



PROPERTY

OVERAGE

Q: What do you do if you want to sell a piece of land at a price which reflects its present value but where there is a chance that it may be worth more in the years to come, as it has (for example) development potential? How can you share in the increase in value in these circumstances?

A: You ring your solicitor to discuss how to protect your position. Lawyers use the term overage to describe the right of a person who is not the owner of land to share in increased value. The term clawback is also used.



Overage does not have to occur on a sale, although this is the most common situation. Overage rights can be granted in a variety of other situations: for example, retained land may increase in value as a result of development on adjoining land, in circumstances where the owner of the retained land has sold part of the land to be developed. If the developer constructs roads or other services that benefit the retained land, the developer itself might wish to have overage rights.

Whatever the circumstances, the practical issues need to be considered. The first question to ask is, when is the payment due? In the most common case, where land is sold in the expectation that there will be a future increase in value, the grant of planning consent is often nominated as the trigger for payment. Alternatively you can use the date of the start of the development, and the developer may well press for practical completion of the building or even completion of a sale of the developed land, so that he does not have to fund the overage payment in advance.

Valuers will be involved at an early stage. A formula will have to be found for valuation of the land after the trigger event, to establish the uplift in value. The valuers will also negotiate the percentage of uplift payable to the owner, and the period during which the overage arrangements are to subsist (overage deeds normally cover development that takes place within 20 years at

the most, although there is no reason why they should not apply for longer periods).

A key problem in dealing with overage is to ensure that the person who ultimately pays the overage is creditworthy, and that any mortgagees of the land will not take priority. It is always possible that the land may be sold, perhaps more than once, and it is important to ensure that the developer at the time the overage payment is triggered is caught.

There are a number of ways of achieving this, although they all have their problems. For example, it might be thought that the simplest way of protecting overage rights would be to impose restrictive covenants on the land that has been sold. The problem with this, however, is that the overage owner must retain land nearby which is capable of benefiting; covenants are vulnerable to release or variation by the Land Tribunal; and the general tendency of the courts has not been favourable to those who wish to extract money from the release of a restrictive covenant. Other devices are sometimes used, such as positive covenants or a covenant to pay backed by a restriction on the register of the title, but the machinery involved in ensuring that each successive owner of the overage land enters into a new covenant with the original owner is cumbersome. Mortgages can be useful, but they are not suitable where the land owner wishes to use the land as security for borrowing. Ransom

strips ie the retention by the original owner of a piece of land crucial to the development can be an effective form of overage where physical circumstances allow. Another device is the grant of a lease, to include covenants limiting the use of the land and restricting development.

Circumstances will dictate in each case which is the most suitable framework for protecting overage rights. If you want to structure your sale so as to secure a benefit in the long term, careful thought will have to be given to the issues mentioned above, and more. Overage deeds are complicated and detailed, and it is important for you and your solicitor to sit down together to discuss all the possible ramifications at the outset. The law relating to overage rights is still developing, but provided that the parties' intentions are clearly set out and expressed in a deed that contemplates all possibilities the future payment should be secure.

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FOR BETTER FOR WORSE, FOR RICHER FOR POORER

The familiar words of the marriage service have come under scrutiny recently in the widely reported case of Ray and Karen Parlour. But what effect will this have on “ordinary” divorcing couples?

First, some background. Ray was a Premiership footballer for Arsenal; Karen is a housewife and mother to their three children. The Parlours had a short marriage lasting 3½ years, having lived together for a similar time before marriage. There are 3 young children, whose income needs were agreed and which Ray is paying willingly. The capital case was sorted out, with Karen getting some 40% of the (fairly modest) capital. But Karen claimed to have made a significant contribution to Ray’s earning capacity by steering him away from excessive drinking in the early 1990s, and thus she contended for a similar share of Ray’s large income, which was over her agreed need for an annual income of some £120,000. Ray currently earns some £1.2 million net a year, more than the two of them, combined, need for daily living. Until now, the law would generally have allowed Ray to keep the surplus.

Karen succeeded in persuading the court that she should be entitled to share Ray’s future earnings. How then to achieve eventual financial independence for this relatively young couple? Ray has to give proper priority, in how he disposes of the surplus, to assist Karen toward independence. Karen has to make the

most of the surplus. Of the annual award of £440,000 she is required to save £294,000. If the surplus is not put towards proper provision for independence (ie saved in some sort of pension/retirement provision) the court has retained the ability to revisit the maintenance order in 4 years’ time and could well reduce what Ray pays. This timeframe might be extended but by then the court hoped that a clean break could be achieved, with Karen keeping her savings. In 2008 Ray can be expected to have retired from professional football and be drawing his own pension.

Joe and Josephine Bloggs need not be overly concerned. The effect of this judgment is unlikely to be as sensational as reported by the media – as these were exceptional circumstances. In most divorce cases there is not a vast surplus of income after accounting for the ‘reasonable needs’ of the couple and their children. But the ruling will affect negotiations and judgments, as issues are raised about contribution to earning capacity. So, where divorce cases settle, as they usually do, the price of the income settlement may well have increased for the higher earning spouse (usually the husband).

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EMPLOYMENT

It’s not worth getting upset if you are unfairly dismissed

In 2003, in the case of *Dunnachie v Kingston upon Hull City Council* the EAT ruled that in unfair dismissal claims employees could not claim compensation for ‘non-pecuniary losses’; that is losses which are not readily quantifiable in monetary terms. This halted any ability by employees to claim losses such as ‘injury to feelings’ (a loss which is available in discrimination cases) in respect of an unfair dismissal claim.

At the beginning of February 2003, the Court of Appeal overturned this decision, and employers all over the UK held their breath as employees started including awards for injury to feelings or loss of reputation as part of their unfair dismissal claims. Such claims were to be permitted in relation to the “circumstances of the unfair dismissal”. Fortunately for employers, the case was appealed to the House of Lords and their decision was given last month. Their Lordships have unanimously ruled against the Court of Appeal’s majority decision that such damages were awardable. They have therefore reinstated the position that had previously survived for more than 30 years, since the case of *Norton Tool Co Ltd v Tewson* [1972] that “loss” should be confined to financial loss only, and there shall be no awards in respect of non-economic losses such as injury to feelings. It will require legislation now to change that position.

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It ain’t what you do; it’s the way that you do it

On the same day as the judgment refusing compensation for non pecuniary loss in unfair dismissal cases, the House of Lords also gave their important decision on two appeals in which they allowed common law claims for pre-dismissal psychiatric injury

The issue in question was whether employees can bring common law actions for damages for psychiatric injury caused by the manner of dismissal or from actions of an employer prior to the actual dismissal. The difficulty had arisen because of differing interpretations of the Lords’ decision in *Johnson v Unisys Ltd* [2001]. The Lords had held in that case that an employee could not use the implied term of trust and confidence to claim damages for psychological injury, if the damage complained of was caused by the manner in which they were dismissed. They decided that that term was concerned only with preservation of the continuing employment relationship and not with the termination of that relationship. As a result, common law actions based on breach of the implied term could not be brought.

The employees in the *Eastwood* case sought to sidestep the ruling in *Johnson v Unisys* by identifying occurrences preceding their dismissals, which could be used to bring a claim for breach of the implied term of trust and confidence. The Lords decided that the facts constituted causes of action that accrued

before the dismissals, and therefore the employees were not barred from bringing common law claims for damages for psychiatric injury allegedly caused by their employers’ actions.

In practical terms, there are some difficult questions of damage limitation and causation which arise from this decision. For example, an employer may actually be better off dismissing than suspending an employee. A claim for unfair dismissal is subject to the statutory cap, however a claim for damages (ie for psychiatric injury caused by suspension) may not be subject to a financial limit.

In addition, when consideration has to be given to conflicting medical evidence, the onus will be to decide whether the “fact” of dismissal was either “the last straw” for the employee, or whether the illness came into being before the dismissal. It will be a difficult call to make. However the Lords are aware of these difficulties and have called for urgent legislative changes to address them.

An important practical factor is for employers to ensure such potential claims are covered under the provisions of any negotiated compromise agreement when handling an employee’s termination arrangements.

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Overhauled or Overwrought?: The 1954 Act revisited

Changes to the Landlord and Tenant Act 1954 provide a new framework for the renewal and termination of business tenancies to provide a fairer balance between landlords and tenants. Outline of Main Changes:-

1. Exclusion Agreements – Instead of obtaining a court order to exclude the tenant's right to obtain a new lease at the end of the old one, the landlord now has to serve a notice on the tenant in a specified form warning that the right to a new lease is excluded from the new tenancy.

The tenant must sign a simple declaration that (s)he has received the notice at least 14 days before entering into the lease or agreement for lease. Alternatively, if the notice period is less than 14 days, the tenant must sign a statutory declaration in the presence of a solicitor. A similar procedure applies to agreements to surrender an existing lease.

2. Renewal Procedures – The landlord must still serve a notice to terminate the current tenancy but the tenant no longer has to serve a counternotice or to commence court proceedings

between 2 and 4 months of the notice. Although a deadline for applications to the court is retained, it is longer than previously and may be extended if the parties agree in writing before the deadline.

3. New Procedures For Landlords – Landlords who are not opposing renewal must set out their proposals for the new tenancy in the notice terminating the existing tenancy. Landlords who have served such a notice (whether or not they are opposing renewal) may start court proceedings straightaway.

4. New Procedures For Tenants – Now tenants, as well as landlords, may apply for interim rent.

5. Notices Requiring Information – The information to be provided by either party is increased and must be updated if that information changes within 6 months.

6. Interim Rent – If the lease is renewed, interim rent is usually the same as the rent in the new lease unless market conditions have changed significantly over the period interim rent is payable or if the terms of the new lease are significantly different from the terms of the old one. Interim rent may also now be backdated.

7. Other Changes – When a tenancy has been continued under the Act, if the tenant wishes to end the continuation tenancy (s)he must serve a straight 3 months notice.

If the landlord's misrepresentation has led a court to refuse renewal the tenant may claim compensation.

Courts may now grant a new lease of 15 years.

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PROPERTY

Onwards And Upwards?

It has been clear for some time that the government is minded to prohibit upward only rent reviews. A voluntary Code of Practice was introduced by the property industry following encouragement from the government. Reading University was appointed to monitor the use of the Code and its effectiveness. The end of the monitoring period is almost upon us, with a report from the university due at the end of the year. By this time we will have a better idea of whether upwards and downwards rent reviews are to become a reality.

Most people in the property industry will be aware that the Code was brought in as an attempt to encourage the use of a standard form of lease and, helpfully in our view, to promote the use of standard Commercial Property enquiries before contract. This put an end to the production of lengthy and individual sets of enquiries for an acquisition. Now before the grant of a new lease the prospective tenant's solicitor can simply ask for replies to CPSE 1 and 3, and his opposite number will know what is required.

The overall objective of the Code was to provide more flexibility in leases for the benefit of both parties: for example, we more commonly see mutual break options and landlords are more willing to accept an ability on the part of its tenant to sub-let at the market rent rather than at the higher of the current rent and the market rent. At Cumberland Ellis Peirs we act for both landlords and for tenants in roughly equal measure and are therefore well placed to advise either. We can anticipate the likely reaction from a landlord's solicitor

on a requested lease amendment because the following day we may ourselves be wearing the same hat on another transaction, and therefore can give balanced advice to our client.

Reading University found in an interim report that 87.4% of all rent reviews and 98.4% of rent reviews in leases in the prime property market were still upwards only. If its final report later this year confirms this prevalence we may find that the government will legislate against upward only rent reviews. The consultation paper issued in June this year by the government outlined several options. The first was an outright abolition of upward only rent reviews. This would be good news for tenants, but how much damage would be done to the investment market? A further option was to ban upwards only reviews, but subject always to the provision that the rent could not fall below the initial rent. This would have the benefit of certainty for tenants but again could cause incalculable damage to landlords' investments - something for the government to consider with the value of many people's pension funds in an already parlous state.

A further option was for the government to legislate on the length of leases granted. Undoubtedly leases are much shorter than previously and we have encountered a number of cases of Landlord and Tenant Act 1954 renewals where the tenant in exercising his statutory right to renew requests merely a five year term, though the original lease might have been for 25 years. Of course, shorter leases that have security of tenure and

which therefore are continually renewable provide the desired flexibility on both sides. However shorter leases are usually contracted out of the security of tenure provisions. Landlords and tenants are likely to feel uncomfortable about government intervention that means they cannot have a longer lease if they want one. Longer leases are preferable for the restaurant trade, for example, because of the complementary goodwill and they are also sometimes required by lenders.

The notion of requiring landlords to provide tenants with "a choice of terms at fair prices" sounds wonderful. However telling a tough landlord and its equally tough solicitor when acting for a tenant that "it's not fair!" has never held much weight in our experience. Any breach of this requirement to act fairly would be impossible to enforce.

The government's final option is to do nothing and let matters carry on as at present, with the vast majority of leases providing for upwards only rent reviews.

Where do we go from here? It will be interesting to see the result of the final report from Reading University, and clearly the government will have to consider that report carefully before embarking on any action. We wonder, however, whether any government, despite dire warnings uttered by ministers in Parliament, is going to force through legislation which flies in the face of the interests of the powerful landlords' lobby.

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Congratulations to **Neil Turner** who takes over as Senior Partner from Lionel Judd, who continues as Finance Partner. Neil is head of the Property Group and specialises in property litigation. He writes monthly summaries of Property Litigation case law.

In the Employment Department, **Mark Shulman** joined as a partner in July to take over as Head of the Department. Mark originally trained as a barrister before being called to the Bar in 1981. After a brief period of practice at the Bar, Mark spent a period as a legal journalist writing on employment law before working as a local government lawyer, undertaking both civil litigation and criminal work. After leaving the public sector, Mark has had substantial experience as an employment lawyer in private practice. In his spare time, he enjoys travel, playing jazz piano and performance driving.

Mark joins us as **Barry Jameson** leaves to work more locally to his Oxfordshire home. He has been with the firm for some 37 years; from first days as an articled clerk in Mayfair, he progressed to head the Commercial Group and the Employment Law Department in recent years.

We wish him well.

May was busy for us this year. 1st May saw **Angela Lucy** of the Property Department and **Chan D'Souza**, Head of Property Litigation, promoted to the partnership. **Emma Ries** and **James Lamont** became Associates in the Family and Company Commercial Departments respectively.

Roger Pingram retired in April (after 30 years of service) but has been spotted around the office on several occasions since. Roger, who joined us as a consultant in September 2003 when we merged with Ellis Wood, is now enjoying spending his free time playing table tennis and swimming in the sea.

We have also done some reorganising.

In June, **Andrea London** moved from the Commercial Litigation Department to the Employment Department, whilst **Richard Collier-Wright** joined the Commercial Litigation Department from the Property Litigation Department. **Carol Wray**, the Commercial Litigation Department secretary took on additional responsibilities for debt collection. Finally we renamed the department so that it now more accurately reflects the approach to litigation in the 21st Century: it is now called the Commercial Dispute Resolution Department.

In September, **Joanna Kay** finished her training and joined the Family Law Department as a solicitor.

Gareth Mason joined CEP as Chief Executive in June. Starting professional life as an engineer, he has recently taken similar roles within leading city firms and barristers' chambers.

Many congratulations to **Matthew Sabey** whose theses on inheritance tax mitigation and Inland Revenue reporting requirements have earned him membership of the Society of Trusts and Estates Practitioners ("STEP"). STEP members are experts from the legal, accounting and banking professions who have demonstrated exceptional ability in their field and are able to support you through every trust or estates issue. Head of the Private Client Department **Nicola Waldman** and **Colin Millicent** have been members since the Society was formed.

On to social/sporting achievements. In April CEP faced local accountants CLB in a doubles pool competition. Those of us who were knocked out early in the evening felt that our immense talents were hindered by having to use a child size cue on one side of the table because it was too close to the wall.

Tim Bartlett, **Madeleine James** and **Nick Fowle** joined EC4 Music in performances of George Lloyd's Litany. The piece was extremely challenging for the performers and was greatly enjoyed by the members of the firm who attended. The final performance was supported by several members of the late composer's family who gave the choir a standing ovation.

The views and recommendations in this publication are those of Cumberland Ellis Peirs and have been obtained from a variety of sources. Whilst we believe that our sources are reliable, we cannot guarantee that the information in this publication is accurate and it may be condensed or incomplete. No responsibility can be accepted for the accuracy of the information in this newsletter and no action should be taken in reliance on it without advice.

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