OVERRIDING INTEREST

Summer 2017

Highlighting developments and issues in the real estate industry

IN THIS ISSUE

KEY CONTACTS

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THE UK GOVERNMENT PROPOSES INNOVATIVE TRANSPARENCY REQUIREMENTS FOR OVERSEAS OWNERS AND BUYERS OF UK PROPERTY

The government has published proposals for a new reporting requirement for overseas property-owners to disclose their beneficial owners. If introduced, then failure to comply could have serious implications for anyone wishing to buy or let property through non-UK companies and for their lenders.

On 5 April 2017, the then UK government published a Call for Evidence seeking views on the design of an innovative public register intended to show beneficial ownership of overseas legal entities (**"overseas entities"**) that own UK property or participate in UK public procurement (the **"New Register"**). At present we do not expect that the recent changes in the UK government will materially impact on any decision whether or when to proceed with this initiative.

The government's stated intention is to improve transparency of beneficial ownership of overseas entities investing in the UK. This follows on from a similar drive for more transparency of ownership of certain UK entities. That drive culminated in the introduction, in April 2016, of the people with significant control register (**"PSC Register"**) requirements under which companies incorporated in the UK are required to supply information about their beneficial owners - termed people with significant control (**"PSCs"**) - to Companies House, the registrar of companies in the UK.

KEY POINTS

- The New Register would, like the PSC Register, be held by Companies House.
- Overseas entities owning or proposing to acquire property in the UK would have to provide information to Companies House about their ultimate beneficial owners - PSCs - and apply for a registration number.
- Without a registration number, registration of title to property would not be possible. Overseas entities already owning UK property would be given a transitional period of 12 months to sell the property, or to comply and obtain a registration number which they would need if they wished to sell the property after the expiry of

the 12 month period.

- A failure to register would result in a restriction being placed on the title register of the relevant property preventing a sale or the grant of a long lease or legal charge of the property.
- Compliance with the New Register requirements would extend to owners and buyers of freehold title, and to tenants under leases that have an initial term of at least 21 years.
- The New Register would be available for anyone to view without charge on the Companies House website. It is expected that Companies House would charge overseas entities a modest fee for registration.
- The government is looking at developing rules under which it would be possible in certain cases to keep certain information out of the public domain. This is likely to include a case where a person's safety would be compromised by the disclosure.

WHEN WILL THIS CHANGE BE INTRODUCED?

It is not yet clear when or if the New Register requirements will become law. However, the Call for Evidence proposed a reasonable lead-in period during which awareness of the New Register will be raised.

WILL YOU BE AFFECTED?

The proposed changes will affect overseas companies and other overseas entities that own or intend to acquire certain UK property. Further, the New Register requirements would extend to overseas entities wishing to participate in UK central government procurement contracts.

The government has not yet said exactly which types of overseas entities would fall within the scope of the New Register regime but the intention is to capture every kind of overseas entity that could hold UK property or bid on central government procurement contracts in the UK.

The requirements are intended to apply to registered freehold titles and to leases that have an initial term of at least 21 years and which require registration. They would not apply to overseas entities currently owning unregistered land; however a transfer of unregistered land would trigger registration requirements.

It is also proposed that overseas entities must supply beneficial ownership information before a UK central government procurement contract valued at over £10 million can be finalised. Compliance would be mandatory for procurements by central government and voluntary for wider public sector bodies such as Local Authorities.

To avoid duplication of reporting, the intention is to exempt overseas entities that are already subject to equivalent disclosure requirements to those proposed. There would be no requirement to investigate further up a chain of ownership where a beneficial owner is already required to provide information about its beneficial owners to a publicly-accessible register - for example where a beneficial owner is a UK company currently subject to the PSC Register requirements.

WHICH PEOPLE WILL BE PSCS OF OVERSEAS ENTITIES FOR THIS PURPOSE?

It is proposed that the definition of PSCs as understood under the PSC Register regime be adopted with some changes and that accordingly PSCs whose information needs to be disclosed will generally be individuals. On this basis the relevant individuals will be those who directly, or indirectly through a majority ownership chain, hold more than 25% of the shares or voting rights in the overseas entity or can control the appointment of a majority of the Board, or otherwise those who have the right to exercise, or actually exercise, significant influence or control over the overseas entity.

In line with the intention to capture all overseas entities, beyond just companies limited by shares, it is proposed that provision be made for the control conditions under the New Register regime to extend for example to: voting rights in relation to different overseas entities, rights to a share of the capital or profits of the overseas entity and rights to appoint and remove a majority of the equivalent management body of that overseas entity.

WHAT INFORMATION WILL NEED TO BE MADE PUBLICLY AVAILABLE?

It is intended that information required about PSCs in the New Register is to be the same as under the PSC Register requirements. Particulars of PSCs required on the New Register would therefore include, among other things: name, date of birth, residential and service address, nature of control and when that person became a PSC. It is also intended that overseas entities will have to check the accuracy of information with their PSCs before disclosing information on the publicly-accessible New Register.

It is further proposed that the overseas entity provide information to Companies House about itself. This is expected to include its name, legal form, registered office address, contact email and country of incorporation.

Overseas entities, much like UK entities, will be required to take all reasonable steps to locate PSCs and will be in compliance with the scheme if they record that they are unable to identify

who their PSC(s) are after having taken all reasonable steps, provided reasonable steps have indeed been taken.

Where overseas entities are unable to supply information about their PSCs, it is proposed that they provide information about their managing officers. Details required on the New Register about managing officers would include: name, date of birth, service and residential address and nationality. If the managing officer is a legal entity, the firm name, registered office, legal form and the name of the register on which it is entered would be required.

PROTECTING INFORMATION

The government is aware that an extensive protection regime may be required given that the New Register will connect individual properties to individual PSCs. Accordingly, it is expected that there will be a system allowing a PSC or managing officer to apply to have information excluded and that this is likely to cover, as a minimum, situations where an individual would be at risk of violence or intimidation as a result of information that would otherwise be made public.

WHAT ARE THE SANCTIONS?

As noted above, where New Register requirements have not been complied with it is proposed that a restriction would be added to the property's Land Registry title register prohibiting its sale, or the grant of a long lease or legal charge. It is also intended that overseas entities acquiring relevant property would not be registered as proprietor unless they have complied with the New Register requirements.

The government proposes to make it a criminal offence for anyone knowingly or recklessly to submit false or misleading information to the New Register. The government is also considering making it a criminal offence for overseas entities to continue to hold UK property at the end of the 12 month transitional period without having complied with the

New Register requirements, or if they fail to update this information at least once every 2 years. It is proposed that overseas entities on the New Register would be contacted three months before their update is due.

HOW WILL THE NEW REQUIREMENTS AFFECT PROPERTY LENDING?

It is proposed that existing lenders will be permitted to enforce their existing security and sell property even where their overseas entity borrower fails to comply with the New Register requirements. By contrast, the grant of new security would not be possible where the borrower has not complied with the New Register requirements.

This raises the prospect of lenders getting involved in ensuring that the New Register requirements are correctly applied. The government is aware that beneficial owners of property could seek to circumvent the requirements by posing as a lender and repossessing their own property and therefore proposes that only accredited or legitimate lenders would be able to repossess and dispose of property which has a restriction against it.

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MEES UPDATE

In February the government published guidance on how the MEES Regulations will be applied. These regulations could potentially have a major impact on landlords and, with less than a year to go before they come into effect, the guidance on how they will work is welcome.

As you may recall, the regulations provide that:

- from 1 April 2018, landlords of non-domestic private rented properties (including public sector landlords) may not grant a tenancy to new or existing tenants if their property has an EPC rating of band F or G (shown on a valid Energy Performance Certificate for the property).
- from 1 April 2023, landlords must not continue letting a non-domestic property which is already let if that property has an EPC rating of band F or G.

EPCS - WHAT THEY ARE

Energy Performance Certificates (EPCs) are needed whenever an eligible property is constructed, sold or rented out (under the Energy Performance of Buildings (England and Wales) Regulations 2012) and after installing certain improvements (the Building Regulations 2010).

An EPC for a non-domestic building gives the property an energy efficiency rating from A+ (most efficient) to G (least efficient) and is valid for ten years. The EPC relates to the property rather than to the owner, therefore an EPC obtained by a previous owner of the property will remain valid even after a property is sold on, so long as it is less than ten years old.

WHAT LANDLORDS NEED TO DO ABOUT THE REGULATIONS

Where a landlord wishes to continue letting property which is currently sub-standard (ie band F or G), they will first need to ensure that energy efficiency improvements are made which raise the rating to a minimum of E. In certain circumstances landlords may be able to claim an exemption from this prohibition. Where a valid exemption applies, landlords must register the exemption on the database set up for this purpose – the PRS Exemptions Register. Local Weights and Measures Authorities will enforce the minimum standards. Where a property has been let in breach of the Regulations the authorities may serve a penalty notice on the landlord imposing financial penalties and publish details of the breach.

Some exemptions and exclusions

Works to a sub-standard property are not required in the following cases:

- Where the recommended measure does not achieve an energy

efficiency payback of seven years or less. The guidance sets out in detail how to calculate this.

- Where a landlord has made all the relevant energy efficiency improvements to the property that can be made (or there are none that can be made), and the property remains sub-standard.
- Where third party consent is required for a particular measure (eg planning permission, consent from mortgage lenders, landlord's consent, consent from the current tenant of the property). The landlord must be able to demonstrate to enforcement authorities on request, 'reasonable effort' to seek consent. The guidance says that reasonable efforts may include attempts on a number of separate occasions and using a number of different available means of communication to secure agreement, although in the case of planning consent refusal, evidence of a single application and subsequent refusal is likely to be sufficient evidence. In addition where consent is proffered subject to conditions, it is thought that that it will not be reasonable for the landlord to comply with a condition which may reduce the landlord's ability to let the property or if it involves unreasonable costs.
- A temporary exemption of five years from meeting the minimum standard will apply where the landlord has obtained a report from an independent surveyor who is on the Royal Institution of Chartered Surveyors register of valuers advising that the installation of specific energy efficiency measures would reduce the market value of the property, or the building it forms part of, by more than five per cent.

But beware: exemptions from the prohibition on letting do not pass over to a new owner on sale of a property - the new owner will need either to improve the property to the minimum standard, or to register an exemption.

THE PRS EXEMPTIONS REGISTER

The Regulations require that part of the database must be open to the public and will contain the following information:

- the address of property;
- the name of landlord (where the landlord is not an individual);
- the exemption/s relied on;
- a copy of the EPC; and
- the date on which exemption was registered.

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NEW JOINERS

Emily Reynolds

Charlotte

Emily Reynolds is a partner in the firm's Charlotte office and represents developers, lenders, and investors in a variety of complex real estate matters, including: corporate relocations and major operations leases; acquisition, development, financing, leasing, and sale of commercial and industrial properties; joint ventures; renewable energy facilities; private placement real estate funds; strategic planning; recapitalisations and 1031 exchanges.

Mounir Letayf

Paris

Mounir Letayf is a partner in the firm's Paris office and leads its banking and finance practice. He has extensive experience in acquisition finance covering a large spectrum of financing products (senior, second lien, mezzanine, unirate/unitranche, PIK, TLB, high-yield, SSRCF). Additional core areas of practice are real estate finance, project finance, debt restructuring and structured finance (factoring and securitization). He advises lenders (banks, mezzanine funds and alternative debt providers) as well as sponsors and borrowers (investment funds and listed and non-listed companies) on domestic and cross-border transactions.

EVENTS

CREFC Europe Spring Conference

The London office hosted the Commercial Real Estate Finance Council Europe's two day Spring Conference on 10-11 May. A team of lawyers from the finance group attended alongside a number of guest clients, with the event providing a platform for commercial real estate (CRE) finance market professionals to come together to learn about and discuss the latest trends and challenges facing the industry.

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

Seminar on Lease Agreements - Warsaw

On 16th May K&L Gates' Warsaw office held a breakfast seminar on lease agreements and discussed their main advantages during the event. The discussion focused on the practical aspects of securing contract durability, the most important risks during their lifetime, rules of cost, and also settlement of expenditures. K&L Gates Lawyers involved in this event included Halina Więckowska, Piotr Łaska and Karolina Bąk.

For more information on this event or our events in Warsaw please contact:
Halina Więckowska
halina.wieckowska@klgates.com

Property Race Day

On 14th July, the London real estate and finance teams are attending the Property Race Day at Ascot. The Property Race Day is an established key date in the property calendar. The principal aim is to fund-raise for selected charities and it also offers a perfect opportunity for networking within the sector whilst enjoying a day at one of the finest racecourses in the world.

For more information please contact:
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Where's the Money? roundtable event - New York

During June we held a roundtable event at our New York Office titled Where's the Money? The event was a roundtable which discussed the variables shaping today's real estate lending landscape including debt funds and foreign investing.

For more information on the event please contact:
Sheri Chromow
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or
Brian Wildstein
brian.wildstein@klgates.com

PLEASE JOIN US

Annual Real Estate Breakfast Seminar - 12 September 2017

Global Real Estate Trends, Africa and Opportunities for 2017/2018

TUESDAY 12 SEPTEMBER 2017
08:00AM - 10:00AM

This seminar will include:

- An analysis of Global Real Estate Trends
- Operating in Emerging Markets - Africa and Opportunities
- A panel discussion

PANELLISTS/SPEAKERS:

- **Sabina Kalyan**, Global Chief Economist and Head of EMEA Strategy & Market, CBRE Global Investors
- **James Green** Partner, K&L Gates, London
- **Adri Kerciku**, Investment Consultant, M3 Capital Partners (UK) LLP
- **Mike Phillips,** UK Editor, Bisnow

PROGRAMME:

8:00am - Registration and breakfast

8:30am - Seminar commences

10:00am - Seminar concludes followed by coffee/ networking

LOCATION:

K&L Gates
One New Change
London EC4M 9AF
(Watling Street entrance)

RSVP:

To register for this event or if you require further information, please email Robyn Duffy (eventslo@klgates.com) or call +44.(0)207.360.8248.

REAL ESTATE GUIDE: RIGHTS OF LIGHT

WHAT ARE RIGHTS OF LIGHT?

A right to light is a right to enjoy the natural light that passes over someone else's land. The right entitles the beneficiary to receive sufficient natural light through an aperture (usually a window) to allow the room behind to be used for its ordinary purpose. It is not a right to direct sunlight. Rights of light can be created expressly by agreement, but more often than not rights of light are gained by light entering the same window without interruption for 20 years (known as a prescriptive right).

WHY ARE RIGHTS OF LIGHT IMPORTANT?

Rights of light are a key aspect of developments, especially where a proposed scheme may interfere with the natural light which passes over adjoining properties. If a development interferes with an adjoining building's rights of light, the developer can be liable to pay compensation to the adjoining owners or, in the most serious cases, be required to alter or even demolish the part of the development.

DEVELOPER'S DUE DILIGENCE

Owners of adjoining properties whose rights of light are affected by a development can take steps to protect their rights of light. Responding to these attempts can take up valuable time and resources. Developers will therefore want to consider the impact that their scheme will have on adjoining buildings at a very early stage in the development process. From a technical perspective, a surveyor will carry out an analysis to establish whether the development will impact on the surrounding buildings. If that analysis suggests that some neighbouring buildings will potentially be affected, we would then carry out a legal review of the titles and occupational leases. If rights of light are identified, the surveyor will assess the likely level of damages and whether any rights are so severely affected that the development is at risk of being stopped.

OUR EXPERIENCE IN RIGHTS OF LIGHT MATTERS

- Our lawyers in London have a wealth of experience in assisting developers and adjoining landowners with rights of light matters. We offer a fully integrated service and our real estate lawyers work closely with our colleagues who provide planning, tax and insurance coverage that clients require to resolve successfully rights of light matters.
- We guide our clients through the process of establishing whether they benefit from or are subject to any rights of light and then devising a strategy to best protect their interests, drawing on our experience in rights of light matters, and our strong relationships with rights of light professionals to ensure that we provide a seamless service and an extensive professional network for all of our clients' rights of light requirements.

REPRESENTATIVE RIGHTS OF LIGHT MATTERS

We have experience in acting on a wide range of rights of light matters. Recent examples of our work include acting for:

- a developer of a 1m square foot Central London tower development
- an institutional investor in connection with various adjoining Central London developments
- an investment owned by a family office in connection with an adjoining development
- a PLC London developer in connection with multiple redevelopments
- a gallery owner in connection with an adjoining mixed use (residential and hotel) development

OUR REAL ESTATE LAWYERS WORK CLOSELY WITH OTHER PRACTICE AREAS INCLUDING:

Planning

Corporate

Insurance Coverage

Tax

STRATEGY: FOR DEVELOPERS

Once the initial due diligence processes have been completed, the developer, its surveyors and lawyers will formulate a strategy to allow the developer's scheme to be built even if it does impact on neighbouring buildings' rights of light.

Historically, the primary remedy available to neighbouring owners was for an injunction to be awarded requiring the building (or offending part) to be demolished, exposing the developer to significant risks and high costs. However, recent case law has suggested that the developer's conduct will be taken into account when assessing the remedies available to adjoining owners: where the developer has sought to engage with adjoining owners, it is more likely for damages to be awarded if court proceedings arise. This gives developers a greater incentive to settle potential disputes and de-risk their development.

STRATEGY: FOR ADJOINING OWNERS

For adjoining owners whose buildings are affected by developments, we can help formulate a strategy to protect their rights of light and/or maximise the compensation which the developer must pay. After carrying out a title analysis to establish that their building benefits from rights of light, we would involve rights of light surveyors to confirm whether, and to what extent, those rights are being infringed by a development. We will then take all necessary steps to enforce the rights of light and protect our clients' interests in conjunction, at the right stage, with specialist counsel.

COMPENSATION

Most commonly, developers will approach adjoining owners on a "without prejudice" basis and offer to pay compensation to the affected owner in return for a release of its rights to light over the land to be developed. The level of compensation for the release will be calculated and negotiated by the parties' surveyors. They will consider, amongst other factors, the affect that the infringement on light will have on the value of the affected premises ("book value") and the profit that the developer will gain from the development proceeding ("profit share").

RELEASE OF RIGHTS

The release of rights might be limited to the development in question (so the affected owner will retain its rights to light beyond the "development envelope") or it could release all rights of light to allow for any number of future developments. Adjoining owners may push for a reciprocal release to allow the adjoining owner to develop its land in the future. We will negotiate the deed of release and advise on any related taxation issues which should be considered by developers and adjoining owners, and deal with any security or registration provisions.

TAX CONSIDERATIONS

Paying compensation in exchange for a release of rights of light can give rise to Stamp Duty Land Tax payments for the developer. Both parties should also consider whether VAT is also payable on any consideration (including reciprocal releases) given by them. We are familiar with the taxation issues that arise in relation when rights of light releases are negotiated and will guide our clients through them.

INSURANCE

Insurance against successful third party claims for infringement of a right to light might also be available. It is important to remember that, generally, insurance will not be available if negotiations have started with the surrounding landowners. However, some insurers are willing to offer more sophisticated policies which allow developers to negotiate with third parties to reduce further the likelihood of claims being made—and we work closely with the best brokers to obtain optional insurance solutions.

We know which aspects of rights of light tend to be unfamiliar or surprising to our clients and how best to explain and guide you through these issues.

VALUE ADD

In particular, we know which parts of the process are likely to cause delays to our clients' developments. For example, instructing rights of lights surveyors and carrying out rights of light technical and legal assessments are vital parts of development feasibility studies. We advise our clients to make these a priority as early in the development process as possible.

We have a strong network of rights of light professionals, from surveyors and barristers to insurance brokers to whom we can introduce clients where required. We also work closely as a team with our colleagues in tax and planning to present seamless advice and solutions.

REAL ESTATE GUIDE: REPRESENTING CORPORATE OCCUPIERS IN THE UK

OUR EXPERIENCE ACTING FOR OCCUPIERS

We guide our clients through the process of taking and managing space, drawing upon the experience of the firm's global platform and our strong relationships with brokers, surveyors, developers and project managers to ensure that we provide a seamless service and an extensive professional network for all of our clients' real estate requirements.

REPRESENTATIVE OCCUPIER TRANSACTIONS

- acting for one of the largest charities in the world in the establishment of its European headquarters based in London
- advising a prominent advertising consultancy, based in Boston, on its London office acquisition
- acting for one of the six major movie studios in relation to its London head office lease work
- representing one of the world's leading online service providers—we deal with all of their lease work in the UK, including their head office in London and their regional offices
- handling the acquisition of the first lease in London for a Canadian state pension fund
- acting for an Illinois-based, global software company in the acquisition of its new UK premises
- acting for a California-based private technology company, with 18 offices worldwide, in relation to its UK real estate requirements

CONSIDER FREEHOLD OR LEASEHOLD

There are two ways of owning land, known as 'freehold' or 'leasehold'. A freehold interest is an interest that is not limited by time. The owner controls and owns all of the land, the buildings on it, the subsoil and airspace. Ownership may be restricted by the rights of others: for example, a third party might have rights of access over the land. With leasehold property, however, the interest is contractually time limited to the length of the lease. For leases of commercial property, the average length of lease term has been reducing over recent years and now stands at eight years. The majority of our overseas clients choose to take a leasehold interest rather than acquire a freehold interest. It could be that there is an existing tenant, in which case the existing tenant will assign the lease to the overseas client. This will require the landlord's consent. Alternatively, this could be a new lease of the premises, in which case the landlord will grant the lease to the client direct.

NEGOTIATING TERMS OF THE LEASE

We recommend that our clients instruct the services of a real estate agent to help them find premises and to negotiate the main terms of the lease, including the length of the term, the amount of the rent, the length of any rent-free period and any other commercial points. When a deal is struck with the landlord, the commercial terms are set out in a document called "heads of terms". At this stage the proposed time scales will be agreed upon and typically the parties anticipate that the letting will be concluded in three or four weeks. Heads of terms are not legally binding. We have strong relationships with agents in London and the rest of the UK and can guide our clients accordingly.

MINIMISE THE RISK OF DELAYS

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

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

BE PREPARED TO PROVIDE DEPOSITS OR GUARANTEES

The landlord will want to know that the tenant entity has sufficient financial strength to be able to pay the rent and to perform the obligations on the tenant's part set out in the lease. Often our overseas clients establish a UK subsidiary company and this company becomes the tenant under the lease. As it may not have any history of financial performance at an early stage, the landlord may ask for a rent deposit, which is typically

OUR REAL ESTATE LAWYERS WORK CLOSELY WITH OTHER PRACTICE AREAS INCLUDING:


Corporate


Insurance Coverage


Tax


Employment


Intellectual Property


Regulatory Advice


Finance


Competition

for between six and 12 months' rent. They may ask that the overseas parent company gives a guarantee of the subsidiary company's lease obligations. If that is acceptable, we would often help, through our office in which the client is based, to give a legal opinion letter which confirms to the landlord that the parent company has entered into the guarantee in a legally enforceable manner in the parent's own jurisdiction.

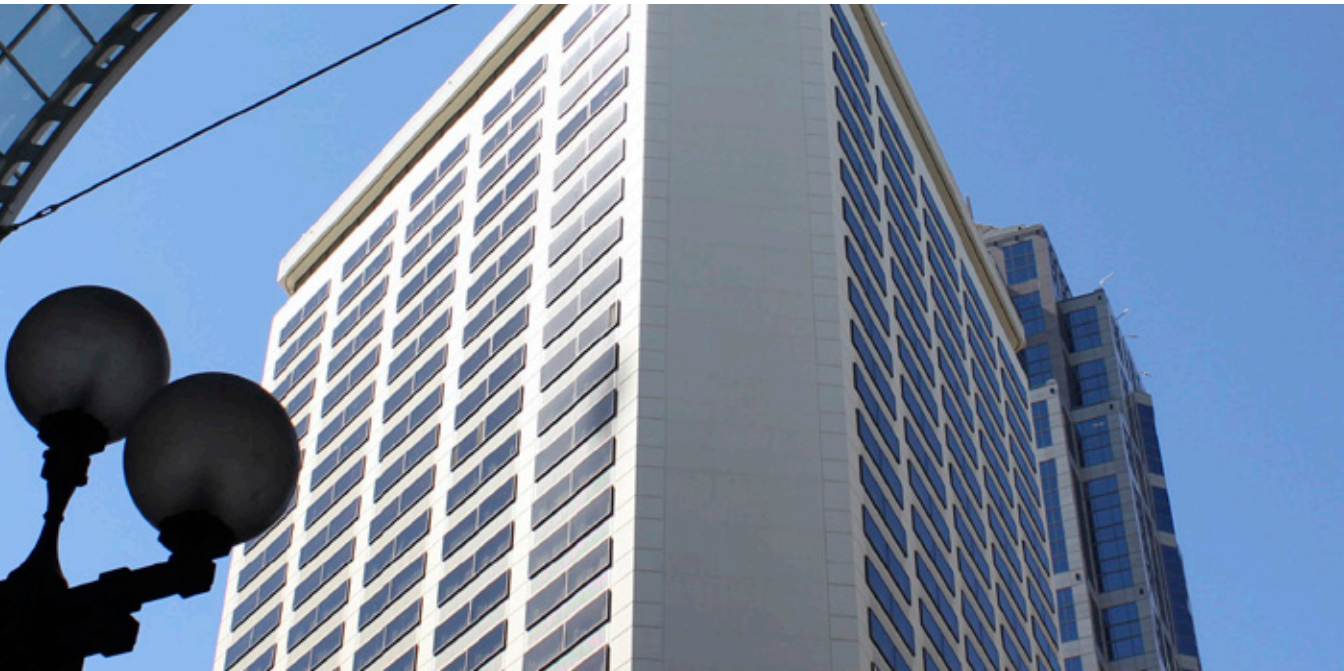
CONDITION OF THE PROPERTY

It is rare for a landlord to warrant that the physical condition of the premises (and the building in which they sit) is satisfactory or suitable for its use. Most commercial leases require the tenant to be responsible for keeping the interior of the premises in good repair; the landlord is obliged to keep the structural parts of the building in good repair and they will recover the cost of doing that from the tenants through a service charge. Depending on the nature of the building, we recommend clients to obtain a suitable survey report so that they are fully aware of any potential defects or liabilities (during the term and dilapidations liabilities at the end of the term).

In the case of newly built or refurbished premises, a tenant will expect a construction pack including remedies against the professional team if defects in the construction arise. This should be agreed in the heads of terms.

CLOSING THE DEAL

Once the heads of terms are agreed, the landlord and the tenant instruct their respective lawyers. The landlord's solicitors will produce a legal pack, including: drafts of the lease, the fitting out licence and any rent deposit deed; the landlord's title to the building (whether freehold or leasehold); evidence that the premises are authorised for the use that the tenant intends; confirmation that there is no environmental contamination; and replies to standard questions about, for example, the

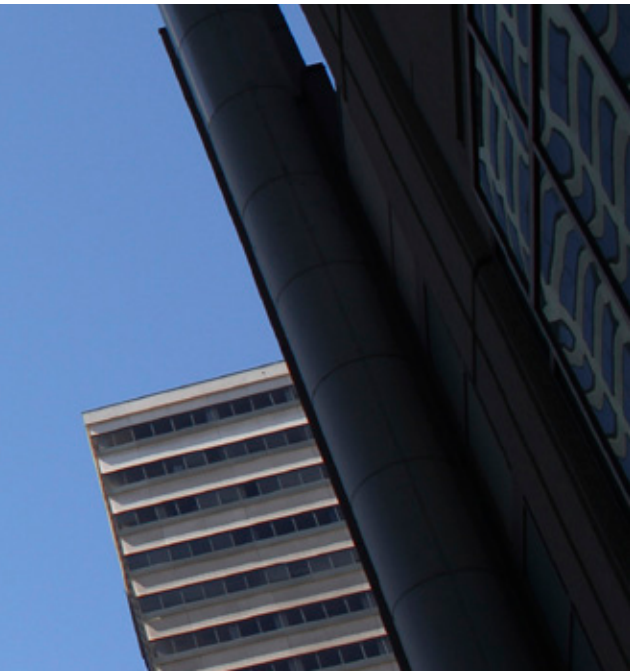


landlord's management of the building and the service charge.

Our real estate, planning and environmental lawyers will review this information, raising further questions as necessary. We also negotiate the lease documentation and, if an opinion letter is required, obtain that from our colleagues in the relevant overseas office. We will tailor the level of our due diligence to the value of the letting and produce a report on all of our findings.

Once everything is agreed, the fit-out plans have been approved by the landlord, all consents are agreed, and the parties are ready to go ahead, the next stage is to complete the lease and other documents.

The post-completion stages are applications to register the lease at the Land Registry if it is for a term of seven years or more. Stamp Duty Land Tax may be payable within 30 days of completion. We will advise on the amount if any and make the payment and application for you.



We know which aspects of UK real estate law tend to be unfamiliar or surprising to overseas clients, and how best to explain and guide you through those issues.

VALUE ADD

In particular, we know which parts of the process are likely to trip our clients up. For example, instructing a fit-out contractor and obtaining the landlord's approval to the clients fit-out plans is a very common cause of stressful delays. We advise our clients to make this a top priority while we focus on the lease negotiation.

In terms of due diligence, whilst we factor in the value of the letting, we always strongly recommend that our clients allow us to square off all the component parts. Overseas clients, perhaps unfamiliar with the UK system, need to feel assured that they are not going to fall into any traps.

We have a strong network of real estate professionals, from brokers, to surveyors to fit-out contactors, to whom we can introduce clients if they need those introductions.

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CASES

FIRST TOWER TRUSTEES LTD AND INTERTRUST TRUSTEES LTD V CDS (SUPERSTORES INTERNATIONAL) LTD [2017] EWHC B6 (CH)

Facts of the Case - Prior to the lease being entered into, the trustee landlords provided the tenant with the usual set of responses to enquiries (including the CPSE.1). One of these was confirmation that they had **not been notified of any breaches of environmental law**, whether actual or otherwise. The lease itself contained a clause stating that **the tenant had not entered into the lease in reliance on any representation** made by the landlords. Once the tenant took possession, it discovered that substantial remedial works would be required in respect of the presence of asbestos at the property. It was later revealed that **the landlords had been warned about this in advance of completion** of the lease.

Decision of the High Court - The court held that the landlords had made false representations to the tenant about the presence of asbestos at the property. It also held that the non-reliance clause amounted to an attempt to exclude liability, meaning that the Misrepresentation Act 1967* could be invoked. The landlords would therefore have had to prove that the clause was reasonable in order to be able to rely on it.

It was decided that it was **highly unreasonable** for the landlords to withhold their knowledge of such a serious issue from the tenant at the pre-contract stage, since it rendered the enquiry process worthless. The need for remedial works in order to handle the asbestos problem would have had an impact on the tenant's decision to take the lease.

** Note: under s3 of the Misrepresentation Act 1967, a clause limiting or excluding liability for misrepresentation is void unless it satisfies the test of reasonableness under the UCTA 1977.*

SHAW V GROUBY & ANOR [2017] EWCA CIV 233

Facts of the Case - Ms Shaw owned a house, access to which from the highway was provided under the terms of a transfer by means of a right of way over Mr Grouby's driveway. She undertook renovation and landscaping works and decided to construct a new entry way along the driveway. She also built a brick wall over the original access point as she no longer needed it. The two parties entered into negotiations for her to purchase the driveway, but these proved unsuccessful. Ms Shaw started proceedings in order to compel Mr Grouby to remove the two bins full of concrete he had left in front of her

new entrance, and he counter-claimed saying she had no right to create this new entrance and that the erection of the brick wall constituted a trespass.

Mr Grouby argued that Ms Shaw's right of way was limited to what was physically necessary to obtain access to the property at the date of the grant of the right. He claimed that she did not need to move the access point, and therefore she should not have done so. In the alternative, his case was that what was "necessary" should be construed to denote a point of access which is the shortest distance from Ms Shaw's property to the highway.

Decision of the Court of Appeal - The Court of Appeal agreed with the judge at first instance, stating that at the test for what was "necessary" need not be assessed based on a particular point of time. It should be assessed instead from time to time throughout the subsistence of the grant. Therefore, even if the access point had been moved since the right was first granted, it was still necessary for Ms Shaw to use it. There was also no evidence to suggest that the original access point had been identified based on the distance from Ms Shaw's property to the highway.

If Mr Grouby wanted to specify the access point as being the only one that could ever be used, then this should have been stated expressly in the 1999 transfer.

GENERAL MOTORS UK LTD V THE MANCHESTER SHIP CANAL COMPANY [2016] EWHC 2960 (CH)

Facts of the Case - A licence was granted in 1962 by The Manchester Ship Canal Company to discharge surface water from a nearby assembly plant into the canal for the sum of £4 per month. The right was granted in perpetuity, and in exchange General Motors had to pay an annual sum of £50. It stopped paying that licence fee in 2013, with the result that the licence was terminated for breach in 2014. Both parties attempted to negotiate the grant of a temporary right instead, but the annual sum would have had to increase substantially. No agreement was reached and General Motors issued proceedings.

Decision of the Court - The main issue considered by the court was whether it could grant relief from forfeiture, in favour of General Motors. It has long been assumed that this discretionary relief only applied to leases or contracts granting proprietary or possessory rights over the land in question. In this case, the court accepted that although the right to drain through land was not any of those rights noted above, nevertheless, exceptionally, the right was sufficient to allow for this relief to be used. One of the reasons for this was that General Motors had a right that not only entitled it to indefinite and exclusive use of the channel into the canal, but also placed certain restrictions on The Manchester Ship Canal Company's use of the same.

Thus, the rights were deemed sufficient to constitute a right to occupy the land.

The court was however very clear in stating that this decision was based on the particular circumstances of this set of facts, and that "sufficiency" of such rights had to be considered on a case-by-case basis.

Comment: This case is significant in that the court took the test for relief from forfeiture and extended it to cases where the claimant has rights that are not quite possessory, but more than purely contractual. While the passage of water through land can be construed as a form of "occupation" over the land while the water flows, this is little more than a transient state of being and could represent too big a leap of logic for the Court of Appeal to accept. The Manchester Ship Canal Company has applied to appeal this decision.

FIRST TOWER TRUSTEES LTD AND INTERTRUST TRUSTEES LTD V CDS (SUPERSTORES INTERNATIONAL) LTD [2017] EWHC B6 (CH)

Facts of the Case - A commercial tenant was allowed to claim damages for negligent misrepresentation from his landlords after he discovered that certain pre-contract enquiries had been incorrect.

Prior to the lease being entered into, the landlords provided the tenant with the usual set of responses to enquiries. One of these was confirmation that they had not been notified of any breaches of environmental law, whether actual or otherwise. The lease itself contained a clause stating that the tenant had not entered into the lease in reliance on any representation made by the landlord. Once the tenant took possession, it discovered that substantial remedial works would be required in respect of the presence of asbestos at the property. It was later revealed that the landlords had been warned about this in advance of completion of the lease.

Decision of the Court - The court held that the landlords had made false representations to the tenant about the presence of asbestos at the property. It also held that the non-reliance clause amounted to an attempt to exclude liability, meaning that the Misrepresentation Act 1967 could be invoked. The landlords would therefore have had to prove that the clause was reasonable.

It was decided that it was highly unreasonable for the landlords to withhold their knowledge of such a serious issue from the tenant at the pre-contract stage, since it defeated the purpose of going through the enquiry process altogether.

Comment: This case demonstrates the need to keep replies to pre-contract enquiries under review until completion, and of ensuring all information provided is up to date up until that time. It also shows the potential pitfalls of drafting a clause too widely, as it may be found to be void altogether as a result.

VIVIENNE WESTWOOD LIMITED V CONDUIT STREET DEVELOPMENT LIMITED [2017] EWHC 350 (CH)

Facts of the Case - A commercial landlord was found to have subjected its tenant to a penalty clause in respect of the payment of rent, which was found to be unenforceable.

Vivienne Westwood held a 15 year lease from 2009 at an initial rent of £110,000 per annum, subject to review every five years. At the same time as the lease was granted, the parties entered into a side letter allowing for reduced rents for the first five years of the term. The letter stated that if the revised open market rent payable after these five years exceeded £125,000 per annum, the rent amount would be capped at that amount. However, the letter also provided that it could be terminated with immediate effect if the tenant breached the terms of either agreement.

The tenant missed a rent payment, and the landlord argued that the side letter had been terminated due to this breach. The rent payable would therefore be set at open market value, which was £232,500 per annum, and thus significantly higher than that agreed in the side letter. Vivienne Westwood argued that this was effectively a penalty clause and could not be enforced.

Decision of the Chancery Division - The Chancery Division held that the termination clause applied (i) only to non-trivial breaches of the lease, as there would otherwise be no sensible commercial effect of entering into the side letter, and (b) retrospectively as well as prospectively, in that the result of enforcing it would be as though the side letter never existed. The tenant would therefore have been liable for all rent starting from the beginning of the lease.

In light of this, the court decided that the termination clause was a penalty clause, as it imposed a secondary obligation upon the breach of a primary obligation. This is a well-established principle of English law.

Furthermore, the clause entitled the landlord to more than was proportionate to the legitimate interest of a landlord

in having the tenant comply with its obligations as opposed to paying full compensation for any breach of the lease. Making Vivienne Westwood liable retrospectively and prospectively would have been an exorbitant and unconscionable result, and as such the court did not see fit to allow it to be enforced.

Comment: This case was decided primarily on the specific wording of the clause in question. As such, it remains to be seen how useful this decision will be in the future. Nonetheless, it is advisable that landlords are careful not to impose unduly onerous terms when drafting rent concession terms, as they will become unenforceable if they are seen to impose penalties on tenants. For example, an obligation to pay the higher rent in case of breach only operates prospectively, rather than retrospectively.

NEWBIGIN (VALUATION OFFICER) V S J & J MONK (A FIRM) [2017] UKSC 14

Pursuant to the Local Government Finance Act 1988, valuation officers generally assume that the property being valued is in a reasonable state of repair at the time of the valuation, meaning that any works of repair or refurbishment in the property could be disregarded and the business rate liability of the developer be fixed at the normal rate. This would apply even where the works were so extensive so as to prevent beneficial occupation of the property.

As business rate liability is assessed according to a property's open market value, this led to situations where the business rate would be payable despite the property's actual open market value being nil (as it would be incapable of beneficial occupation).

Although this ruling did not define "beneficial occupation", the court held that it would require an objective assessment of the actual condition of the property and that it might, for example, change according to whether certain parts became capable of occupation or not.

Comment: Business rate liability has to be objectively assessed where a property undergoing reconstruction is incapable of beneficial occupation. If the property is found to be incapable of beneficial occupation, then the owner's liability for business rates would be nil until the works were completed. This is important for clients undertaking large-scale construction works to bear in mind, as such liability may amount to as much as the value of the property even where the property is unoccupied. Once the works are done, it is advisable to ensure the property is occupied as soon as possible in order to prevent unnecessary financial losses occurring.

SHAW V GROUBY & ANOR [2017] EWCA CIV 233

Facts of the Case - Access to an easement could be moved according to what was necessary throughout the subsistence of the grant of right of way, rather than fixed by reference to what was required at the start of the grant.

Ms Shaw owned a house, access to which from the highway was provided under the terms of a transfer by means of a right of way over Mr Grouby's driveway. She undertook renovation and landscaping works and decided to construct a new entry way along the driveway. She also built a brick wall over the original access point as she no longer needed it. The two parties entered into negotiations for her to purchase the driveway, but these proved unsuccessful. Ms Shaw started proceedings in order to compel Mr Grouby to remove the two bins full of concrete he had left in front of her new entrance, and he counter-claimed saying she had no right to create this new entrance and that the erection of the brick wall constituted a trespass.

Mr Grouby argued that Ms Shaw's right of way was limited to what was physically "necessary" to obtain access to the property at the date of the grant of the right. He claimed that she did not need to move the access point, and therefore she should not have done so.

In the alternative, his case was that what was "necessary" should be construed to denote a point of access which is the shortest distance from Ms Shaw's property to the highway.

Decision of the Court of Appeal - The Court of Appeal agreed with the judge in the first instance trial, saying that the test for what was "necessary" need not be assessed based on a particular point of time. It would be assessed instead from time to time throughout the subsistence of the grant. Therefore, even if the access point had been moved since the right was first granted, it was still a part of Ms Shaw's access needs over the driveway. There was also no evidence to suggest that the access point had been identified based on the distance from Ms Shaw's property to the highway.

If Mr Grouby wanted to specify the access point as being the only one that could ever be used, then this should have been stated expressly in the 1999 transfer.

Comment: The court took a fairly common sense approach to the question of what would be "necessary" to access a property. This is beneficial to the users of easements as it shows that there is no strict interpretation of the rights they can enjoy, as the court is more concerned with the actual purpose of granting such rights in the first place.

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