Corporate
NEWSLETTER

Autumn 2015

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EMPLOYMENT LAW

The Height of Expectation

Rachel Harrap, Head of Employment

Electricity meters out an evolving concept of "associative discrimination" and a blurring of the distinction between direct and indirect discrimination in the European case of *Chez Razpredelenie Bulgaria adv Komisia za Zashtita ot Diskriminatsias*.

This case concerned an electricity supplier which placed electricity meters at an inaccessible height in a particular district of a Bulgarian town for the ostensible purpose of preventing crime on account of the high levels of meter tampering and unlawful connections to the network. The particular area of the district in question was populated mainly by people of Roma ethnic origin. Upon evidence it appeared the Company only applied the height policy in other "Roma districts". The implication being that the Company thought it was mainly Roma people who were making unlawful connections. The Company failed to produce evidence of this or that it had carried out any objective analysis of the problem leading to the allegation that its approach was tainted by racial stereotyping.

Currently as the law stands there is a rule against direct discrimination which aims to achieve formal equality of treatment, that is, there must be no "less favourable treatment" between otherwise similarly situated people on grounds of colour, race, nationality or national origins.

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Editor's Note

Welcome to the Autumn 2015 edition of our Corporate Newsletter. This latest issue contains a variety of useful articles covering employment, intellectual property, litigation & dispute resolution, real estate, corporate & commercial, and property litigation law.

We strive to provide current topics which we think are relevant to, and a useful update for the respective business units. If there are any particular areas of interest you would like us to consider in the next issues please do get in touch and we also welcome your comments.

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Indirect discrimination looks beyond formal equality towards a more substantive equality of results, that is where criteria, which appear neutral on their face, may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins that puts them at a "particular disadvantage".

Direct and indirect discrimination are said to be mutually exclusive – you cannot have both at once. This distinction has stark consequences as an act of direct discrimination is not saved by benign motive. Once an act of direct discrimination is proved it cannot be justified.

In the *Chez* case it first appeared to be a case of indirect discrimination – that a policy applied in the same way to everybody in the district, that is they could not readily check their electricity usage but which put Roma people at a particular disadvantage. However, there were also strong grounds for asserting that the electricity suppliers' action in fact amounted to direct discrimination because of only implementing the policy in Roma districts i.e "less favourable treatment".

The twist of the facts is that the case was brought by a woman of non-Roma origin who ran a shop in the district. She brought a race discrimination claim stating she had suffered the same disadvantage as her Roma neighbours.

The European Court agreed with the Claimant that she had been discriminated against by association, ruling that the Discrimination Directive extends to persons although not themselves a member of the racial or ethnic group concerned they nevertheless suffer "less favourable treatment" i.e. direct discrimination or a "particular disadvantage" i.e. indirect discrimination on the ground of that race or ethnic origin.

Whilst this case relates to racial discrimination there is already case law covering associative discrimination in disability claims and we see no reason why it would not extend to all protected characteristics.

The European judgment in *Chez* therefore suggests a focus of associative claims is not so much the nexus to a protected person but to "less favourable treatment" or "particular disadvantage". Employers should be aware the case creates plentiful scope for creative indirect discrimination claims based on an employee suffering alongside an actual or hypothetical protected group while not having the relevant protected characteristic.

This case has also blurred the lines between direct and indirect discrimination and challenges the UK understanding that these are mutually exclusive.

As the case marks a potentially significant extension to the scope of indirect and associative discrimination it is advisable for employer's to consider their policies, rules, decisions and practices as they will be more vulnerable to legal challenge.

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INTELLECTUAL PROPERTY LAW

Care Required When Threatening Legal Proceedings

The Intellectual Property (Unjustified Threats) Bill: An Update


Simon Miles, Head of Intellectual Property
Charlie White, Associate

When a trader is threatened with an IP infringement action (whether under trade marks, patents or designs) they may capitulate in the face of such a threat thus causing damage to their business even where the IP right in issue may be invalid.

Threats of such litigation against a competitor's retailers or distributors can be a productive tactic because such non "primary" infringers will usually have less invested in the product being sold and may well be able to simply source alternative products from elsewhere. The potential for a well-directed threat to cause damage to a number of parties is significant and the groundless threats laws were devised to try and curtail this injustice.

The problem is that the law had become somewhat fragmented and uncertain with subtly different rules applying to different IP rights. Case law had developed the position to such an extent that it was challenging for advisors, and nigh on impossible for lay clients, to avoid making an actionable threat if one strayed beyond making the barest assertion of rights ownership. This unfortunate situation had the unintended effect of encouraging Claimants to launch into legal proceedings prior to communicating with an alleged infringer – a result which was not in the spirit of the procedural code of the Civil Procedure Rules which stressed the overriding objective of proportionality.

The Law Commission has been working on reforming this area of the law since 2012. A consultation was launched on 17 April 2013. The Institute of Trade Mark Attorneys (ITMA) was one of a number of interested parties and our Head of IP Simon Miles (an ITMA Council member) prepared ITMA's response which was submitted on behalf of its members. The Law Commission reviewed the responses and subsequently made recommendations which were accepted by the Government on 26 February 2015.

The Bill is still in draft form; it was recently circulated to various stakeholders for comments and it is currently with the Law Commission to incorporate a few small adjustments following its circulation. The draft which is to go before Parliament "at the earliest legislative opportunity" still has to go through the lengthy Parliamentary process and further amendments are still possible.

"The potential for a well-directed threat to cause damage to a number of parties is significant and the groundless threats laws were devised to try and curtail this injustice."

Some key provisions of the draft Bill (dated 9 July 2015) are as follows:

- **A statutory test for whether a communication is a "threat of infringement proceedings"**
  This does not depart too far from the current test – that a communication would be understood by a reasonable person to mean that a person has a trade mark, patent or designs right and intends to bring proceedings in a UK court. Under the new test, the Bill refers to an intention to bring proceedings "whether in a court in the United Kingdom or elsewhere" for infringement by an act done in the UK or an act which, if done, would be done in the UK. Previously, the test had required that the threat would be understood to include proceedings in a UK court. This requirement cannot be satisfied for Unitary Patents because infringements of those rights come within the exclusive competence of the Unified Patent Court which is not a UK Court.
- **Some of the changes brought in for patents in 2004 are extended to trade marks and designs**
  In relation to whether a threat is "actionable", the Bill preserves the provisions which state that threats relating to acts that cause the greatest harm e.g. (1) applying, or causing another person to apply, a sign to goods/packaging, (2) importing goods for disposal, or (3) supplying services under a sign, are not actionable ("Primary Acts"). If the threat relates to a mix of Primary Acts and other acts then currently, for trade marks and design rights, the threat could be actionable but the Bill states that where the person to whom such a threat is made has done, or intends to do, a Primary Act then the whole threat will not be actionable. The focus has shifted from the act of infringement itself to the person to whom the threat is made.
- **The Bill introduces a section on "permitted communications"**
  Effectively a safe harbour for communications which would ordinarily amount to an actionable threat. The intention is to provide more clarity on how to communicate without incurring liability. A communication can be made for a "permitted purpose" if it is made only for the permitted purpose, the information contained in it is necessary for that purpose and the person making the communication reasonably believes the information communicated is true. "Permitted purposes" include discovering by whom a right has been infringed and giving notice of a right where the existence of the right may not be obvious.
- **Provisions preventing threats actions against professional advisers**
  Subject to certain conditions, proceedings in relation to actionable threats may not be brought against a professional adviser. The conditions are that in making the threat the professional adviser is acting on the instructions of another person and when the threat is made the professional adviser identifies the person on whose instructions the adviser is acting.

This area of the law has needed attention for a while and the changes are, on the whole, welcome. As ever there are a number of concerns in relation to the proposed legislation. For example, concern was raised in the consultation process that the permitted purposes exemptions could leave the new regime open to abuse notwithstanding the requirement for good faith. A communication supposedly for the purpose of discovering whether a trade mark has been infringed and by whom, might be cleverly dressed up as a threat of infringement proceedings. There remains the problem of what constitutes a Primary Actor. A designer might well "apply a sign to goods or their packaging" but would often not be thought of as a primary infringer – it would depend on the degree of independence. We will have to wait and see whether any further changes are made as the Bill progresses through Parliament and how the Bill looks at the other end of that process.

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LITIGATION AND DISPUTE RESOLUTION LAW

EU and US Sanctions Against Russia – Beware of Not Complying


Nick Neocleous, Partner

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This article contains a brief overview of the EU and US sanctions introduced in response to the situation in Ukraine. It should be emphasised that the Ukraine-related sanctions regime is complex and careful analysis of the transaction is usually required for compliance purposes. This issue is particularly relevant for complex business transactions involving multiple jurisdictions.

EU Sanctions

The EU sanctions include the following measures:

1. Asset freezes and visa bans.
2. Crimea and Sevastopol sanctions.
3. Sectoral sanctions.

Asset Freezes and Visa Bans

The measures introduced by the EU comprise:

- a freeze of all assets owned or controlled by specified individuals and entities
- prohibition against funds or economic resources being made available to or for the benefit of them, and
- EU travel ban on the specified individuals.

The EU asset freezes and visa bans apply to two categories of persons:

- those said to be responsible for the misappropriation of Ukrainian state funds and human rights violations in Ukraine, and
- those said to be responsible for undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

The measures with respect to both categories are currently in force until March 2016.

Crimea and Sevastopol Sanctions

In essence, the EU has imposed a general embargo on most business transactions related to Crimea and Sevastopol as the measures include prohibitions on:

- the import into the EU of goods from Crimea and Sevastopol as well as the provision of related services
- the acquisition of real estate or entities (including creation of joint ventures) in the region
- the granting of any financing or the provision of investment services
- the sale/supply of goods into Crimea in specified key sectors as well as the provision of related services, and
- the provision of services related to tourism.

At present the Crimea and Sevastopol sanctions are in force until 3 June 2016.

"The consequences for violations of the EU and US sanctions can be severe and include substantial fines and imprisonment in some cases."

Sectoral Sanctions

In summary, the sectoral sanctions affecting Russia contain restrictions/prohibitions on:

- capital markets and financing transactions involving specified Russian banks and other entities
- import/export of military and dual use goods and technology to/from Russia as well as related technical assistance, financing and financial assistance, and
- export to Russia of specified oil-related equipment as well as the provision of specified services in the oil sector.

The EU sectoral sanctions currently expire on 31 January 2016 (unless extended further).

US Sanctions

The US sanctions regime is broadly similar to the European regime. In summary, the US sanctions against Russia include:

- travel bans and asset freezes on specially designated nationals said to be responsible for the crisis in Ukraine
- sectorial sanctions in the financial and energy sectors
- restrictions related to Crimea and Sevastopol, and
- export restrictions.

Consequences of Not Complying

The consequences for violations of the EU and US sanctions can be severe and include substantial fines and imprisonment in some cases.

In the EU the imposition of penalties for violations of the EU sanctions is a matter of national law of each Member State. For example, a breach of the EU sanctions in the UK may result in a two years' imprisonment and/or an unlimited fine.

It should also be noted that any contracts entered into in violation of the applicable sanctions regimes are likely to be unenforceable.

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CORPORATE & COMMERCIAL LAW

Bound by an Unsigned Agreement

Eoin Broderick – Associate

In *Reveille Independent LLC v Anotech International (UK) Ltd* [2015] EWHC 726 (Comm), the Commercial Court has ruled that a party can accept the terms of an agreement by its conduct alone regardless of the presence of a clause requiring the signature of both parties for the agreement to take effect.

The Issue

The claimant, Reveille Independent LLC (Reveille), a US television company and the defendant, Anotech International (UK) Ltd (Anotech), a UK cookware manufacturer, had negotiated a deal under which Reveille would licence the IP rights it held in the MasterChef brand to Anotech, and permit the promotion and integration of Anotech's products into the MasterChef television programme.

"This case should act as a reminder that contracts can become binding by virtue of a party's behaviour regardless of whether or not a written contract has been signed."

The agreement was set out in a short deal memorandum (the "Deal Memo") with the intention that a long form agreement would be agreed in due course.

Reveille brought a claim contending that having entered into a binding agreement with Anotech and that, having performed its obligations under the agreement, it is entitled to payment of the sums due under the Deal Memo. Anotech said that no contract was reached between the parties and therefore the claim should fail.

The question for the court was whether a binding contract had been formed. The Deal Memo stated: *"This Merchandising Deal Memo shall not be binding on Reveille until executed by both [the Defendant] and Reveille."*

"Whilst the law recognises that some preparatory work can be carried out before any contract shall come into effect, the longer the work continues and more extensive it becomes, the more likely that a binding contract has arisen by conduct."

The Judge found that Reveille were unable to prove that it had signed the Deal Memo (having lost the original document) and had never sent a signed copy to Anotech. The Judge quoted the general rule that *"an acceptance has no legal effect until it is communicated to the offeror"* and concluded that Anotech would not be bound by the Deal Memo until Reveille's acceptance of it was communicated.

Acceptance of the contract was not a mere formality in this case as the Deal Memo signed by Anotech contained a hand written amendment referring to the necessary conclusion of a branding conflict with Gordon Ramsay (the presenter of the show) (the "Brands Conflict Term").

Therefore the question to be resolved was whether there had been acceptance of the contract by conduct and the Judge stated that evidence of this "must be clear and, when considered as a whole and in context, unequivocal."

Anotech further argued that even if there was found to be a contract between the parties, the Brands Conflict Term was a condition precedent which was never fulfilled.

The Decision

Reveille provided detailed evidence showing that Anotech's products had been integrated into episodes of MasterChef US as well as confirming that Anotech had used the MasterChef branding in marketing literature at a trade show and referred to the licence in other sales literature and press releases. Judge Mackie QC found it *"overwhelmingly clear that the work envisaged by the Deal Memo was carried out by the parties"* and whilst this *"does not of itself mean that there was acceptance by conduct…it goes a long way."*

Reveille drew the Judge's attention to the fact that Anotech's managing director had agreed to pay invoices raised for the sums provided for in the Deal Memo. The Judge agreed that there could be no plausible explanation for Anotech agreeing to arrange for payment of the invoices if it did not consider that it was bound to do so under the Deal Memo.

The Judge rejected Anotech's assertion that no conduct could *"trump the fact"* that the Deal Memo had not been signed and returned as well as the claim that the performance by Reveille was essentially pre-contractual work. He found that Reveille had communicated its acceptance by conduct and Anotech recognised this when acknowledging its obligation to pay. The Judge said: "What more powerful evidence ... could there be?" The Judge did not agree with Anotech's construction that the Brands Conflict Term was a condition precedent and found them liable to pay Reveille the sums due under the Deal Memo.

Comment

This case should act as a reminder that contracts can become binding by virtue of a party's behaviour regardless of whether or not a written contract has been signed. Whilst the law recognises that some preparatory work can be carried out before any contract shall come into effect, the longer the work continues and more extensive it becomes, the more likely that a binding contract has arisen by conduct. As a practical step, it is important to ensure all contracts are properly executed and that a copy can be produced when necessary.

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PROPERTY LITIGATION LAW

Can a Subtenant Obtain the Right to a Lease Renewal?

Joanna Osborne, Partner

When a tenant takes a lease of property and occupies that property for its business it will have the right to renew its lease at the end of the contractual term under the Landlord and Tenant Act 1954 (the Act). A tenant will lose this right if it sublets the whole of its property as it is then no longer occupying the premises for its own business. However, the subtenant may still be protected under the Act.

A subtenant may obtain protection under the Act if it fulfils the qualifying criteria for a lease renewal:

- there is a tenancy
- the tenancy relates to premises
- the premises are occupied for the purpose of a business
- the business is carried on by the tenant, and
- the tenancy does not fall within any of the specific exclusions (e.g. agricultural tenancies, tenancies for less than six months).

If the subtenant fulfils the above criteria, its tenancy will automatically continue after the end of the contractual term. In addition, the subtenant may serve a section 26 notice to request a new tenancy unless one of the following applies:

- it is a contractual periodic tenancy (in this case there is still a continuation tenancy but it can only be renewed on the landlord serving a section 25 notice*)
- the lease was for a year or less (in this case there is still a continuation tenancy but it can only be renewed on the landlord serving a section 25 notice)
- the landlord has already served a valid section 25 notice
- it has already served a valid section 26 notice
- it has already given notice to quit or otherwise terminates the tenancy.

It is important that the section 26 notice is served on the competent landlord. The subtenant must therefore decide whether to serve on its immediate landlord or the head landlord. Under the Act, the competent landlord is the first entity in the chain of superior tenancies to own an interest in relation to the tenancy which is:

- an interest in reversion which will have the right to possession of the property on the termination of the relevant tenancy
- and the above interest is either:
  - a freehold interest; or
  - a leasehold interest that will not come to an end within 14 months by effluxion of time or notice.

A subtenant's rights to a renewal lease can cause a number of difficulties, for example when the subtenant is requesting a renewal lease longer than the immediate tenant's reversion. For this reason, most subleases are contracted out of the Act. Whether you are a tenant considering subleasing your property, or a head landlord considering a request for consent to a sublease, you should consider these points and ensure all necessary steps are taken to protect your investment.

* A section 25 notice is a landlord's notice of termination by which the landlord starts the renewal process.

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INTELLECTUAL PROPERTY LAW

Not So Safe Harbor?

Nick Phillips, Partner
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A recent case before the Court of Justice of the European Union (CJEU) has declared the US "Safe Harbor" scheme to be invalid.

Safe Harbor is used by many companies including Google, Facebook (about which this case was brought) and Amazon and it currently allows personal data to be transferred, in compliance with EU data protection rules, from the European Economic Area (EEA) to the US.

Background

In order to comply with EU data protection rules, personal data should only be transferred outside of the EEA if the recipient of that data has "adequate" procedures in place to protect that data. There are a number of countries listed that have been found to have adequate procedures but the US is not one of them.

The EU Commission decided in 2000 that companies that undertake to comply with the "Safe Harbor" principles provide "adequate" protection for personal data they receive from the EEA (the "Safe Harbour Decision"). Many US companies took this relatively simple step in order to be able to receive personal data from the EEA.

The Safe Harbor scheme is regulated by the Federal Trade Commission in the US but until recently such oversight has been quite light. The Edward Snowden leaks (Snowden released large amounts of information regarding the US government's electronic spying and data collection programmes) have shown that US authorities could access such data apparently freely despite the Safe Harbor rules.

Current Case

An Austrian citizen, Max Schrems, objected to Facebook (Ireland) transferring his personal data to Facebook (US). He made a complaint to the Data Protection Commissioner in Ireland (the "DPC") to prevent such transfers. The DPC decided that the Safe Harbor Decision could not be overruled. Mr Schrems sought judicial review and the case eventually made its way to the CJEU on the question of rights under the EU Charter of Fundimental Rights versus the Safe Harbor Decision.

CJEU Decision

The CJEU has followed the very recent Attorney General's opinion in this case and has declared Safe Harbor invalid. In doing so the CJEU focussed on the derogation in Safe Harbor which allowed data to be passed to the US National Security Agency (NSA) and other US government agencies. It held that the very generalised access to personal data, with no or little right of redress, which was allowed to government agencies such as the NSA meant that the US did not ensure an adequate level of protection for the data.

The CJEU decision does not however go quite as far as the AG's opinion which had said that it should be open to national Data Protection authorities to question whether or not other non-EEA countries provided an adequate level of protection for personal data. The CJEU has confirmed that it is the only body with the power to review decisions of the EU Commission approving international transfer of data. This is widely seen as a sensible step in order to promote certainty because if the AG's position on this had been followed we would have been in a position where individual Data Protection Offices could decide that they were not bound by decisions of the EU Commission in relation to international data transfers. This in practice could have meant, for example, that a successor scheme to Safe Harbor only applied in part of the EU.

"In order to comply with EU data protection rules, personal data should only be transferred outside of the EEA if the recipient of that data has "adequate" procedures in place to protect that data."

Practical Considerations
If taken at face value the CJEU's decision means the (temporary) end of large parts of the internet and a serious threat to many companies operating in the cloud, as large volumes of cross border data transfers have routinely relied on Safe Harbor.

The reality is that although this is a serious and potentially far reaching decision it is highly likely that guidance on what to do in practice will be forthcoming fairly shortly from national data protection authorities and from the Article 29 Working Party (a grouping of the national data protection authorities of the EU). In the meantime the general view is that prosecutions are highly unlikely at least until such guidance has been issued and companies have been given a chance to put their houses in order.

However if you do rely on Safe Harbor to transfer EEA personal data to, or receive such data in the US, then you will inevitably need to review your procedures. As part of this review you should consider the following:

- **New Safe Harbor** – the EU Commission and the US Department of Commerce are in negotiations over a new form of Safe Harbor scheme. The success of this will largely depend on the extent to which the US is prepared to give EU citizens greater recourse to its courts in order to challenge data transfers to US government agencies. This may take some time to finalise.
- **Binding Corporate Rules** – these are for use to cover transfers between companies in a large corporate group. They comprise a set of legally enforceable rules prepared by the group for the processing of personal data and have to be approved by relevant data protection authorities. Even if they are approved by one EEA data protection authority that does not necessarily mean that they will be approved by all other relevant EEA data protection authorities and it can therefore be a very long winded process to get your binding corporate rules approved.
- **Consent** – the data subject can consent to the transfer of his/her data outside of the EEA however there are likely to be situations where it is simply too difficult to obtain consent and/or that consent may not be reliably obtained (e.g. employees who may feel they need to consent or put their job at risk).
- **Model Clauses** – this leaves contracts based on the EU approved model clauses to be used in agreements between parties to a transfer of personal data outside of the EEA. These can be cumbersome and cannot be used in all situations but they are at least a partial solution for most companies. It may also prove to be a relatively lengthy process to get all of the agreements signed by all of the parties involved in such data transfers. This is however likely to be the safest and quickest route to compliance at least in the short term.

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PROPERTY LAW

Leases – the Consequences of Holding Over

Susan Johnson – Senior Associate

Stamp Duty Land Tax (SDLT) is a tax on land transactions, and whilst most tenants of business premises are only too aware of their SDLT liability on entering into a new lease, few realise that an additional SDLT liability may be triggered if the tenant continues to occupy the premises following contractual expiry of the lease.

Reasons for tenants not vacating by the contractual expiry date are varied, and include ongoing negotiations with the landlord to agree terms of a new lease (which is common where the lease is within the security of tenure provisions of the Landlord and Tenant Act 1954), or when an outgoing tenant is for some reason unable to deliver vacant possession of the premises by the contractual expiry date.

For SDLT purposes (and where the original lease was granted on or after 1 December 2003), this period of remaining in occupation, or "holding over", is treated by HMRC as an extension of the original lease, turning it into a "growing lease" from the first day of holding over, initially for a further one year term, until a new lease is granted or the lease comes to an end and the tenant vacates.

This means that at the beginning of the holding over period, the tenant must recalculate the SDLT payable for the lease.

This is done as follows:

- Look at the rents and any premium paid for the original contractual lease, and also for the implied one year holding over period.
- If further SDLT arises from this calculation, HMRC must be notified no later than 30 days after the holding over period begins.

The requirement to recalculate the SDLT is a rolling obligation on the tenant, and accordingly, if the holding over period continues after one year, a further one year period is implied, a new SDLT calculation must be carried out by the tenant and, where necessary, notified to HMRC and any SDLT must be paid. This process is repeated every year until a new lease is entered into or the tenant vacates the premises. Failure or delay in submitting an SDLT return and paying any SDLT payable will result in interest and penalties being incurred.

SDLT is a self-assessment tax, and it is likely that many business tenants are holding over in ignorant bliss of the potential SDLT implications. However, HMRC's enforcement powers are not time barred, and they have all the information to hand in respect of lease expiration dates to be able to pursue tenants who may have incurred a further SDLT liability. A prudent tenant should be aware of the implications of holding over after the contractual expiry date of the lease and should make timely payment to HMRC of any SDLT due.

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