SLAUGHTER AND MAY/

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REAL ESTATE NEWSLETTER

NEWS

So glad we made it

Leasehold and Freehold Reform Bill becomes law

The Leasehold Reform Bill made it through to Royal Assent during the "wash up" period before the dissolution of Parliament ahead of next month's general election. Significantly, the new Act does not contain provisions abolishing or restricting existing ground rents in long residential leases. Those measures that did make it through include various provisions to simplify and extend the scope of collective enfranchisement and lease extensions. The limit for non-residential space will increase from 25% to 50% and the two-year ownership requirement will be removed. The abolition of marriage value should also make the process more affordable. Lease extensions will be increased to 990 years for houses and flats at a nominal "peppercorn" rent and, subject to limited exceptions it will no longer be possible to grant long leases of houses. Other provisions include improving transparency in relation to service charges and insurance, making it easier for tenants to take over management and extending the leasehold redress schemes to improve dispute resolution. The Renters' Reform Bill, however, did not make it onto the statute book. The government had already delayed the introduction of the promised ban on S21 "no fault" evictions and the fate of the proposed reforms now lies in the hands of the new government.

Paid in full

Changes to the Construction Industry Scheme

Agreements for lease frequently contain provisions relating to tenant's works, which usually count as "construction operations" and can therefore fall within the scope of the Construction Industry Scheme (CIS). Where the landlord makes a payment to the tenant in the form of a contribution or inducement, the question therefore arises as to whether CIS withholding applies, as tenants rarely have gross payment status unless they happen already to operate in the construction sector. In such cases, the landlord will need to consider whether an exception applies. There is a long-standing exception for payments of "reverse premiums", i.e. inducements paid by the landlord to the tenant to take up the lease and which are used by the tenant to fund its own fit-out and fixtures – typically, anything that qualifies as "Cat B" works. For various reasons, the tenant's works will often include an element of completing the landlord's "Cat A" fit-out – and given that such works are the landlord's cost and responsibility, any payment by the landlord is usually viewed not as an inducement but as a payment to undertake the works, or a reimbursement for their cost. As such, CIS withholding would apply, potentially at some inconvenience to the parties.

However, following lobbying and consultation, the law was changed to introduce a new exception for payments made on or after 6 April 2024 by landlords to current or prospective tenants. Broadly speaking, where the "construction operations" are agreed in connection with a lease or agreement for lease, the CIS will not apply to the payment by the landlord, provided that the works in question are intended primarily for the benefit and use of the occupational tenant and will be carried out by the tenant itself or, more likely, a third party contractor engaged by the tenant. The new exception is available both where a new lease is being entered into and where an existing lease is being varied or extended. While the Reveune have confirmed that the new exception can apply to both "Cat A" and "Cat B" works, the "primary benefit and use" requirement does impose some limits on it. The Revenue say that it will not apply, for instance, where the works include major structural changes or repairs to the fabric of the property, or essential work that would be required for any tenant to occupy the premises. Works on common areas of the building can qualify provided that they are required to meet the

tenant's needs (e.g. additional lockers or bike racks). Works on areas for sub-tenants can also qualify where the tenant partially sub-lets in accordance with the lease – although in such cases, say HMRC, the tenant must engage a third-party contractor to undertake the works.

Knowing me, knowing you

Changes to the overseas entities registration regime

There is a new duty to provide information in response to a notice served by Companies House under S1092A of the Companies Act 2006. This is in addition to the initial registration and annual updating requirements. Failure to comply with such a request will mean that the relevant entity will cease to be a registered overseas entity for the purposes of the regime and the restriction on title. Although Companies House has confirmed that no such notices have been served to date, it will be important to check whether any such notices have been served on an overseas entity and whether it has complied with the notice. It is hoped that the existence of an outstanding notice will be noted on the register. Other recent changes include a requirement for more information in respect of trustee beneficial owners and for nominee overseas entities owning property to provide information about the beneficial ownership of the property. For existing registered overseas entities, this obligation will be caught on the next annual update.

What's going on?

Government consults on contractual controls on land

The government is consulting on its proposals to provide greater transparency in connection with contractual agreements relating to land in England and Wales. The government's concern is focused on contracts, such as option agreements, pre-emption agreements, conditional contracts, and promotion agreements which can be used to control land use and ownership. It is perceived that this can lead to land-banking and also deter the development of adjoining and neighbouring land. For example, although an option must be protected by registration against the grantor's title, if the notice is registered as a unilateral notice, a copy of the underlying option agreement does not need to be provided. Accordingly, although a third party is on notice that the grantee has the benefit of an option over the land, it is not possible to find out additional information about that option, including the option period, any conditions to its exercise and any restrictions on the grantor's ability to deal with the land during the option period. The consultation ran until 20 March 2024 and followed the government's call for evidence in 2020. Controversially, the new regime is likely to have retrospective effect. Information in respect of relevant agreements entered into after 6 April 2021 will need to be provided within 12 months of the proposed regime coming into force. This was expected to be 6 April 2026 but will now depend on the new government. The consultation suggests that agreements which last or can last for more than 12 months should be caught. Agreements entered into for the purposes of national security are excluded. The consultation covers agreements irrespective of whether or not they are protected by a notice or restriction against the relevant title and there will be an obligation to update the information provided. In addition to additional costs associated with the increased administrative burden, there are confidentiality concerns, particularly in relation to agreements already completed. There will also be enforcement issues, particularly in relation to any matters policed by an already overburdened Land Registry.

CASES ROUND UP

Out of time

Court considers execution of deeds and limitation

Lendlease Construction (Europe) Ltd v Aecom Limited: [2023] EWHC 2620 (TCC)

In this case, the Technology and Construction Court considered a claim against contractors in connection with a hospital development project. Lendlease was the main contractor and had appointed Aecom to provide specialist mechanical and electrical, and fire safety services. The appointment was entered into on 15 October 2004. Various defects in the new building became apparent and the hospital commenced proceedings against Lendlease. The hospital was awarded damages and Lendlease issued proceedings for an indemnity or contribution from Aecom. A number of issues were considered including the limitation period applicable to the appointment. Aecom argued that the appointment has a simple contract and not a deed and, therefore, the limitation period was 6 years and not 12. In particular, it claimed the appointment had not been properly executed as a deed. The form of appointment provided an execution block for execution by affixing Aecom's common seal and also, as an alternative, for signing by two directors. Two individuals had signed the document on behalf of Aecom. However, neither person was a statutory director at the time of execution and the signatures had been made using the common seal execution block and not the two directors' block.

The Judge considered the requirements of S36A of the Companies Act 1985 and S1(2) of the Law of Property (Miscellaneous Provisions) Act 1989. The Judge decided that the agreement should take effect as a deed. The signatories clearly intended to execute the appointment as a deed acting on behalf of Aecom. The use of the wrong execution block was a simple error that did not mean that the agreement should not take effect as a deed. Aecom had represented that the signatories had authority to execute the appointment as a deed on its behalf and Lendlease had relied on this representation when entering into the appointment. Aecom was not able to argue that the agreement was not a deed in order to benefit from a shorter limitation period. There had been an estoppel by representation. Accordingly, a 12-year limitation period applied. Even if the agreement was not executed as a deed, Lendlease had argued that a clause in the appointment providing that claims could not be brought after the expiry of 12 years from the completion of the works meant that the parties had agreed to extend the statutory period for bringing claims. The Judge held that this contractual long-stop provision did not have the effect of extending the statutory limitation period. Express words would be needed in order to contract out of the statutory limitation period. The Judge also confirmed that the cause of action for breach of contract accrues from the date of breach, which in this case was when the design was handed over to the contractor, even if construction was not completed until later. The cause of action for negligence accrues when the damage is caused, which was when the defective design was incorporated into the building when the contractor builds in accordance with the design issued to it. The Judge found that all the alleged claims were statute-barred. The Judge also considered the nature and extent of Aecom's obligations under the appointment. Lendlease had argued that Aecom was obliged to achieve the same obligations as those on the part of Lendlease under the main contract, which were of a higher level than those in the appointment. Although there was a requirement to have regard to Lendlease's obligations, the Aecom's duties were limited to those set out in the appointment itself. Accordingly, express wording was required if agreements were to be back-to-back. The sub-contractor was not subject to the same obligations as the contractor in relation to skill and care.

Wordy rappinghood

Landlord's misrepresented business plans on renewal

McDonald's Restaurants Limited v Shirayama Shokusan Company Limited: [2024] EWHC 1133 (Ch)

In this case, the landlord had opposed McDonald's proposed statutory renewal of its lease of restaurant premises at County Hall. The landlord's ground of opposition was that it intended to use the premises for its own business under S30(1)(g) of the Landlord and Tenant Act 1954. To satisfy the ground, the landlord had to show that, as at the date of the hearing, it intended to operate the business within a reasonable time of the termination of the lease. The key date is the landlord's intention at the date of the hearing. There is nothing to prevent the landlord from genuinely changing its intention after the hearing. However, the tenant is entitled to compensation under S37A if it becomes apparent that the landlord has misrepresented or concealed material facts at the hearing. The landlord had claimed that it intended to operate a Zen Bento restaurant following the termination of the tenant's lease. The landlord's intention was considered at a preliminary hearing. The landlord provided evidence of a business plan for the new restaurant, named the executive team, had appointed an architect who had undertaken a tendering process for the intended fit-out works and a successful contractor had been identified. The landlord also confirmed the projected opening date and gave an undertaking to the court to open its new restaurant as soon as reasonably practicable. The court accepted the landlord's case and refused to grant a new lease on the basis that the landlord had made out ground (g). McDonald's vacated but subsequently discovered that no restaurant had been opened by the date given by the landlord at the hearing and very little work had been carried out at the premises to enable a new business to open. McDonald's did not accept that the landlord had genuinely changed its mind following the hearing.

The court considered the evidence provided by the landlord at the hearing. No steps had been taken by the landlord to progress its stated intention to open a Zen Bento restaurant. Instead, a variety of different plans had been proposed including a Spanish fish restaurant. The court found that the landlord had deliberately misrepresented its intention to the court and, on the basis of those misrepresentations, the court had decided to refuse the grant of a new lease to McDonald's. Accordingly, McDonald's was entitled to claim compensation under S37A. The court rejected the landlord's argument that it genuinely intended to open a business, even if it was not the one put forward at the hearing. The landlord was not able to rely on a different scenario which had not been advanced at trial. Any such alternative scenario may not have met the fixed and settled intention requirement or have satisfied the requirement for the business to be opened within a reasonable time after the termination of the tenancy.

Stairway to heaven

Landlord failed to show intention to redevelop

Sainsbury's Supermarkets Limited v Medley Assets Limited: [2024] (unreported)

This case considers the redevelopment ground of opposition under S30(1)(f) of the Landlord and Tenant Act 1954. To establish ground (f), the landlord must demonstrate that "on the determination 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 works of construction on the building or part thereof and that he would not reasonably do so without obtaining possession of the holding". Sainsbury's is the tenant of a building in Kentish Town with retail premises on the ground floor. The landlord served a S25 notice on Sainsbury's opposing the renewal of its lease on the basis that it proposed to convert the upper floors into residential flats. The landlord subsequently obtained planning permission for the work. Sainsbury's challenged the landlord's reliance on ground (f) and the matter was referred to trial as a preliminary issue. Before the trial, the landlord had changed its plans and stated that it intended to convert the upper floors to offices. The works also included altering the staircase in the building and lowering the basement. Although Sainsbury's lease was of the whole building, it only operated from the ground floor retail premises. The basement and the upper floors were empty. The landlord's proposed widening of the building's staircase affected parts of the ground floor premises occupied by Sainsbury's. One week before the trial, Sainsbury's erected a partition to block off an area around the staircase to show that it could continue to occupy its ground floor store for the purposes of its business notwithstanding the landlord's proposed works. The landlord contended that, under S32(2), it required Sainsbury's to take a lease of the whole of the demised premises and not just the parts occupied for the purposes of its business.

The Judge agreed with Sainsbury's and held that the holding for the purposes of ground (f) was the ground floor store occupied by Sainsbury's. The Judge also considered the landlord's intention to redevelop. Following *S Frances v Cavendish*, the landlord had to show that (1) at the date of the hearing it had a genuine and settled intention to carry out the works, (2) it would be practically able to carry out the works, and (3) it would carry out the works whether or not the tenant vacated. It was held that the landlord had not demonstrated a genuine and settled intention to carry out the works, even if Sainsbury's had vacated voluntarily. The Judge decided that the landlord's scheme of works had been engineered to prevent Sainsbury's from obtaining a new lease. The undertaking offered by the landlord on the third day of the trial to carry out the works was found not to be genuine. In addition, the Judge found that the landlord would not be able to lawfully and practically carry out the works. The proposed works did not comply with Building Regulations, there was no planning permission for the proposed new entrance and parking suspensions had not been considered. The Judge also decided that the widening of the staircase could reasonably be carried out without obtaining possession of the retail premises.

It's my party

Tribunal's discretion to grant remediation order

Secretary of State v Grey GR Limited Partnership: (unreported FTT)

In this unreported case, the First Tier Tribunal considered whether to grant a remediation order under the Building Safety Act 2022. The issue related to Vista Tower, a residential property in Stevenage. The building had been converted from commercial to residential use in 2015. The landlord was required to maintain and repair the structure. The defendant acquired the freehold reversion in 2018 as an investment on behalf of a pension fund. Building safety issues were subsequently discovered. The defects included the use of hazardous cladding, a lack of fire stops and cavity barriers and issues with the glazing system. The landlord applied for funding from the Building Safety Fund and was granted £12.5 million out of an expected total of £14.5 million. The landlord entered into a grant funding agreement as well as a construction contract for the remedial works. It had also began interim works including the installation of a fire safety alarm system and the provision of a waking watch pending the carrying out of the building safety works. A remediation order can be granted to require "a relevant landlord to remedy specified relevant defects in a specified relevant building by a specified time". Under the Act, an application for a remediation order can be made by an interested person. The Secretary of State applied for a remediation order as an interested person against the landlord to ensure that the works were completed. The issue before the Tribunal was whether it had a discretion to make a remediation order where the pre-qualification criteria were satisfied. The landlord argued that an order was not necessary because a building contract for the works was already in place and a grant funding agreement had also been entered into.

The Tribunal granted the order. However, it also ruled that the regime enabled the Tribunal to

exercise its discretion. If all the pre-qualification criteria were in place, it was likely that an order would be made. However, that did not mean that the Tribunal could not exercise its discretion. Relevant considerations could include the nature of the works and the position of the parties. Although the landlord had entered into a building contract and a grant funding agreement, the remediation order would act as a backstop to reassure the tenants that the works would be completed. The tenants were not parties to the relevant construction and funding agreements and not all of them were qualifying tenants, accordingly the landlord had been right to seek funding before starting the works.

Two tribes

Unexploded bombs and insurance

The University of Exeter v Allianz Insurance PLC: [2023] EWCA Civ 1484

The issue in this case was whether damage to the University's halls of residence caused by the detonation of an unexploded wartime bomb was "occasioned by war" and therefore excluded from the University's insurance policy. At first instance, the High Court ruled that the proximate cause of the damage was the dropping of the bomb during World War II. Accordingly, the exclusion in the policy applied and the damage was not covered. The unexploded bomb was discovered in farmland in the vicinity of the halls of residence. It had been discovered by contractors and a safety cordon was set up around it. The halls of residence were in the cordon and were evacuated. The bomb was dealt with in situ by an explosive ordnance disposal team. A controlled detonation took place in a sandbox erected around the bomb. A significant explosion occurred causing damage to nearby properties including the halls of residence. The insurance policy included a war exclusion clause that excluded destruction or damage "occasioned by war".

The Court of Appeal considered the Law in relation to causation. The usual rule is that an insurer is only liable for loss proximately caused by an insured risk. Proximate does not mean the last in time. What matters is the dominant, effective, or efficient cause of the loss. Where there are concurrent causes, the court had to consider the proximacy of all the causes. Where there are two causes and one of those is an insured risk and the other is excluded, the exclusion will generally prevail. In this case, the concurrent causes were the dropping of the bomb during World War II and its detonation 76 years later. These two causes were of approximately equal significance in causing the damage. The war exclusion clause prevailed and the damage was not covered.

Hurry up Harry

Modification of restrictive leasehold covenants

Blackhorse Investments (Borough) Ltd v London Borough of Southwark: [2024] UKUT 33 (LC)

A reminder that an application to discharge or modify a restrictive covenant under S84 of the Law of Property Act 1925 can be made in respect of restrictive covenants in long leases, as well as those affecting freehold titles. An application can be made to discharge or modify restrictive covenants in leases granted for a term of more than 40 years and where 25 years of that term have passed. The section applies to covenants which amount to a restriction as to user of the land. In this case, the applicant was the tenant of a pub and the Council was both the landlord and local planning authority. The lease contained covenants requiring the use of the property as a pub as well as an obligation to keep it open as a pub. The lease also contained an obligation to use the tenant's best endeavours to renew trading licences as well as restrictions on alterations and alienation. The applicant wanted to demolish the pub and redevelop the site as a mixed-use building. The Lands Tribunal Upper Tribunal (Lands Chamber) granted an order modifying the covenants. The Council challenged the Tribunal's jurisdiction to make the order on the basis that a number of the covenants were positive in nature and not restrictive covenants.

The Upper Tribunal (Lands Chamber) confirmed the extent of its jurisdiction under S84. It did not have jurisdiction to modify the alienation covenant as this was not a restriction on the use of the land. An alienation covenant was only concerned with the ownership of the land and interests in it and not the activity conducted on it. It was suggested that a covenant restricting the sub-division of the land into separate units of occupation could be distinguished, but the Upper Tribunal did not comment further. Although it had jurisdiction to modify the covenant restricting the use of the land as a pub, it could not modify the keep open covenant as this was also a positive covenant. The best endeavours obligation to renew the premises licence was also a positive covenant that could not be modified. The Upper Tribunal made a new order limited to the restrictive covenants that it had jurisdiction to modify.

Please, please, please let me get what I want

Landlord could give conditional consent to alterations

Jacobs v Chalcot Crescent Management Company Ltd: [2024] EWHC 259 (Ch)

In this case, the High Court considered a first instance ruling that a landlord's consent for an application by the tenant to make alterations had been reasonably withheld. The tenant applied for consent to carry out alterations to a flat in a converted house. The judge found that three of the reasons given by the landlord for refusing consent were unreasonable. One of these grounds was that alterations would not comply with Building Regulations. During the trial, the landlord's surveyor also said that he was concerned about the increased risk to the structure of the building in the case of fire. This reason had not been previously raised and was distinct from the Building Regulations issue. However, the judge held that it was reasonable for the landlord to withhold consent on the basis of this concern, even though it had not been pleaded and had only been raised at the trial.

On appeal, it was decided that the judge could not decide the case on the basis of an issue that had not been pleaded. A trial was adversarial and not inquisitorial. The Court was confined to considering the issues properly pleaded. The Court also pointed out that the landlord should have obtained the advice of a fire expert. The judge went onto consider whether concerns about the risk of fire damage would have amounted to a reasonable ground for withholding consent. He pointed out that the landlord's consent subject to appropriate conditions to deal with fire safety concerns, such as installing a misting system, was the sensible approach to considering the application and the grant of consent. Accordingly, a declaration was made that the landlord could have granted a conditional consent and its refusal to consent would have had been unreasonable. The case confirms the need for landlords to consider carefully their reasons and to set these out as early as possible and in any event as part of the proceedings.

OUR RECENT TRANSACTIONS

We advised Song Capital on the refinancing of a portfolio of hospitals owned by Medical Properties Trust.

We advised Legal & General on the forward funding of a new Nike fulfilment campus at Magna Park, Corby.

We advised Derwent London on the pre-letting of office space at 25 Baker Street to Cushman & Wakefield as their new West End offices.

We advised Sir Jim Ratcliffe on the acquisition of his shareholding in Manchester United, including the construction issues relating to Old Trafford.

AND FINALLY

Slow horses

A motorist has been arrested after driving at 30 mph on a section of the M60. The motorist provided a positive breath sample.

Doge

The dog behind the "Doge" meme has sadly passed away aged 18. Kabosu, a Japanese shiba inu, became an internet sensation and is also the face of the cryptocurrency Dogecoin.

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