

Meet the Team - Patrick Whetter

What does he do?

Patrick has been with Henmans LLP since 1998 and specialises in many aspects of commercial property with particular expertise in commercial landlord and tenant, freehold acquisitions and disposals and management of property portfolios.

Recent deals?

Patrick has been kept very busy notwithstanding the difficult economic climate. Last year included many complex transactions including acting for a tenant on a ten year lease for industrial premises with an annual rent of £1.4million conditional on a valuable landlord and tenant works.

Outside of work?

Patrick spends most of his time with his wife and two energetic boys who keep him young at heart. Patrick also enjoys cricket, tennis and golf and has recently started doing half triathlons – a sure sign of a midlife crisis!

Favourite Restaurant?

Patrick loves the food and setting of Gee's in Oxford (even after waiting tables there as a young man). There is no better place to spend a Saturday afternoon.

Contact Patrick on 01865 781145 or via email on patrick.whetter@henmansllp.co.uk.



Patrick Whetter,
partner,
commercial
property team

Tenant breaches and the right to forfeit

Before forfeiting a business lease for a breach of a tenant covenant (other than payment of rent), the landlord must serve a notice on the tenant. The notice must:

- Specify the breach,
- If the breach is capable of remedy, require the tenant to remedy the breach, and
- Require the tenant to compensate for the breach.

If the tenant fails in a reasonable time to comply with the notice, then the landlord can forfeit the lease (Section 146 of the Law of Property Act 1925).

The majority of breaches are capable of remedy, but there are two breaches of covenant that are considered to be irremediable:

- i. not to assign or underlet, and
- ii. illegal or immoral use.

The fact that a breach is incapable of remedy does not necessarily mean that the landlord can forfeit the lease, as highlighted by the

recent case *Patel and another v K & J Restaurants Ltd and another (2010)*.

In this case the tenant had shared possession of part of the premises, and another part of the premises were being used for illegal and immoral purposes. Both considered irremediable breaches. The Court

took a practical rather than a technical approach and the landlord's claim for forfeiture and possession was dismissed, although the tenant did have to pay the landlord's costs. With regard to the sharing of possession, although the breach

had not been remedied, the tenant was continuing their efforts to regain possession of the whole of the premises. With regard to the illegal and immoral use, the fact that there was no stigma attaching to the premises was a key factor in the Court's decision.

Landlords should be cautious before claiming a right of forfeiture for a tenant's breach of covenant in a lease. The correct notice must first be served on the tenant, and no assumption can be made as to whether the breach is capable of remedy.

For further information please contact Patrick Whetter on patrick.whetter@henmansllp.co.uk

Planning permission - can I rely on a resolution to grant?

Many commercial property contracts are conditional on the grant of planning permission for a change of use or other development. Contracts become unconditional on the grant of planning permission and the date for completion is calculated by reference to it, but is it safe to rely on the local authority's decision alone?

“Many commercial property contracts are conditional on the grant of planning permission for a change of use or other development.”

The Courts have held that planning permission is “granted” when the written decision notice is issued. If that decision is conditional on the completion of a planning agreement the decision notice might not be issued for many months.

This approach gives rise to two problems. A party with an interest in the decision, for example someone who has objected to it, might bring proceedings by way of judicial review to challenge the validity of the decision or new facts come to the attention of the local authority that are relevant to its decision.

Judicial review may be commenced when there is an irregularity in the procedure or in the decision itself due to matters having been taken into account when they should not have been or due to a material consideration having been overlooked. For this reason commercial contracts often allow at least three months (usually three months and fourteen days) to see if a challenge is made before a contract becomes unconditional. Although an application for leave to bring proceedings for judicial review must be brought promptly after the decision and in any event within three months the Courts do have the discretion to allow late applications. So there is no absolute guarantee that a “wait and see” period of this type will fully address such a problem. The remaining risk might be insurable.



Adrian White,
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The other problem arises where new facts come to the local authority's attention after the resolution to grant. As a planning permission is only granted when the decision notice is issued a planning committee at a subsequent meeting or a planning officer, where the decision has been delegated, might consider that the new fact is material to the decision and that the decision need to be reconsidered. If the planning officer dealing with the matter regards the new fact as a material consideration the courts have held that it would be prudent for the

application to be reconsidered and for the planning officer only to issue the decision following such reconsideration if satisfied that the local authority would reach the same decision (on the application of *R (on the application of Kides) v South Cambridgeshire District Council* 2002).

A case in West Oxfordshire has further clarified the decision in the Kides case. In *R (on the application of Dry) v West Oxfordshire*

District Council 2010 there had been changes made to the Environment Agency's flood maps following the floods in 2007 and the proposed development of 100 houses was now in an area where the risk was greater. The court held that it was sufficient for the local authority to have consulted the Agency again (who were satisfied that the matter did not need to be reconsidered) before issuing its decision notice and there was no need for the decision to also be reconsidered by the planning committee.

Before taking a decision to proceed with a purchase following the resolution to grant but before the issue of the planning permission clients should consider a) whether the decision - making process (including what is required in a planning agreement) is robust and not susceptible of a challenge and b) whether any new facts have been brought to the attention of the local authority that might be relevant to its original decision (and if so what action the local authority has taken on being made aware of them)

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