

Public Sector Update Seminar



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Practical considerations regarding Mines & Minerals issues

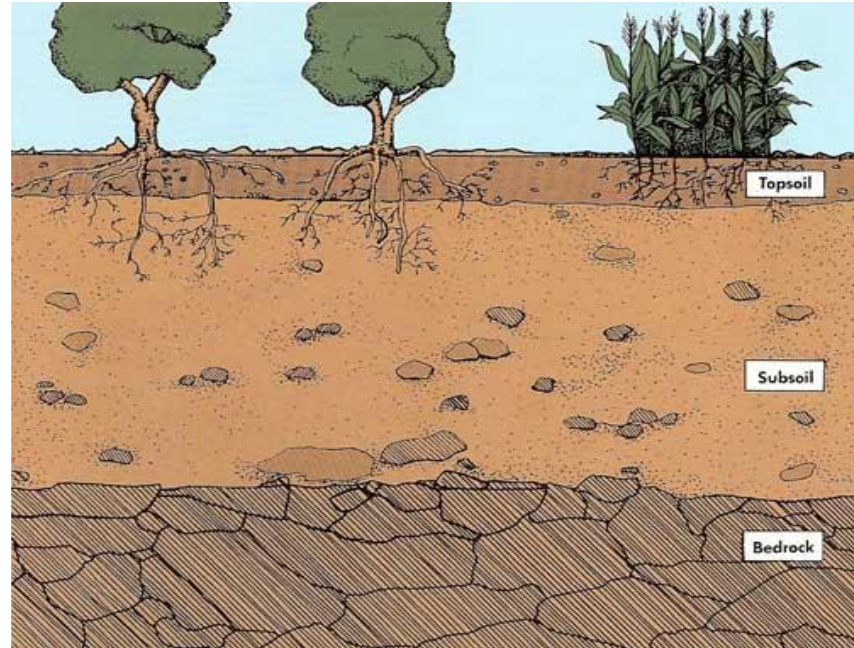
Alex Cox, Partner

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Practical Considerations regarding Mines & Minerals issues

- Property Ownership – all the way to the centre of the earth? Often not the case
- Separation of Ownership of Mines and Minerals from the Surface



Practical Considerations regarding Mines & Minerals issues

- What are Mines and Minerals?
 - No set legal definition
 - Vernacular meaning
 - May include the void space
- Relevant document may specify



Practical Considerations regarding Mines & Minerals issues

- Ownership of Mines and Minerals
 - Registered title position
 - Separation of surface and mineral ownership
 - Reservation on sale
 - Transfer of minerals
 - Copyhold Enfranchisement
 - Crown vested Minerals
 - Inclosure Act
- Ownership position often requires investigation



Practical Considerations regarding Mines & Minerals issues

- Commercial Quarrying and Mining Activities.
- Minerals can only be worked where they exist.
- 50 active quarries between Northumberland and Hartlepool.
- Whinstone, Limestone, Sandstone, Sand & Gravel, Brickclay and Fluorspar.
- Landlords
- Main players
- Agreements: options and leases
- Heads of terms



Practical Considerations regarding Mines & Minerals issues

- Minerals Ownership and Development
- Trespass Argument
- Injunctive Relief?
- Ransom of development
- Threat of action sufficient?



Practical Considerations regarding Mines & Minerals issues

- Known Mineral Owner negotiating a deal
- Geology – superficial/solid
- Exception and reservation – what minerals have been excepted and what working rights are reserved.
- Tests
- Trespass, Encroachment or Clean title.
- Wide ranging deals



Practical Considerations regarding Mines & Minerals issues

- Indemnity Insurance
 - Is it appropriate?
 - Sometimes the only option?
 - Timing critical
 - Acceptable to all parties?
 - Wording of policy important
 - Duty of disclosure



Questions and answers

Recent case law update

Jeremy Hardy, Director

Renewal Process for Protected Leases under the Landlord and Tenant Act 1954

- Applies only to business tenancies
- There is a statutory right to a new lease at the expiry of the lease
- In the absence of either the landlord or the tenant taking steps to terminate the lease the tenancy will continue after the end of the term with the tenant holding over
- The landlord and tenant should both review the position at the end of the lease to decide whether they are happy for the lease to continue

What steps can be taken to terminate the lease?

- The landlord can serve a Section 25 Notice giving not less than 6 months notice
- The Section 25 Notice must set out the landlord's proposals as to the terms of the new lease, including the rent and length of the lease
- The landlord may be able to oppose a new lease on one of the statutory grounds
- Alternatively, the tenant can serve a Section 26 Request for a new tenancy and the landlord can serve a counter notice within 2 months opposing a new lease on one of the grounds

Most common grounds for opposing a new tenancy

- Premises are in disrepair (Ground (a))
- Arrears of rent (Ground (b))
- Other breaches of covenant (Ground (c))
- Suitable alternative accommodation (Ground (d))
- Landlord's intention to demolish and/or redevelop the premises (Ground (f))
- Landlord's intention to occupy the premises itself for the purpose of its own business (Ground (g))
- Grounds (f) and (g) will entitle the tenant to claim statutory compensation
- **Grounds (a), disrepair and ground (c), other breaches of covenant**

Kent v Guest

- The Court refused to grant a new tenancy on the basis that the landlord had established grounds (a) and (c)
- The Court held that the correct approach is for the landlord to establish the factual position relevant to the ground of opposition and then for the Court to consider, whether in the light of this, the tenant ought not to be granted a new lease
- Expert evidence is likely to be necessary
- The premises were “a mess” and had greatly deteriorated and were being used for selling artificial turf in breach of the user provisions

Ground (f) – intention to demolish and/or redevelop site

S Frances Ltd v Cavendish Hotels (London) Limited 2018

- Prior to this case it was sufficient for a landlord to be able to show that it had an intention to demolish and/or redevelop premises regardless of whether it would do the works but for the presence of the tenant
- This case decided that the landlord's subjective intention to redevelop the tenant's premises had to exist independently of the tenants right to renew the lease
- Lord Sumption said that “The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily”
- London Kendal Street v Daejan Investments Limited held that this could be demonstrated by the landlord giving an undertaking that it would do the works

Unlawful Subletting

- Many leases contain a provision preventing an assignment/subletting without the landlord's consent
- If there is an unlawful subletting the landlord may be able to claim damages from the tenant based upon the amount of profit made by the tenant – Attorney General v Blake [2001]
- The circumstances do however have to be exceptional and justify an award of damages
- Almancantor Centre Point Nominee 1 Ltd v CiD Investments Limited [2021] provides helpful clarification, holding that where a subletting is permitted with the landlord's consent but that consent was not obtained there should not be an award of damages

- **Pandemic Renewal Terms**
- Some tenants are seeking to amend lease terms on renewal to include a rent suspension provision to deal with a closure of the premises brought about by a further wave or new outbreak
- Poundland Limited v Toplain Limited [2021]
- Poundland proposed that the annual rent should be reduced by 50% if the premises were forced to close but the Court held that this was not a fair and reasonable amendment to make as the tenant was seeking to impose a new risk upon the landlord

- **Fixtures or Chattels?**
- Whether something is a fixture or chattel is relevant at the end of the lease in deciding what a tenant is entitled to remove
- The question is the extent to which the chattel is attached to the land or building and how it is affixed together with the purpose for which the chattel was annexed to the land or building
- *Berkley v Pulett* [1977] – Lord Scarman – “If an object cannot be removed without serious damage to, or destruction of, some part of the realty, the case for its having become a fixture is a strong one
- *Royal Parks Ltd v Bluebird Boats Limited* [2021] held that a boathouse on the Serpentine which had been constructed by the tenant at considerable expense was a fixture on the basis that the structure was permanently fixed to the land
- Tenants do need to take care to take steps if necessary to ensure that items can be removed at the end of a tenancy

Questions and answers

Electronic Communications Code 2017

Jeremy Hardy, Director

- Replaced the 2003 Code.
- The Telecoms Operator can potentially require a landowner to enter into an agreement to allow telecoms equipment to be erected.
- The Operator writes to the landowner requesting the landowner's agreement. If this is not provided the Operator can make an application to the Tribunal.
- In deciding this the Tribunal will consider the following points:
 - Can any prejudice to the landowner be adequately compensated by money?
 - Whether the benefit to the public outweighs the prejudice to the landowner.
 - Tribunal may refuse an order if the landowner can demonstrate an intention to re-develop all or any part of the building.
- The Code sets out the basis on which the rent to be paid is determined, being the market value taking no account of the fact that it is a telecoms agreement.
- In addition the Tribunal can order a one-off compensation payment to compensate the landowner.
- Generally the rent payable by the Operator will be lower than under an "old" agreement.

Terminating a Telecoms Lease

- Need to consider whether the Agreement is an “old” agreement entered into before 28 December 2017 or a “new” agreement after that date or before that date but contracted out of the Landlord and Tenant Act 1954.
- If it is an “old” agreement the landowner will need to serve a Section 25 Notice opposing a new tenancy on one of the statutory grounds.
- If it is a “new” lease the 2017 Code will apply and the landowner will need to serve notice under Part 5 of the Code setting out one of the statutory grounds for opposing a new agreement e.g. an intention to redevelop.
- Generally not less than 18 months notice will be necessary. The Telecoms Operator then has 3 months to serve a counter notice if it objects to the notice and a further 3 months to apply to the Tribunal.
- If the Tribunal does make an order terminating the agreement and the Telecoms Operator fails to remove the mast it may be necessary to serve a further notice under Part 6 of the 2017 Code.

A client has a building which it is wanting to develop which has a number of masts on the roof under separate agreements as follows:

- A. Lease dated 2000 which expired in 2017 and not contracted out of the Landlord and Tenant Act 1954
 - This is an “old” agreement with the 1954 Act applying. A Section 25 Notice will therefore need to be served.

- B. Lease dated 2016 for a term of 20 years with a landlord’s right to terminate on the grounds of redevelopment on 12 months’ notice. Contracted out of the Landlord and Tenant Act 1954.
 - The 2017 Code applies as the lease is contracted out of the 1954 Act.
12 months’ notice would need to be given pursuant to the right to terminate together with 18 months’ notice under Para 5 of the 2017 Code.

- C. Lease dated 2016 for a term of 15 years with a landlord's right to terminate on the grounds of redevelopment on 12 months' notice. Not contracted out of the 1954 Act.
- This is an "old" agreement with the 1954 Act applying as the lease is not contracted out.
12 months' notice would need to be given pursuant to the right to terminate together with a Section 25 Notice.
- D. A mast which is not a telecoms mast with no written tenancy agreement
- The 2017 Code doesn't apply as not a telecoms lease. It is likely to be an implied business tenancy.
 - It is vital to ensure that the correct notices are served and the correct procedure followed

Questions and answers

Construction disputes

Neil Williamson, Partner

Construction Disputes

Stella Rimington

'...the Thames House Refurbishment was fraught with difficulties. It was clear that dealing with the building industry was just as tricky as dealing with the KGB.'

Litigation

- Technology and Construction Court (TCC) – specialist construction court with own judges and procedures;
- Based in London but district registries;
- All cases on multi-track;
- Pre-Action Protocol specific to Construction Disputes – if not followed then potential costs penalties;
- Small Claims Court;
- Costs.

Arbitration

- If selected in contract or agreed between parties;
- Similar to litigation (in procedure and cost) but arbitrator can be surveyor, engineer, etc;
- Advantages and disadvantages.

Adjudication

- Statutory or contractual procedure;
- Decision intended within 28 days, but can be extended in certain circumstances;
- Binding in interim (often permanently in practice) subject to commencement of full litigation/arbitration proceedings – beware of contractual time limits for challenge;
- Shortened court procedure for enforcement of adjudicator's decision if necessary and few grounds to challenge;
- Parties bear own costs (unless agreed otherwise in advance) but adjudicator can order losing party to pay his fees;
- Costs.

Construction Disputes

Mediation

- Strongly encouraged by courts;
- Mediator seeks to facilitate settlement, but can't impose anything on parties;
- Advantages and disadvantages;
- Costs.

Structure of Claim

- Who are you?
- Who is claim against?
- What is the contract and what are the contractual terms (or tortious duties)?
- Have they been breached?
- Has the breach caused loss?
- What is the loss?
- Defences and other considerations

Construction Disputes

Avoiding Disputes

- Well-drafted contract
- Good contract administration
- Commercial relationships
- Due diligence in advance
- Some disputes unavoidable

Questions and answers

Thank you

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