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PMA: Browne Jacobson legal update

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CVAs, Super CVAs and the new insolvency era - why it's important!

Emma Taylor



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Current CVA trends

- Write-offs of rent arrears - effectively to wipe the slate clean;
- A shift towards turnover rents - potentially underpinned by a minimum guaranteed rent fixed at a percentage of contractual rent;
- More severe future rent reductions - especially when compromised as a percentage of contractual rent rather than being converted to turnover rent;
- Pre-baked rent holidays/waivers in case of future lockdown periods; and
- More unviable sites being exited entirely - exacerbated by changes in consumer behaviour.



Part 26A Restructuring Plans

...to eliminate, reduce, prevent or mitigate the adverse effect on a company's ability to carry on business as a going concern caused by serious financial difficulties that the company encounters or is likely to encounter





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Flexible leases - are we doing enough?

Claire Burns & Sarah Parkinson



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Covid Rent Arrears Update

James Coles & Louise Read



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Commercial Rent (Coronavirus) Bill and Code of practice for commercial property

- Arrears of rent, service charge, insurance, VAT and interest accrued by businesses forced to close during pandemic will be ring fenced
- Period 21 March 2020 to 18 July 2021 (in England) (or earlier*)
- Exclude essential retailers and voluntary closure



Commercial Rent (Coronavirus) Bill and Code of practice for commercial property

- If parties haven't/can't agree how to deal with these arrears, either party can refer the matter to an arbitrator within 6 months of the legislation being passed
- 25 March 2022
- Decision final and binding



Commercial Rent (Coronavirus) Bill and Code of practice for commercial property

- Party must notify the other of their intention to refer
- 14 days to respond
- 14 days before go to arbitrator
- No response, 28 days after initial notification



Commercial Rent (Coronavirus) Bill and Code of practice for commercial property

- Business viability of tenant and landlord solvency key
- Proposals to be made by parties
- Arbitrator to consider those proposals



Commercial Rent (Coronavirus) Bill and Code of practice for commercial property

- No debt claim
- CRAR
- Forfeiture
- Winding-up
- Bankruptcy Order
- Draw down on deposit



Commercial Rent (Coronavirus) Bill and Code of practice for commercial property

- Claims after 10 November 2021 can be stayed
- Where judgment given landlord can not enforce or rely on it during the moratorium period
- *the period beginning with the date legislation is passed and ending six months later (where no reference to an arbitrator) or the day the arbitration ends*



Commercial Rent (Coronavirus) Bill and Code of practice for commercial property

- If landlord draws down on tenant's rent deposit to recover any ring-fenced arrears before legislation passed, tenant does not need to top up
- Rent deposit funds will count as rent arrears



Commercial Rent (Coronavirus) Bill and Code of practice for commercial property

- If bankruptcy order made against a tenant in relation to ring-fenced arrears after 10 November then regarded as void



Commercial Rent (Coronavirus) Bill and Code of practice for commercial property

- Forfeiture, CRAR and winding up already in force to March 2022
- Debt claims, draw down and bankruptcy orders against individual not protected initially



Potential Issues with the draft Bill and Code

1. How will the Courts treat claims that have been brought before 11 November 2021?
2. Disclosure of confidential financial information (from both landlord and tenant potentially in a public hearing)
3. Are tenant's that have suffered financial hardship but still previously paid going to feel unfairly treated?
4. Consistency of decision making



Potential Issues with the draft Bill and Code

1. Essential retailers that have been significantly impacted
2. Costs - limited and unlikely to recover lawyer's fees
3. Training and recruitment of Arbitrators - No requirement that Arbitrators are legally trained.



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Planning - let's talk permitted development rights

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Let's talk permitted development rights...



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Changes to Use Classes

- Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020
- Creation of a new 'Class E'
 - Commercial, Business and Service
 - Broadly replaces A1/2/3 & B1
- New Class F - Local Community and Learning
- New additions to Sui generis





Changes to Permitted Development Rights

- Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2021
- New Class MA
 - Class E to Class C3
 - 3 month vacancy requirement
 - Must have been in Class E use for two years
 - Floor space limit of 1,500 sqm





Changes to Permitted Development Rights

- Prior Approval Required
 - Transport, contamination, flood risk, noise from commercial premises, natural light, loss of services provided by nursery or health centre
 - Applicants have only been able to seek since 1 August 2021
- Space Standards
- Article 4 Directions
 - Existing directions can remain in place until end of July 2022
 - But proposals to make it harder to get new ones





What does this mean for retail centres?

- Risk of uncoordinated, piecemeal development
- *Mapping Class E: Understanding the expansion of permitted development* - UCL Report, July 2021
 - Headline that 80.3% of shops and other commercial buildings could be lost to residential conversion
 - Increase from 60.3% under previous PDR rules



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How are local authorities responding?

- Kingston Article 4
 - Seeking in relation to Town Centre only
- RB of Kensington and Chelsea
 - Seeking in relation to the entire borough
- GLA - Strategic evidence to support London borough Article 4 Directions (commercial to residential)





Effect on Class V - Dual Use Permissions

- Part 3, Class V:

Development consisting of a change of use of a building or other land from a use permitted by planning permission granted on an application, to another use which that permission would have specifically authorised when it was granted

- Enables changes of use between more than one use of land or buildings unfettered by any requirement to secure a further planning permission
 - Lasts for 10 years from the date of the planning permission
 - Can be secured by explicitly referring to GPDO Class V in the description of development in a planning application for more than one alternative uses of land or buildings
 - Various restrictions - for example no change to betting office of pay day loan shop
- Do we still need it?





Any Questions?



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Case Law and general update - what's new?

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The Good News!



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Capitol Park Leeds Plc v Global Radio Services Ltd

- T's break option conditional on delivering vacant possession
- T stripped out significant elements of the base build and landlord's fixtures in the property and handed back to L an empty shell of a building
- Had T delivered vacant possession?
- So why is this good news?
- So does that mean T got away scot-free?



TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) Ltd

- T claimed that six leases it held in designer retail outlet centres had not been validly contracted out
- In each case T's statutory declaration did not have a fixed lease commencement date
- Did this invalidate the contracting out process?
- So why is this good news?



Monosolar IQ Ltd v Woden Park Ltd

- RPI rent review clause: $A \times B \div C$
- A = previous rent; B = RPI prior to review date; C = RPI before start of lease
- Read literally rent for previous year increased by increases in RPI since lease granted
- On one set of figures initial rent of £15,000 pa would increase to over £76m by end of year 25!
- Could court correct error?

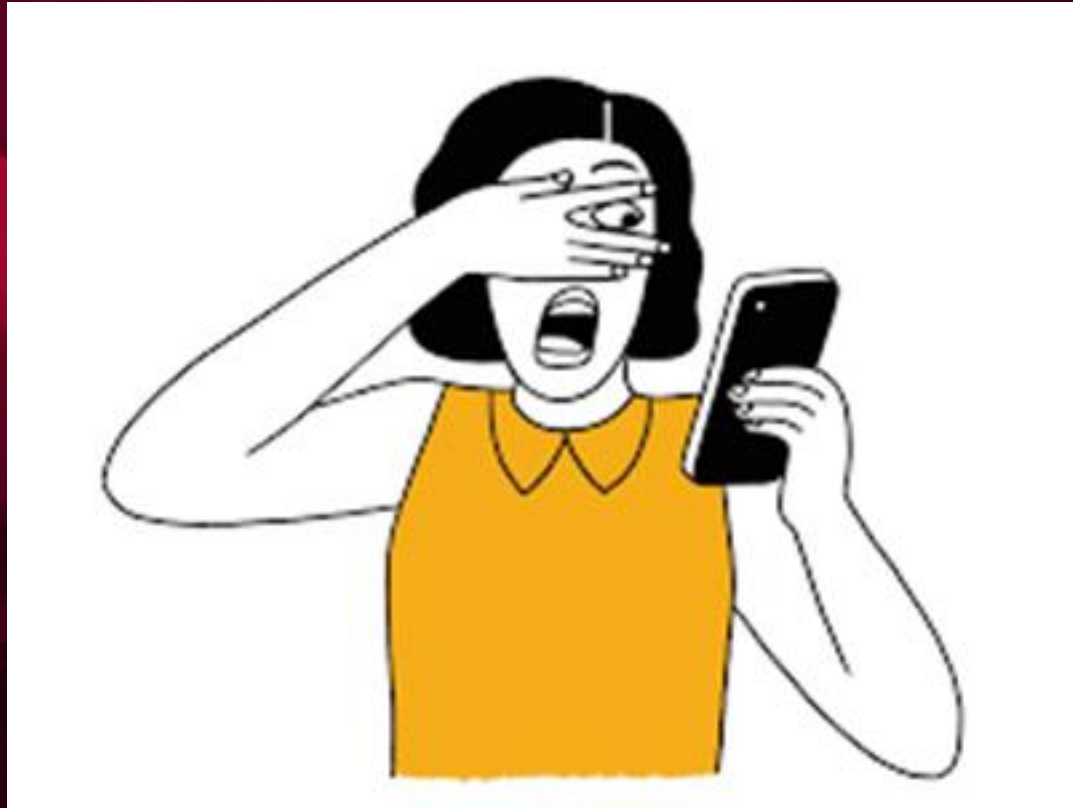


Monosolar IQ Ltd v Woden Park Ltd

- So why is this good news?
- How to avoid such an error happening in the first place



The Bad News!



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Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd

- T covenanted to pay a fair and reasonable proportion of the total service cost
- L's certificate conclusive unless manifest or mathematical error or fraud
- In last year of lease T's bill eight times the previous year
- T claimed that some of L's expenditure was not within the scope of the service charge
- Did the certification clause preclude T from challenging L's service charge bill?
- So why is this bad news?



Criterion Buildings Ltd v McKinsey & Company Inc

- Fair proportion of L's costs to be paid by T as service charge to be determined by L
- T claimed that proportion determined by L unfairly favoured another tenant at its expense
- Could the court interfere with the service charge proportions determined by L?
- So why is this bad news?
- What, if anything, can tenants do about it?



And now for something completely different...



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WH Smith Retail Holdings Ltd v Commerz Real Investmentgesellschaft mbh

- Parties agreed that new lease would contain a pandemic rent suspension clause
- T was an essential retailer who remained open during lockdowns
- What should the trigger be for the rent suspension clause?
- When T forced to stop trading?
- Or when non-essential retailers forced to close?



Poundland Ltd v Toplain Ltd

- T sought inclusion of pandemic rent suspension clause in new lease
- L resisted
- Was this a fair and reasonable amendment to make to terms of existing lease?
- So where does that leave us?
- Is there a market norm for these type of clauses?





A reminder of a few important points on repairing covenants



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Pullman Foods Ltd v The Welsh Ministers

- T took lease for 42 years in 1972 to build a cold storage and distribution depot
- T covenanted to deliver up the property at the end of the term “in good and substantial repair and condition”
- Did the presence of asbestos mean that T was in breach of its yielding-up covenant?
- Did it matter if asbestos was on the land before the lease was granted?
- Two reminders on repairing/yielding up covenants



Stonecrest Marble Ltd v Shepherds Bush Housing Association Ltd

- Water ingress from L's retained premises caused damage to T's property
- L was not obliged to repair damage to retained property where it had no obligation to insure against that damage
- L's insurance policy excluded damage caused by wear and tear
- L was therefore not liable to insure against the damage
- And not therefore expressly liable to repair it
- Nonetheless, was L liable to T for the damage?



Stonecrest Marble Ltd v Shepherds Bush Housing Association Ltd



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What's on the horizon?



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National Security and Investment Act 2021

- What is it all about?
- How does it work:
 - mandatory notification
 - voluntary notification
 - government's call in powers
- When does it take effect?
- Is this likely to be relevant to me?



MEES consultation for non-domestic buildings

- Reminder of current position
- Problem with current position
- Government's proposals:
 - First Compliance Window - 2025 to 2027
 - Second Compliance Window - 2028 to 2030
- The 'shell and core' problem
- A sting in the tail?





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Thank You