



K&L GATES

# OVERRIDING INTEREST

Winter 2015

Highlighting developments and issues in the real estate industry



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## What Price Heritage?

## Introduction of Enhanced Advisory Services by Historic England

In April this year English Heritage split into two organisations. English Heritage, now a self funding charity, assumed responsibility for the national collection of over 400 historic properties. The regulatory role of planning and heritage protection passed to Historic England who are now the government's statutory adviser on the historic environment.

With the aim of reducing risk on prospective development schemes, Historic England have announced their new package of enhanced advisory services. In exchange for payment of a fee, developers are promised speed, clarity and early engagement with Historic England on historic environment issues. The enhanced advisory services comprise:

- Extended pre-application advice;
- Fast-track listing;
- Listing enhancement to provide clarity within the list description over the extent of statutory protection; and
- Listing screening of sites to ascertain the likelihood of any heritage assets that would warrant statutory listing.

The offer of extended pre-application advice in respect of planning applications, applications for listed building consent and scheduled monument consent, where Historic England would be a statutory consultee, is likely to be of most interest to developers. The practice of charging for pre-application advice by local planning authorities is now the norm. However Historic England has sought to avoid the criticism of running a two-tier planning advice system by offering the first 15 hours of pre-application advice free of charge. Promoters of major schemes that may impact on historic assets will also benefit from an extended service, beyond the first 15 hours, for which they will be charged.



Farnham Castle keep / Lewis Hulbert / CC BY-SA 3.0

In return, Historic England guarantee an allocated lead officer who will be able to participate in early design review meetings and provide a continuity of advice prior to submission of an application.

Developers/fund managers will also be given the opportunity, through the listing enhancement service, to seek clarity within an agreed time frame, of the extent of statutory protection of a building. This will identify which structures are of special interest and may enable parts of buildings to be excluded from protection within an enhanced list description.

The enhanced advisory service also extends to fast-tracking of applications to list a building; schedule a monument; register a park, garden or battlefield; protect a wreck site; apply for a certificate of immunity from listing; and apply to amend or remove an entry from the National Heritage List for England. Historic England are guaranteeing, in return for a fee, to halve the current time taken to process such applications and to make list recommendations to the Department of Culture Media and Sport within 12 weeks for straightforward cases.

An additional listing screening service, where Historic England are offering to carry out a survey and assess the likelihood of

any heritage assets above ground meriting protection by listing, completes the package of the enhanced advisory services on offer. Its benefit to developers however may be limited, as the risk of taking up such a service may lead to statutory designation of assets.

Overall the package of enhanced advisory services now offered by Historic England is likely to be welcomed by developers and the costs absorbed in the development costs for the project. Whether it will reduce the risk of applications being refused, as Historic England claims, will only become clear over time.

Details of the likely fees to be charged for these enhanced advisory services are set out on the Historic England website: [historicengland.org.uk](http://historicengland.org.uk).

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## Recent Insurance Trends in Corporate Real Estate Transactions

M&A insurance is now a regular feature of European M&A transactions. From sellers taking greater control of the insurance process to buyers looking to unlock transactions by insuring identified risks, the insurance market now offers a variety of products to allow parties to navigate deals smoothly.

Our contacts who specialise in this area at the insurance broker, Howden, comment below on key trends in the use of this type of insurance to facilitate transactions in the commercial real estate sector.

### Stapling Insurance to a transaction

Warranty & Indemnity (**W&I**) insurance is now a common feature of indirect real estate transactions. Sellers often limit their liability to £1 under the sale agreement. Buyers then obtain their contractual protection for loss arising from a breach of warranty or claim under the tax deed directly from the W&I insurance market.

Historically, it was the buyer who would approach the insurance market for terms. Sellers were often willing to hand over control to buyers if it meant limiting their liability to £1. However, this has now changed with sellers more often driving the W&I insurance process even though it is the buyer who is the insured party under the policy.

A particular trend which has emerged is that some sellers are keen to make sure the W&I insurance is built into the transaction timetable. With a stapled insurance product, even before a bidder has been chosen, a seller can obtain a part-underwritten and pre-negotiated W&I insurance policy. The ability to offer a policy with wide cover to a prospective bidder reduces a seller's execution risk.

However, the final cover will remain subject to any issues identified in the bidder's due diligence.

Sellers now have more oversight of the process and a greater awareness of the cover. The concept of stapling insurance is popular in multi-bidder auction scenarios, where the W&I insurance and the acquisition agreement is offered as a package. The added benefit of providing the W&I insurance policy along with the sale agreement is that it allows the seller to take a more balanced approach to the first draft of the warranties which, in turn, reduces negotiation time.

Further, the ability to obtain a pre-underwritten policy is dependent on the seller's advisors carrying out vendor due diligence. Insurers will review the due diligence reports along with the information in the data room in order to provide the policy draft. Without vendor due diligence, it is still possible for the insurers to produce a first draft of the policy but it will not be 'pre-underwritten' in the same way as with vendor due diligence.

In the stapling process, the seller has the responsibility to approach the market and choose the insurer on the future buyer's behalf. It is therefore for the seller to make sure the policy gives the broadest cover available. Any bidder will be frustrated if it is forced to take on an insurance policy which does not give it the protection it needs. The role of the insurance broker along with the seller's lawyers is critical in the process to make sure the cover is fit for purpose. A seller must take the responsibility of obtaining the broadest cover seriously. If not, it could lead to delays if the buyer has to spend time negotiating the cover with the insurer or, even worse, the seller being liable for

any excluded warranties. This removes the benefits of stapling insurance to a transaction: building it into the transaction timetable and minimising execution risk.

### Specific Risk Insurance

W&I insurance is designed to cover unknown risks. Insurers will typically exclude facts or matters that are reasonably likely to give rise to a breach of warranty or a claim under the tax indemnity. On corporate real estate transactions, the main risks that impact cover are, often, tax risks. A specific tax exclusion could, therefore, impact the buyer's ability to recover its losses. Buyers and sellers are then put in a difficult situation and, often, deals stall at this stage of the transaction while the parties look for a resolution.

The M&A insurance market has responded to these concerns and now offers the ability to insure specific tax risks. Although not all tax risks are insurable, a number of specific tax risk policies have recently been underwritten by the market. From the risk of a company being deemed trading to the risk of a target being caught by the anti-avoidance provisions in the Finance Act 2003, it is possible to obtain cover for difficult corporate real estate tax issues.

To place a specific risk policy, insurers expect the insured to obtain written tax advice (i.e. advice from a tax adviser or a legal opinion from a solicitor or barrister).

Specialist tax underwriters determine their ability to insure tax risks based on the following factors:

1. **Technical Defences:** tax underwriters will review the available information and decide on the robustness of the technical defences available to the insured in the event of an enquiry or investigation from the tax authorities;

2. **Discovery Risk:** if insurers consider there to be strong technical arguments, the insurer will then determine what the likelihood is of the matter being discovered by the tax authorities.

Pricing for specific tax risk policies is more expensive than for standard W&I policies but, often, it is a solution which unlocks a transaction and allows the parties to do the deal.

The M&A landscape is constantly changing and parties are using M&A insurance in innovative ways to drive transactions and cover a much broader range of risks. Although M&A insurance is not a panacea, it is an important feature of indirect real estate transactions and, whether you are a buyer or a seller, there are ways to improve your price or protection through the use of W&I insurance.

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## Announcements and Events

### New Joiners



**Giles Bavister**  
London

Giles Bavister is a partner in the firm's London office where he is a member of the Tax practice group. Giles advises UK resident and non-resident companies, individuals and trusts in the real estate sector on a wide range of property transactions. He also advises on VAT, particularly in relation to cross-border supplies of goods and services, financial services and e-commerce.

Prior to joining the firm, Giles was a partner in the London office of another global law firm.



**Shehram Khattak**  
London

Shehram Khattak is an associate in the firm's London office where he is a member of the Finance practice group. He has experience advising arrangers, originators and trustees on asset sales, securitisations and debt capital market transactions across numerous asset classes and leading stock exchanges.



**Dennis Kiely**  
New York

Dennis Kiely is of counsel in the firm's New York office where he is a member of the Real Estate practice group. He concentrates his practice on domestic and cross-border real estate transactions, joint ventures, real estate finance, development and leasing. Dennis represents clients in connection with acquisitions, dispositions,

joint venture agreements, financing, development, and leasing of real property, including multi-family, office, industrial, retail and hotel properties. He also represents both financial institutions and borrowers in connection with construction, mezzanine, and general secured real estate financings.



**Brittany Lins**  
Charlotte

Brittany Lins is an associate in the firm's

Charlotte office where she is a member of the Environmental, Land and Natural Resources practice group. Brittany was a summer associate at K&L Gates in 2014.



**Diane Skapinker**  
Sydney

Diane Skapinker is a partner in the firm's Sydney office

where she is a member of the Real Estate practice group. She focuses her practice on property developments, strata and community titling, acquisitions, disposals, and leasing. She regularly advises on the property aspects of telecommunications and infrastructure projects.



**Ronnie Yearwood**  
London

Ronnie Yearwood is an associate in the firm's

London office where he is a member of the Finance practice group. Ronnie concentrates his primary practice on international finance.

### Recent and Upcoming Events

#### The German Real Estate Market for Asian Investors: Drivers and Success Factors

On 10 September 2015 approximately 50 clients, primarily from the real estate investment world, attended our event in the Frankfurt office. The agenda covered key facts and figures on the German real estate market, including a comparison of total return patterns in Europe and Asia across asset classes, essentials on the different cultural mind-sets, success factors and hands-on experience when doing business across the two continents. K&L Gates speakers were joined by speakers from Colliers International, MSCI Inc., Pramerica Real Estate AG, gmp Architekten (a global architect firm with long-standing experience on the Chinese market).

For more information please contact Kristina Baurtschmidt ([kristina.baurtschmidt@klgates.com](mailto:kristina.baurtschmidt@klgates.com)).

#### Real Estate Breakfast Seminar

On 29 September 2015 the London office hosted the annual Global Real Estate Trends and Opportunities for 2015/2016 breakfast seminar, an essential update for delegates to keep up to date with where we are in the current market and where the next opportunities may lie. This seminar included an analysis by Sabina Kalyan, Global Chief Economist at CBRE Global Investors, followed by a panel discussion chaired by Steven Cox (K&L Gates London), with panelists Peter Hobbs (Managing Director, Real Estate Research, MSCI), Mike Phillips (Editor, EuroProperty Magazine) and Kristina Baurtschmidt (K&L Gates Berlin).

We are pleased to announce that the K&L Gates UK Planning Team was shortlisted by UK publication **Planning Magazine** for "Planning Law Team of the Year 2015."

Approximately 150 key industry contacts from the UK real estate market attended including Investec Bank Plc, CBRE Loan Servicing Limited, NIBC Bank N.V., Oversea-Chinese Banking Corporation Limited, Capita Asset Services, Cushman & Wakefield, Hatfield Philips International and TIAA Henderson Real Estate.

For more information please contact Bonny Hedderly ([bonny.hedderly@klgates.com](mailto:bonny.hedderly@klgates.com)) or Steven Cox ([steven.cox@klgates.com](mailto:steven.cox@klgates.com)).

#### MIPIM UK Exhibition and EXPO Real Estate Conference in Germany

In October, two key real estate events took place across Europe, attended by our European real estate and planning lawyers.

On 21 - 23 October UK real estate and planning lawyers attended this year's MIPIM UK, the UK's largest exhibition for property professionals, at Olympia London. UK players and international investors attend this exhibition annually to discuss projects and opportunities in the UK real estate sector.

On 5 - 7 October members of the European real estate and planning team attended the EXPO REAL conference in Munich, Germany. The conference is the 18th International Trade Fair for Property and Investment and provided an opportunity to meet with the key players in the real estate market in Europe and discuss current trends across Europe. Lawyers who attended included partners from our London, Berlin and Frankfurt offices.

For more information please contact Bonny Hedderly ([bonny.hedderly@klgates.com](mailto:bonny.hedderly@klgates.com)).



Members of our UK Planning Team and clients of the firm at The Planning Awards 2015

#### An Evening with Dame Tessa Jowell

On 10 November 2015 the London office was proud to host an evening drinks reception with Dame Tessa Jowell and Valerie Jackson, our Senior Advisor to the Management Committee and Firmwide Director of Diversity and Inclusion, alongside the rest of the London Diversity Committee. The event heard Dame Tessa talk about her career as a Member of Parliament and government minister in areas including health, education, employment and culture, media & sport; her work in helping to bring the 2012 Olympics to London; her views on the future of London as a global city; and the challenges faced by women in reaching the pinnacles of their professions and the issues she faces as a high profile woman in public life.

For more information please contact Jonathan Lawrence ([jonathan.lawrence@klgates.com](mailto:jonathan.lawrence@klgates.com)).

#### 40percent Symposium

K&L Gates is proud to have supported the 40percent Symposium. The 40percent Symposium is an annual real estate

sustainability conference, this year held at the Wellcome Collection in London on 18 November 2015. The theme of the conference was "Sustainability in property investment - the risks and opportunities". As well as K&L Gates being the sole legal sponsor, Sebastian Charles (a partner in our planning & environment practice) presented on the reform of the business energy efficiency tax landscape.

For more information please contact Steven Cox ([steven.cox@klgates.com](mailto:steven.cox@klgates.com)).

#### The London Market Analysis Launch

On 25 February 2016, K&L Gates will be hosting Levy, a leading specialist London consultancy, that advises on the core sectors of the capital's commercial and residential real estate markets, in relation to a launch of the London Markets Analysis Report. Further details of this breakfast seminar will follow.

#### MIPIM 2016

A team from our global platform will be attending MIPIM in Cannes during 15 - 18 March 2016. Further details will follow.

For more information please contact Bonny Hedderly ([bonny.hedderly@klgates.com](mailto:bonny.hedderly@klgates.com)).



## Transaction Profile: Smart Technology in the Real Estate Sector

K&L Gates LLP recently advised on the reverse takeover, equity fundraising and AIM IPO of 365 Agile Group plc, a company which provides specialist mobile back office data and systems solutions to the real estate sector.

365 Agile is a complete eco-system of IoT Software & Hardware solutions that delivers a completely new way of working for field based property management teams using the latest technology. The traditional back-office systems used by property management organisations and existing ‘reactive’ or ‘responsive’ service delivery models will not deliver the efficiencies needed in an increasingly challenging financial environment. In addition traditional back-office systems are difficult to use on modern Smart Phones and Tablets which means that customer service is hampered by a lack of access to information.

In a recent report, IDC Energy Insights noted that, after lagging behind other sectors in terms of adopting new technology, the buildings industry is catching up quickly. IDC Energy Insights estimates that companies worldwide spent \$5.5 billion on intelligent buildings in 2012, and the figure is expected to rise to \$18.1 billion by 2017 – a 27.1% compound annual growth rate. 365 Agile is well placed to deliver leading edge solutions that maximise the potential of Internet of Things (IoT) solutions built on the highly scalable Microsoft Azure IoT suite.

The product 365 Agile has developed allows field based/customer facing property management teams to be ‘proactive’ rather than ‘reactive’ which will drive significant cost savings by improving efficiency and attending to assets



Logo provided by 365agile

before they fail. This will be achieved by streaming the telemetry data through Agile’s business layer to automatically send triggers and alerts to both customers and field-based teams. Field-based teams can securely access any system, data and/or document from any global location meaning that they have all of the necessary information at their fingertips. Agile is currently used by many social housing landlords and local authorities to improve the operational efficiency of their field based property management, asset management and neighbourhoods teams. The solution is highly configurable and flexible and has potential for use across the real estate management, care & support, assisted living and citizen self-service industries generally.

K&L Gates corporate partner Tom Wallace said, “We are increasingly acting in the technology space and the interplay with technology and real estate is an obvious one. At K&L Gates the corporate, finance and technology groups collaborate closely with our real estate colleagues, so this transaction was an interesting one as a number of our clients operate in the property management space”.

For more information about this transaction, or the 365 Agile, please contact Tom Wallace.

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## What is ESOS?

The Energy Savings Opportunity Scheme (“**ESOS**”) is an EU-led initiative obliging large entities (and in some cases, whole corporate groups) to report on their energy consumption, carry out an energy audit and identify areas where savings might be made. ESOS came into force in the UK in July 2014 and the deadline by which affected entities must comply is 5 December 2015.

### Who must comply with ESOS?

In brief, ESOS applies to all “large undertakings,” as well as any undertaking which is part of the same group as a large undertaking. In this context, “undertaking” has a wide meaning, and includes companies, partnerships, trusts and other entities.

If an undertaking has more than 250 employees or has an annual turnover and balance sheet above €50m and €43m respectively, it is a “large undertaking”. This means that it, and the rest of its group, will need to comply with ESOS. There are complicated rules relating to the qualification tests.

### What to do if you are required to comply with ESOS?

Failure to comply with ESOS could result in civil penalties, including a maximum fine of up to £50,000. To avoid such penalties, affected undertakings (that is, large undertaking and other undertakings in its group) must have completed the necessary assessments and notified the Environment Agency of compliance by 5 December 2015.

ESOS assessments can be demanding. Total energy consumption over a twelve-month period must be calculated and a Qualified Lead Assessor must be appointed to audit consumption. The audit

must identify how an undertaking can improve energy usage in a cost-efficient way going forward.

At the date of publication of this update, the deadline for compliance is getting very close. There is a known shortage of Qualified Lead Assessors. The Environment Agency (the “EA”) has stated that if an affected undertaking is unlikely to be able to meet the deadline, it can escape penalties if it notifies the EA before 5 December and gives its reasons for delay. The affected company can then discuss with the EA an appropriate timetable for reporting and auditing.

Although the EA has suggested that it is unlikely to impose penalties for late notification before 29 January 2016, companies, partnerships and other entities who wish to minimise risk of liability should aim to notify the EA before the deadline if they cannot complete their assessment on time.

ESOS has been much criticised as although completing an assessment is mandatory for qualifying companies, there is no requirement that these recommendations actually be implemented.

If you have any further questions about ESOS, including whether your business needs to complete an ESOS assessment and how to go about doing so, please contact Sebastian Charles.

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Legal Updates and Cases

Cases

Supreme Court Ruling Impacts on Penalty Clauses

Two recent cases have provided the Supreme Court with the opportunity to address the role of the rule against penalties first in a commercial contract of sale and second in a consumer contract. Briefly, the facts were:

The respondent had sold an interest in his business to the appellant. The contract contract allocated a large payment for goodwill but one clause in the contract provided that, if the seller breached certain restrictive covenants, the buyer did not have to pay any future instalments of the price. The respondent breached the covenants and, when the appellant sought to rely on the relevant clauses, the respondent alleged that those clauses were unenforceable as penalties.

*Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67*

The respondent put up several notices around the car park stating that any failure to comply with a two hour parking time limit would result in a £85 charge. The appellant parked his car for almost 3 hours and was fined £85. The appellant appealed the fine as a penalty under common law and as contrary to the Unfair Terms in Consumer Contracts Regulations 1999.

*ParkingEye Limited v Beavis [2015] UKSC 67*

The Court disapproved of the old test for penalties which focused on whether a clause was a deterrent rather than a genuine pre-estimate of loss, and, in both of the above cases, upheld the clauses in question where the financial consequence for the party in breach was substantially greater than the loss suffered by the

innocent party. Nevertheless, it was held that a clause that is “out of all proportion to any legitimate interest of the innocent party” will still be struck down as a penalty.

**Comment:** This decision is good news for businesses, providing more freedom to impose financial consequences on defaulting parties without such provisions being held to be penalties, particularly in contracts between parties of comparable bargaining power.

Relief from Forfeiture

A tenant deliberately granted an underlease in breach of their alienation covenant not to sublet without landlord’s consent. The undertenant subsequently caused nuisance to surrounding properties, resulting in complaints to the landlord who eventually forfeited the lease.

The tenant applied for relief from forfeiture but due to its poor behaviour was unsuccessful, and due to the length and value of the lease, the landlord gained a seven figure benefit.

On appeal it was held that relief could be granted on the condition that the lease was assigned within six months. The Court held that whether it was appropriate to allow the landlord a windfall as a result of forfeiture was a matter of proportionality, to be considered on its own merits and weighed against the tenants’ conduct.

**Comment:** This case serves as a reminder to landlords and tenants of the factors that the Court considers when deciding whether to grant relief from forfeiture. It confirms that a windfall to a landlord will not automatically result in relief and given the uncertainty, tenants should observe their covenants so as to avoid an action for forfeiture.

*Freifeld and another v West Kensington Court Ltd [2015] EWCA Civ 806*

Unilateral Notice Registered Against Freehold Title to Protect Agreement for Lease

The claimant was the successor to a housing association which had entered into an agreement with the freehold owner of a block of flats for the grant of 33 long leases of flats in the building. The leases were to be granted following completion of building works. The defendants acted as the association’s solicitors and entered a unilateral notice against the owner’s freehold title to protect the agreement. The owner then charged its freehold interest to a bank, after which the long leases were completed without the bank’s consent. The charge was registered and then the leases.

The claimant alleged that the defendants had been negligent in respect of the grant of the leases because the charge had priority over the leases. The defendants argued that the leases had priority over the charge and that the bank’s consent to the grant of the leases had not been required.

It was held that the unilateral notice had protected the agreement, thus giving it priority over the bank’s charge.

**Comment:** This decision will be welcomed by conveyancers. It confirms that a unilateral notice will override the usual rule that priority is given by date registered and will protect subsequent leases. If the court had decided in favour of the claimant, it would be pointless registering a notice to protect an agreement for lease.

*A2 Dominion Homes Ltd v Prince Evans Solicitors [2015] EWHC 2490 (Ch)*

Power of Sale of an Equitable Owner pf a Legal Charge

A partnership contracted to sell a property to the claimant, with the property transferred and payments made in instalments and protected by a charge. Following the claimant’s failure to make payments, the partnership assigned their interest in the charge to a third party by way of a deed of assignment. A TR4 for the transfer of the charge was executed but was not registered at the Land Registry.

The third party sold the property and the claimant sought an injunction on the grounds that the third party was not the registered proprietor of the charge and as such wasn’t entitled to the statutory power of sale.

The Court found that, whilst older authority suggests that an equitable assignee could not give a valid discharge for a debt unless expressly empowered to do so, current case law shows a different approach. As a result, the Court held that the third party was entitled to receive and give a discharge for mortgage monies for the purposes of s. 106(1), and was therefore able to exercise the power of sale in s.101 of the LPA 1925.

**Comment:** This case highlights that, although an assignee with the benefit of a charge does obtain some rights of an owner, it is imperative to register the transfer of a charge promptly at the Land Registry, as the rights of a holder of an equitable interest in a legal charge are not as extensive as those of a legal owner of the charge.

*Skelwith (Leisure) Ltd and another v Armstrong and others [2015] EWHC 2830 (Ch)*

Court holds Local Authority liable for inaccurate response to local search question

The local authority (LA) failed to disclose an investigation into whether part of a property was a highway maintainable at public expense. The claimant buyer relied on its local search results stating that parking spaces which formed part of the property it was buying were not a highway maintainable at public expense. The claimant completed the purchase in 2007 and in 2010 the LA determined that part of the property was, and always had been, highway maintainable at public expense. The claimant then brought a claim against the LA arguing that since the car parking spaces were highway rather than private land the difference between the price paid and the value without the parking spaces was a foreseeable loss.

The High Court held that a LA was liable to a buyer for an incorrect reply in a local authority search result which the buyer relied upon when purchasing a property.

**Comment:** This case shows that local authorities can be liable, in tort, to a member of the public for failure to keep its information correct. It is essential for local authorities to ensure that their highways records are up to date when providing local search results.

*Chesterton Commercial (Oxon) Ltd v Oxfordshire County Council [2015] EWHC 2020 (Ch)*



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