

The background of the entire page is a photograph of a sailboat's mast and rigging. The mast is a dark, vertical pole on the left side, with numerous thin, dark lines of rigging extending across the frame. The background is a bright, warm sunset sky with a gradient from yellow at the top to orange and red at the bottom. The overall composition is dynamic and nautical.

K&L GATES

OVERRIDING INTEREST

Summer 2018

Highlighting developments and issues in the real estate industry

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IMPLEMENTATION OF BENEFICIAL OWNERSHIP REGISTER FOR OVERSEAS OWNERS AND BUYERS OF UK PROPERTY DELAYED UNTIL 2021

*The UK government intends to publish a draft Bill later this year to create a register of the beneficial owners of overseas owners and buyers of UK property, with a view to implementation of the new regime in 2021. **Our report on the UK government's proposals which provides additional background appeared in the Summer 2017 edition of *Overriding Interest* and is available [here](#). This article provides an update on government proposals following the publication in March 2018 of a government response to its April 2017 Call for Evidence.***

On 22 March 2018, the government published its response to its 5 April 2017 Call for Evidence in which it sought views and feedback on initial proposals for a new register intended to show beneficial ownership of overseas legal entities that own UK property or participate in UK public procurement (the “New Register”). The published response details certain changes to government plans for the New Register and outlines the current timeline for legislation to implement those plans.

The government's view, as set out in the Call for Evidence and reiterated in the response document, is that the New Register will improve the transparency and accountability of overseas legal entities operating in the UK. Respondents to the Call for Evidence were reportedly divided on the likely impact of the proposals on the UK property market. Whilst a minority felt that the New Register requirements would have a positive

impact by improving the reputation of the UK property market, more of the respondents were concerned that these requirements could deter overseas investors and make the UK property market less competitive on a global level.

Nevertheless, the government is pressing ahead with its proposals, and will publish a draft Bill for scrutiny later this Summer.

Key Points

- The current timeline proposes that the New Register will be operational in 2021.
- All forms of overseas entity (but not trusts) owning or proposing to acquire property in the UK will have to provide information to Companies House about their ultimate beneficial owners and apply for a registration number.

- In a change to the original proposal, relevant overseas buyers of UK property without a registration number will receive beneficial but not legal title.
- The transitional period during which overseas entities already owning UK property will have to obtain a registration number or sell the property will potentially be extended to longer than the 12 months originally proposed. There will be criminal offences to provide an effective sanction for those existing relevant UK property owners who have no plans to sell, lease or mortgage their property.
- The New Register will be held at Companies House, will be available for anyone to view without charge, and will contain very similar information to the existing Persons with Significant Control Register for UK companies (the “PSC Register”).
- Compliance will extend to owners and buyers of freehold title as proposed but also to all tenants under leases of a ‘registrable duration’ - a broadening of scope of the regime as compared with the proposal to apply the regime to tenants under leases of at least 21 years’ initial duration.
- Once registered, New Register information must be updated, at an interval which has not yet been decided but which may potentially be more frequently than the 2 year interval originally proposed. There will be criminal sanctions for failure to update.

Who is required to register?

The government has concluded that all forms of overseas companies and other entities which own or intend to acquire UK property will be affected. However, the government may provide exceptions for certain types of entity where appropriate, such as where there is already transparency of beneficial ownership information. Overseas trusts will be excluded from the scope of the New Register requirements.





As proposed, overseas entities bidding for UK government contracts will also be in scope.

The requirements will apply to UK registered freehold title as planned. It was originally proposed that they would also apply to tenants under leases with an initial term of at least 21 years. However, the government has now decided to expand the scope to holders of all leases of ‘registrable duration’. All leases of more than seven years are compulsorily registrable, but there are some shorter leases (such as reversionary leases) which are also subject to compulsory registration.

Overseas entities which currently own UK property will have a transitional period

to sell the property, or to comply and obtain a registration number. This period was originally proposed at 12 months, but following feedback the government is considering extending this period. At the end of this period, a restriction will be noted on the title of the property to prohibit the owner from selling, leasing or charging the land until it has complied with the registration requirements.

In relation to UK government procurement, the government has decided that it would be disproportionate to require all overseas bidders to register before bidding. Instead, only the preferred bidder will be required to supply beneficial ownership information as a condition of being awarded a contract.

What are the consequences of non-compliance?

The government has confirmed its proposals to enforce the New Register requirements by a combination of statutory restrictions, putting notes on the relevant land register, and criminal sanctions.

Current overseas owners who have no plans to sell, lease or mortgage their property will be subject to criminal sanctions for failure to comply by the end of the relevant transitional period. There will also be criminal sanctions for failure to update the New Register where required.

The government's initial proposal was for a document transferring UK property to an overseas entity buyer to be voided where the overseas entity does not have a valid registration number. Following consultation, the government has come to the view that this would not be workable as a matter of Land Law and could have damaging consequences for innocent third parties. Accordingly, in these circumstances the regime will be designed so that the beneficial interest but not the legal title in the relevant property would pass to the non-compliant overseas entity in this scenario.

What information will be on the New Register?

The information required will be essentially the same information as is required on the PSC Register with the same control threshold of 25%, save for the point mentioned below concerning "managing officers".

Some responses to the Call for Evidence suggested that certain additional information should be required such as details of related politically exposed persons and the exact percentages of ownership. However the government has largely decided to align the requirements of the PSC Register and the New Register, both in relation to the definition of a beneficial owner and in terms of the information required from that beneficial owner. In summary, that information is, in relation to each individual (if any) who directly, or indirectly through a majority ownership chain, (i) holds more than 25% of the shares or voting rights in the relevant entity, (ii) can control the appointment of a majority of the relevant entity's Board, or (iii) can otherwise exercise, or have the right to exercise, significant interest or control over the relevant entity, the following: the individual's name, date of birth, residential and service address, nature of control, and when that person became a person of significant control.

One area of difference from the PSC Register requirements which the government has confirmed it is pursuing will be to require an overseas entity which is unable to give information about its beneficial owners to provide the same information on its "managing officers".

It continues to be expected that there will be system allowing persons to have their information excluded from the public view where they are at risk of violence or intimidation as a result of information being made public.

When does the New Register have to be updated?

The information on the New Register must be kept updated. This was originally proposed to be required every two years, but respondents felt this period was too long. The government is therefore considering increasing the frequency of these updates. Despite suggestions, the updates will not be event-driven.

A failure to update information as required will result in criminal sanctions. It is proposed that registered overseas entities will be contacted three months before any update is due.

How will property lending be affected?

The government initially proposed that only accredited or legitimate lenders would be able to repossess and dispose of property which has a New Register-related restriction against it. This was because they were concerned that otherwise beneficial owners of property could seek to circumvent the rules by posing as a lender and repossessing their own property. However, respondents to the Call for Evidence mostly felt that a

definition of legitimate lenders would not be workable and the government has concluded that it agrees that a distinction between legitimate and other lenders would be impractical to create and implement.

What next?

The government intends that a draft Bill will be published in Summer 2018, and will be introduced to Parliament early in the second session (Spring/Summer 2019).

Currently, the government intends that the New Register will become operational in 2021, which misses the original target date by a year. This delay has resulted in criticism from some commentators, including the Mayor of London, who called for the government to speed up their plans saying that “Londoners deserve to know the identity of those that own property in their city.”

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COMMERCIAL REAL ESTATE INVESTMENT IN THE UK—A BRIEF GUIDE

This real estate investment guide gives a brief overview of some of the legal issues and principles of buying and investing in property in England and Wales. Although the legal principles may not be familiar to overseas investors, the UK does offer a generally certain and transparent market with well established legal principles.

At K&L Gates we guide our clients through the process of purchasing and investing in UK property, drawing upon experience of the firm's global platform and our strong relationship with brokers, surveyors and other real estate professionals to ensure that we provide a seamless service for our clients' real estate requirements.

WHAT IS THE UK LEGAL SYSTEM?

The UK legal system is formed from a combination of case law and statute. There exists a clear and established legal framework; certainty of law and title and a sophisticated tax regime. The rules governing UK law have evolved from various sources including domestic legislation, common law and European Community law which is currently binding on the English legal system. Scotland has its own jurisdiction which is not covered in this guide.

WHAT DOES REAL ESTATE TITLE MEAN?

Real estate in the UK includes land and any buildings or other structures on or over the land. It also includes the subsoil below and the airspace above the land to a height necessary for the

ordinary use and enjoyment of the land. The types of ownership and legal rights which exist over a property can have an impact on its valuation. Property is valued by a surveyor, who is regulated by a professional body known as the Royal Institution of Chartered Surveyors. We liaise with the valuers to ensure that they are kept informed of material issues which could affect the valuation. In the UK property will usually be either freehold or leasehold.

What is meant by freehold?

A freehold interest is an interest in land that is not limited by time. The owner of a freehold generally controls and owns all the property: the land itself, any buildings/ structures on it, the subsoil below and the airspace above it. However, ownership may be restricted by the rights of others (for example a third party may have a right of access over the property).

What is meant by leasehold?

With leasehold property, the interest is contractually time limited to the length of the lease. Generally, flats and much of central London property are held on a leasehold basis.

The lease is the key document setting out the terms of the relationship between the Landlord and the occupier (the Tenant). The lease terms will vary depending on the property type and the relationship between the landlord and the tenant.

In the UK there is a public register which contains details of the type of property. Where title to the land is registered all parts are registered together under the same title at the Land Registry. This is maintained by the Land Registry (www.landregistry.gov.uk). The Land Registry exists to provide a reliable record of information about ownership of and interests affecting land by maintaining the public register of title, provide owners with a title that is underpinned by the state and simplify the transfer of interests in land.

CONSIDERATIONS WHEN LEASING PROPERTY TO OCCUPY

Negotiating Terms of the Lease

We often advise clients who are looking to occupy space in the UK for the first time, for example when setting up UK operations, or relocating to the UK for expansion purposes. We then would recommend that our clients instruct the services of a real estate agent to help them find premises and to negotiate the main terms of the lease, including the length of the term, the amount of the rent, the length of any rent-free period and any other commercial points. When a deal is struck with the landlord, the commercial terms are set out in a document called “heads of terms”. At this stage the proposed time scales will be agreed upon and typically the parties anticipate that the letting will be concluded in three or four weeks. Heads of terms are not legally binding. We have strong relationships with agents in London and the rest of the UK and can guide our clients accordingly.



Minimise the Risk of Delays

If the client is fitting-out the premises, it is critical that it instructs the fitting-out contractor and obtains the landlord's approval to the plans and specifications for the works as swiftly as possible. The heads of terms will state that the landlord will enter into a fitting-out licence at the same time that it grants a lease. In our experience, dealing with this aspect of the project is a major cause of delays and it should therefore be treated as a priority.

Another significant cause of delays is where the landlord itself holds the premises on a lease. This is called a superior lease and it often requires that the landlord obtain the superior landlord's consent to the grant of the lease to the client/tenant. It is important that the landlord makes the application for this consent at the earliest stage, and progresses it vigorously.

Be Prepared To Provide Deposits or Guarantees

The landlord will want to know that the tenant entity has sufficient financial strength to be able to pay the rent and to perform the obligations on the tenant's part set out in the lease. Often our

overseas clients establish a UK subsidiary company and this company becomes the tenant under the lease. As it may not have any history of financial performance at an early stage, the landlord may ask for a rent deposit, which is typically for between six and 12 months' rent. They may ask that the overseas parent company gives a guarantee of the subsidiary company's lease obligations. If that is acceptable, we would often help, through our office in which the client is based, to give a legal opinion letter which confirms to the landlord that the parent company has entered into the guarantee in a legally enforceable manner in the parent's own jurisdiction.

REAL ESTATE INVESTMENT STRUCTURES

Various investment structures can be used to buy and hold commercial real estate investments, particularly where there are joint owners. The best structure always depends on a number of factors, such as how the property will be funded, tax considerations, and how the property will be managed and owned, and what is the overall investment strategy (including exit). At K&L Gates our multi disciplinary team is on hand to guide our clients through this process.

Common investment structures include:

- Joint ventures;
- Partnerships (with limited liability);
- Limited liability companies;
- Property unit trusts;
- REITS.



RESTRICTIONS ON HOW THE PROPERTY IS OWNED

Overseas investors acquiring real estate in the UK can generally do so without any restrictions. Real estate can be bought, rented or leased by individuals or companies for their own use or for investment.



There are some basic legal hoops for a purchaser to go through in order to facilitate the acquisition process, so for instance a purchaser would need to provide:

- Evidence of identity in accordance with statutory requirements (money laundering regulations);
- Credit checks on the purchaser's ability to fund and complete the transaction.

A legal opinion may be necessary.

REAL ESTATE FINANCE IN THE UK

The most usual way of raising finance to acquire or invest in property in the UK is to borrow from a bank or other funder. In relation to granting security over UK real estate a lender would generally want to make sure its interest is protected.


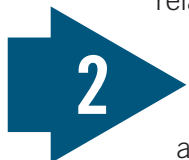
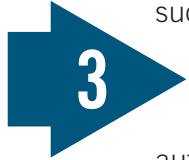


We can help advise on all options in relation to the financing of a real estate transaction.

A lender would protect its interest in one or more of the following ways:

- A charge by way of a legal mortgage;
- A charge over rents and all bank accounts to which rent is paid (leasehold properties);
- A fixed charge over any plant and machinery which is not affixed to the property;
- A charge over shares;
- A "floating" charge over all the assets.

TIMELINE FOR A TYPICAL REAL ESTATE TRANSACTION

The procedure for purchasing property in England and Wales is broadly:

-  **A buyer submits a bid** (or offer for the property) which is accepted by the seller. This is not legally binding at this stage and forms part of the “heads of terms” process. This “heads of terms” document sets out the key commercial terms of the purchase with the seller, such as price, timing and finance arrangements. It is usual for advisers to work together to agree these key terms. Although the heads of terms do not legally oblige the parties to complete the transaction, it is possible to include provisions relating to costs and confidentiality and make these binding.
-  **Due diligence** is undertaken on the property (the key rule is that the buyer needs to make sure they know and are satisfied with issues affecting the property). There are many issues bespoke to the UK which can be daunting to those not familiar. For example, there may be restrictions affecting how the property can be used and enjoyed (restrictive covenants) or for leasehold properties there may be restrictions on how the lease can be disposed of. Issues which arise on both freehold and leasehold properties are fully investigated by the legal team in conjunction with other advisers such as specialists, for example “rights of light” specialists.
-  **Usual diligence includes** reviewing the title documents, undertaking various searches of the public registers, raising enquiries of public authorities and utility providers. When an investment property is being purchased we would also need to review rental income and financial standing of the tenants.
-  **A full inspection and survey of the property** is carried out. There are different sorts of surveys depending on the type of property being acquired.
-  **The terms of the Sale Contract** (in line with the “heads of terms” agreed at the outset) and transfer document (by which title is transferred to a purchaser) are negotiated. These may need further amendment depending on what the full legal due diligence process shows (we would issue a report on title, before exchange of contracts). We can help you with this. The purchaser may also need to negotiate the banking documents with the lending bank.

WHAT TAXES AND COSTS ARE RELEVANT?

The taxes that need to be paid very much depend on how the real estate transaction is structured. However, two “usual taxes” which are relevant to buying property in England and Wales, are Stamp Duty Land Tax (“SDLT”) and Value Added Tax (“VAT”).

SDLT is charged on land and property transactions in the UK. The tax is charged at different rates and has different thresholds for different types of property and different values of transaction. Almost all land transactions will be subject to SDLT, which is payable within 30 days of the date of purchase (this will reduce to 14 days next year).

The current SDLT commercial property rates and thresholds for a freehold commercial purchase are:

- 0%, where the amount payable is £150,000 or less;
- 2%, where the amount payable is between £150,001 - £250,000;
- 5%, where the amount payable is between £250,001 or more.

Where the property is owned by a company (or other vehicle), the purchaser may be able to acquire the company, rather than take a direct transfer of the land.

VAT is a tax that is charged on most goods and services that VAT registered businesses supply in the UK. Generally the supply of land is exempt for VAT purposes. However, an owner of commercial property can opt to tax the property so as to treat any supplies it makes in relation to the property subject to VAT at the standard rate. If the option is made, any sale is normally subject to VAT. Many owners of commercial property opt to tax.

The acquisition of an income generating investment property should ordinarily be treated as a “going concern” and therefore no VAT should be payable. All the purchaser needs to do is ensure it complies with certain administrative requirements to ensure the property transaction is treated as a “going concern”. We can help you with this. Additional tax can be payable on rental income and this is something we could advise you on.

LIABILITIES

If the owner of the property is also the occupier, then he/ she will be under a statutory duty to keep the property in a good state of repair. This will require compliance with various health and safety and environmental matters as well as owing a duty of care to all visitors to the property.

If, however, the property is acquired for investment purposes only, the cost of complying with these obligations should ordinarily be passed to the tenant(s).

PLANNING AND ENVIRONMENTAL ISSUES

The planning regime is also always a relevant factor when acquiring or investing in UK property. Planning permission is usually required for the carrying out of any development of land. The local planning authority is responsible for deciding whether a proposed development should

be allowed to go ahead. We work closely with our colleagues in our planning legal team to provide a seamless service to clients, particularly if tricky “planning issues” arise.

In the UK the contaminated land regime set out in the Environmental Protection Act 1990 allows regulators to take retrospective action on current or former owners in relation to “contamination” issues. Additionally, the targets set out to reduce greenhouse gas emissions do impact on some of the legal obligations placed on owners or occupiers of UK property. We can advise on these issues.

OTHER ACQUISITION COSTS PAYABLE ON A PURCHASE OF REAL ESTATE IN THE UK

These include:

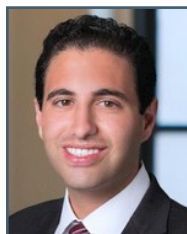
- Search fees, carried out as part of the legal due diligence process;
- Land Registry fees;
- Building surveyor’s fees;
- Valuation fees;
- Investment surveyor’s fees;
- Bank fees;
- Companies House fees; and
- Legal fees, each party usually bears its own legal costs. You should however expect to pay the bank’s legal fees if you purchase with the benefit of bank finance.

NEW JOINERS



Adam Stopyra is an advocate and Partner at K&L Gates in Warsaw. He is an experienced banking lawyer concentrating on regulatory issues,

derivatives and securitization. His practice is also focused on advising on receivables trading, investment funds and payment services. He has advised on various M&A transactions in the banking sector, as well as on opening branches of foreign banks or investment firms in Poland. He has on numerous occasions represented banks and other financial institutions in administrative proceedings at the PFSA (Komisja Nadzoru Finansowego). He deals with mortgage lending and covered bonds and financial instruments. He advised the largest banks in Poland on the process of establishing and building mortgage banks. He has also advised on many resolution transactions in the cooperative financial sector. He has experience in implementing EU regulations such as EMIR, CRD IV, MiFID, UCITS, BRRD, and AMLD.



Robert Salame is an associate at K&L Gates in New York where he is a member of the real estate practice group. Prior to joining the firm, Robert served as an associate

for a full-service corporate law firm where he represented investors, private equity funds, and real estate management firms in connection with all aspects of real estate management, including acquisitions, dispositions, and financing of real estate.

K&L GATES HIRES HOSPITALITY, RESTRUCTURING AND INSOLVENCY TEAM IN NEWARK

The Newark office of K&L Gates has added a team of lawyers to its resort, hospitality and leisure and restructuring and insolvency practices. Partner Scott G. McLester joins from Wyndham Worldwide Corporation, where he served as executive vice president and general counsel, while partner Daniel M. Eliades and Of Counsels David S. Catuogno and William L. Waldman — each with nearly three decades of experience — arrive from LeClairRyan.



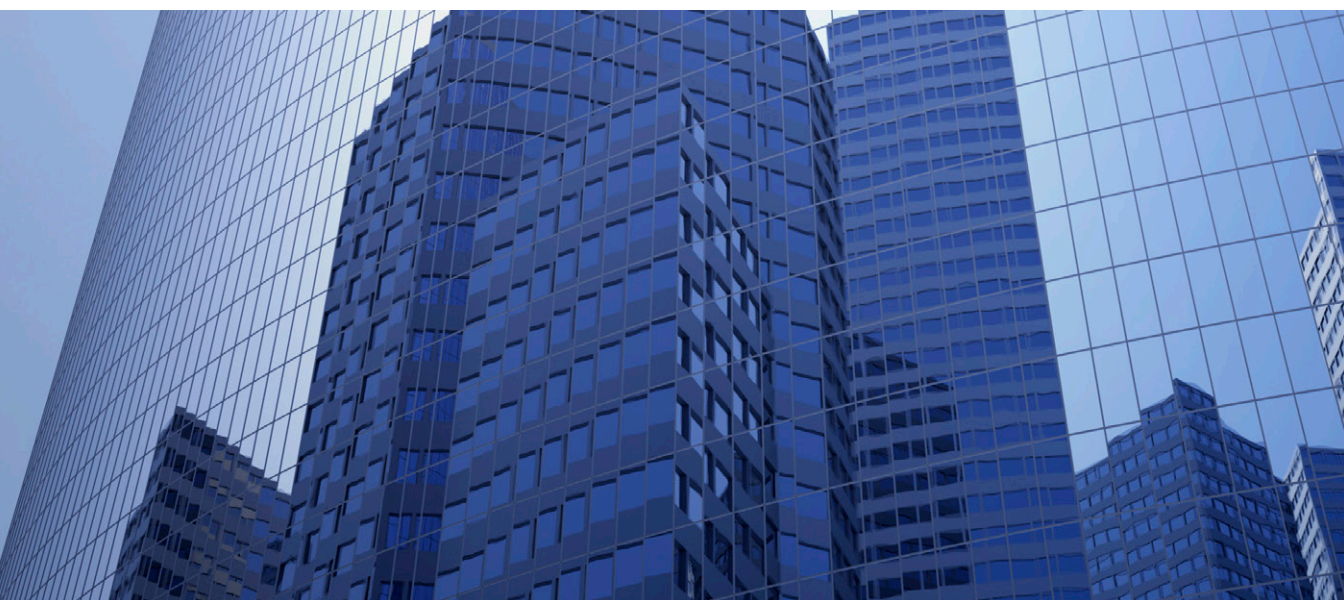
Heather Horowitz is a Counsel at K&L Gates in New York where she is a member of the real estate practice group. Prior to joining the firm Heather served as

counsel at an international law firm where she represented institutional clients in financing transactions, including senior and mezzanine lending and preferred equity arrangements, managed client relationships, lead negotiations, and solved business and legal issues arising throughout the diligence review and closing process.



Edmundo de la Fuente is a Counsel at K&L Gates in Houston where he is a member of the firm's real estate and energy, infrastructure & resources practice

areas. He has extensive experience in real estate acquisition, disposition, project and conventional financing and development and also focuses his US and cross-border transactional practice on the development and financing of energy and infrastructure projects; trading of commodities; mergers, acquisitions and divestitures. Edmundo has significant experience in structuring and negotiating cross border projects, transactions and investments in and throughout Latin America. He is bilingual, and his bicultural perspectives and experiences have proven an asset to our clients.



EVENTS

Property Race Day - July 2018

On 13th July, the London real estate team attended the Property Race Day at Ascot. The Property Race Day is an established key date in the property calendar and the principal aim is to fund-raise for selected charities. It is the perfect opportunity for networking within the sector whilst enjoying a day at one of the finest racecourses in the world.

For more information please contact:
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Experiences of BAME Professionals in the Property and Planning Sectors (Organised in conjunction with the BAME in Property Network) - June 2018

On 21st June we held an event in our London office which discussed different experiences of being a BAME professional in the property and planning sectors. The event included a diverse panel of speakers who gave the audience a snapshot into their working lives: Viral Desai MRTPI - Senior Planning Consultant at Atkins and Chanel Rodriguez – Partner at Knight Frank. The panelists shared varying successes of implementing a diversity and inclusion policy and discussed what strategies have worked, why they believe they

worked and also any difficulties they may have faced. The event was well attended by professionals in the real estate sector who shared best practices of bringing more ethnicity to the property sector.

For more information please contact:
Jonathan Lawrence
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OR

Zara Din
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Oxford Real Estate Society - Brexit Panel - May 2018

On 30th May, K&L Gates held an event in conjunction with the Oxford Real Estate Society with a panel discussion around current and expected impacts of Brexit on the UK Real Estate Market. Piers Coleman, Partner, K&L Gates, was the panel moderator and other speakers included Savvas Savouri, Chief Economist, Partner, Toscafund Asset Management; Helen Thomas, Founder, Blondemoney; James Townsend, Co-Founder, Kontor and Paul Richards, Head Of European Real Estate, Mercer. The evening event was attended by contacts from the UK real estate industry.

For more information please contact:
Steven Cox
steven.cox@klgates.com

GDPR in the Real Estate Industry – What Has to be Considered? - April 2018

In April, the real estate practice group in the Berlin office held a breakfast seminar on GDPR in the real estate industry. Approximately 30 guests attended and Friederike von Brühl discussed the new regulation for the Europe-wide harmonisation of data protection. Key topics discussed included: duty to inform the people concerned, creation of processing directories, big data in building monitoring, data integrity, sharing data with third parties, amongst others.

**For more information please contact:
Friederike von Brühl
friederike.bruehl@klgates.com**

CREFC Spring Conference - April 2018

We recently sponsored the Commercial Real Estate Finance Council (CREFC) two day Spring Conference in London in April. A team of lawyers from the UK real estate finance group attended to meet with clients and main players in the industry. This is a marquee event that provides a platform for commercial real estate finance market professionals to come together to learn about and discuss the latest trends and challenges facing the industry. In November, the London office will once again be sponsoring CREFC's Europe's two day Autumn Conference with a team of London lawyers attending.

**For more information please contact:
Andrew Petersen
andrew.petersen@klgates.com**



EVENTS

Internet of Things (IoT) - Understanding the Risks, Round Table Discussion - September 2018

On 11th September, K&L Gates and Willis Towers Watson are hosting an exclusive breakfast round table event at our London office to discuss the evolving risks for companies using technology, in particular “Internet of Things” (IoT) based solutions. The event will address the following key topics: threats to business strategies from hyper-connectivity associated with IoT; the Human Factor; insurance and the pace of innovation required. It will also include a discussion on scenario-based case studies. Speakers will include: Sarah Emerson, Senior Associate - Insurance Coverage, K&L Gates; Andrew Hall, MBE, Risk Adviser, Willis Towers Watson; Stephen Hopkins, Director – Risk Advisory Services, Deloitte and Fredrik Motzfeldt, GB Regional Industry Leader for Technology, Media and Telecommunications, Willis Tower Watson.

**For more information please contact:
Sarah Emerson
sarah.emerson@klgates.com**

EXPO REAL conference - October 2018

On 8-10th October members of the European real estate team will attend the EXPO REAL conference in Munich, Germany. The conference is Europe’s largest real estate and investment trade fair and provides an opportunity to meet with the key players in the real estate market in Europe and discuss current trends within the sector. A team of European lawyers from K&L Gates will attend.

**For more information please contact:
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Annual Real Estate Breakfast Seminar

Global Real Estate Trends and Opportunities for 2018/2019

**Wednesday 12 September 2018,
8AM - 10AM**

This seminar will include:

- An analysis of Global Real Estate Trends
- Using AI and Big Data to make game-changing Real Estate, investment, development and management decisions
- A panel discussion

Panellists/Speakers:

- Sabina Kalyan, Global Chief Economist and Head of EMEA Strategy & Market, CBRE Global Investors
- Joyeeta Das, CEO and Founder of Gyana
- Steven Cox, (Chair) Of Counsel, K&L Gates LLP

**For more information please contact:
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CASES

SHB REALISATIONS LIMITED V THE PRUDENTIAL ASSURANCE COMPANY LIMITED [2018] EWHC 402 (CH)

Facts - British Home Stores (“BHS”) decreased rents due to landlords by up to 75% in 2016 after establishing a company voluntary arrangement (“CVA”) with its creditors. It was agreed that upon the termination of the CVA, landlords would be entitled to the total rent due under the original leases rather than the reduced levels in the CVA. BHS entered administration a month after the CVA was approved and the administrators traded from stores for a period of months while paying reduced rents under the CVA. BHS later stopped paying rent altogether which led to one of the landlords terminating the CVA. Liquidation inevitably followed. Consequently, the liquidators applied to the High Court for a direction regarding the extent to which BHS should honour the terms of the original leases. The High Court was asked to consider whether BHS could challenge its own CVA under principles relating to contractual penalty clauses. A contractual clause is considered a penalty and unenforceable where a payment of money is stipulated against an offending party but represents an exorbitant alternative to the damages that would be typically awarded at common law.

Held - Penalty clause principles could not apply to a CVA as such an agreement is a hypothetical contract and no element of negotiation had occurred. Furthermore, the rules against penalties were not applicable as BHS had proposed and agreed the CVA and therefore, BHS could not subsequently claim to have been oppressed by it. The High Court found in favour of the landlords, whom the CVA was designed to protect in the event of its termination, and BHS was ordered to pay the full outstanding rent due to the landlords under the original leases.

PARKHURST ROAD LIMITED V SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT AND THE COUNCIL OF THE LONDON BOROUGH OF ISLINGTON [2018] EWHC 991 (ADMIN)

Facts - The developer, Parkhurst Road Ltd (the “Claimant”), purchased a site in Islington for £13.25m. In January 2016, the Claimant applied for planning permission to redevelop the site proposing 96 residential units with a 10% affordable housing provision. Islington council (the “Council”) adopted the Islington Core Strategy in 2011 which requires 50% of all housing built in the Borough to be affordable. Developers

must justify any provision of less than 50% via viability assessment to show that such provision is the “maximum reasonable amount of affordable housing”. The Claimant argued that any more than 10% affordable housing was unviable after adopting a “pure market approach” to calculate a benchmark land value (“BLV”) for the site between £11.9m and £13.6m.

The Council declared that the Claimant’s BLV approach was circular as it included land sales at prices which assumed little or no affordable housing provision and such prices were used in turn to conclude that affordable housing was not viable. The Council calculated that the BLV should be £6.75m after a “per market unit” analysis of comparable market evidence was used to avoid the circularity issue. The Council therefore rejected the Claimant’s planning application as too little affordable housing was to be provided. The Claimant appealed the Council’s decision to a planning inspector who found in favour of the Council and the Claimant subsequently issued proceedings to challenge the inspector’s decision.

Held - Although Holgate J noted that the inspector was wrong to regard the Council’s “per market unit” approach as one which avoided the circularity, he dismissed the claim as such legal error made no difference to the outcome of

the appeal. The judge found that under the Islington Core Strategy it was the Claimant’s responsibility to demonstrate on viability grounds that it had offered the maximum reasonable amount of affordable housing when offering lower than the 50% target. Accordingly, if an applicant’s valuation evidence is validly rejected then it has failed to demonstrate that its affordable housing offer is the maximum reasonable amount. Further, the inspector was held to have validly rejected the evidence of the Claimant as that evidence had failed to include any adjustment of market provisions to ensure that it was policy compliant.

VICTORY PLACE MANAGEMENT COMPANY LIMITED V KEUHN AND KEUHN [2018] EWHC 132 (CH)

Facts - Mr and Mrs Keuhn, lessees of a flat in Victory Place, were required to remove Vinnie, their terrier, to comply with a covenant in their lease. The covenant provided that that no dogs, cats or birds may be kept without written consent from the landlord, Victory Place Management Company Ltd (“VPMC”). Having not received the required consent, the couple refused to adhere to the terms of the covenant. VPMC therefore obtained an injunction in first instance to remove the dog. The leaseholders appealed.

Held - The refusal to give consent was reasonable and not predetermined for two reasons. Firstly, VPMC had considered the general consensus opinion held amongst other lessees which was in favour of the blanket ban. Secondly, VPMC had shown a willingness to consider all exceptional circumstances when deciding whether or not to grant consent. However, the case demonstrates the need for landlords to be increasingly diligent when enforcing against tenants.

On appeal, the Keuhns cited the long-established *Wednesbury* principle of unreasonableness in their defence in an attempt to challenge the justification of a blanket ban on pets. A decision is considered *Wednesbury* unreasonable if it is so unreasonable that no reasonable person acting could reasonably have made it. The Keuhns argued that the “no dogs” policy constituted a predetermined decision and hence, its enforcement did not take into account all relevant factors as required under the *Wednesbury* principle. The High Court considered that both limbs of the *Wednesbury* test (process and outcome) had been correctly applied to VPMC’s decision to deny consent.

NO.1 WEST INDIA QUAY (RESIDENTIAL) LTD V EAST TOWER APARTMENTS LTD [2018] EWCA CIV 250

Facts - The Court of Appeal considered an appeal by No.1 West India Quay (Residential) Limited (the “Landlord”) as to whether it had reasonably refused consent to the assignment of two residential leases. East Tower Apartments Limited (the “Tenant”) required the Landlord’s consent for assignments which could not be unreasonably withheld. The Landlord sought to impose three conditions on the proposed assignments: (1) an inspection of each flat by a surveyor; (2) an undertaking to pay £1600 plus VAT (a fee for the grant of the licence plus a surveyor’s fee plus VAT); and (3) a bank reference for the proposed assignee. The Tenant refused to agree to the conditions and the Landlord refused to provide consent to the assignments.

Held - The Court of Appeal considered whether the Landlord had acted lawfully in refusing consent on a mixture of “good” and “bad” grounds. The Court concluded that the Landlord’s decision to refuse consent was reasonable. The fact that one of the reasons behind the decision was held to be “bad” (the costs undertaking) did not strip the other two “good” reasons of meaning or effect in the context of the decision as a whole. The “good” reasons were held to be free-standing and there was no connection between them.

GORST V KNIGHT [2018] EWHC 613 (CH)

Facts - A house had been divided into two maisonettes; one was on the ground floor (“Flat 1”) and the other was on the first and second floors (“Flat 2”). Flat 1 included a small cellar beneath ground floor level. Mr and Mrs Gorst (the “Tenants”) held a long lease of Flat 1 and obtained planning permission to turn the five-foot high cellar into habitable space. This would involve digging down into the subsoil beneath the premises. The freeholder, Ms Knight (the “Landlord”) opposed the Tenants’ plan and claimed that the subsoil was not included in their demise.

Held - The subsoil was not included in the demise of Flat 1. The Landlord therefore had complete discretion as to whether to allow the extension and on what conditions. Unless otherwise indicated, the freehold interest in land would include everything below the surface and up to the sky. The description of the demise in the lease of Flat 1 included all parts of the building below the midway line. “The maisonette” was separately expressed to include “the foundations and the void or cellar below the ground floor”. The Court found that this specific extension of the demise implied that the subsoil was excluded. This was supported by a reservation to the landlord of the right to pass services through conduits in or under the demised premises and by a clause allowing the landlord to repair the foundations if the Tenants failed to do so.



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