Devonshires

Leasehold Management Brief

Issue 5

In this issue

Welcome

I am pleased to welcome you to our most recent edition of the Leasehold Management Dbrief. It has been a busy time for the Leasehold Management Team and we have been asked many interesting and varied questions by our clients. As a result we focused the spotlight on some of those key issues we have found our clients have faced and raised with us on regular occasions.

In this issue, we highlight notable recent decisions in the Tribunals regarding interim fire safety measures as well as highlighting the issues arising out of lease extensions and the difficulties faced with an absentee landlord. Our “Ask the Expert” section looks at recovering aged service charge arrears and we also consider whether or not a landlord has the right to replace a leaseholder’s front door. We also consider the methods available for varying leases.

We hope you find this interesting and informative and, as ever, please do make use of our Leasehold Advice Line.

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Ask the Expert:
Recovery of Historic Service Charge Arrears

Question:

A leaseholder has a 125 year lease for a flat but has allowed service arrears to build up. Unfortunately, the debt dates back many years. The landlord has approached the leaseholder for payment but they have said that the debt is over 6 years old so no legal action can be taken against them to recover the arrears. Is this correct? Has the landlord lost the opportunity to recover these arrears as a result of the passage of time?

Answer:

The leaseholder is right that there are time limits within which legal action must be taken. If those time limits are missed then the opportunity to take legal action is lost. These time limits are imposed by the Limitation Act 1980. Under the Limitation Act 1980, legal action based on a contract must be brought within 6 years of the date when the cause of action arose. In this case that would be when the service charges should have been paid. It seems that this is the provision that the leaseholder is relying on.
However, the lease will have been executed as a deed. This means that it will be sealed and witnessed when completed. As a consequence of that, the timeframe the Limitation Act 1980 provides for the limitation period is 12 years. This is because a deed is a "specialty" for the purpose of the Limitation Act 1980 and a specialty has a limitation period of 12 years rather than 6 years. Therefore, so long as the arrears accrued within the last 12 years the landlord will be able to pursue legal action against the leaseholder.

Of course, the landlord should make sure that the sums due were demanded properly in accordance with the lease and that the demands were made within 18 months of the landlord incurring the costs. Assuming that is the case, the length of time the arrears have been outstanding will not prevent the landlord from taking legal action to pursue the arrears so long as they are no more than 12 years old.

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Replacing Front Doors of Leasehold Properties

A number of issues need to be considered where a landlord intends to replace the front doors of leaseholders' flats. The need to replace doors often arises as a result of the requirement to meet recommendations following fire safety assessments.

The issues that arise are often in respect of the extent of the control that the landlord actually has over the doors. This will impact on whether the landlord can actually interfere with the doors and replace them in the event that a leaseholder objects to the works. This also impacts on whether the costs incurred by a landlord in replacing the front doors of flats can be recovered through the service charges. The answers to these questions will depend on the terms of the lease.

Unfortunately, leases are not always clear on who has responsibility for the front door of a flat. Even where the lease is clear, often not all of the leases of properties in the same building are in the same form. There may be situations where the door falls within the leaseholder's ownership but other occasions where the landlord is responsible.

Therefore, in order to determine who is responsible for the door of a particular flat, the lease will need to be reviewed to see if the door falls within the landlord's control and ownership or whether it falls within the leaseholders control and ownership. Importantly, it should not be assumed that the landlord has control and ownership of the door as that is not always the case. Also, while it is often the case that the obligation to repair will fall to the owner, that is not always the case.

It is possible that a landlord will have an obligation to repair a door even if the leaseholder retains ownership of the door. Different leases are drafted in different ways.

Work to a door, including replacing a door, may well be deemed to be a repair if the condition of the original door has deteriorated in some way. However, if the door is being replaced because a higher level of fire resistance is now desired but the existing door is not in disrepair, then this is likely to be seen as an improvement. Just because an existing door does not provide the desired level or fire resistance does not necessarily mean that it is in need of repair. This is important because, if the lease does not allow for improvements, then the landlord may not be able to carry out the works or, if they can, they are unlikely to be able to recover the costs of the new doors.

Therefore, if the landlord intends to replace the front doors of flats and is intending to recover the costs of replacing the doors from the leaseholders, then the landlord should first review the leases in question to assess what right the landlord has to do this. This will allow the landlord to know what steps they can take in the event that any leaseholders object to the doors being replaced and avoid any surprises when it comes to recovering the costs of replacing the doors.

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Nuts & Bolts: Variation of Leases

Residential Leases are typically granted for long periods of time, such as 99 or 125 years. As the obligations and duties under a Lease are set when it is granted, the terms of long residential Leases can become outdated or irrelevant throughout such an extended period of time. For example, more units may be added to a building which could impact on the way service charges are calculated. There may also have been errors in the drafting of a Lease which do not come to light until many years into the life of the Lease. Such issues can often lead to the Landlord encountering difficulties managing flats within a block.

In such circumstances, one or both of the parties to a Lease may wish to take steps to vary the terms of the Lease. There are two ways this can be done: either by agreement between the parties which is then formalised within a Deed of Variation or by the statutory process laid out at Part IV of the Landlord and Tenant Act 1987 ("the Act").

The first method is straightforward. The Landlord and the Leaseholder agree between them how they wish the Lease to be varied and then enter into a Deed of Variation to this effect. However, this requires the parties to agree both that a variation is required and what form that variation should take. This is not always possible, particularly in circumstances where the Lease, in its unvaried form, favours one of the parties to the Lease.

In such circumstances, the statutory process may assist. Section 35 of the Act provides that a single party to a Lease may make an application to the First Tier Tribunal ("the Tribunal") for an order varying the terms of a Lease.

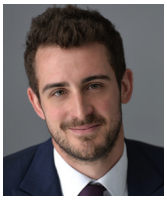
In order to be successful, the applicant must show that the Lease, in its current form, does not make satisfactory provision for one or more of the following fundamental categories:

1. The repair or maintenance of the flat or building the flat is within;
2. The insurance of the building;
3. Repair or maintenance of any installations which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;
4. The provision of maintenance of any service which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;
5. The recovery by one party to the Lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party;
6. The computation of service charge payable under the Lease.

Alternatively, if there is more than one Lease that needs to be varied in relation to the same issue (e.g. where there are a number of Leases over properties in a building which have the same issue), section 37 of the Act provides that such variations can be sought by way of application to the Tribunal. Section 37 applications can be made for any variation, there is no requirement for the variation sought to relate to one of the categories laid out above as there is with section 35.

However, in order for an application under section 37 to be successful, the applicant must show that the majority of the effected Leaseholders consent or do not object to the variation being made. Obtaining such consent and maintaining it throughout the process can be challenging for Landlords.

In conclusion, Landlords should be aware that something can be done if a Lease isn't working i.e. the existing terms are preventing a Landlord from full service charge recovery. In the first instance, Landlords should seek to agree any variations directly with the Leaseholder as this is the quickest and most cost-effective way to solve the problem. However, if this is not possible or practicable, Landlords should bear in mind the statutory process available under the Act. Which type of application to make will depend on how many Leases are involved, what changes are sought and whether the Leaseholders are likely to consent to the application being made.



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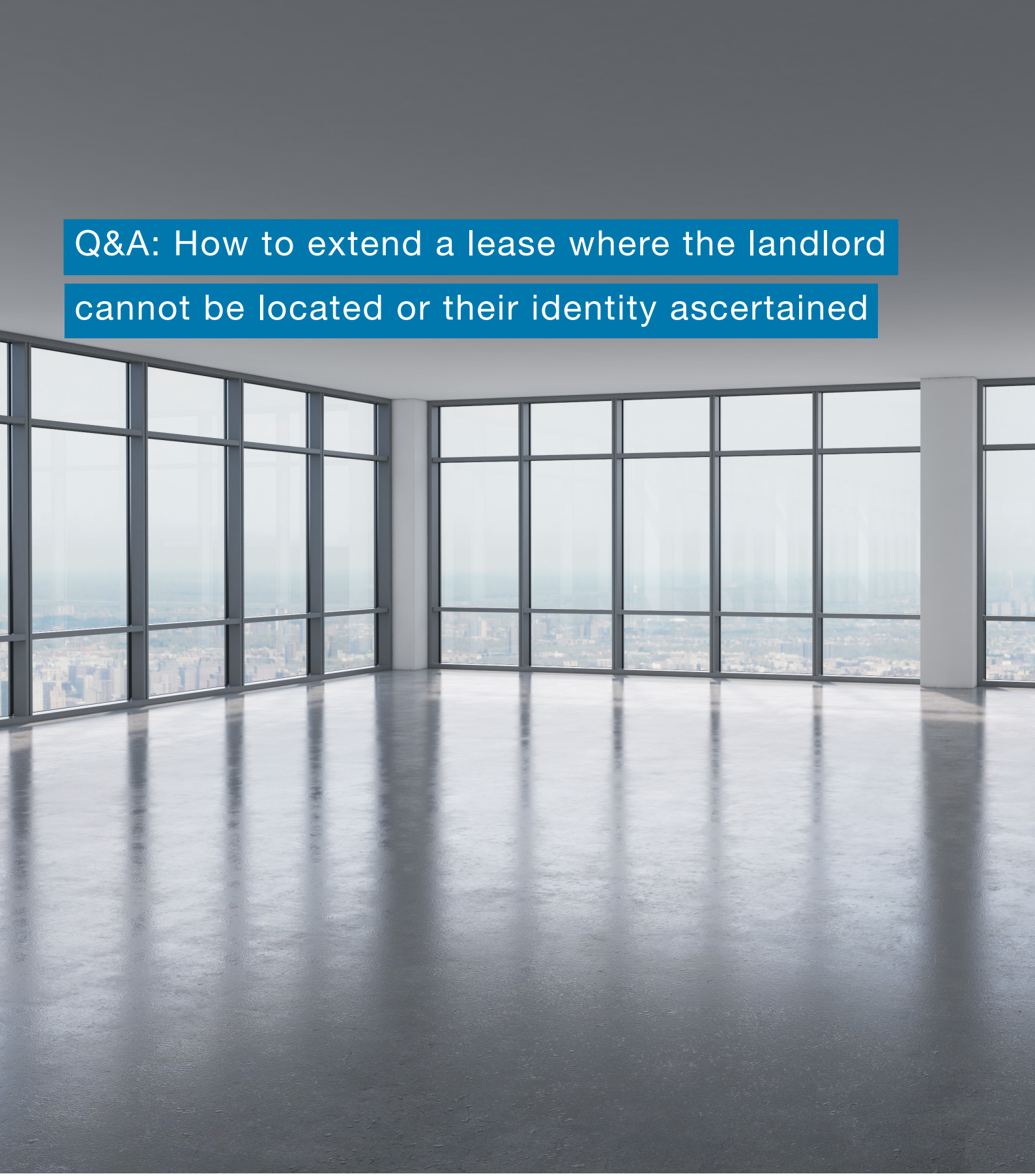
Q&A: How to extend a lease where the landlord cannot be located or their identity ascertained



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Under the Leasehold Reform, Housing and Urban Development Act 1993 qualifying leaseholders have the right to extend their lease for a further 99 years at a peppercorn ground rent. The tenant will have to pay a premium for the new lease and can propose that the new lease is on different terms to the existing lease.

The process is started by the leaseholder serving a notice on their landlord, and the landlord then has to serve a counter-notice stating if he agrees with the tenant's proposals. If the parties cannot negotiate the terms of the extension between themselves, or if there is some other dispute, they can apply to the court or the First-Tier Property Tribunal to obtain a determination (statutory time periods do apply).

What happens if a tenant is unable to serve a notice on their landlord to start the proceedings? Does this mean that the tenant cannot extend their lease?

Can a lease extension still proceed if the landlord is missing?

The 1993 Act provides a solution should this circumstance arise. A leaseholder is entitled to apply to court for a vesting order, and the court has the power to grant an order providing for a new lease to vest in the leaseholder which overcomes the issue of having to serve a claim notice on the landlord. The leaseholder will have to satisfy the court that they have the legal right to a new lease, and that the landlord is truly missing or that their identity cannot be ascertained.

When is a landlord truly missing?

The court will need to be satisfied that the landlord is truly missing. Simply not having had any contact with your landlord for some time is not likely to be sufficient and invariably the court will want evidence of reasonable attempts made to locate the landlord. Some examples that we have dealt with have been caused by the landlord's title being unregistered, or where the tenant's notice has been served but this has been returned as undelivered and no forwarding address is known. What will be required in each case will be fact dependent but some common things to check are:-

- Check the probate register in case the landlord has passed away
- If the landlord is a company, check companies house records for any current address or details of any recent changes to the status of the company
- Land registry will have a service address for the landlord in respect of their freehold interest (only if their title is registered)
- If there is a managing agent they may be able to provide contact details
- A visit or letter to the last known address might elicit a forwarding address
- Tracing agents can be instructed to try to locate a landlord as a last resort

Before the court grants the vesting order they may require the tenant to take further steps to try to locate the landlord. This could be by way of advertisement or such other method as the court considers appropriate in the circumstances of the case.

How does the legal process work?

The legal process effectively allows the tenant to bypass serving a notice on the landlord. There are three stages to the process:-

1. Firstly, the leaseholder applies to the court for a vesting order
2. Once the vesting order is made, the leaseholder must apply to the First-Tier Property Tribunal for a determination of the premium payable and/or the terms of the new lease
3. When the leaseholder has the FTT's determination they must restore the proceedings in the county court so that the court can execute the new lease. The premium is paid into court and held for the landlord who can claim the money should they resurface.

Devonshires act for both tenants and landlords in the lease extension process, and our Property and Leasehold Management Teams work together closely to advise and guide you through the entire process.

Recovery of costs of interim fire safety measures

Two recent decisions of the First Tier Tribunal ("FTT") have explored the issues surrounding a Landlord's ability to recover service charges in relation to the provision of a 'waking watch' service. A 'waking watch' is where one or more wardens patrol a building 24 hours a days, 7 days a week in order to ensure the early detection of a fire. In the immediate aftermath of the Grenfell Tower disaster, many Fire and Rescue Services ("FRS") advised that a waking watch service should be implemented at a number of properties on an interim basis whilst investigations were carried out in order to establish the risk posed by a building, for example where external cladding is in place.

In both E & J Ground Rents No. 11 LLP v Various Leaseholders (24.01.18) and FirstPort Property Services Limited v Various Leaseholders (09.03.18), the FTT had to consider whether the costs incurred by the Landlord implementing and maintaining a waking watch service were recoverable and, if so, that the costs incurred were reasonable.

Recoverable?

In both cases the FTT found that the costs incurred by the Landlord in implementing such waking watch services were recoverable from the Leaseholders by way of service charges. In both cases, the FTT found that the relevant Leases could and should be interpreted so as to enable the Landlord to recover the costs from the Leaseholders.
In E & J, the clause of the Lease the FTT relied upon was a clause which provided that the Landlord was able to recover the costs incurred in:

'Complying with the requirements of any competent authority and with the provisions of all statutes regulations orders and bye-laws made thereunder relating to the Building in so far as such compliance is not the responsibility of the lessess of the [Flats]".

The FTT found that the recommendations of the Greater Manchester FRS to the Landlord that a waking watch should be implemented, coupled with the Landlord's obligations under the Regulatory Reform (Fire Safety) Order 2005 ("the 2005 Order"), were sufficient to bring the costs of the waking watch service within the terms of the Leases concerned.

The decision in FirstPort was much the same with the FTT relying on an almost identical clause as the one laid out above to find that the costs of the waking watch service were recoverable, although the Tribunal also found that there were other clauses in the Lease under which the Landlord could have recovered the costs.

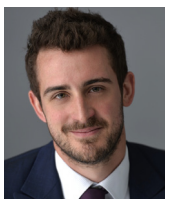
Reasonable?

The FTT also had to consider whether the costs involved in providing the waking watch were reasonable.

The FTT found in E & J that it had been reasonable for the Landlord to pay a higher hourly rate for the waking watch service when it was initially implemented as the FTT accepted that immediate emergency cover was likely to be more expensive than long term cover after a competitive tendering exercise was carried out by the Landlord. The Landlord took steps to replace the immediate cover with less expensive cover within 3 months which the Tribunal found to be reasonable.

In FirstPort, the Tribunal held that the costs of a waking watch service were initially recoverable after the Landlord had been advised by the relevant FRS in June 2017 that a waking watch service should be implemented. However, following the issue by the relevant FRS of a guidance note in September 2017 which advised Landlords to consider alternative options to a waking watch service (such as the installation of a common fire alarm system), the Landlord should have taken steps to consider such alternatives within 3 months of the guidance note being issued. As such, the Tribunal allowed the costs of the waking watch service until December 2017.

Although each case will depend on its own facts and, in particular, the terms of the relevant Leases, these 2 recent decisions suggest that the FTT seems to be approaching the issue of costs incurred by Landlords in providing interim fire safety remedies in a way that allows the Landlord to recover those costs from the Leaseholders. However, in order to show that such costs incurred were and continue to be reasonably incurred, Landlords will have to provide evidence that the interim measures they are operating remain appropriate and necessary and will not continue indefinitely without other permanent measures being put in place which provide the same level of protection more cost effectively.



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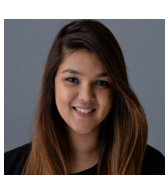

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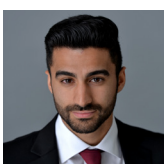

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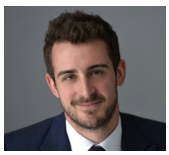

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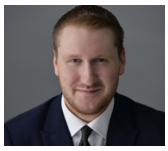

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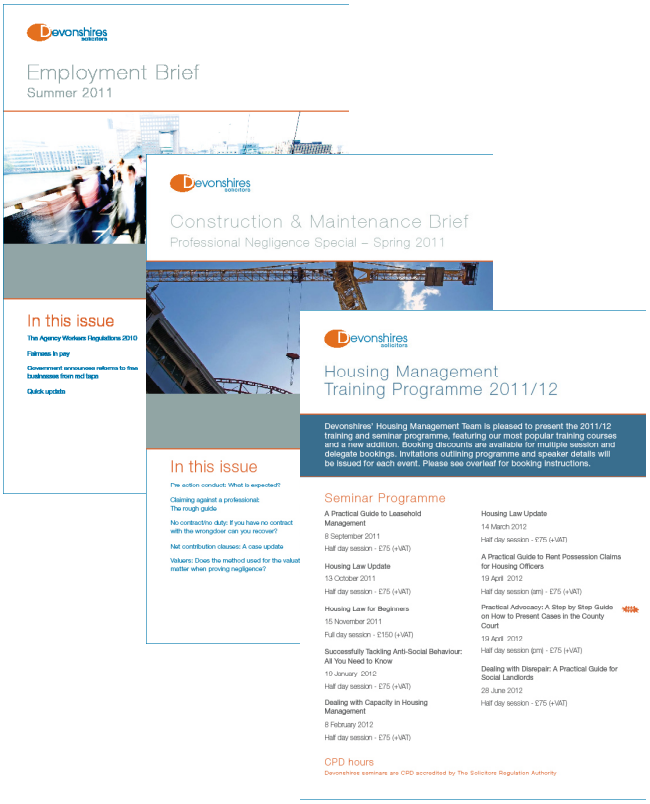

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