

## Q&A

This month, Simon Keen looks at exclusivity agreements whilst Adam Balfour flags up a new consultation which proposes that landlords help prevent illegal tobacco trading on premises.

**Q: We are selling a property and have found a buyer. At the buyer's insistence, we entered into an exclusivity agreement which gave the buyer an exclusivity period of 21 days in which to formally contract with us for the purchase of the property. However, another buyer has approached us and offered a higher price. Can we proceed with buyer number 2? Does the exclusivity agreement prevent that and what penalty would we have to pay if we ignore it and go ahead with buyer number 2 anyway?**

**A:** Exclusivity is quite normal in a commercial context. The buyer will have insisted on one so that when it starts spending money on legal and other costs, it doesn't find at the last minute that you have been negotiating with someone else and lose the deal. 21 days might not be long enough to exchange contracts, but it will generally be long enough to give the buyer a lead over anyone else and the best chance of closing the deal.

You cannot force the buyer to do a deal with you, and equally they cannot force you to do a deal with them so, if you now decide you want to go with buyer number 2, you might be able to let the 21 days pass and then start talking to that alternative buyer. You must be careful, however, that you are not in breach of the exclusivity agreement. I would expect it to prevent you from talking to anyone else about selling the property in the 21 day exclusivity period. If buyer number 2 has approached you then you must explain you have entered into an exclusivity agreement and you are not at liberty to discuss any other deal until the exclusivity period has passed.

You also need to read the exclusivity agreement carefully as some buyers include strict obligations in them that could affect how much you can say at this stage to buyer number 2. It may also require you to act in good faith to try to progress the deal with buyer number 1, or something similar, so you would not be able to just "down tools" while time passes.

Broadly though, now that you have signed up to the agreement, you should not breach it by engaging with another bidder and letting them have access

to any information about the property. You certainly should not start discussing potential sale terms or send them a draft contract. If you ignore this you could be sued for breach of contract and be liable for the costs incurred by buyer number 1 who acted in reliance on the exclusivity agreement. These costs could be quite significant depending on the nature of the property and the extent of the legal and other costs buyer number 1 may already have occurred. There is also a reputational risk if you deliberately breach the agreement.

**Q: What's all this I hear about the government wanting to make landlords stop illegal tobacco trading on their premises?**

**A:** Landlords could potentially find themselves hit with new lease requirements, periodic checking obligations and even financial penalties following the publication of the *'Sanctions to tackle tobacco duty evasion and other excise duty evasion'* consultation document by the government.

The government is committed to tackle evasion of tobacco duty and the illicit tobacco trade. In 2015-16, the UK consumed around 5 billion illicit cigarettes and 3,200 tonnes of illicit hand-rolling tobacco. Evasion of tobacco duty robs public finances of revenue and undermines the government's wider public health objective of reducing smoking, which contributes to over 100,000 deaths each year.

**Q: Sure, but what does this have to do with landlords?**

Whilst the underground world of illicit tobacco trading may seem remote to landlords, they need to be aware of some key – and potentially onerous – proposals of the consultation. These proposals reflect a perception that some landlords are turning a blind eye to their tenant's behaviour to protect their rental income.

Whilst many leases prohibit a tenant from using the property for any illegal, immoral or improper purpose, HMRC are proposing to write to landlord associations to request that they voluntarily add a clause to their standard lease agreements prohibiting illicit tobacco or excise trading.

More serious is a potential sanction proposed in the consultation which would impose a statutory duty of care on the landlords of properties or land which are used in tobacco (or other excise duty) fraud.

The proposals are:

- The duty of care would only arise once the landlord has been notified that the tenant has evaded an excise duty.
- Landlords who have taken reasonable steps to prevent future wrongdoings on their property would have a defence available (in an effort to minimise the burden on them). Such reasonable steps could include:
  - Including provisions in all new leases making it clear that any illicit tobacco trading or any other illicit excise activity will terminate an existing lease and providing HMRC with copies of tenancy agreements. It is not clear whether the usual forfeiture clause for breach of covenant would suffice.
  - Requiring the landlord to undertake periodic checks of the premises and request relevant information from tenants.
  - Contacting HMRC or Trading Standards immediately should landlords have any concerns.
- If the tenant continues to deal in illicit excise trading and the landlord cannot demonstrate that they have taken steps to address the issue, HMRC will consider action against the landlord. A new civil penalty would be introduced for non-compliance.

### **Q: Sounds pretty onerous for landlords. What happens next and can I object?**

The consultation document seeks views on whether the proposed steps landlords could take to prevent illicit activity on their properties are reasonable and proportionate. HMRC is also querying what sanctions they should apply to landlords who fall short of their obligations, including whether they should suffer a financial penalty.

Responses to the consultation are due by 12 May 2017 and can be found at <https://www.gov.uk/government/consultations/sanctions-to-tackle-tobacco-duty-evasion-and-other-excise-duty-evasion>

*An earlier version of the question on illegal tobacco trading appeared on our blog: [www.ukrealestatelawblog.com](http://www.ukrealestatelawblog.com). Sign up to receive regular, topical commentary on real estate issues.*



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