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What's ahead for real estate?

New real estate disputes partner Paul Tonkin shares some predictions for the coming months.

When I was asked to write an introduction for the Spring 2019 Real Estate Quarterly, the B-word inevitably came to mind. However, I suspect that many of you (like me) are already suffering from political fatigue and so I thought that I would use this opportunity to provide some much needed respite by sharing my thoughts on a few other issues, which I certainly expect to see on my radar and will no doubt be on many of yours as well.

Further pressure in the retail and casual dining sector

This one will come as no surprise. Even before 2019 got underway, we saw the news of HMV's (second) administration as the effects of a sluggish Christmas trade compounded what was already a difficult year. Rumours are already swirling around other major retailers. 2018 was the year of the CVA with retailers and restaurant groups using CVAs to rationalise their portfolios and to reduce lease liabilities. Unless the tide is stemmed, or at least controlled, will we see a more seismic shift in the fundamentals which underpin the retail investment market? Put simply, how can underlying investment value be assessed where tenants can use CVAs to re-write their lease liabilities? The Hogan Lovells real estate disputes team is acting on a challenge to one of the major CVAs of 2018 and I, for one, hope that this will provide much needed clarity for both landlords and tenants.

A recalibration of residential

The government has committed to tackling the housing shortage and has put forward various measures to achieve this, including changes to the planning system and the removal of red tape around local authority housing development. At the same time, the government has proposed widespread changes to the use of leaseholds in the residential sector, the most significant being a proposed ban on new leasehold houses and a £10 per annum cap on ground rents for leasehold flats. The changes are a reaction to the perceived scandal of consumers being caught out by unfair ground rents. But do they go too far? A blanket ban on leasehold houses may seem like a simple solution but it ignores the fact that many urban regeneration schemes, carried out jointly by local authorities and private developers, rely upon complex leasehold structures. An outright ban on leasehold houses will require a fundamental rethinking of these structures. Similarly, the effective abolition of ground rents ignores the fact that ground rent income (and particularly the ability to sell that income stream) is often a significant line in a developer's financial appraisal. Removing this, will place further pressure on viability which will result in developers finding it even more of a challenge to meet already ambitious affordable housing targets. If the effect of the ban is ultimately to reduce affordable housing allocations, this will be an own goal. My prediction (or hope!) for 2019 is that the government takes seriously the industry's concerns over these proposals and considers whether a sledgehammer really is needed to crack this particular nut.

Flexible working vs flexible leasing

We're all very familiar with the growth in the flexible business space sector. As uncertainty continues to deter tenants from signing up to long-term lease commitments we will, I'm sure, continue to see more and

more landlords rolling out their own flexible working products. However, even within the traditional office leasing model, flexible working cannot be ignored. Collaborative working and co-working arrangements will continue to grow and in that context the traditional lease restrictions on sharing of occupation will become increasingly outmoded. To thrive, landlords will need to embrace flexible working and flexible leasing as an opportunity rather than seeing it as a threat.

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Time's up for residential letting fees

Lauren Addy examines the Tenant Fees Act 2019 which received royal assent on 12 February and is set to shake up the residential letting market this summer.

Against a backdrop of daily headlines about our 'housing crisis', the Tenant Fees Act 2019 comes into force on 1 June 2019 with the aim of improving transparency and affordability in the residential lettings market for the 4.7 million private rented sector households in England. It bans various fees often charged to tenants - including for reference checks, key collection, late rent reminders, inventories and exercising break clauses - and caps payments which continue to be allowed. Government research indicates that fees charged have far outstripped inflation, rising by 60% between 2010 and 2015, and that the Act will save tenants £240 million per year, equivalent to £70 per household.

The Act applies to assured shorthold tenancies (ASTs) (excluding social housing and long leases), student leases and most licences to occupy (collectively referred to as 'tenancies' in this article). For the first year of its life the Act will only apply to new tenancies, but from 1 June 2020 it will apply to all existing tenancies. Note that the Act applies only in England. Welsh authorities are in the process of drawing up their own similar legislation and restrictions on residential fees have existed in Scotland since 1984.

Permitted fees

Rather than specifying which fees are banned, the Act prohibits all payments except those which are permitted. This approach is intended to remove potential loopholes through which the spirit of the legislation could be abused.

Prohibited payments will only be illegal if they are required; landlords and agents can accept payments that would otherwise be prohibited where a tenant has been given a choice between making the payment and something else permitted under the Act. For example, there is scope for a scheme of optional fees in return for slightly lower rent.

The permitted payments are:

1. **Rent:** Sadiq Khan may be campaigning for the introduction of rent control, but landlords currently remain free to set rent levels. However, the Act does not allow rent 'spikes' at the start of lease terms to offset agents' letting fees that landlords, instead of tenants, will likely now have to pick up. This does not prevent landlords from increasing rent evenly throughout the term, but it will at least 'smooth' rent payments for which tenants are liable.
2. **Refundable Tenancy Deposits:** deposits to compensate the landlord for breaches of the terms of the tenancy must now be capped at five weeks' rent where the annual rent is less than £50,000 or six weeks' rent if the annual rent is £50,000 or more. The current average deposit is 4.9 weeks' rent; time will tell as to whether deposits of five or six weeks' rent will become the norm rather than the maximum. Legislation requiring deposits to be held via protected schemes remains unchanged.
3. **Holding Deposits:** if a tenancy is granted, any holding deposit paid by the tenant must be capped at one week's rent and returned within seven days or otherwise set off against the rent or tenancy deposit. If the tenancy is not granted within 15 days of payment of the holding deposit (or such longer period as the parties agree), it must be returned unless the prospective tenant chooses not to proceed, fails 'Right to Rent' checks or provides false or misleading information or if the landlord or agent has taken all reasonable steps to enter into the tenancy but the tenant has not done the same.

What constitutes 'all reasonable steps', or whether false information mistakenly provided by tenants will allow landlords and agents to retain holding deposits, is unclear. Hopefully the government's planned guidance to accompany the Act will clear this up.

4. **Default Payments:** default fees are only permitted for rent which is more than 14 days late or replacement of lost keys and only if the tenancy document requires these default fees to be paid. In respect of late rent, the fee must not exceed interest on the sum due at a rate of 3% above base from the due date until payment. Fees for replacement keys must be reasonable and reflect the cost incurred by the landlord/ agent as a result of the loss.
5. **Payments on variation, assignment, novation or termination at the tenant's request:** fees for variation, assignment or novation are capped at the higher of £50 and the reasonable costs incurred. Fees for early termination are limited to the loss suffered by the landlord and the reasonable costs of the agent.
6. **Payment in respect of council tax, utilities, TV licences or communication services.**

Remedies

Enforcement remedies include fines of £5,000 or, in the case of repeat breaches within five years, criminal liability, banning orders and fines of up to £30,000. Lease terms requiring prohibited payments are not binding, but where tenants have paid unlawful fees, they can seek to recover them via the courts. Further, a landlord who has not repaid a prohibited payment to an AST tenant cannot use section 21 of the Housing Act 1988 to regain possession of their property at the end of the term.

Enforcement responsibility falls to Trading Standards and district councils - unsurprisingly there are concerns about their ability to fulfil their role due to lack of funding.

Rent on the rise?

The increasing number of private sector residential renters, who move on average every 3.9 years, will welcome the new law. Time will tell though as to whether the Act will simply prompt rent hikes by landlords who are feeling the pinch from recent stamp duty increases and the withdrawal of mortgage interest rate relief.

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Non-resident SDLT surcharge: adding 1% and more complexity

When the government announced in 2018 that foreign investors into the UK property market were to be targeted with an additional SDLT levy, we said that the devil would be in the detail. The consultation document published on 11 February gives that detail. But just how devilish is it? Elliot Weston considers the proposed change.

The government is going ahead with a 1% SDLT surcharge on top of the existing SDLT rates for non-UK residents purchasing residential property in England or Northern Ireland. Both freehold and leasehold interests will be caught but existing reliefs will generally apply as normal. Indeed, the distinct lack of specific reliefs from the new charge is straightforward (if likely to be unpopular). Mixed use schemes and purchases of 6 or more dwellings will at least continue to be treated as non-residential and therefore outside the scope of the surcharge.

Multiple Dwellings Relief will also be available. The government states that the minimum rate of 1% of the total amount paid will remain at the same level for those subject to the surcharge. This would appear to mean a minimum effective rate of 2% for non-residents benefitting from the relief once the surcharge is applied, although clarification of what is intended will be needed.

However, the surcharge looks set to add a further layer of complexity to the myriad of SDLT rules. In terms of calculating the amount due, adding 1 percentage point to the rate may sound simple. But once you factor in the surcharge, there will be (at least) 32 different permutations as to the rate of SDLT payable on a purchase of freehold residential property. The top rate of SDLT will become 16% for those within scope.

Given that it is branded a non-UK resident surcharge, you would be forgiven for thinking that it would not complicate things for a UK resident purchaser. Not so. The rules propose introducing either new or modified tests of residence for these purposes. (Ironically, using the existing tests was seen as too complicated.) An individual who is UK resident for income tax purposes could therefore still find themselves non-resident for SDLT purposes. Non-UK resident companies are in scope but closely held UK companies can also be caught if a non-UK resident could exercise control over them.

Even the government's stated aim of helping to control house price inflation seems fraught with difficulty. Reliably predicting the impact of tax measures on house prices is notoriously difficult at the best of times. At least the rules are not coming in until a future Finance Bill (which year is not stated). Hopefully this will allow time for a bit of a re-think about the complexity of the SDLT rules for residential projects, which will only be made worse by this proposed charge.

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> “Given that it is branded a non-UK resident surcharge, you would be forgiven for thinking that it would not complicate things for a UK resident purchaser. Not so.”

Recreational easements: a new species

How far do easements go towards protecting your right to use neighbouring land? Following a recent Supreme Court decision, perhaps further that we thought, explain Tim Reid and Lien Tran.

The Supreme Court has recently recognised the existence of a novel type of easement – recreational easements – in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2018] PLSCS 198. Although recreational easements have already been widely recognised in common law jurisdictions, the leading English authority on easements of recreational and sporting rights (the much-quoted *Re Ellenborough Park* [1956] Ch 131) is more than 60 years old and reached the end of the road in the Court of Appeal ([2017] EWCA Civ 238; [2017] EGLR 24).

Taking the opportunity presented by the *Regency Villas* appeal, the Supreme Court revisited the law on easements and reiterated the principles that had been articulated in *Ellenborough Park*.

Regency Villas was a timeshare complex which benefitted from free use of the swimming pool, golf course and other sporting and recreational activities on the adjoining estate, known as Broome Park, near Canterbury, Kent.

An express right to use the sports facilities at Broome Park had been a major selling point when the Regency Villas timeshare apartments were being marketed. The extent of the rights appeared clear from the outset, even including the right to use facilities that had not yet been built. In the case that came before the Supreme Court, the owners of Broome Park challenged the rights of the current Regency Villas owners to use the facilities without fees or having to make a contribution to the maintenance costs, arguing that the rights originally granted could not take effect as easements.

The value of an easement

An easement is a type of property right which allows the owner of one piece of land (the "dominant tenement") to make use of neighbouring "servient" land. One important feature of an easement, which makes them more valuable than a mere personal or contractual right, is that – when the land changes hands – easements run with the land for the benefit of successive owners of the dominant land and by way of burden on the servient land. Having the benefit of an easement over neighbouring land can be an attractive – and often vital – part of buying land. Conversely, the burden of an easement can limit the owner's scope for redeveloping the subject land, because they can be very difficult to extinguish.

Easements can be created by express grant or by implication. An easement might be implied as a matter of necessity (typically, where part of land has been sold and there is no way to enjoy use of, or access to, the sold land other than by the implied easement) or because of the original common intention of the parties. The law relating to how an easement can arise by implication is worthy of a lengthy article in its own right.

There are four conditions which must be satisfied for a right to take effect as an easement, and a lawful easement must have all of the requisite characteristics (see box). That can be rather difficult to prove, especially when it comes to enjoying rights of sport or recreation. In *Regency Villas*, the High Court and the Court of Appeal had both concluded that the right to use the leisure facilities existed as an easement. However, the issues were sufficiently important to warrant the appeal being escalated to the Supreme Court.

The four requirements of an easement

Ellenborough Park established the conditions for a right to constitute an easement:

1. There must be dominant and servient land.
2. The right must accommodate the dominant land.
3. The dominant and servient owners must be different persons.
4. The right must be capable of forming the subject matter of a grant.

A right must satisfy all four elements to exist as an easement.

Regency Villas illustrates well enough how the first and third conditions operate. There was dominant land (Regency Villas), which had the benefit of rights granted to use facilities on the servient land (Broome Park). The dominant and servient owners were different people, so that satisfied the third condition.

As in *Ellenborough Park*, the contentious issues in *Regency Villas* centred on whether the second and fourth requirements had been met.

'Accommodating' the dominant land

The Law Commission's 2011 report "Making land work: easements, covenants and profits à prendre" stated that – to be an easement – a right should be of some practical importance to the benefitted land, rather than just to the right-holder as an individual (such as a personal right granted between friends for one neighbour to use the other's swimming pool from time to time). The right must be reasonably necessary for the better enjoyment of that land for its normal use. More typical examples include easements of rights of way, which improve accessibility for the dominant land, and rights to lay service media on land, which allow the dominant owner to receive utilities.

In *Ellenborough Park*, the Court of Appeal had determined that a right granted for recreational or sporting use is capable of being an easement. A classic example of a recreational use which is exercised for the better enjoyment of the dominant land would be the use of a communal garden which is connected with and enhances the normal enjoyment of the surrounding homes. *Ellenborough Park* itself was held by the judges in that case to have been a communal garden for the benefit and enjoyment of adjoining houses. In such cases, the right of the owners of the neighbouring "dominant" land to use the garden can constitute an easement.

It is relatively easy to recognise that certain easements, such as rights of way and rights to lay service media across a neighbour's land, provide utility and benefit to the dominant land. In comparison, it will not always be the case that a right granted for the use of neighbouring land for sport will amount to an easement (and therefore be enforceable by successors in title), so the questions of utility and benefit have to be looked at closely in every case.

It is primarily a question of fact as to whether a particular recreational right accommodates the dominant land. In *Regency Villas*, the dominant land was used for timeshare units. These would typically be used by holidaymakers who would benefit from having free use of the nearby leisure complex at Broome Park. The timeshare owners' rights to use the leisure facilities were for the benefit, service and utility of the Regency Villas apartments, and were found to be a major selling point to buyers of the timeshares.

The subject matter of a grant

The requirement that an easement must be capable of forming the subject matter of a grant is rather vague. Even the judges in *Ellenborough Park* said that its significance is "not entirely clear". However, it seems to encompass a miscellany of requirements, which must be met in order for the right in question to constitute an easement.

In *Regency Villas*, the Supreme Court noted that a right:

a) must be defined in sufficiently clear terms;

b) cannot be "purely precarious", so that it can be denied at the servient owner's whim;

c) must not oust the servient owner from enjoyment or control of their own land; and

d) should not impose any obligations on the servient owner to expend money or do anything beyond "mere passivity".

The Supreme Court provided some helpful commentary on the third of those requirements – the doctrine of "ouster" – which is a rather controversial issue. The Law Commission said in 2011 that the requirement regarding ouster should be abolished owing to its uncertainty and consequent propensity to create litigation. In *Regency Villas*, the owner of the servient tenement at Broome Park was expected to maintain the facilities, but the Regency Villas owners were assumed to have "step-in" rights to carry out maintenance on the facilities if the Broome Park owner failed to do so. It is important to look at the parties' ordinary expectations, at the date of the grant, as to who was expected to maintain the facilities. The Regency Villas owners' step-in rights would arise only if the Broome Park owners failed to carry out their maintenance obligations. Nothing in the terms of the grant therefore encroached on the control wielded by the owners of Broome Park.

The requirement regarding "mere passivity" is, in comparison, relatively well settled. The court in *Moncrieff v Jamieson* [2007] 1 WLR 2620 said that a right that "required some positive action to be undertaken by the owner of the servient land in order to enable the right to be enjoyed by the grantee" could not be an easement (such as an informal arrangement for one person to use a neighbour's swimming pool with their permission and with access being provided by the owner from time to time).

The majority of the Supreme Court concurred that the grant of an easement should not impose an obligation on the owner of the servient land, for the benefit of the owner of the dominant land, to carry out maintenance on the facilities that are the subject of the easement. That does not mean, however, that a right to use facilities on a neighbour's land, which that neighbour

would usually maintain, is not capable of being an easement. Even if there is an understanding between the parties that the owner will maintain and repair the facilities on their own land, the neighbour's right to use the facilities can still be an easement as long as the owner of the facilities does not have a legal obligation to the dominant owner for such maintenance.

Although, in the case before the Supreme Court, the parties had intended that the owners of Broome Park would be responsible for maintaining the facilities, there was no obligation between them and the owners at Regency Villas for them to maintain or meet the cost of maintenance for any of the facilities. In fact, there was evidence that there was a general (if ultimately misguided) belief that the cost of maintaining the facilities would be met by income from fee-paying members of the public. If the owners stopped maintaining their facilities, there was a risk that the facilities would no longer be usable, but this limitation did not prevent the rights from being an easement. On this point, Lord Carnwath (one of the judges in the Supreme Court) dissented, reasoning that intensive management would be required to maintain the pool and golf course, and the rights to use such facilities, in such circumstances, should not be treated as easements.

Part of modern life

So, the Supreme Court has extended English law to recognise recreational easements as a new species of easement and – on the facts of *Regency Villas* – it determined that an easement did exist for the benefit of Regency Villas. The parties had intended to confer an easement on the owners of the Regency Villas land which was for the benefit of successors in title of the land. The grant of the rights related to the facilities complex as a whole (an 18-hole championship golf course and indoor swimming pool being particularly significant features which enhanced the attractiveness of a Regency Villas timeshare), without a corresponding obligation to contribute towards maintenance costs.

As recreational and leisure activities clearly provide practical utility and benefit in modern life, the Supreme Court's view is that the law should support structures which promote and encourage it. It is very much the case that each case will be decided on its facts, but as long as the four *Ellenborough Park* conditions are met, this new decision confirms that purely recreational rights which accommodate the dominant land can take effect as easements, potentially opening the door for more claims to easements for recreational use, and potentially constraining redevelopment of land currently enjoyed for sporting purposes.

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The impact of drones on real estate

The use of unmanned aerial vehicles, more commonly known as drones, is increasing across the real estate sector, and for good reason. Jane Dockeray considers their impact on real estate.

Drones can have significant safety and efficiency benefits for business. They are flexible and labour saving, and the ways in which drones are used across the real estate sector is increasing and seems likely to increase further. Organisations are already using drones to conduct external property inspections, at a cost far cheaper than any manual inspection regime. Drones are now being used for insurance valuations and heat seeking drones can be instrumental in ascertaining whether a building has damp. All of this information can then be shared digitally. It has even been suggested by trend analysts that drone inspections could replace physical property viewings entirely by 2025.

Of course all technology can be used for good and for bad, and drones are no different. Here in the UK, as the number of drones in the air continues to grow exponentially, lawmakers are grappling with drone safety and security concerns. At the same time, public awareness around the misuse of drone technology is growing. In recent months, we have seen a drone cause a main infrastructure bridge to close down and major airports brought to a standstill by the misuse of drone technology.

As a result, despite the clear technological and economic advantages to drone technology for the commercial market sector, we have seen some resistance to drone technology from members of the public and landowners. Coventry City Council has recently joined other councils and announced plans to implement a general ban on drones in parks and open spaces unless permission to fly a drone is sought and granted from the council. As landowners, councils are primarily concerned about the liabilities they could incur from any damage caused to people or property on council land and also from increases in trespass and nuisance incidents.

In response to recent drone incidents, the government has announced plans to extend the no-fly parameters around major infrastructure and to provide the police with greater powers to seize drones and fine their misuse. Currently however, the laws surrounding the interaction of drones and property remain untouched.

Article 95 of the Air Navigation Order states that drones cannot be flown within 50m of a person, vehicle or building "not under your control". There is little guidance on the meaning of "not under your control" when it comes to airspace but the case of *Bernstein of Leigh v Skyviews & General Ltd* [1978]

establishes that a landowner's airspace extends to such height as is necessary to ensure the ordinary use and enjoyment of the land. However, drones flying closer than 50m to private property do not necessarily trigger claims of trespass, as demonstrated in *Anchor Brewhouse Developments Ltd v Berkeley House (Docklands Developments) Ltd* [1987]; there must be a degree of regularity and permanence to the infringement.

As drones become more popular and their uses evolve, it is clear that the law and drone technology need to develop, particularly as landowners are likely to want to embrace this new technology and take advantage of the unique opportunities and perspectives that drones present. We must strike the right balance between innovation and security in order to enable the many benefits of commercial drones, while preventing the bad.

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A landlord's intention to redevelop – crucial news from the Supreme Court

The Supreme Court's judgment in the case of *S Franses Limited v The Cavendish Hotel (London) Ltd* represents the most important 1954 Act case for decades. The Court's decision clarifies the nature of the 'intention' which a landlord must have in order to oppose a tenant's right to renew its tenancy on the ground that the landlord intends to redevelop the tenant's premises. Ben Willis considers the judgment.

Whilst the Court confirmed that a landlord's motives for carrying out redevelopment works are irrelevant, the Court made clear that a landlord's intention to carry out works must be unconditional.

A landlord's right to redevelop

The Landlord and Tenant Act 1954 (the "Act") provides tenants with a statutory right to renew their tenancies of business premises, subject to the ability of the landlord to oppose renewal on a limited number of grounds.

The most commonly used ground by landlords to oppose renewal is set out in section 30(1)(f) of the Act, known as ground (f), and provides that a landlord may oppose renewal if:

"*on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding*".

The existing case law had established that a landlord must have a fixed and settled intention, as at the date of trial, to carry out works of redevelopment to satisfy ground (f) and that, provided a landlord has this intention, the landlord's motive for carrying out works is irrelevant (even if the sole aim of the works is to satisfy ground (f) and remove the tenant).

The facts

S Franses Limited (the tenant) has a lease of premises at 80 Jermyn Street, London and deals in antique tapestries and textile art. Its landlord is the Cavendish Hotel.

In 2015, the tenant sought to renew its lease and the landlord opposed renewal relying on ground (f). Over the next 18 months the landlord proposed three different schemes of works, the latest of which was known as Scheme 3, which was the scheme of works which it ultimately relied upon at court.

The first instance decision

At first instance:

- the judge acknowledged that "*some aspects of the intended works have been contrived only for the purposes of ground (f)*";
- it was acknowledged by the landlord that the works would not be undertaken if the tenant left voluntarily, but that if possession on redevelopment grounds was ordered, the entirety of the works would be carried out; and
- it was acknowledged that the works that the landlord intended to carry out would not provide any utility to the landlord without further works that required planning permission.

At first instance the judge decided that the landlord had satisfied ground (f) and was entitled to possession of the premises.

The appeal

The tenant appealed to the High Court on a number of grounds; however, the High Court rejected the tenant's appeal. The tenant was then given permission to appeal directly to the Supreme Court.

In the Supreme Court the tenant argued that:

- when Parliament said that a landlord has to intend to do works of demolition, reconstruction or construction in order

to satisfy ground (f), what it meant was that such works had to have some commercial purpose beyond trying to get vacant possession from a tenant; and

- when the Act says that the landlord 'intends' to carry out works, that intention needs to be unconditional, i.e. the landlord does not have the necessary intention if it would not carry out the works if it could get possession of the premises by some other means (i.e. if the tenant leaves voluntarily).

Significantly, the Supreme Court made clear that a landlord's intention to carry out works to satisfy ground (f) must be unconditional. Lord Sumption stated: "*The landlord's intention to carry out the works cannot therefore be conditional on whether the tenant chooses to assert his claim to a new tenancy and to persist in that claim*".

In this case, the landlord had admitted that it would not carry out the works if the tenant left voluntarily. As a result, the landlord's intention was not unconditional, so was not sufficient to satisfy ground (f). In Lord Sumption's view: "*The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily*".

However, the good news for landlords is that the Supreme Court was clear that a landlord did not have to show that the works were reasonable or had some commercial purpose (above and beyond removing the tenant) in order to satisfy ground (f). That argument was "*not only more radical in its implications but more difficult to reconcile with established authority on the Act of 1954*". Therefore, it remains the case that a landlord's motive for carrying out the intended works is strictly irrelevant.

What does this mean for landlords and tenants?

Going forwards, if landlords are seeking to rely on redevelopment grounds to remove tenants, they will need to be prepared for the fact that they will have to show that they will carry out the required works whether or not a tenant leaves voluntarily. This may well be more difficult to show in cases (such as *Franses*) where the only reason for doing the works is to remove the tenant and will, naturally, provide tenants with further opportunity to seek to challenge a landlord's intention to carry out the works.

S Franses Limited v The Cavendish Hotel (London) Ltd [2018] UKSC 62

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Q & A

Paul Tonkin considers the current position on ACM cladding, whilst Simon Keen and Ingrid Stables look at practical next steps when the CRC ends.

Q. ACM Cladding: where are we now?

A. On 21 December 2018 the government's promised ban on the use of aluminium composite (ACM) cladding on residential buildings came into force.

Q. Does the ban apply to all buildings?

No, the ban applies to new buildings over 18 metres tall containing flats, as well as new hospitals, residential care premises, dormitories in boarding schools and student accommodation over 18 metres.

Q. What about buildings under construction?

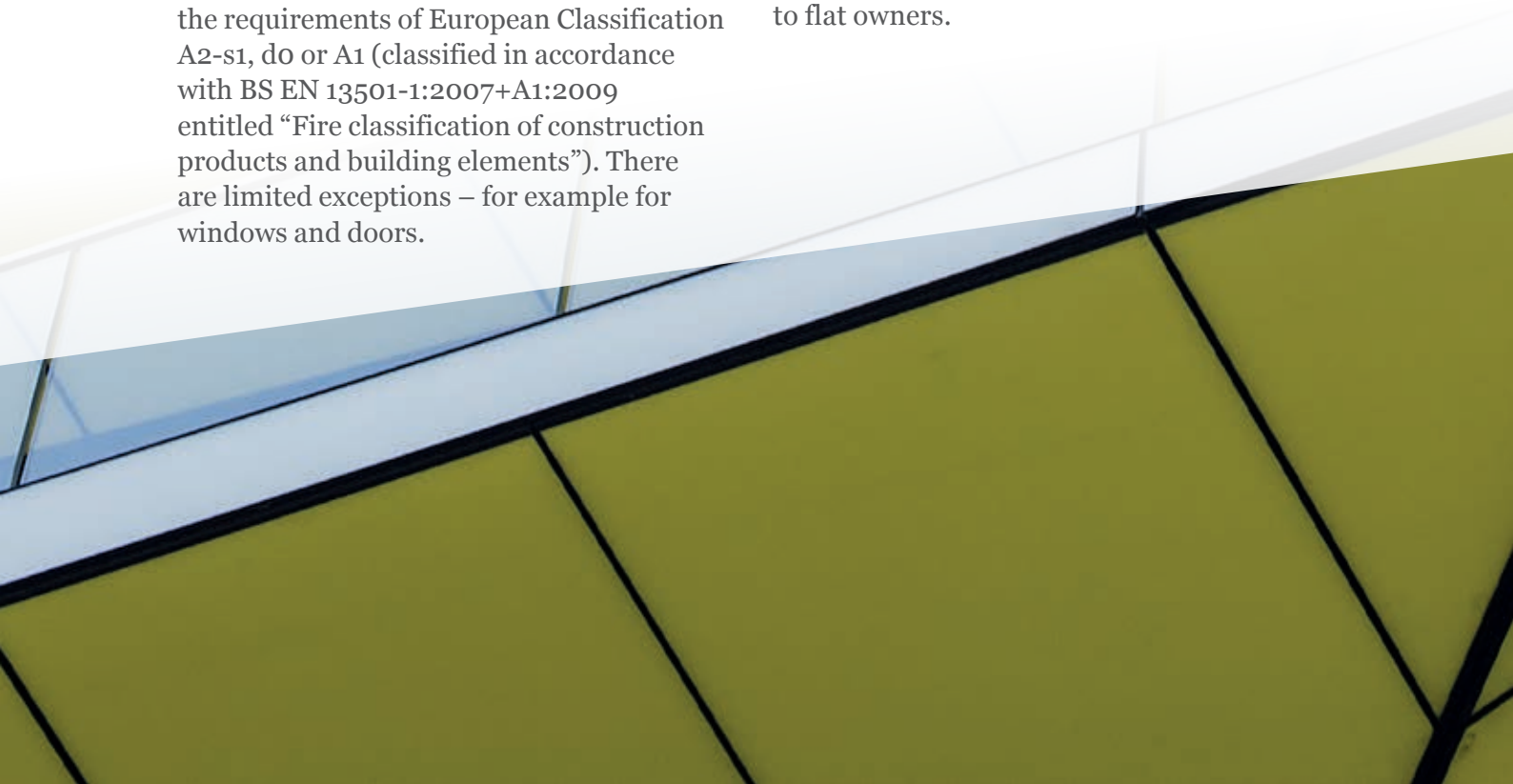
The ban will not apply where building works started before or within 2 months after 21 December 2018.

Q. What is the effect of the ban?

The regulations prohibit the use of combustible materials on the external walls of new buildings. Any materials which form part of external walls and attachments such as balconies or sun-shades must achieve the requirements of European Classification A2-s1, d0 or A1 (classified in accordance with BS EN 13501-1:2007+A1:2009 entitled "Fire classification of construction products and building elements"). There are limited exceptions – for example for windows and doors.

Q. What about existing buildings?

The ban does not apply retrospectively to existing buildings. However, the government has made clear that it expects the owners of privately owned buildings to replace ACM cladding without passing the costs on to flat owners. The government has identified 289 privately owned residential high-rise buildings containing combustible cladding panels and has introduced new powers for local authorities to remove cladding on privately owned buildings and to recover the costs from the owners. Whilst the government has said that costs should not be passed on to flat owners, this is not currently legally binding and the position will be governed by the terms of the leases. There have already been cases in which the First Tier Tribunal has held that flat owners were responsible for the costs of replacement cladding and associated fire safety measures. That said, a number of building owners have publicly committed to funding the works themselves and not passing the costs on to flat owners.



Q. The CRC is ending. What do I need to do? Are there any practical steps I need to take?

A. The Environment Agency published guidance at the end of last year to participants in the CRC Energy Efficiency Scheme on what to do now it is being closed. The compliance year ending 31 March 2019 will be the last one for CRC.

The guidance describes the steps you need to take, which are:

- collecting all relevant CRC data for this final compliance year;
- submitting an annual report for this compliance year (by no later than 31 July 2019);
- ordering the allowances needed to cover your 2018/19 emissions (this needs to be done between 1 June 2019 and 31 July 2019);
- paying for all allowances you've ordered (which needs to be done between 2 and 19 September 2019);
- surrendering the correct number of allowances (by no later than 31 October 2019);
- maintaining up-to-date contact details on the CRC registry (until 31 March 2022); and
- maintaining a CRC evidence pack (until 31 March 2025).

The guidance also makes it clear that you do not need to:

- collect any CRC data after 31 March 2019;
- make any annual CRC reports for years beyond this compliance year;
- register for any further phases of the CRC; or
- pay any further subsistence fees, unless they are already due.

It goes on to say that you can correct any reports you've submitted for previous years or, if necessary after it is submitted, the report you submit for this final compliance year. There is a process for buying additional allowances until the end

of February 2022. If after that date any participant is discovered to have surrendered too few allowances for any compliance year, the CRC administrator will be able to impose a penalty at least equal to the value of the allowances shortfall. You are therefore strongly advised to check your reports and the allowances you have surrendered for previous years as soon as possible, so that if any corrections or additional allowances are needed, you can sort this out well before the end of February 2022. The CRC regulators can continue to conduct compliance audits, and will take enforcement action against CRC participants who are found to have surrendered too few allowances, until 31 March 2025.

The guidance states that the Department for Business, Energy and Industrial Strategy has indicated that the current rules for allowances refunds will continue as they are until 31 March 2022. After that date the Secretary of State may refund any unsurrendered allowances (which implicitly means that he may decide not to do so too). Again, therefore, if you have bought more allowances than you needed for any compliance year (and you are confident that your returns are accurate and therefore you do not need to surrender them for any other compliance year) make sure you act quickly while there is still a clear framework for refunds.

The CRC is not being replaced directly, but the Climate Change Levy has been increased to ensure that the abolition of the CRC remains fiscally neutral to the Treasury.

A brand new regime known as Streamlined Energy and Carbon Reporting ("SECR") takes effect from 1 April 2019 and requires certain businesses to report on their carbon dioxide emissions and energy use in annual reports. The government consulted on SECR over the summer last year, published its response to the consultation in October, and legislated in November 2018. Guidance was published in January to explain what relevant businesses need to include in their annual energy and carbon reporting.

SECR is more limited in its scope than the CRC and, in particular, does not apply to any public sector bodies or to any overseas companies or undertakings that hold UK real estate (although their UK subsidiaries could be included if they meet the qualification criteria).

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2019 – The year of the dedicated property stock exchange?

An intriguing prospect for 2019 is the possibly of the first UK stock market listings of individual real estate assets. Public market investors could obtain exposure to specific properties and asset owners and managers would have a new source of equity financing. Sian Owles and Jonathan Baird investigate.

The differences between IPSX and existing markets, including the London Stock Exchange and AIM, include the specific focus on real estate and the flexibility to list single properties. The potential benefits to investors include the ability to make highly targeted decisions to obtain investment exposure to particular properties, businesses and sectors.

But significant elements of the listing process and on-going obligations for the new exchanges will be similar to the requirements for existing stock exchange-listed property companies.

The securities traded on the new exchanges will be shares of public limited companies that own the relevant properties. These companies would be closed-ended, meaning that investors must rely on secondary market demand to exit their investment, avoiding the current liquidity and suitability concerns surrounding open-ended property funds.

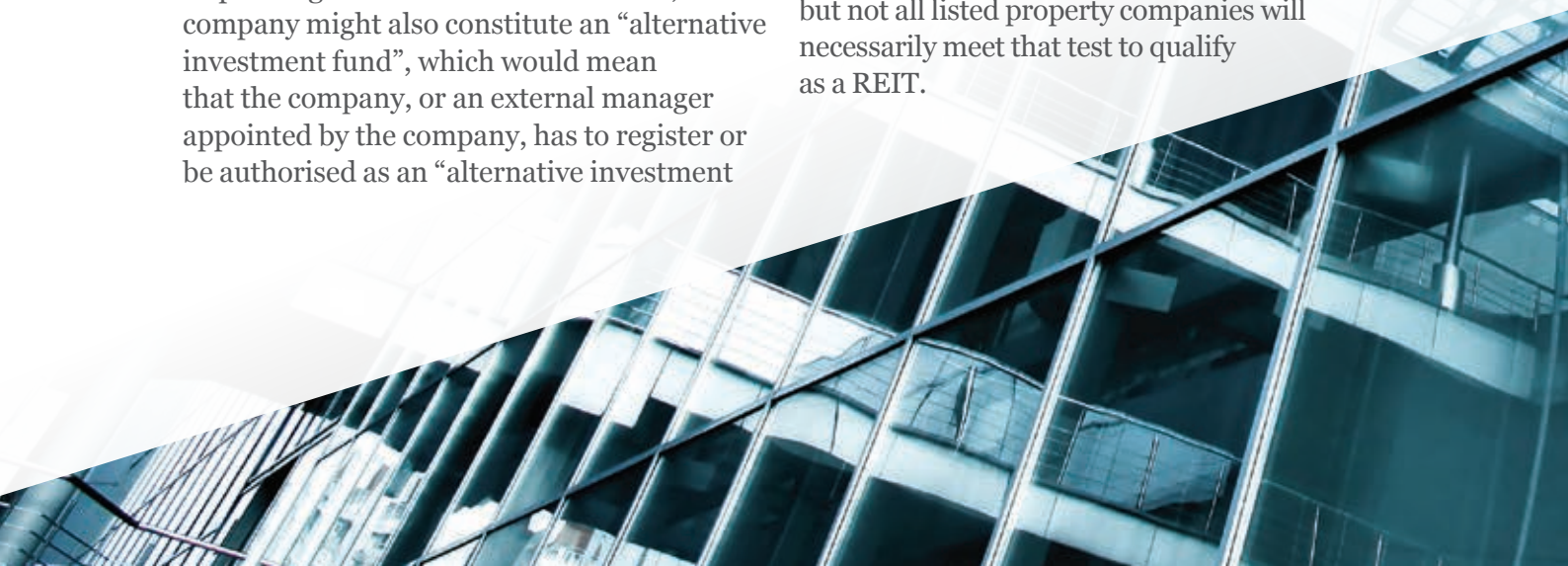
In order to list, a company will have to prepare a prospectus which is reviewed and approved by the Financial Conduct Authority and which must include a RICS valuation and a description of the company's material contracts, which may include key debt finance and tenancy agreements.

Depending on the exact circumstances, the company might also constitute an "alternative investment fund", which would mean that the company, or an external manager appointed by the company, has to register or be authorised as an "alternative investment fund manager". If a fund, the company would also be required to publish a "key information document" setting out the specific direct and indirect costs borne by its investors.

In order to become and remain listed, at least 25% of the company's shares must be widely held. In addition, unlike most privately held entities, listed companies are subject to the requirements of the UK Takeover Code, including its mandatory bid obligations which, among other things, can restrict the acquisition of controlling stakes.

Most significantly, a company choosing to list on a property exchange must be prepared to comply with the on-going disclosure obligations applicable to public companies. Besides preparing audited financial statements, this will require prompt public disclosure of any material changes in the company's circumstances, for instance regarding a key tenant or a rent review, irrespective of the impact that the disclosure may have on the company's share price.

An advantage of a listed company over a private company is the ability to become a REIT for tax purposes. But a REIT must own three or more single rental properties. What counts as a single property is fairly flexible, but not all listed property companies will necessarily meet that test to qualify as a REIT.



From a technical perspective, apart from the attraction of listing single property companies, most of what a real estate specific stock exchange is intended to achieve could most probably be done at similar cost by a listing on one of the UK's existing regulated markets. Newcomers will need to differentiate themselves by providing investors with better exposure, pricing and liquidity than the current options.

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Case Round-Up

The Alexander Devine Children's Cancer Trust v Millgate Developments Ltd and others [2018] EWCA Civ 2679

Developer faces consequences of deliberate breach of restrictive covenant

Millgate was a developer that owned land subject to a restrictive covenant which prevented any use of the land other than as a car park. The Alexander Devine Children's Cancer Trust owned a neighbouring property which benefitted from the covenant. It was building a hospice for terminally ill children on the site and planned to have a peaceful wheelchair path around the perimeter of its gardens.

Millgate built 13 affordable housing units in order to meet planning obligations which would allow it to market a high-value development nearby. It built the homes close to the boundary with the Trust's land, in deliberate breach of the covenant, and then applied to the Upper Tribunal to modify the covenant.

In 2017, the Upper Tribunal found that the housing development had a significant impact on the hospice land and also noted that Millgate had not acted in good faith. However, it held that the public interest in making the affordable homes available immediately to people who had been waiting for social housing was sufficient to justify modifying the covenant.

On appeal by the Trust, the Court of Appeal overturned the decision. The public interest in allowing the social housing units to remain did not outweigh the public interest in protecting the Trust's contractual rights. The Court noted that it would have been possible for Millgate to build all of the housing units on land unaffected by covenants, while still meeting its affordable housing requirement. Alternatively, Millgate could have paid a contribution to provide social housing on an alternative site nearby, which could have been ready quickly.

Millgate had acted in a way that was "deliberately unlawful" and it should not be entitled to rely on its own unlawful conduct in having built the social housing in breach of covenant as a factor justifying the modification of the covenant. While the Court of Appeal made clear that the judgment was not intended to be a punishment, it emphasised that it would not incentivise law breaking.

Mears Limited v. Costplan Services (South East) Limited, Plymouth (Notte Street) Limited and J.R. Pickstock Limited

Breach of tolerances is not always sufficient to enable termination of contract

The case concerned the development of two blocks of student accommodation, following which Mears (the tenant) intended to manage them. Mears entered into an agreement for lease with Plymouth (the landlord) which required Mears to take a lease of the blocks following practical completion.

The agreement for lease specified that Plymouth could not vary the development so as to make any "distinct area" more than 3 per cent smaller than the size set out in the agreement. It transpired that many of the rooms within each block were in excess of 3 per cent smaller. Mears sought declarations from the High Court, including that any breach of the agreed tolerances enabled Mears to terminate the agreement for lease.

The High Court held that each room within the development was a "distinct area" for the purpose of applying the tolerances. The Court then made an important distinction between the materiality of the variation in the size of a room and the materiality of the resulting breach of contract. The former is purely a case of arithmetic whereas the latter requires an appreciation of the context of the development (i.e. how important the breach is to the property in question). For example, even if a room was 5 per cent smaller than stated in the agreement for lease and, despite this, could still be let at a similar rent, it would be unlikely that the resulting breach of contract would be sufficiently serious so as to enable Mears to terminate the agreement. This was so even though the breach in this case was irremediable (the rooms could not be altered to make them any bigger).

The Court refused to make the declaration requested by Mears. It held that any breach of the tolerances did not always equate to a breach sufficiently serious to permit Mears to terminate. However, the Court refused to address the question of whether the extent of the actual breach in this case was sufficiently serious to enable Mears to terminate. This was because it was not necessary to answer that question in order to decide whether or not to grant the declaration.

Al-Hasawi v Nottingham Forest Football Club Ltd [2018] EWHC 2884 (1 November 2018) (HHJ David Cooke)

Exclusion of misrepresentation claims must be expressly stated

Al-Hasawi was a buyer who purchased shares in Nottingham Forest Football Club. The buyer claimed that during the due diligence process, the seller had misrepresented the liabilities of the club in a spreadsheet which indicated they were approximately £6.6 million, whereas in fact they were over £10 million.

The key issue was whether an entire agreement clause, which seeks to restrict the agreement between parties to written contract terms, could prevent a claim for pre-contractual misrepresentation. The entire agreement clause in the Share Purchase Agreement (SPA) provided:

"this agreement (together with the documents referred in it) constitutes the entire agreement between the parties and supersedes and extinguishes all previous discussions, correspondence, negotiations, drafts, agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter".

At first instance, the judge dismissed the buyer's claim, deciding that the entire agreement clause was "deliberately wide" to exclude claims for misrepresentation. The existence of contractual indemnities in the SPA for any loss caused by the seller misstating the Club's liabilities indicated that the parties intended for claims relating to such loss to be dealt with via a contractual claim for breach of indemnity.

On appeal the High Court reversed that decision. The wording of the entire agreement clause was not clear enough to demonstrate an intention to exclude other claims outside of the contract (i.e. misrepresentation). In addition, the Court held that a contractual mechanism to allow a remedy (such as an indemnity) does not imply that other remedies are excluded. The Court cautioned against improving the bargain the parties had actually made by inserting provisions that would make commercial sense but were not actually contained in the written agreement.

UKI (Kingsway) Limited (Respondent) v Westminster City Council (Appellant) [2018] UKSC 67

Council's completion notice deemed valid

Westminster City Council intended to serve a completion notice on UKI, who was redeveloping a building at 1 Kingsway. The notice specified a date upon which the new building would be brought into the rating

list, which would result in the owner becoming liable to an assessment for rates, valued as if the building were complete.

The Council was not able to identify UKI's name or address as owner of the building. The relevant rules on service provided that a completion notice may be served, where the name or address of that person could not be ascertained after reasonable enquiry, by addressing it to the "owner" of the building and leaving it with a person who appears to be resident or employed on the land or by affixing it to some conspicuous part of the building.

The building was managed by a company (C) under a contract with UKI. However, C had no authority to accept service of notices on behalf of UKI. The Council delivered the notice by hand to the building. It was addressed to "Owner, 1 Kingsway, London, WC2B 6AN" and it was given to a receptionist employed by C. The receptionist scanned and emailed a copy of the notice to UKI.

UKI appealed against the notice on the grounds that service of the notice was invalid because it was not served on UKI, but on C instead.

The Supreme Court ruled that the notice was validly served. An analogy was drawn with the situation where a notice which is correctly addressed, but mistakenly delivered to a neighbouring address, is then passed on to the intended recipient. In such a situation, the neighbour is outside of the control of either party, but the sender can still be said to have caused the delivery of the notice.

Leon v Her Majesty's Attorney General and others [2018] EWHC 3026 (Ch)

Co-mortgagor denied vesting order

Westminster Council (one of the co-defendants in the case) granted a lease of a flat to a tenant company controlled by Leon. The tenant company entered into a mortgage over the flat with Leon as co-mortgagor. The company was subsequently struck off the register and dissolved.

After the tenant company was dissolved, Leon continued paying the mortgage and receiving rent from the flat. However, when the Council discovered that the tenant had been dissolved, it requested that the Crown disclaim the lease. After the Treasury Solicitor disclaimed the lease, Leon sought a vesting order under section 1017 of the Companies Act 2006.

On appeal, the Court vested the lease in the mortgage company instead of Leon, even though he was the co-mortgagor of the disclaimed lease. The court held that Leon had no proprietary right over the disclaimed lease. Although Leon was under a liability as co-mortgagor, the judge found that it would not be just to compensate him when the disclaimer had not caused him any loss. Indeed, Leon would be liable under the mortgage regardless of whether the lease was disclaimed. Consequently, the vesting order in favour of Leon was discharged and one was made in favour of the mortgagee instead.

Stemp v 6 Ladbroke Gardens Management Ltd

Landlord's right to forfeit waived for residential lease

Stemp was the tenant under a long lease demising a residential maisonette. Under the lease, Stemp covenanted to pay service charges for repairs and maintenance. Stemp also covenanted to pay any administration costs incurred by the landlord under section 146 of the Law of Property Act 1925.

The landlord demanded payment of on-account service charges to cover the cost of substantial repairs. Stemp failed to pay and the landlord's right to forfeit the lease for non-payment arose on 22 April 2016. However, the landlord was not entitled to exercise its right of re-entry until it complied with the statutory requirements under section 81 of the Housing Act 1996 and section 146 of the Law of Property Act 1925.

The landlord applied to the First Tier Tribunal for a determination of Stemp's liability to pay and the reasonableness of the service charges (being one of the pre-requisites to forfeiture). In the meantime, on 3 September 2016, the landlord served another service charge demand on Stemp.

The FTT concluded that the service charges were reasonable. However, the landlord had spent over £40,000 in making its application to the FTT and sought to recover this cost by way of administration costs payable under the lease. Stemp argued that the landlord had waived its right to forfeit by making the subsequent service charge demand on 3 September so the costs were not incurred in connection with forfeiture proceedings and were no longer recoverable. The landlord argued that it could not have waived the right while it was waiting for the FTT's determination.

The Upper Tribunal found in favour of Stemp. Even though the landlord had to take certain procedural steps before it could forfeit the lease, this did not mean that it could not waive the right to forfeit in the meantime. Therefore the landlord could waive the right to forfeit even though no section 146 notice had been served. The tenant was not liable to pay the administration costs for the period after 3 September 2016 because the landlord was no longer able to forfeit.

The Manchester Ship Canal Company Limited v Vauxhall Motors Limited (formerly General UK Motors Limited) [2018] EWCA Civ 1100

Relief from forfeiture requires proprietary or possessory rights

Manchester Ship Canal Company (M) granted a licence to Vauxhall (V) to discharge water and trade effluent into a canal. The licence was granted in perpetuity in 1962 for a fee of £50 per annum. In 2013, V failed to pay and, after a reminder notice, M terminated the licence in accordance with its right to do so under the licence. Following a period of negotiation for a new licence, V issued proceedings for relief against forfeiture seeking the reinstatement of the original lease.

The High Court granted relief, rejecting M's arguments that it could not do so because

the licence did not confer any proprietary or possessory right on V and that relief ought not to be granted due to the delay in V's application.

M appealed to the Court of Appeal on the grounds that V could not obtain relief from forfeiture as its rights were analogous to an easement, rather than proprietary or possessory rights. By the time of the hearing, the value of V's right under the licence was estimated to be between £300,000 and £440,000 per year.

The Court of Appeal dismissed M's appeal. The court confirmed that the right to relief from forfeiture arises only where the applicant has a proprietary or possessory interest in the subject matter. On these particular facts, V had a possessory interest and was entitled to relief.

The Court of Appeal commented that the High Court was entitled to take into account the potential windfall to M if relief were refused, recognising recent cases in which proportionality is an important consideration for the court when exercising its discretion to grant relief. Further, the delay in V's application did not make it wrong in principle to grant relief.

Rashid v Nasrullah [2018] EWCA Civ 2685

Fraudster relies on limitation period to claim adverse possession

Mohammed Rashid (M) was the registered owner of a property in Birmingham. While he was abroad, another man with the same name fraudulently transferred the property to himself using forged documents. Later that year, the fraudster gifted the property to his son, Farakh Rashid (F). F, who was complicit in the fraud, became the registered proprietor of the property on 1 November 1990.

In 2013, M applied to rectify the register by arguing that F had no right of ownership because the property had been acquired knowingly through fraud. F argued that he was in adverse possession of the land, which amounted to exceptional circumstances that justified not altering the register.

The Upper Tier Tribunal (UTT) had previously held that adverse possession is not ruled out by unlawful behaviour. However, the registered proprietor of land cannot be a trespasser, regardless of whether the title was transferred to him fraudulently or otherwise and so cannot be in adverse possession. The UTT also commented that it would have found in favour of M on the second point regarding illegality, as F should not benefit from his fraudulent act. F appealed.

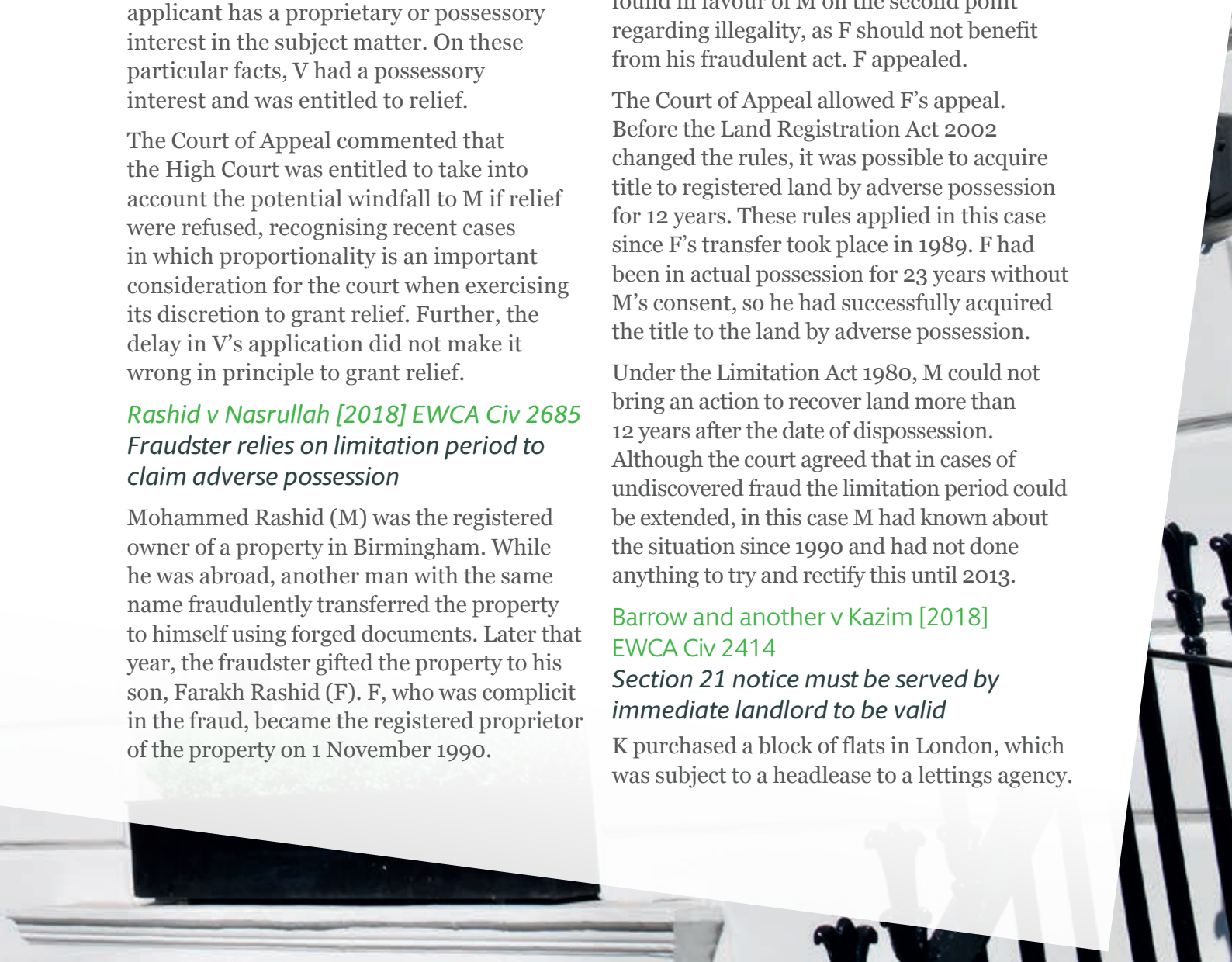
The Court of Appeal allowed F's appeal. Before the Land Registration Act 2002 changed the rules, it was possible to acquire title to registered land by adverse possession for 12 years. These rules applied in this case since F's transfer took place in 1989. F had been in actual possession for 23 years without M's consent, so he had successfully acquired the title to the land by adverse possession.

Under the Limitation Act 1980, M could not bring an action to recover land more than 12 years after the date of dispossession. Although the court agreed that in cases of undiscovered fraud the limitation period could be extended, in this case M had known about the situation since 1990 and had not done anything to try and rectify this until 2013.

Barrow and another v Kazim [2018] EWCA Civ 2414

Section 21 notice must be served by immediate landlord to be valid

K purchased a block of flats in London, which was subject to a headlease to a lettings agency.



The agency was permitted to sub-let a number of flats within the property as residential accommodation. B was the tenant of two of these flats under an assured shorthold tenancy (AST).

K served notice to quit on both the agency and the occupants of the flats, stating that K would take possession on 19 March 2016. The notice was also intended to constitute service of a section 21 notice under the Housing Act 1988, giving the tenant at least two months' written notice to terminate the AST.

On 19 March 2016, the agency's lease (which was not an AST) came to an end and K obtained a possession order against B. B unsuccessfully appealed against the order, arguing that, at the point the section 21 notice was served, its landlord was the agency and not K and therefore K could not serve a valid section 21 notice. The High Court found that the essential criteria to determine who the landlord is for the purpose of section 21 is whether they are entitled to the premises at the date the notice was to come into effect, rather than having to be the landlord at the date of service.

The Court of Appeal overruled the High Court, holding that a notice under section 21 of the 1988 Act must come from the landlord who is the tenant's immediate landlord under the AST at the date when the notice is actually served. As the agency was B's landlord at that date, no valid section 21 notice had in fact been served. The Court of Appeal also found that even where the landlord's tenancy would terminate before the date served in the notice, it did not mean that the superior landlord would be considered the direct landlord at the date the notice is served.

Cornerstone Telecommunications Infrastructure Ltd v The University of London [2018] UKUT 356 (LC)

Operator granted preliminary access under Electronic Communications Code

Cornerstone (C) was required to remove its electronic communications apparatus from a property which was going to be demolished. C requested access from the University of London (UoL) to visit the replacement site to assess its suitability to install the equipment. UoL refused to grant access due to security concerns. After repeatedly requesting and being denied access, C asked the Upper

Tier Tribunal to impose an agreement for access under Part 4 of the Electronic Communications Code 2017 (the Code).

The Tribunal had to consider whether it had jurisdiction to impose an agreement for providing a right of access under the Code. It also had to determine whether C could seek an interim Code right without seeking any permanent rights, and if C satisfied the relevant conditions under the Code (i.e. that the affected person can be adequately compensated by money and the prejudice to them was outweighed by the public benefit).

The Tribunal found in favour of the operator. It held that the right to undertake preliminary surveys to carry out works was a Code right and that there was no reason why a right to undertake works should exclude preparatory steps to installation. It also held that C could claim interim Code Rights for access and these did not have to be linked to permanent rights. The Tribunal was persuaded that there was a good arguable case that the requisite conditions under the Code were fulfilled. Therefore C was entitled to access the site to carry out its preliminary investigations.

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Can Brexit frustrate a lease? High Court says No Deal.

The High Court handed down judgment on 20 February 2019 in the closely watched case of *Canary Wharf (BP4) T1 Limited and others v European Medicines Agency [2019] EWHC 335 (Ch)*. The Court has held that the European Medicines Agency remains bound by the terms of its lease, notwithstanding Brexit. Paul Tonkin and Ben Willis report on the case and its implications.

What is the case about?

The European Medicines Agency (EMA) leases 30 Churchill Place, Canary Wharf pursuant to a lease entered into in 2014 for a term of 25 years, with no break, expiring in 2039. The lease was granted pursuant to an agreement for lease entered into in 2011. The current annual rent is approximately £13m.

Canary Wharf sought a pre-emptive declaration from the Court that Brexit does not frustrate the EMA's lease. In response, the EMA argued that, as a result of Brexit, its lease will be frustrated and so, as from 29 March 2019, it will not need to comply with its obligations in the lease.

What is frustration?

Frustration is the legal principle that a contract, including a lease, can be terminated if performance effectively becomes impossible. A frustrating event must be one which:

- occurs after the contract in question has been entered into;
- is so fundamental as to strike at the root of the contract;
- is entirely beyond what was contemplated by the parties;
- is not due to the fault of either of the parties; and
- makes any further performance of the contract impossible or illegal or makes performance radically different from that originally contemplated by the parties.

What has the Court decided?

In a complex and detailed judgment, which delves into the constitutional intricacies of EU law, the High Court has found in favour of Canary Wharf and held that the lease was not frustrated. In particular, the Judge held that it would not be impossible as a matter of European or English law for the EMA to continue to hold the lease post-Brexit and indeed there was no legal requirement for it to leave the UK as an automatic consequence of Brexit.

Whilst the Judge thought that the possibility of Brexit could have been foreseeable when the lease was granted in 2011, it was not sufficiently foreseeable that it could have been reasonably expected to impact on the parties' decision making at the time. That said, ultimately, the EMA had negotiated a 25 year lease and had received an incentive package which reflected the long term certain it was signing up to. Moreover, the lease contemplated the possibility that the EMA might at some point wish to divest itself of the building and included provisions for assignment and sub-letting (albeit on onerous terms). There was nothing to prevent the EMA from seeking to divest itself of the lease through those contractually negotiated provisions and it would be unfair to now provide it with a further means of doing so.

What are the implications of the case?

In reality, and despite the degree of attention it has attracted, the wider implications of the case were always likely to be limited. Ultimately, the arguments turned on the very bespoke characteristics of the EMA as a European institution and the prospect of a wider risk of commercial tenants seeking to argue that Brexit is a frustrating (in the legal sense!) event has always seemed wide of the mark. However, the Court's decision reaffirms the very high threshold required to establish frustration and ought to lay to rest any residual concerns on that front. That said, the case is going to appeal and the outcome will be closely watched by the whole industry.

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