

Welcome to the latest edition of the Anderson Strathern Retail Property Bulletin. The Retail Bulletin is designed to be of interest to the retail property and landlord and tenant sectors. Our aim is to highlight current issues.

Anderson Strathern seeks to adopt a concise, no nonsense approach to providing topical information. This information is sent to key players in the retail property sector.

This edition of the Retail Property Bulletin contains information on:-

- Scottish Enterprise and the £2m bill for empty offices
- Burger King: Hold the Mayo and withhold the consent!
- An Irritating Situation: The Stargas Case
- Powerhouse; Cutting the Landlord off at the source

If you would like more information or if you know of any who would be interested to receive our Retail Property Bulletin please contact us at retail@andersonstrathern.co.uk

Break Right Lost

Following a recent decision of the Court of Session, Scottish Enterprise is faced with the prospect of paying out over two million pounds in rent and other outgoings for the remaining ten years on a lease of office premises that they had intended to terminate.

Scottish Enterprise attempted to trigger a tenant's break option contained in the lease. The Landlord argued that the option had not been correctly exercised as the notice had been served on an associated company instead of direct to the landlord per the terms of the lease.

The Court held that the notice had not been validly served in accordance with the terms of the lease. The Court also disregarded the fact that the notice subsequently found its way to the landlord and that the landlord was aware of the tenant's intention to give notice under the lease.

The moral of this sorry tale, which is equally applicable to both landlords and tenants, is to ensure that you always consult and strictly comply with the terms of your lease about the process before serving any notices.

(The Courier, 3 March 2006)

Burger King: Hold the Mayo and withhold the consent!

Burger King following a downturn in trade at one of their west coast outlets sought consent to sub-let the property to a discount retail chain. By way of an incentive to the proposed sub-tenant, and to take account of prevailing market conditions, Burger King offered to pay a substantial reverse premium to the sub-tenants.

The landlord refused consent on the following basis:-

1. the landlord did not consider the proposed sub-tenant to “be of sound financial standing”; and
2. any sublease must be granted at “full market rent”, disregarding any premium.

Burger King raised an action arguing that the landlord was acting unreasonably in withholding consent.

In respect of the landlord’s first ground for refusal, the Court held that the use of the commonly accepted market test of three years’ net profits to equal or exceed three years’ rent was not unreasonable provided that the test is not used to the exclusion of all other considerations. The Court decided that the landlord had acted unreasonably by failing to take proper account of a range of considerations.

On the second ground, it was held that the reverse premium was excessive to the point where it would impact on future rent and could affect the capital value of the property. The landlord’s refusal on this basis was therefore held to be reasonable.

An Irritating Situation: The Stargas Case

The recent case involving Kingston Communications (Hull) plc v Stargas Nominees Limited highlighted the difficulties that can arise for a landlord when a tenant goes into receivership.

The tenant went into receivership. The tenant's business was taken over by another company, which occupied the property under a licence granted by the tenant's receiver. The receiver offered the landlord rent, but made it clear he would not be adopting the existing lease. The landlord called for the Receiver to adopt the lease and a further offer of rent by the receiver was refused. The landlord was at the same time seeking to preserve its rights against the guarantor under the lease. The guarantor argued that it was not liable as the landlord had agreed a new lease with the occupier of the property. The court held that the guarantor was liable as the landlord was entitled to accept rent even if the lease was under discussion.

What You Need to Know

- Landlords must exercise care in accepting rent
 - From a party other than the tenant
 - After a known breach
- Be aware of any guarantor's right to argue that the guarantee no longer applies if the actions of the landlords have altered the circumstances.
- The guarantor's liability should be made clear and fully protected in any negotiations around the lease.

Powerhouse: Cutting the Landlords off at the Source

Landlords have expressed concern after electrical retail giant Powerhouse used a "company voluntary arrangement" to withdraw from selected properties early and compensate landlords with sums significantly below what they would have received by way of rent. The object is to cut deadwood out of any flagging retail portfolio. These arrangements are established when 75% of creditors agree to accept a proportion of the money owed to them. This rescue package mechanism is capable of undermining contractual obligations and the landlords concerned are taking legal advice about challenging the scheme. Some other companies, not only those operating in the retail sector, appear to be following suit.

This is a matter of interest to both landlords and tenants and if the Powerhouse scheme succeeds, will cause a review of the covenant security behind many of our lease arrangements.

News in brief

- The new owners of Edinburgh's St James Centre have made it clear that they do not intend to demolish the 240,000sqft development. Instead they intend to pursue what has been described as an "aggressive letting strategy" for the significant number of vacant units. In June, the food court will be redeveloped with Burger King and KFC allegedly taking up residence.
- Granton in Edinburgh is the proposed site of a 346 acre £1 billion waterfront regeneration scheme that will include apartments, offices, shops and restaurants. However, protesters have mobilised to protect a beach where an English invasion force sent by Henry VIII once landed. This spot is currently earmarked to be concreted over and replaced with a thistle shaped island in the firth of forth.
- MFI have recently announced that it is to close eleven of its stores as part of a UK wide restructuring that will result in 1500 job losses. The intention is to refocus the stores around kitchens and bedrooms, with a move towards higher-margin products.

Glossary

Attached, as always, is a link to Anderson Strathern's Glossary of Scottish Property Terms (please [click here](#)). Please feel free to use it. It explains in simple terms legal wording frequently encountered in Scotland. Where appropriate specific legal advice should be obtained.