on penalties was revisited by the Supreme Court in the case of ***Cavendish Square Holding BV v El Makdessi and ParkingEye Limited v Beavis*** [2015] UKSC 67, in which an £85 car parking charge was not considered a penalty and could be charged to a vehicle owner for overstaying the allocated time. When considering whether a contractual stipulation was a penalty, the Supreme Court applied the following test:

- firstly, is the provision in question a secondary obligation which bites upon breach of a primary contractual obligation;
- secondly, what is the extent and nature of the legitimate interest of the innocent party in having the primary obligation performed; and
- thirdly, having regard to this legitimate interest, is the secondary obligation exorbitant or unconscionable in amount or in its effect?

THE DECISION

The court stated that:

- the termination provisions contained within the Side Letter were a "blunt instrument that may give rise to a very substantial and disproportionate financial detriment"; and
- as a result of a minor breach that does little to harm Conduit Street's legitimate interests (namely its cash flow and the value of its reversion), the additional rent payable was "exorbitant and unconscionable".

Consequently, the court ruled that the termination provisions were penal in nature and were not enforceable meaning the tenant was only liable for the reduced rent of £125,000 per year; not the £232,500 being market rent sought.

ANALYSIS

Rent concessions in side letters are common in commercial property transactions, however, this case provides a reminder to both landlords and tenants to give extra thought when negotiating the terms of side letters. The courts will protect genuine legitimate interests but any contractual stipulation need to be proportionate so avoid exorbitant or unconscionable figures. Landlords should avoid unduly onerous terms, such as termination provisions which impose significant financial detriment to their tenant, in order to avoid such terms being considered penalties and, therefore, becoming unenforceable.

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TWO STAGE TENDERS

WHAT IS TWO STAGE TENDERING?

Two stage tendering is a method of procurement where the employer seeks to appoint a contractor at an initial stage of the project based on an outline scope of work. It is designed to achieve the early appointment of a contractor on the basis of an agreement to undertake pre-construction services, with the intention that the parties will ultimately enter into a lump-sum contract, or a cost-reimbursable contract with a target price, following a period of negotiation.

The contractor is appointed at a much earlier stage in the construction process than would normally be the case, but on a provisional basis, using a Pre-Construction Services Agreement ("**PCSA**"). There is then a second stage when the employer seeks to appoint a contractor for the construction works under a building contract.

STAGE 1

The employer tenders the project on a competitive basis, but based on an incomplete design prepared by the employer's design team, together with an outline price and programme for the works.

The tenderers submit a proposed construction programme, method statement, price for preliminaries and a percentage for overheads and profit during the life of the project.

The initial stage 1 tender may also include competitive tendering of some already defined work packages, plus a lump sum or cost reimbursable price for pre-construction services and design fees.

This stage concludes when the preferred contractor is appointed, either on the basis of the provisions of an identified contract, or a separate PCSA.

The contractor's role under a PCSA is effectively a consultancy role, more similar in nature to a professional appointment.

STAGE 2

During the second stage, the successful tenderer, or preferred contractor, is in a form of extended contract negotiation with the employer. The negotiations run in parallel with the works which the contractor is carrying out under the PCSA. The process relies on a certain amount of cooperation between the parties to be successful. Typically, the type of issues on which the contractor will advise the employer will include the buildability of the design, based on his experience. The contractor will also be seeking to agree a programme and cost plan with the employer.

The contractor may also tender early and long-lead works packages, and together with the employer select certain specialist sub-contractors.

Tendering may be on an open-book basis to allow the employer to monitor and understand the contractor's pricing.

Stage 2 concludes with agreement of a lump sum price for completion of the project and the terms of the building contract. Theoretically, the employer may appoint an entirely different contractor to carry out the construction works under the building contract. However in practice, the employer and stage 1 contractor will usually have worked closely together during the initial stage, enabling them to reach an agreement as to the price and terms of the contract. Given the contractor's involvement in the development of the design, the building contract will generally be a design and build contract .

ADVANTAGES OF TWO STAGE TENDERING FOR THE CONTRACTOR

At stage 1, the contractor only has to supply a fixed price for preliminaries, and a percentage for over heads and profit. This makes production of the tender much less resource-intensive, and thus cheaper to prepare, so reducing abortive costs.

Unlike in conventional procurement, there is no requirement for the contractor to price the unknown, and make allowances for risks which may or may not occur, because there is a much greater opportunity for a thorough evaluation of the project before entering into the contract.

The contractor's ability to tender long-lead packages at stage 1 increases costs certainty for the contractor. This is enhanced by the opportunity to input into the design, identify risks which cannot be designed out and negotiate risk allowances.

Collaboration between the employer, contractor and design team during the pre-construction phase may create a more productive, less adversarial relationship during the construction phase.

ADVANTAGES OF TWO STAGE TENDERING FOR THE EMPLOYER

This method of procurement is often used when an employer wants a project to start as soon as possible. Achieving early appointment of the contractor, prior to completion of the design, potentially leads to an earlier start on site which may mean earlier completion. Other methods of procuring construction works quickly, such as construction management, do not provide the certainty of price which can be achieved with two stage tendering.

The contractor's involvement at pre-construction stage allows for input into buildability, sequencing and sub-contractor selection, leading to fewer problems during construction. The employer also retains greater involvement in the selection and appointment of sub-contractors.

The contractor can start developing solutions to problems which it is anticipated may arise during construction; this may lead to a shorter construction programme.

Pricing undertaken during the second stage is more likely to reflect the actual construction costs, because it is based on more complete information, meaning the employer has greater certainty of costs, and lower probability of claims.

If sub-contract works are tendered during the pre-construction phase, the prices can be benchmarked against the market, ensuring value for money.

ARE THERE ANY DISADVANTAGES?

The employer pays an additional fee for the contractor to carry out the pre-construction services. This fee is not incurred where a single stage tender process is used.

Once the preferred contractor is appointed, it is no longer in direct price competition with other bidders. This means that there is no particular incentive on the contractor to provide a good price, so other methods will have to be considered in order to insure the pricing represents value for money.

If the parties fail to adopt a co-operative approach, the second stage can be difficult for the employer as the contractor is in a strong negotiating position, being already committed to the project.

In stage 2, due to the absence of any direct price competition from other bidders, the contractor may seek a greater allowance for risk transfer.

Use of a Guaranteed Maximum Price ("**GMP**") for the building contract may address some of the pricing issues, but unless on an open book basis may include a healthy margin to allow the contractor to realise a gain.

WHAT IF THE EMPLOYER AND CONTRACTOR ARE UNABLE TO REACH AGREEMENT AS TO PRICE?

The main vulnerability of this method of procurement is the uncertainty as to whether the preferred contractor will submit a competitive bid at the conclusion of stage 2. The employer may be in quite a weak negotiating position, as any competitor contractors are no longer involved and the preferred contractor has been very involved in the whole design process.

In order to give the employer options at the end of stage 2, the PCSA used to appoint the contractor should provide a mechanism for the employer to explore other options if the contractor does not submit a favourable bid. One option is for the employer to indicate a price ceiling that the stage 2 bid must not exceed. If the ceiling is exceeded, then the employer should have the right to return to market on the basis of either a conventional single stage tender, or a package based procurement. The preferred contractor should be excluded from any open market tender, on the basis he has already submitted his best bid.

The difficulty for the employer is that this will lose any time advantage gained during the first stage, although a package-based procurement would help to mitigate some of the delay suffered as a result of the re-tender.

Another option is for the employer to use a GMP or target cost approach with a pain share/gain share mechanism to incentivise the contractor.

The employer can use the PCSA to prescribe the components of the stage 2 bid, relying on sub-contract prices, which he will have knowledge of through the open-book procedure, together with a fixed percentage contribution for overheads and profit.

WHEN SHOULD IT BE USED?

Two stage tendering should not be used by an employer who is only interested in securing the lowest possible bid.

It works well where there are programme constraints which necessitate an early start on site and/or early involvement of the contractor.

It requires a project which, at the initial stage 1 tender, is sufficiently well defined for a programme and preliminaries to be prepared.

The employer and design team should be genuinely interested in enabling meaningful dialogue to take place with the contractor during the second stage, and have the appropriate resources to facilitate this.

USING A TWO STAGE TENDER WITH DESIGN AND BUILD

The use of a two stage tender can work well with a design and build procurement, because it enables the contractor to work closely with the employer's design team during stage 1, prior to novation, establishing relationships and enabling the contractor to input on sequencing and buildability.

The preferred contractor will also have an incentive to ensure that the design is completed to an agreed level at the appropriate stage.

The second stage tender bid will have been prepared with the benefit of insight into the employer's requirements, and an understanding of, and input into, the design solutions.

However, it may not be suitable for particularly large or complex projects. There may be difficulties in using a lump sum PCSA where the design is particularly complex as the parties may be unable to agree on design allowances, although this will not be an issue if the contractor is retained under the PCSA on a cost-reimbursable basis. It may also not be possible to agree allowances for completion of the design.

The design team will remain the employer's responsibility until the completion of the second stage, but after that any design change will be a variation. During the second stage, it is advisable to suspend the design process, to clarify the relationship between the contract sum and the novated design, as novation will occur following completion of the second stage. This may be problematic on a complex project.

With a complex design, the contractor is unlikely to benefit from the same understanding of risk which is one of the clear advantages of the process.

TIPS FOR A SUCCESSFUL TWO STAGE TENDER

- Don't start too early: although one of the advantages of this method of procurement is an early start on site, preparatory work must have been undertaken. There must be enough of a design to allow for firm preliminaries and a programme from the contractor, otherwise these may require re-negotiation at second stage.
- Don't be tempted to use a Letter of Intent ("**LOI**") if you are an employer. Again, because two stage tendering is used with projects which need a quick start on site there may be a temptation to use a LOI, but this would undermine the negotiating position at the second stage.
- It is preferable to procure works packages early at stage 1 so they are priced on a competitive, rather than negotiated, basis.
- Use open book accounting to test all assumptions as to design, risk, cost and programme at an early stage. In addition to achieving cost savings it is also likely to lead to overall time savings and improve efficiency.
- Use an appropriate PCSA, so that both the employer and contractor are clear about e.g the degree of design responsibility allocated to the contractor, if any. Make sure it covers items such as enabling works and orders for long lead items.

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EMI CASE SETTLES OUT OF COURT

THE DECISION THAT A TENANT CANNOT ASSIGN ITS LEASE TO ITS GUARANTOR STILL STANDS

In 2016 the High Court considered the validity of an assignment of a lease by a tenant to its guarantor. The anti-avoidance provisions in section 25 of the Landlord and Tenant (Covenants) Act 1995 (**"1995 Act"**) strictly limit the freedom of contract of parties to leases governed by that Act, broadly, those granted after 1995. Agreements which frustrate those provisions are void – even if they are commercially justifiable.

BRIEF FACTS AND DECISION

EMI Group Limited v O&H Q1 Limited [2016] EWHC 529 (Ch)

- HMV was granted a 25-year lease of commercial premises in Worcester in September 1996.
- EMI Group Limited (**"EMI"**) guaranteed HMV's obligations under the lease.
- This lease was a "new tenancy" under the 1995 Act.
- HMV went into administration and the landlord consented to HMV assigning the lease to EMI.
- The assignment of the lease to EMI was completed in December 2014. As part of the assignment, EMI agreed to take on the role of the tenant and the tenant's covenants at the same time as being released as guarantor.

The High Court was asked to look at whether EMI was bound by the tenant's covenants in the lease. The High Court ruled that EMI could not validly take an assignment of a lease from HMV on the basis that:

- The whole thrust of the 1995 Act was that neither the tenant nor their guarantor can validly re-assume their liabilities on permitted assignments as stipulated in section 5(2)(a) in respect of former tenants and section 24(2) in relation to former guarantors.
- So, if a tenant and its guarantor are each subject to the same (or essentially the same) liabilities in relation to the tenant covenants in a lease, neither can as a result of an assignment of the lease, re-assume the same (or essentially the same) liabilities.
- The deal that EMI did in 2014 released EMI from its liability to perform the tenant covenants under its 1996 guarantee but at the same time, that deal made EMI liable to perform the tenant covenants as an incoming tenant. This immediate re-assumption of essentially the same liability by EMI frustrated the operation of section 24(2) and so engaged the wide-ranging anti-avoidance provisions in section 25.

The court declared that the assignment of the lease was void as this was an agreement relating to a tenancy which purported to make EMI liable under essentially the same covenants from which it had just been released.

Therefore, HMV was still the tenant of the lease and EMI was still the guarantor and had not been released from its liabilities under its guarantee.

APPEAL

The case was due to go before the Court of Appeal in May 2017 with many hoping for further clarity or even a reversal of the High Court's decision, however, the parties recently settled the matter out of court on confidential terms. Therefore the High Court's decision still stands - a tenant cannot assign its lease to its guarantor.

WHAT DOES THIS MEAN IN PRACTICE

- Assignment of leases from a tenant to its guarantor are often commercially justifiable and many investors and occupiers will have entered into similar deals since the 1995 Act came into force. Such assignments are therefore void and the case raises questions across portfolios about the identity of tenants.
- Following the assignment of the lease to EMI, EMI granted an underlease to HMV Retail Limited. Given that the assignment to EMI is void, then the underlease to HMV Retail, as a derivative interest, was also void. If EMI had further assigned the lease then presumably that or any subsequent assignments would also be void. Therefore any interest derived from a void assignment would also be void.
- Many such assignments are likely to be registered at the land registry in the name of the guarantor as the new tenant who would be the legal owner with the tenant remaining as the beneficial owner.
- The decision hampers inter-group assignments, and, corporate occupiers who have carried out reorganisations in the belief that they have divested companies liabilities may have to reassess their position.
- There may be stand-alone guarantees which are not disclosed on the basis that they are no longer relevant and the original tenant may have assigned the lease to such a guarantor in the past. It may not be possible to see that the lease assignment is in fact void and, therefore, when carrying out due diligence it may be that more detailed enquiries are raised.

OPTIONS

The legal position in relation to assignments such as that in the EMI case remains uncertain. Parties looking to rectify the position may explore certain options including:

- If all parties are agreeable, then the original lease could be surrendered with a new lease granted direct to the guarantor on similar terms to the existing lease. The landlord may however be putting itself in a worse position given that it would no longer have a guarantor and may, therefore wish to insist on a new guarantor. The 'new tenant' would also need to consider SDLT implications in respect of the new lease.
- Given the potential cost implications where SDLT is applicable in proceeding with the above approach, the original tenant may wish to assign the lease to an intermediate group company and then proceed with a further assignment from the intermediate group company to the original guarantor.
- There are likely to be cases where the original tenant has gone into liquidation and in such cases the landlord may wish to call upon the guarantor to take a new lease in accordance with the terms of the lease however the landlord may be barred from doing so depending on the time limits in the lease for calling upon a guarantor to take new lease.

It is likely that parties may adopt the 'do nothing' approach unless the issue raises its head and warrants some form of action. The landlord will of course be receiving (and accepting) rent from the guarantor and could argue that the guarantor is paying the rent as agent on behalf of the tenant.

REFORM

It is clear that reform is needed. The Property Litigation Association ("**PLA**") and other bodies such as the British Retail Consortium and the British Property Federation have been lobbying in respect of getting reform of the 1995 Act on to the political agenda. Proposals put forward by the PLA include the ability for a tenant to assign to its guarantor and the ability for a guarantor to stand as guarantee for an assignee provided that the tenant, guarantor and assignee are all group companies. The Law Commission called for evidence and submissions last summer and they are aiming to publish their report and draft Bill in spring 2018.

It is important to remember the preamble to the 1995 Act being "..to make provision for persons bound by covenants of a tenancy to be released from such covenants on the assignment of the tenancy…"

Therefore, a change in the position is only likely to come about if there is a change in the law following the publication of the draft Bill, or, if in the meantime the EMI decision is tested in the courts. For now though we are stuck with the decision.

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JAPANESE KNOTWEED. *FALLOPIA JAPONICA*. A PERENNIAL NUISANCE FOR DEVELOPERS, LANDOWNERS AND HOUSEHOLDERS IS ONCE AGAIN IN THE NEWS.

Introduced to Europe by well-meaning botanists in the 19th Century and enjoyed for its bamboo-like qualities and ability to grow anywhere, it has since become a menace. Rapid-growing and with no natural predators, it's powers of propagation and the damage it can cause to infrastructure, buildings and their foundations means that it's now illegal to plant it or cause it to grow in the wild.

Successful removal is extremely expensive. It necessitates the control of its above-ground foliage over several years with the correct herbicide and the total eradication of its below-ground root network. Companies who specialise in its removal will excavate one metre around the extensive root structure of the knotweed. The excavated earth, designated as controlled waste under the Environmental Protection Act, must then be disposed of properly. It is usually incinerated.

Press attention of knotweed has centred around mortgage lenders' restrictive lending policies – until recently a mortgage lender would not lend on a property affected by knotweed or in the vicinity of it. Rules have been relaxed slightly but it still can cause a major issue with funding. Removal of a large patch on the London Olympic site cost millions and DEFRA estimates the cost of its total eradication from the UK to be £1.56 billion.

In a recent County Court case, ***Williams v Network Rail Infrastructure Ltd*** [2017] UK CC, two homeowners brought a private nuisance claim against Network Rail. Their homes were next to a railway embankment owned by Network Rail that was infested with knotweed which persistently spread to the homeowners' land.

Interestingly, the homeowners' claim for nuisance based on the fact that the knotweed had encroached onto their land failed, as the knotweed had not yet caused any physical damage to their properties.

However, their claim for nuisance based on its presence on the homeowners' land succeeded and they were awarded damages for treatment costs, the diminution in value of their homes (the reduced value after treatment, to reflect the stigma attached to the properties) and general damages for loss of amenity and interference with quiet enjoyment. The court decided that Network Rail had constructive knowledge of the risk of both the spread of knotweed and consequential damage to the properties (since the publication of RICS knotweed guidance in 2012-13) and that it had failed to tackle the problem and as such Network Rail had failed to prevent interference with quiet enjoyment of the homeowners' land.

The clear message being that if a landowner is aware of knotweed on their land and that it has spread or has the potential to spread, there is a risk of a private nuisance claim being brought even though the knotweed hasn't (yet) caused any physical damage.

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