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REAL ESTATE NEWSLETTER

NEWS

If you don't know me by now

The Register for Overseas Entities is now "live"

The Economic Crime (Transparency and Enforcement) Act 2022 was introduced in March 2022 with the aim of clamping down on money laundering. In addition to updating the existing sanction and unexplained Wealth Order regimes, the Act provided for a new beneficial ownership register for overseas entities. That register was introduced on 1st August and the related Land Registry regime was introduced on 5th September. Driven by events in Ukraine, the measures have been introduced at breakneck speed and there will, no doubt, be some technical and practical issues as the new registration regime comes into play. An overseas entity cannot be registered as the legal proprietor of land unless it is a registered overseas entity with an overseas entity ID. The regime is also retrospective and will apply to overseas entities that became the registered proprietor of freehold or leasehold property on or after January 1999. The Land Registry will register a restriction on title preventing any unregistered overseas entity from selling, letting or charging that property unless it becomes a registered overseas entity. Existing owners have until 31st January 2023 to apply for registration. Applications for registration must be made to Companies House and the overseas entity must provide prescribed information about its beneficial ownership. Companies House will be writing to existing owners informing them of the registration requirement. The registration requirement also applies to overseas entities that have disposed of registered land after 28th February 2022.

In addition to the initial application for registration, every registered overseas entity will be subject to an ongoing obligation to update its beneficial ownership information every twelve months. The updating is not triggered by a specific change of control but "nil returns" are required. The beneficial ownership information required mirrors that under the existing persons with significant control regime. Significantly, the focus is on the beneficial ownership of the registered proprietor and not the underlying property. Similar regimes will apply in Scotland and Northern Ireland.

Although the new register adds another level of administration and due diligence for property transactions, it is not expected to be a significant issue for most transactions involving overseas entities. Although many offshore holding structures do exist, changes to the UK tax regime mean the use of an offshore property holding vehicle has become less attractive in recent years. It is important to remember that registration is not just an administrative burden, failure to comply with the Act will constitute a criminal offence with implications under the Proceeds of Crime Act 2002. It is expected that the registration and associated verification process will be conducted by specialist service providers and input from advisers in the relevant jurisdictions is likely to be required. In addition to discrete property acquisitions, disposals and lettings, the new regime will need to be considered on financings, refinancings and corporate transactions involving overseas entities. Those overseas entities owning or proposing to acquire UK property should already be considering the new registration requirements.

Ain't nothing going on but the rent

First COVID-19 rent arrears awards made under new arbitration scheme

The first arbitration awards under the Commercial Rent (Coronavirus) Act 2022 have been published by the Falcon Chambers Arbitration Service, one of the approved bodies under the COVID-19 arrears arbitration scheme. The arbitration scheme was introduced to deal with disputes relating to the payment of ring-fenced arrears accrued during periods of enforced lockdown. The first related to an arbitration reference made by Signet Trading Ltd, the owner of the H. Samuel and Ernest Jones jewellery brands. The tenant was seeking relief in respect of £450,000 of rent payable under the lease of its office headquarters in Hertfordshire. The tenant argued that its headquarters were ancillary to its retail business and the offices had been adversely affected by the closure of its retail outlets.

The arbitrator found in favour of the landlord. The business carried on by the tenant at its office headquarters had not been required to close. Accordingly, it was not adversely affected by COVID-19 for the purposes of the Act. Accordingly, the arrears were not ring-fenced and were not protected by the Act. The other award related to a procedural issue in respect of the proposals made by the parties and the effect of any changes to those proposals. Under the scheme, each party may make an initial proposal and then a revised proposal. The landlord wished to correct an error in its initial proposal. The issue was whether this would be treated as its revised proposal. Although both parties agreed to the simple correction of an arithmetical error, the landlord made additional changes to its methodology. The arbitrator ruled that the changes were neither a validly amended initial proposal nor a revised proposal.

Our house

Plans for reform of private rented sector

The government has published its White Paper on the private rented sector. The paper is focussed on promoting fairness for households renting their homes. Key points include the abolition of "no fault" evictions under S21 of the Housing Act 1988, requiring homes to be of a higher standard, a new residential tenancy structure and allowing tenants to keep pets. After much speculation, S21 no-fault evictions for assured shorthold tenancies will be abolished. Assured shorthold and assured tenancies will be replaced by a new periodic tenancy. The tenancy will not have a fixed term and will automatically renew until terminated. Tenants will be able to determine the tenancy at any time by giving two-months' notice. This means that they will have greater flexibility and will not be tied into liability throughout a fixed term. While tenants will have greater flexibility, the abolition of S21 will be a blow for landlords. Section 21 was introduced to make it easier for landlords of assured shorthold tenancies to recover possession on or after the end of a contractual term, simply by serving two months' notice and without the need to establish any ground for possession. This encouraged a wider range of property owners to enter the residential letting market. For example, where a property becomes empty for a relatively short period, such as where the owner is required to move with work or for personal reasons, or if market conditions favour letting rather than a sale. These part-time or accidental landlords may be less willing to make their properties available or seek to utilise shorter-term holiday let or Airbnb style arrangements.

Following the abolition of S21, landlords will need to establish a ground for possession. One of these, will be a new ground where the tenant has been in regular arrears over the term of the tenancy. A landlord will also be able to terminate the tenancy if the landlord plans to sell the property or intends to move into it. This should give landlords some degree of flexibility to juggle their portfolios in order to reflect their own plans. However, it will be interesting to see how easy it will be for a landlord to demonstrate an intention to sell or move into the property and how the legislation will prevent the new ground from being abused. By way of comparison, it is not easy for a landlord to establish the no fault grounds of opposition under the Landlord and Tenant Act 1954 to prevent a tenant obtaining a new lease of commercial premises.

Under the proposals, landlords will need to meet the new decent homes standard. Details of how these obligations will be implemented are awaited and it seems likely that there will be a phased introduction. The government also proposes to make it easier for families and those on benefits to obtain tenancies of residential property and landlords will not be able to exclude prospective tenants on those grounds. In addition, landlords will only be able to exclude pets if there are reasonable grounds to do so. The White paper will also make it easier for tenants to move properties including a potential ability to transfer deposits. There will also be restrictions on rent reviews to help prevent excessive rent increases. In order to reduce lengthy disputes, the government proposes to speed up the

judicial process. A new Ombudsman will be created to assist with dispute resolution and a new portal will also help ensure that landlords are aware of their legal obligations. Full details of the government's plans will be contained in the Renters' Reform Bill.

Go Now!

Contracting out procedure completed successfully

The Supreme Court will not hear the tenant's appeal from the Court of Appeal decision in *TFS Stores v Designer Retail Outlet (Mansfield) General Partner*, after leave to appeal was denied. The tenant had challenged the contracting out procedure in respect of a number of its retail outlets. In particular, the tenant argued that the declaration needed to specify the start date for the relevant lease. The Court of Appeal took a practical approach in determining the requirements of the 1954 Act. It was sufficient to use general descriptive wording to indicate when the term of the lease will start. The key issue is whether the declaration sufficiently identifies the lease that will be contracted out of the security of tenure provisions of the Act. The Court of Appeal also confirmed that the warning notice could be served on the tenant's solicitor as agent and did not have to be served directly on the tenant itself.

CASES ROUND UP

It ain't over till it's over

Collateral warranties can be construction contracts

Abbey Healthcare (Mill Hill) Limited v Simply Construct (UK) LLP: [2022] EWCA Civ 823

The Court of Appeal has decided that a collateral warranty could be a "construction contract" for the purposes of Housing Grants (Construction and Regeneration) Act 1996. Under the Construction Act, if a contract is a construction contract, the rules in relation to adjudication apply. If the contract does not contain the required adjudication provisions, the provisions of the Scheme for Construction Contracts are implied into the contract. In this case, a dispute arose under the provisions of a collateral warranty, given for the benefit of Abbey. The issue was whether Abbey had a statutory right to refer the issue to adjudication. At first instance it was held that, because the works had already been completed, a construction contract was unlikely to arise.

A majority of the Court of Appeal decided that the collateral warranty was a construction contract for the purposes of the Act. Under the collateral warranty, the contractor had not only warranted that it had carried out the works in accordance with the building contract but that it would also continue to do so. This meant that the collateral warranty related to both past and future performance and was therefore an agreement for the carrying out of construction operations. Abbey was entitled to refer the dispute under the collateral warranty to adjudication.

Know your rights

Operator can apply for new rights under new Code

The Supreme Court has considered the operation of the Electronic Communications Code for the first time. The Supreme Court has considered three separate appeals relating to the installation of electronic communications apparatus by telecoms operators. The cases relate to equipment installed under the previous Code and how those relationships have been affected by the introduction of the new Code. In particular, could the operators acquire new and improved rights from the owners of the sites under the new Code? The new Code provides that a Code right may only be conferred on an operator by an agreement with the occupier of the land. The Court of Appeal decided that the operators were already the occupiers of the land and could not benefit from improved rights under the new Code until their existing agreements under the old Code had come to an end. The operators appealed to the Supreme Court.

The Supreme Court considered who was the occupier for the purposes of the new Code and how an operator with an existing agreement could obtain new rights under the new Code. An operator with telecoms equipment at a site was an occupier of the site. Under the new Code there was a distinction between an operator wishing to install equipment at a new site and an operator which already had equipment at an existing site. An operator with equipment already installed at a site is not to be regarded as an occupier of the site. The purpose of the new Code is to allow for operators to apply for the new rights in respect of existing equipment. The new Code was drafted on the assumption that operators can apply for Code rights in respect of their equipment at existing

sites. However, it was suggested that they should only apply to vary existing rights towards the end of their existing agreement with the landowner or occupier. This suggests that operators should generally remain bound by their existing arrangements. The decision is a good result for telecoms operators who will be entitled to benefit from the enhanced rights conferred under the new Code in respect of their existing sites as well as new sites. The Supreme Court's ruling follows the Code's purpose to ensure that new technology, such as 5G, can be rolled out and made available to consumers. The Supreme Court also ruled that where an operator has security of tenure under the Landlord and Tenant Act 1954, it should exercise its rights under that Act rather than renewing its rights under the new Code.

I'm free

Heads of terms were not binding

Pretoria Energy Company (Chittering) Ltd v Blankney Estates Ltd: [2022] EWHC 1467 (Ch)

The High Court has confirmed the general principle that heads of terms are not legally binding. In this case, heads of terms had been agreed for the grant of a new lease. When the landlord failed to proceed with the deal, the proposed tenant brought a claim for breach of contract on the grounds that it had incurred expenses in reliance on legally binding heads of terms.

The court confirmed that the heads of terms had not been intended to be legally binding. Key points from the case included a binding exclusivity period. The inclusion of an exclusivity period indicated that the landlord was free to deal with other parties at the end of that period. This would only be necessary if the heads of terms were not already binding. A provision in an earlier draft indicating that the parties would comply with the heads of terms until a final agreement was entered into had been removed. In addition, although the heads of terms contained many of the essential terms for the proposed lease, they lacked a number of necessary provisions and these would have required further negotiation and bespoke drafting. The heads also provided that the lease was to be contracted out of the security of tenure provisions of the 1954 Act. Any such contracting out procedure had to have been complied with before the parties became bound to enter into the lease. Finally, the heads also described the lease as a proposed agreement and the absence of the words "subject to contract" was not essential if the conduct of the parties and the drafting of the heads of terms made it clear that the parties did not intend them to be legally binding.

The times they are a-changin'

Modification of restrictive covenant in lease

Schwarzschild Ochs Pty Ltd v Concerto Properties Ltd: [2022] UKUT 150 (LC)

The tenant of a long sub-underlease had made an application under S84 of the Law of Property Act 1925 to modify a tenant covenant restricting the use of its premises. The tenant's use of the premises was restricted to use as a shop or showroom or, with the qualified consent of the landlord, for any business use within Class B1 of the 1987 Use Classes Order. The 1987 Order remained relevant under the terms of the lease and included medical use. The tenant wished to assign the lease to an assignee in the medical sector and sought to modify the permitted user.

The tribunal allowed the tenant's application. Although the permitted user clause was not obsolete, preventing the use of the premises for medical purposes did not confer any practical benefit of substantial value or advantage to the landlord. In addition, the proposed modification would not cause the landlord to lose any practical control over the premises.

Fixing a hole

Court could not imply repairing obligation

Stonecrest Marble Ltd v Shepherds Bush Housing Association Ltd: [2021] EWHC 2621(Ch)

This case serves as a reminder of the need to ensure that responsibility for the repair and maintenance of all parts of the premises and the appropriate parts of adjoining or other relevant neighbouring property is comprehensively dealt with in the lease. This is particularly the case with commercial properties where the landlord is not subject to any implied statutory obligations. The tenant's commercial premises had suffered damage as a result of a blocked gutter on the landlord's retained part of the building. Water overflowing from the gutter had, over time, rendered the tenant's premises unusable. The landlord's insurance policy did not extend to damage caused by "gradual deterioration" and the landlord was not under an express obligation to repair or maintain the gutter. The tenant argued that the landlord was liable in negligence or nuisance, or was in breach of its covenant for quiet enjoyment. It also argued that the rent suspension provisions should apply while the premises could not be used.

The court found in favour of the landlord. The covenant for quiet enjoyment could not be used as a way of imposing positive repairing obligations on the landlord. The parties had been free to include positive repairing covenants when the lease was entered into and there was no reason to impose an implied covenant on the landlord to repair the guttering. Although the parties had intended for the lease to provide a comprehensive scheme for the repair, maintenance and insurance of the building, it was not a matter for the courts to plug any holes that appeared in the agreed scheme. The court has to give effect to the ordinary meaning of the contract the parties had entered into and should not seek to improve the position of any one of those parties. The tenant's claim would make good a bad bargain on its part. The rent suspension did not apply because the landlord was not obliged to insure against the gradual deterioration that had caused the damage to the tenant's premises. It is important that the landlord and tenant covenants provide a comprehensive scheme to ensure that responsibility for all repairs and risks is allocated. The court will not step in to fill any gaps that become apparent during the term of the lease.

OUR RECENT TRANSACTIONS

We advised Derwent on the acquisition of City Road Island, the site of The Moorfields Eye Hospital.

We advised Everton Football Club on its construction contract with Laing O'Rourke to deliver the final phase of the Club's new stadium at Bramley-Moore Dock.

We are advising The Clothworkers' Company in connection with the redevelopment of an island site at 50 Fenchurch Street by AXA.

We advised Nica Burns, CEO of Nimax Theatres, on her new theatre, "@Sohoplace" above the new Tottenham Court Road Elizabeth Line station.

We advised The Fishmongers' Company on the redevelopment of Seal House, EC4.

We advised Kirkland & Ellis on its new London office at 40 Leadenhall Street.

AND FINALLY

Not cricket

An elaborate scheme to attract Russian gamblers has been exposed by police in India. The fraudsters had staged bogus games of cricket purporting to be a version of the IPL.

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