



Resolving complex property disputes in a challenging market

Today's challenging economic climate has turned commercial priorities upside-down. Developers and occupiers are examining the details of sale and development agreements and leases negotiated in more buoyant times, identifying opportunities to escape from obligations, or to simply renegotiate.

The following are some of the issues we are seeing with increasing regularity.

Issues relating to Sale and Development Agreements

- developers, buyers or tenants breaching an unconditional obligation to complete a purchase or lease
- developers failing to take forward conditional elements of a transaction such as planning promotion, land assembly, planning applications, remediation, funding or pre-letting conditions
- developers arguing that pre-conditions cannot be satisfied, for example, due to an 'onerous' planning condition or s106 requirement
- developers suspending construction and 'mothballing' a site
- developers delaying or challenging the payment of overage.

All of these scenarios call for advice on the scope of remedies available, from specific performance, claims for damages to forfeiture of deposits, loss mitigation strategies, and asset recovery.

Issues relating to leases - Contested rent reviews and lease renewals

In today's difficult market, tenants may not want to commit to a long term or to a rent which they consider may decrease and are therefore using delaying tactics. Landlords are increasingly prepared to use the court system and arbitration to progress their case and force tenants to make premature decisions about the future of their businesses.

Both landlords and tenants find themselves having to consider new tactics as they struggle to protect their own interests. These tactics require advice which offers a range of options and which fully understands the approach being taken by the other side.

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Issues relating to leases - Service charge and dilapidations disputes

The number of service charge and dilapidations disputes is rising steadily as landlords seek to maximise their claims and tenants become increasingly reluctant to pay out at a time when they face increasing demands on their budgets.

Whether bringing or defending such claims and mindful of the requirement for public bodies to utilise alternative dispute resolution, it is important to know when to utilise the Service Charge Code and the Pre-Action Protocol on dilapidations and to fully understand the range of defences available to tenants and when it is possible to refute them.

- In any service charge dispute, it is essential to carry out a review of the lease in order to establish on what basis the tenant is obliged to pay the service charge. For example, if the service charge is reserved as "rent" under the lease, the landlord would have greater remedies under the lease than if there was merely an obligation to pay the service charge. The lease will also include detailed requirements as to the provision of estimates, accounts and other information, as well as the use of qualified surveyors in approving the service charge. The adherence to such provisions is quite often the main grounds for dispute.
- The RICS Service Charge Code came into force on 1 April 2007 and is applicable to all services charges administered after that date. The Code, whilst not strictly enforceable, is designed to be a guide to best practice in the administration of the service charge, and sets out ways in which landlords and tenants can encourage communication and transparency.
- The potential claim which can be brought in respect of dilapidations will depend largely on the interpretation of the tenant's repairing obligations under the lease and any other related documentation. It will also be necessary to consider from a negotiation stance, what potential defences the tenant is likely to raise. Advice from a building surveyor and a lawyer is therefore essential when considering liability for dilapidations.
- The Pre-Action Protocol for claims in relation to the physical state of commercial property at the termination of a tenancy ("the Dilapidations Protocol") has been introduced by the Property Litigation Association to formalise the procedure for bringing such claims.

Insolvency

Insolvency, whether of developers, buyers or tenants, requires an immediate and expert response to secure maximum recovery for the creditor. The nature of the insolvency, whether liquidation, administration or receivership, and the terms of the sale and development agreement or the lease, will dictate the recovery strategy.

In the context of a failed development, the council may consider the possibility of appointing a substitute developer, or, if the project fails close to practical completion, stepping in to complete. Any such step requires very careful navigation through a complex matrix of contracts, subcontracts, professional appointments, warranties and indemnity insurance policies.



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Defending challenges to Local Authority decisions and actions

- Local Authorities have always been at risk from challenge in their decision making as planning authorities, particularly driven by the fierce competition between the major food retailers.
- Ten years ago and until there was greater familiarity with the EIA regulations, this was an area of risk from challenge with which we were familiar. However, it is only in the last 5 or 6 years, with the growth of freedoms and new powers of competence, that Local Authorities have faced less familiar risks and challenges under public administrative law, significantly European Community law relating to public procurement and State aids.
- It was something of a shock, when two years ago, Local Government and the British property industry learnt that development projects and planning agreements could lie in the ambit of EU procurement law. Now, the implications and risks of challenge to awards of property development contracts have become much clearer. At the same time, the impact of State aid rules in land transactions and the potential inhibitions on gap grant funding, have become much more keenly recognised than they ever had been in the past.
- Ministerial guidance since 2003 has highlighted the overriding need to comply with Best Value principles and warned about the constraints on the use of the well being power in land disposals. The decision in LAML, in which a challenge against a Local Authority procurement was upheld by the Court of Appeal, has left uncertainty about the scope of the well being power itself.
- Competition and recession both drive challenges and Local Authorities can unexpectedly be on the receiving end. Freedom of Information Act requests are also proving an increasingly powerful tool for bidders and operators minded to "have a go". At the end of 2009, the European Remedies Directive will be implemented in to UK law, giving much greater impetus and opportunity for disappointed bidders to challenge Local Authority procurements, and this will be particularly true in the field of land transactions and property developments.

We have a longstanding track record in planning litigation and in defending and managing Judicial Review challenges in relation to property and regeneration projects on behalf of Local Authorities. Judicial Review is on the increase as developers, contractors and professionals focus on Local Authorities and other public bodies, as a growing sector which will lead the way out of recession. Many decisions are likely to be scrutinised. One project may proceed whilst another one does not as, for example, financing is withdrawn or does not materialise. We can bring our experience and insight to bear in the new and testing environment which has developed.

Veale Wasbrough Vizards, Local Government and Regeneration

Local government and property development work are core areas of our business. Within the last 4 years we have advised 52 Authorities over a wide range of issues. We are on a number of public sector panels including Catalist (panels 1 - 7 inclusive) and the ACSes panel.

Our 65-strong Real Estate team advises public and private sector clients over the life-cycle of property activity, from land assembly and acquisition, through tax and corporate structures, planning and environmental issues, to construction, funding, lettings and disposals, and estate management and dispute resolution. It is a measure of our expertise that our partners Tim Smithers and Gary Philpott are advisory editors for the current edition of the 3-volume property development section of the lawyer's bible "the Encyclopaedia of Forms and Precedents".



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Veale Wasbrough Vizards - Property related disputes and our services

We have considerable expertise in dealing with all types of property related disputes. We have a team of individuals who bring together extensive experience in dealing with the whole range of matters which arise including:

Property disputes

- Our property litigation lawyers work closely with our real estate lawyers to provide a "seamless service". We work together to provide advice regarding **breaches of covenant and advising on and pursuing and defending injunctions**. We also work closely together to advise clients on **restrictive covenant and easement disputes**.
- The property litigation team deal with possession actions including **adverse possession claims, agricultural tenancies, Rent Act tenancies, squatters, tenancies at will**, as well as, **Landlord and Tenant Act 1954 tenancies**.

Planning disputes

- **Planning enforcement:** we can advise on the status of any alleged breach of planning control and can assist in deciding on the most suitable course of action in the light of the individual facts of the case, drafting the necessary papers and serving the appropriate notices on the parties concerned.
- Advice in relation to the local development framework process, including modification and adoption of development plans, and where necessary, **challenges in the High Court to the adoption of development plans**.
- **Defending appeals made to the Planning Inspectorate** against applications where certificates of lawful use or development and/or planning applications have been refused. We can advise on the merits of any appeal lodged and/or claim made to the High Court in order to ensure that the risk of an adverse costs order being made is minimise, and if circumstances require, an application needs to be reconsidered.

Construction disputes

- Our specialist construction team provides highly skilled commercial advice to achieve the most effective method of resolution. The team has substantial experience of **mediation, adjudication, arbitration and litigation** and in particular, advising on all aspects of building disputes to include issues such as defective work, claims for extensions of time, contested variations and claims for loss and expense.

Insolvency disputes

- In the current economic climate, we have been working closely with our insolvency team to provide sensible, pragmatic advice on the most appropriate remedy to pursue for arrears of rent including **distress, forfeiture, statutory demands and court proceedings**. A further key issue currently is the liability of former tenants and former tenants' guarantors. We can arrange for the service of **Section 17 notices** on former tenants and guarantors and advise on the relevant issues.
- The insolvency team also work closely with the construction team to advise on the practical steps you can take to ensure that developments are completed.