Real estate

CLYDE&CO

Bulletin

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Contents

Welcome to the spring edition of the Clyde & Co Real Estate Bulletin, prepared by members of our real estate team. Our bulletins are aimed at keeping you up to speed with recent key developments in the real estate industry.

In this issue we first remind you of Commercial Rent Arrears Recovery (CRAR) that comes into force on 6 April 2014 and enables a commercial landlord to effect recovery of arrears of rent.

We follow on from our discussions in the January edition where we considered how the introduction of the Growth & Infrastructure Act has changed the procedure for registration of land as a town and village green; we now report on the new Supreme Court ruling on town and village green's in favour of the landowner in recent cases.

Next we look at the previously unfair position when tenants have gone into administration the day after a rent quarter day, and then attempted to avoid liability to pay rent even if they remain in occupation of the property. We discuss the decisions in *Goldacre* and *Luminar* that were recently overruled by The Court of Appeal, ruling that rent can now at times be recovered as an administration expense.

We then comment on the recent Court of Appeal decision in *Barclays Wealth Trustees (Jersey) and anor v Erimus Housing Limited* [2014] EWCA Cw303 which has given some clarity about the status of tenants when they remain in occupation at the expiry of a lease.

Next we look at the Judgment that was given by the Supreme Court in *Coventry and Others v Lawrence and another* (2014) UKSC13 regarding the most appropriate remedy if a property right such as an easement or right to light is infringed or a nuisance is committed.

We also revisit the importance of both landlords and tenants complying with the Dilapidations Protocol, when dealing with the claims for terminal dilapidations.

If you would like further information on any of the issues raised in this newsletter please contact the Clyde & Co representatives listed on the last page of this newsletter.

Commercial Rent Arrears Recovery (CRAR)

Keith Conway, Consultant

Commercial Rent Arrears Recovery (CRAR) will finally replace the current landlord's remedy of distress on 6 April 2014. Distress has been a relatively potent remedy for landlords in respect of commercial arrears but will the new regime be equally well regarded?

In place of remedy of distress, CRAR will only permit a landlord of commercial premises to instruct a certified enforcement agent to enter the demised premises and seize certain goods provided the following conditions and restrictions are satisfied:

1. The lease must be in writing
2. The demised premises must be wholly commercial – i.e. contain no residential element or use permitted by the lease. This means that CRAR cannot be used at all for mixed – use premises such as a lease comprising a shop and flat for example
3. The landlord can only seek to recover arrears of rent (and VAT and accrued interest on those). CRAR cannot be used to recover other sums due, whether or not reserved as rent, such as service charges or insurance premiums. This is a substantial change from the previous position
4. The landlord must give the tenant at least seven clear days notice in writing (not including Sundays and Bank Holidays) before the certified enforcement agent may enter the demised premises to seize goods. No prior notice was required in respect of distress
5. After expiry of the notice, the certified enforcement agent may enter the demised premises and remove the goods (not including tools of the trade up to a value of GBP 1,350, nor items in actual use) between the hours of 6.00am and 9.00pm on any day of the week. Following removal, the goods may be sold after the expiry of a minimum period of seven days unless the goods' value would become substantially reduced, in which case the goods can be sold earlier (i.e. if the goods are perishable)

Whilst the landlord can apply to the Court to reduce the initial notice period if there is evidence that the goods might be removed or disposed of in order to avoid CRAR, in reality, the seven clear days notice requirement has introduced a significant window where goods might be removed or a tenant might seek to protect itself by entering into an individual voluntary arrangement or administration. The landlord can also apply to the Court to enter other premises if the goods are removed and stored elsewhere in order to avoid CRAR.

Walking possession agreements are replaced by Controlled Goods Agreements (CGA) and two clear days written notice must be given before the enforcement agent re enters the premises to take away goods subject to a CGA.

Where a superior landlord has the right to exercise CRAR against its tenant and there is a sub lease in place, the superior landlord may instead serve a notice on the sub-tenant requiring them to pay its rent directly to the superior landlord but the notice will only take effect fourteen clear days after service.

In summary the restrictions surrounding CRAR provide a considerably more limited remedy to landlords than the currently available one of distress which despite a somewhat draconian reputation has served landlords well when faced with a defaulting tenant. It remains to be seen whether CRAR will strike a fairer balance between landlords and tenants than distress did, whilst still remaining a potent landlord's remedy.

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Supreme Court ruling on town and village greens – more positive news for landowners and developers

Stephanie Meers, Associate

In our last real estate bulletin (see January 2014) we considered how the introduction of the Growth and Infrastructure Act 2013 has changed the procedure for registration of land as a town and village green ('TVG') broadly in favour of landowners and developers. Now there is more welcome news, as the Supreme Court has ruled in favour of the landowner in two recent cases.

Background

Save for a few pioneer areas of England (Blackburn with Darwen BC, Cornwall, Devon, Hertfordshire, Herefordshire, Kent and Lancashire), the High Court has power under the Commons Registration Act 1965 (the '1965 Act') to order rectification of the register of town and village greens where "the court deems it just", so that land registered as a TVG can be deregistered. In February 2014, in the joint hearing of *Taylor v Betterment Properties (Weymouth) Limited* and *Adamson v Paddico (267) Limited*, the Supreme Court considered how long a landowner has to apply for deregistration of its land as a TVG.

Facts

In both cases, an application was made for the registration of an area of land as a TVG which was subsequently granted by the local authority. Some while later, the relevant landowner commenced an application to rectify the register under the provisions of the 1965 Act. In *Betterment* there was a time lapse of four years between registration of the land as a TVG and the landowner's application to rectify the register. There was a delay of 13 years in the case of *Paddico*. The issue before the Supreme Court solely concerned the delay and whether it was just to rectify the register.

Decision

The Supreme Court held that there could be no arbitrary court imposed time limit in which a landowner must apply for rectification of the TVG register and found in favour of the landowner in both cases. In making their decision, the justices considered whether any significant detriment or prejudice had occurred and ruled that this could not be inferred as a result of the lapse of time. The crucial issue was whether it was just, taking into account all the facts, to order the amendment of the register. This may involve consideration of detriment or prejudice to local inhabitants, other individuals, the public and the fair hearing of the case.

In both *Betterment* and *Paddico*, the Supreme Court found that it was not unjust to deregister the TVG. Whilst a lapse of time is not immaterial, the judgment is beneficial to landowners and developers who wish to make claims (despite a significant lapse of time) for rectification where they can prove that the land has been incorrectly registered. However long the delay in applying for rectification, the starting point is whether it is just to deregister a TVG that should never have been registered.

The future

This decision confirms that the 1965 Act provisions can be invoked by the majority of English landowners. The announcement from DEFRA that only two further pioneer areas (Cumbria and North Yorkshire) are intended to be made before the next Parliament means that this wide remedy will remain important in the coming years.

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Game changer: rent can now at times be recovered as an administration expense

Keith Conway, Consultant

For quite some time landlords have been in an impossible position when their tenants have gone into administration. This is because the effect of recent case law has made it common for companies to enter into administration the day after a rent quarter day, thereby effectively avoiding liability to pay rent even if they remain in occupation of the property. If the company was sold quickly then this would mean in effect that the new company could trade for free for the first three months.

The Court of Appeal has now overruled the decisions in *Goldacre* and *Luminar* and ruled that administrators are bound to pay rent as an expense of the administration for the whole period that they are causing the company to use the property, regardless of when the rent fell due under the lease.

Background

Readers of our real estate bulletin may recall that back in March 2012 we wrote about the unsatisfactory state of the law in this area. In summary, the position was as follows:

- When a tenant goes into administration a moratorium comes into effect which prevents any enforcement action being taken against it by the landlord for rent arrears and prevents a landlord forfeiting the lease without the permission of the administrators or the Court
- Administrators are obliged to treat some debts as expenses of the administration; others will just rank as an unsecured debt
- Where rent fell due under a lease after a tenant had gone into administration and the administrators retained the property for the purposes of the administration then the entire quarter's rent was payable as an expense, regardless of whether the company had vacated the property before the end of the quarter
- The corollary of that was that rent payable in advance and falling due before the start of an administration could not be payable as an administration expense, even if the administrator caused the tenant company to use the property for the purposes of the administration for the whole or part of the period to which that payment related

The facts

This "all or nothing" approach led to companies entering in administration on strategic dates designed to avoid having to pay a whole quarter's rent.

In *Pillar Denton Ltd v Jervis* [2014] EWCA 180, one of the companies in Game, which was the tenant of hundreds of retail properties entered into administration on 26 March 2012. This was just one day after approximately GBP 10 million in rent had fallen due under its leases.

Some stores closed down immediately but some stores continued to trade and the administrators sold the business and many of the company's assets to Game Retail Limited on 1 April 2012. By the time that the case got to the Court of Appeal GBP 3 million in rent was still outstanding.

The decision

The question for the Court was when does rent rank as an expense of the administration and when is it no more than an unsecured debt?

The Court of Appeal found as follows:

- The administrator must make payments at the rate of the rent for the duration of any period which the administrator causes the company to retain possession of the property for the benefit of the administration (or winding up, as the case may be). This is called the "salvage principle" and restores the position to what it was prior to the decisions in *Goldacre* and *Luminar*
- The rent will be treated as accruing from day to day and will rank as an expense of the administration

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- The duration of the period for which rent is payable will be a question of fact as to whether the administrators are using the property for the purposes of the administration and will not be determined merely by reference to when rent days fall and whether this is before or after the tenant company enters administration
- If the administrators use only part of the property, it would seem that the Court will most likely apply a fair common sense approach and test if the unused part was sufficiently separate to apportion the rent between an expense and an unsecured debt. If use of part of the property by the administrators means that no-one could sensibly use the remaining part, it is likely the Court will treat all the rent as an expense of the administration

Conclusion

The restoration of the "salvage principle" will be most welcome to landlords who will now at least be paid in full for the period that the property is being used. The principle applies equally to liquidations. It will also enable administrators to have certainty as to their expenses which should result in the preservation of jobs and value for parts of the company that continue to trade in administration.

To assist in any factual argument as to the period for which the administrators were using the property for the benefit of the administration, we would recommend writing to administrators immediately on their appointment, stating your belief that they are in beneficial occupation and using the property for the benefit of the administration. If appropriate, it may also be advisable to demand permission to forfeit the lease, as the administrators' refusal of this request would be clear evidence of their use of the property.

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Obtaining protection

Mike Lewis, Senior Associate and **Sholto Hanvey,** Trainee Solicitor

In 2013, the High Court made a decision that sent ripples of concern through the World of commercial landlords and tenants. In *Barclays Wealth Trustees (Jersey) Ltd v Erimus Housing Ltd* [2013] EWHC 2699 (Ch), the Deputy Judge held that where a tenant of a commercial property had continued in occupation after the expiration of a contracted-out fixed-term lease, an implied periodic tenancy had arisen. The effect of the establishment of this tenancy was that when the tenant vacated the property, they were found to have breached the terms of the tenancy, and so owed the landlord 13 months in rent, equal to around GBP 185,000. This decision made tenants sit up and take note – for it is not only landlords who needed to be wary of the implications should a tenant acquire the protection of the London & Tenant Act 1954 (LTA '54).

The nature of a commercial tenant's occupation in the situation where they remain in occupation after the expiry of a contracted-out lease, whilst negotiations are ongoing, is a notoriously murky area: are they 'holding-over' as the LTA '54 permits, are they merely tenants at will, or might a periodic tenancy arise?

The traditional approach was that where the law has to "fill in the gaps" it "will imply, from what was agreed and all the surrounding circumstances, the terms the parties are to be taken to have intended to apply".

The decision

However last week, in hearing the appeal, and reversing the decision of the Deputy Judge, the Court of Appeal has bought some clarity to the legal position, ruling that Erimus Housing, the tenant, was a mere tenant at will throughout the period of occupation following the expiry of the lease.

In the High Court the Deputy Judge's decision had been based on two principle factors: firstly, that negotiations were only a "very half-hearted exercise", and that the occupation was effectively a permanent arrangement, rather than an interim measure whilst a new lease was finalised. Secondly, neither party would evict or vacate without notice, as indicated in August 2011, when the tenant advised the landlord of their intention to vacate in March 2012 (seven months away). The court took this to be conclusive evidence that the parties expected security of tenancy over that period, precluding the arrangement from being a mere tenancy at will.

However, the Court of Appeal recognised the inherent problems of the court acting to determine what can be considered effective negotiations. Lord Justice Patten appreciated that the negotiations had been "desultory", but crucially he also recognised the importance that the arrangement of the tenant in occupation was founded of a state of negotiation.

Furthermore, Lord Justice Patten felt that the Deputy Judge had not given enough weight to the fact that a periodic tenancy would attract the protection of the LTA '54. Since both the expired lease had been contracted-out of the LTA, and the heads of terms of the new lease – agreed in June 2011 – also contracted-out, it could not have the intention of the parties to attract the protection of the Act.

Comment

The Court of Appeal has bought some clarity to the position, highlighting the importance of taking into consideration "all of the surrounding circumstances", the intention of the parties, and allowing a very broad interpretation of the "throes of negotiation". It reasserts that the courts should be reluctant to infer contractual terms where parties are themselves negotiating contractual arrangements, and reaffirms the principle established in *London Baggage Co Ltd v Railtrack Plc* [2000] L&TR 439 that the situation where a commercial tenant is holding over during negotiations for a new lease is a "classic case" where the court will impute a tenancy at will.

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"*Shelfer* back on the shelf"

Keith Conway, Consultant

In previous Real Estate Bulletins, we have suggested that an injunction was the prime remedy rather than damages if a property right such as an easement or right to light is infringed or a nuisance is committed. However, this will now need to be revisited in light of the judgment that was given by the Supreme Court in *Coventry and Others v Lawrence and another* [2014] UKSC 13.

The case concerned the law of nuisance and the judges in the Supreme Court found that the Court should not be so "slavish" in its approach as to whether an injunction or damages should be awarded as the most appropriate remedy.

Facts of the case

Ms Lawrence and Mr Shields bought a house near a Trojan speedway stadium and race track which hosted motor racing events. They issued proceedings against the owners and lessee of the stadium and race track for noise nuisance. At first instance, the Court granted an injunction restricting the noise above certain levels and at specified times of the day. They also awarded damages of approximately GBP 20,000.00. The Court found that the planning permissions which had been previously granted to the Defendants were not particularly relevant as they were personal to the occupier and limited the hours of use. As such, they had not altered the character of the locality permanently. The Defendants appealed to the Court of Appeal as they believed the planning permissions and Certificate of Lawfulness of Existing Use of Development should have been taken into account and an injunction was not appropriate.

The Court of Appeal reversed the decision and found that the decisions of the Local Planning Authority had changed the character of the neighbourhood and as such, the noise generated from the stadium and track were established characteristics of the locality.

As a consequence, whilst the planning permissions did not authorise the nuisance, they had changed the character of the locality so that the actual noise was no longer held to be a nuisance. The Court was influenced by the fact that the planning permissions were a matter of public record and could have been reviewed before Ms Lawrence and Mr Shield's purchase. Ms Lawrence and Mr Shield appealed to the Supreme Court.

The Supreme Court's decision

The Supreme Court reinstated the injunction finding that the character of the locality is to be assessed with the defendant's activity carried out but not to the extent where it causes a nuisance.

However, the decision is very significant in light of the comments of Lord Neuberger and Lord Sumption who took the opportunity to clarify when the Court should award damages in lieu of an injunction.

Lord Neuberger stated that the case of *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 should no longer be followed and firm guidance should be avoided; instead the Court should consider the facts of each case and apply judicial discretion. In summary, the case of *Shelfer* had been followed for some time and stated that damages in lieu of an injunction would not be appropriate unless the following *Shelfer* principles were satisfied:

a. The injury was small

b. The injury was capable of being estimated in money

c. The injury could be compensated by a small payment

d. It would be oppressive to the defendant to grant an injunction

He also commented that the Court has a power to award damages instead of an injunction and should not award an injunction as a matter of right. It should look to whether public interest is relevant in deciding whether an injunction is the most appropriate remedy. The Court should consider whether an injunction would have serious consequences for a defendant or its employees as well as members of the public who might derive benefit from it. The example of planning permission was used, as this may provide support that an activity is of benefit to the public.

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Lord Sumption argued that the Court should not adopt an injunction where there is another adequate legal remedy available. He said that *Shelfer* created a strong presumption in favour of an injunction and maintained that the *Shelfer* principles were now out of date. It was a case that had effect when less people owned property. Damages were now thought to be an adequate remedy for nuisance and an injunction should not be granted in a case where conflicting interests, other than those of the parties, arise. For example, where the use of land, which is the subject of a nuisance or other claim, requires and has received planning permission.

Lord Sumption also considered the approach that has been taken by other jurisdictions, including Canada and the United States, where a flexible approach allowing for a nuisance to continue if it is in the interests of the wider community is preferred.

Importantly, Lord Neuberger also stated that damages should be made up of both the reduction in value of the Claimant's property as a result of the continuation of the nuisance as well as, where appropriate, the "release-fee" to compensate for the loss of the Claimant's ability to enforce its rights.

Comment

The commentary of both Lord Neuberger and Lord Sumption suggests that injunctions should no longer be an automatic remedy for nuisance. Instead the courts should consider whether damages would be more appropriate, particularly in cases where the public interest outweighs the Claimant's complaint. The decision seems to align with common sense, in so far as if the general public derive a great benefit from an activity, it should not be for the interest of one individual to outweigh the public's interests at large.

It will now be crucial to see how the decision will influence the Court in other situations like infringements of rights to light or easements where developers have more recently been restrained in their approach and moved away from developing in breach of rights whilst offering to compensate the affected party because the developer has feared that the Court would grant an injunction (as happened in the *Regan* and *Heaney* cases – see Real Estate Bulletin of June 2013). It will also be interesting to see how the decision is taken up by the Law Commission whose proposals as part of their consultation on rights to light focused on whether the grant of an injunction would cause disproportionate harm to the developer and neighbour – a somewhat similar approach to that now taken by the Supreme Court in this case.

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Dilapidations Protocol – Court ("well") limited in award for indemnity costs

Keith Conway, Consultant, and **Ben Meneham,** Trainee Associate

In previous Real Estate Bulletins we have emphasised the importance of both landlords and tenants complying with the Dilapidations Protocol ("the Protocol") when dealing with the claims for terminal dilapidations. The courts have insisted that landlords and tenants must make their cases on liability and quantum clear at an early stage in any dispute, for example in the case of *Hammersmatch Properties (Welwyn) Ltd v Saint-Gobain Ceramics and Plastics Ltd* – in our October 2013 bulletin.

In the recent case of *Courtwell Properties Ltd v Greencore PF (UK) Ltd* [2014] EWHC 184 (TCC), the court was asked by a landlord, after an out of court settlement, to make an order for indemnity costs against its tenant based on breaches of the Protocol. The court firmly rejected the application. Whilst not seeking to impose rigid criteria to succeed in an award for indemnity costs, parties must at least (i) follow the Protocol, (ii) act in a proportionate way, and (iii) the defaulting party's behaviour must have been particularly unreasonable.

Facts of the case

Courtwell Properties Ltd ("Courtwell") was the sub-lessee of industrial premises in Salford. Its sub-sub-lessee was Greencore PF (UK) Ltd ("Greencore") who in turn had sub-let the premises for use as a bakery. Greencore's tenant's sub-lease expired and in April 2010 Courtwell prepared terminal schedules of dilapidations claiming total remedial work costing GBP 1,774,000.

The bakers apparently had no intention of leaving the premises, and so Greencore's building surveyor suggested that Courtwell had suffered no loss. After numerous meetings between the parties' expert building surveyors Courtwell issued a letter of claim in June 2012 limiting its claim to GBP 700,000 based on its expert's assessment of the diminution in the value of its reversion rather than the costs of remedial works.

Greencore were unable to comply with the prescribed time limits for a response in accordance with the Protocol and did not respond to Courtwell's suggestions for mediation. Accordingly Courtwell issued a claim in the Technology and Construction Court in November 2012.

After the court approved Courtwell's cost budget of GBP 411,171, the case settled in October 2013 after Greencore accepted Courtwell's Part 36 Offer for GBP 800,000. However, as the Part 36 Offer was made within 21 days of the trial date the court was not bound to assess costs on the standard basis and Courtwell applied for indemnity costs alleging Greencore's conduct throughout the claim had not complied with the Protocol and had been unreasonable. Indemnity cost assessments are most beneficial as the onus of proof as to whether costs had been unreasonably incurred then falls on the paying party. Courtwell relied upon four grounds:

1. A failure by Greencore to comply with the Protocol
2. A failure by the Greencore to mediate
3. Greencore's pleading that Courtwell had suffered no loss
4. The alleged unreasonable conduct of Greencore's experts

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Court decision:

Judge Akenhead noted how indemnity costs are only appropriate where:

– The paying party's conduct is particularly unreasonable (conduct out of the norm)
– Where a party pursues or defends a hopeless claim (not just a weak one)

Courtwell were granted (as accepted by Greencore) the costs for litigation on a standard basis, however were not awarded indemnity costs for the following reasons:

1. Courtwell had not demonstrated the high degree of unreasonableness required to justify an award of indemnity costs. On the evidence, both sides were at fault for non-compliance with the Protocol. Specifically, Courtwell did not serve its Schedule and Quantified Demand within 56 days of the Lease expiry and delayed substantially in this respect. There was also a noteworthy lack of co-operation, by experts on each side, and the court held that Greencore could not be penalised in costs because of its delays or conduct
2. The failure to mediate was a result of both parties' actions and it was unlikely that mediation would have succeeded in any event (given the poor relationship between the experts). Greencore were cooperative: not accepting mediation only due to their requirement for further documentary evidence; suggesting expert determination; and also participating in the settlement process
3. The "no loss" defence was not so implausible or hopeless that no professional team should have put it forward. Furthermore, the court did not think this was so unusual in a dilapidations case, where Greencore had relied upon advice from multiple expert parties; (surveyors, valuation experts, and Counsel)
4. As the experts had corresponded on a without prejudice basis (not expecting future scrutiny by the court) and as all the arguments had not been tested through oral evidence, it was impossible to come to a sensible and fair conclusion as to whether or not Greencore's experts had behaved so unreasonably as to justify an order for indemnity costs

Comments

The claim for indemnity costs failed resoundingly. Moreover, the court made clear that parties must act in a proportionate way at all stages of litigation and properly follow the Protocol. Further, there should be very few, if any, applications of this sort.

It had been suggested by some commentators that applications for indemnity costs might be an escape from the more recent emphasis on proportionality of costs in accordance with the Jackson reforms. This case, however, demonstrates that proportionality must be carefully considered before making an application for indemnity costs. As Judge Akenhead said, whilst the claimant was entitled to seek indemnity costs, "*what it can not be allowed to do is to act in a disproportionate way when it comes to [its present] application*".

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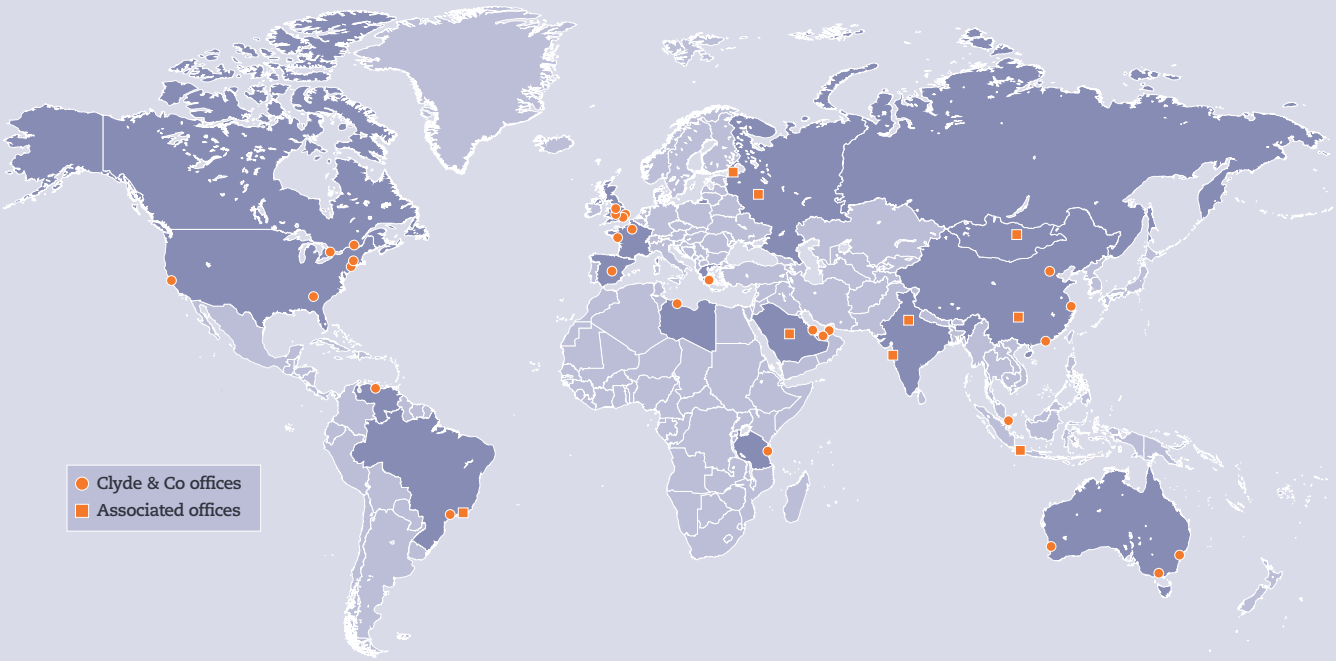

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