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REAL ESTATE NEWSLETTER

NEWS

Who are you

Overseas entities regime in force

The transitional period for existing overseas entity proprietors to register their beneficial ownership details expired on 31 January 2023. The Land Registry suggested that while more than 30,000 overseas entities are registered as the proprietor of freehold and leasehold titles, only 7,500 had registered at Companies House ahead of the deadline. When dealing with an overseas entity seller or landlord it will be essential to ensure that they have registered and can provide an overseas entity ID number. Overseas entities wishing to acquire UK property will also have to register. In due course, it will also become important to check that the overseas entity has complied with the annual updating requirements. Failure to comply with the regime is a criminal offence.

The restriction on the overseas entity's freehold or leasehold title will prevent it from transferring the title, granting a lease of more than seven years or charging the property. The exemptions are limited but a disposition by the registered proprietor of a legal charge over the property will not be caught. This covers both the exercise of the chargee's power of sale and a sale by receivers appointed by the chargee. However, an overseas entity will not be able to grant a new charge unless it has complied with the registration requirements. The new registration requirements only apply to the owners of freehold or leasehold titles and do not apply to overseas entities acquiring security over such titles.

Other measures requiring the disclosure of information include HMRC's Trust Registration Service (TRS) and the information about interests and dealings in land provisions in the Levelling-Up and Regeneration Bill. The UK TRS was set up in 2017 and those trusts affected were required to register by 1 December 2022. Express trusts are required to register and provide information about the trust, including its trustees, the beneficiaries and details of any UK land or property acquired by the trust. The property data provisions in the Bill follow the government's 2020 call for evidence on data on land control, which focussed on rights of pre-emption, options and conditional agreements, such as those conditional on the grant of planning permission. Although the detail will be contained in regulations, the information required to be provided is likely to include details of the parties, the principals on behalf of whom the parties are acting, the terms of the transaction and information about funding.

Everything's gone green

MEES regime applies to all commercial leases

Currently, the main statutory regime aimed at improving the energy efficiency of buildings is the Minimum Energy Efficiency Standards (MEES). From April 2023, the regime applies to all existing leases of commercial property, as well as the grant of new leases or the renewal or extension of existing leases. Under the current rules, a building is "sub-standard" if it has an EPC rating of F or G. It is estimated that 18% of the UK's commercial buildings are currently sub-standard. The minimum lawful standard is expected to rise to at least B by 2030, which means that the number of sub-standard buildings will increase significantly. If the landlord lets or is letting a sub-standard property, a penalty is payable unless an exemption applies, and that exemption has been registered. Although non-compliance with the MEES regime is not a criminal offence, the landlord may be required to pay a penalty if a non-compliance notice is served by the local authority. The penalty payable ranges from £10,000 to £150,000, depending on the rateable value of the property.

CASES ROUND UP

Making your mind up

Supreme Court considers conclusivity provision in service charge

Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd: [2023] UKSC 2

The Supreme Court has given its judgment in this case relating to disputed service charges for leases of retail stores. The leases provided that the landlord was to provide a certificate setting out the service charge amount payable for each service charge year. The certificate was expressed to be conclusive in the absence of manifest or mathematical error or fraud. A dispute arose regarding the service charge amounts for two service charge years. The tenant refused to pay and claimed that the certified amounts were excessive and included costs that were not properly recoverable under the service charge provisions. The landlord applied for summary judgment on the basis that its service charge certificates were conclusive. The tenant argued that the conclusivity provision only related to the amount of the service charge and not the tenant's liability to pay it. The Court of Appeal allowed the landlord's appeal and awarded it summary judgment.

The Supreme Court dismissed the tenant's appeal against the summary judgment but also decided that the judgment did not prevent the tenant from subsequently pursuing a counterclaim in relation to its underlying lability to pay the certified amounts. Neither party's interpretation of the conclusive certificate provision was satisfactory. A conclusive certificate, subject only to manifest or mathematical error or fraud, was inconsistent with the overall service charge provisions in the lease. The tenant was entitled to inspect the landlord's receipts, invoices and other evidence relating to the service charge costs for up to 12 months after the landlord's certificate. If the certificate was conclusive and prevented any challenge by the tenant, the ability of the tenant to inspect and review evidence of expenditure would be largely superfluous. The Supreme Court considered that it would be surprising if arguable issues as to liability for the service charge could be determined conclusively by the landlord and without giving the tenant the opportunity to make any challenges or representations under a "pay now, argue never" regime. The landlord contended that the commercial purpose of the clause was to allow it to recover the costs and expenses with minimal delay or dispute, thereby avoiding cash flow issues in the management of its properties. The Supreme Court adopted a third and alternative interpretation. The landlord's certificate was conclusive as to what was payable by the tenant after the certificate was issued. However, the certification process did not prevent the tenant from subsequently disputing liability for that payment. The lease created a "pay now, argue later" regime. Lord Briggs dissented on the basis that the wording of the clause made it clear that the tenant could only challenge the certificate if it could identify manifest error, mathematical error or fraud.

I can see for miles

Overlooking from viewing platform was actionable nuisance

Fearn and others v Board of Trustees of the Tate Gallery: [2023] UKSC 4

The Supreme Court has allowed the appeal of the tenants of flats overlooked by a viewing gallery erected as part of an extension to Tate Modern and ruled that the overlooking constituted an actionable nuisance. The viewing platform was opened in June 2016 and offered panoramic views of London. Unfortunately, it also meant that those using the platform could see directly into several flats in the neighbouring Neo Bankside residential development. The affected flats were built with floor-to-ceiling glass leaving the occupants open to the public gaze. The owners of the flats sought an injunction to prevent members of the public from using the viewing platform to staring into their flats or damages on the basis that the looking into their flats amounted to a private nuisance. The flat owners appealed against the Court of Appeal's decision that overlooking could not amount to an actionable nuisance.

The Supreme Court found that the Tate's use of the viewing gallery gave rise to liability under the common law of nuisance. The viewing gallery constituted a very particular and exceptional use of the Tate's land. The overlooking was not simply part and parcel of urban living. In addition, the flat owners could not be expected to block out their view by using curtains or blinds in order to protect themselves from the intrusion. Although the Supreme Court decided that the Tate was liable for nuisance, it was unable to decide what remedy should be granted. The parties were encouraged to reach their own settlement and, if this was not possible, to refer the issue back to the High Court for a ruling. Although the decision is a high profile one, its impact on most developments is likely to be limited. It seems unlikely that two blocks of residential flats overlooking each other would give rise to an actionable nuisance. However, plans involving viewing platforms or roof top gardens may require closer consideration. The planning process also has a key role to play in considering the

potential impact of overlooking when a new development is proposed.

Radio gaga

Receivers not required to give an AGA on assignment

Alma Property Management Ltd v Crompton and another: [2022] EWHC 2671 (Ch)

The claimant is the owner of a 22-storey tower in Manchester with a hotel on the lower floors and flats on the upper floors. The owner had charged its reversionary interest and the lender appointed Law of Property Act receivers when the owner defaulted on the loan. There was a lease of the common parts and structure of the building which was disclaimed following the liquidation of the tenant company. The receivers obtained a vesting order for the lease in order to help preserve the value of the building. However, the receivers did not need to sell the property because the owner managed to redeem the charge. Although the receivership also came to an end, the lease remained vested in the receivers. Four years later, the owner of the building sought to recover £1m in respect of major works to the building from the receivers as tenant of the structure and common parts lease. The receivers applied for consent to assign the lease to a company controlled by the leaseholders of the flats. The claimant gave its consent but on the condition that the receivers entered into an AGA. The claimant sought an order requiring the receivers to carry out the repairs to the building and the receivers counterclaimed that consent to the assignment had been unreasonably withheld.

The court dismissed the claim for specific performance of the tenant repairing obligations. An order for specific performance of a tenant's repairing obligations will only be granted in exceptional circumstances. The claimant landlord had alternative rights and remedies, including forfeiture and a right to carry out the repairs itself and recover the costs under a *Jervis v Harris* provision. In addition, the LPA receivers were acting as agent of the claimant and would be entitled to be indemnified by the landlord as principal. Accordingly, there was very little point in requiring the receivers to carry out the works as tenant. The indemnity would apply even though the receivership had ended some time ago. However, the indemnity would not extend to any AGA given by the receivers as a condition to the grant of consent to the assignment of the lease. This would mean that the landlord would be better off than when the lease has simply vested in the receivers as tenant. The court decided that it was not reasonable for the landlord to require an AGA from the receivers as a condition to its consent to the assignment.

Highway to hell

Owners could not cross a road to access neighbouring premises

Hambling and another v Wakerly and another: [2023] EWHC 343 (Ch)

This case considers the extent of an easement and whether it was capable of benefitting adjoining residential property. The claimants owned two properties either side of an access road. One plot is a field and the other a cottage occupied by the claimants. An easement had been granted over the access road that benefitted the field only. The issue was whether the access road could also be used to access the cottage by passing over the access road to and from the field. The easement specifically referred to the access road only being used for access to the field and not to Garden Cottage. At first instance, the judge decided that the natural and ordinary meaning of the words used was that the access road could only be used for access to and egress from the field and not the cottage. The claimants argued that using the access road to pass to and from the field to the cottage was a legitimate ancillary use of the easement benefitting the field.

The High Court rejected the claimants' appeal. It was clear that the easement was not intended to benefit the cottage and the dominant land was the field only. Passing across the access road from the cottage to the field was not permitted. In addition, there was a covenant to maintain a fence along the boundary between the cottage and the access road and this supported the parties' original intention that the access road should not be used to access the cottage from the field. The easement expressly prohibited the use of the access road as a means of access to or from the cottage, whether this was from the field or otherwise. Any such use was not ancillary to the use of the access road for access to and from the field.

Our house

Restrictive covenant conferred substantial value

Sutton v Baines: [2022] UKUT 342 (LC)

A restrictive covenant entered into in 1970 prevented the applicant from building a second building in her garden. The applicant's plot could only be used as "a single private dwelling house". The applicant's neighbours objected to her plans to build a second house in her garden.

They were concerned that an additional house would have an adverse effect on their privacy and that it would make them feel "hemmed in". In 2014, the applicant had obtained outline planning permission to build an additional house. The reserved matters were not complied with and the planning permission lapsed. An

application was made to the Upper Tribunal to discharge the restrictive covenant under S84 of the Law of Property Act 1925. The Tribunal was satisfied that the erection of a house in a residential area was a reasonable use of the land and the restrictive covenant impeded that use. The issue was whether the restriction conferred a benefit of substantial value or advantage on the objectors.

Although the proposed development was a reasonable use of the land, the restriction did confer a practical benefit on the objectors. One problem for the applicant was that she had applied for a full discharge of the restrictive covenant and not just a modification to allow her proposed development. A full discharge of the covenant would leave the objectors subject to any development that might be permitted by planning permission granted at any time in the future. Accordingly, the restrictive covenant remained of substantial value to the applicant's neighbours and should not be discharged.

Walk on by

Construction of roads sufficient to meet planning conditions

DB Symmetry Ltd and another v Swindon Borough Council: [2022] UKSC 33

The Supreme Court has confirmed that a planning condition did not require a developer to dedicate land within a development site as public highway. In 2015, the Council granted outline planning permission for a site forming part of a major new mixed-use development known as New Eastern Village. The plans envisaged that there would be access road connections between the site and the wider New Eastern Village development. One of the conditions to the outline planning permission related to the construction of the proposed access roads. The access roads were to be built in such a way as to ensure that each unit was served by a fully functioning highway and were to be constructed to at least base course level before the development could be occupied and used. The Council argued that this condition required the roads to be dedicated as public highway. The developer argued that it only related to the standard to which the roads had to be built before the site could be used. The developer applied for a certificate of lawful use on the basis that the roads had been constructed to the required standard and could be used as private access roads.

The Supreme Court found that the planning condition did not require the dedication of the access road as public highway as a condition to the development becoming operational. The reference to "highway" did not just mean public highways. In addition, there was an assumption that dedication as public highway would be dealt with in the S106 agreement. The roads did not need to be part of the public highway in order to provide an adequate means of access to the site and the S106 agreement was the appropriate place to deal with dedication as public highway.

Sign your name

Witness had attested three signatures

Euro Securities & Finance Ltd v Barrett: [2023] EWHC 51 (Ch)

The High Court has considered the attestation requirement under Section 1(3)(a)(i) of the Law of Property (Miscellaneous Provisions) Act 1989. An individual must sign in the presence of a witness who attests the signature. The three defendants had signed a guarantee which purported to be a deed. The defendants argued that the guarantee had not been validly attested by a witness and that it operated as a simple contract only and not as a deed. This meant that the limitation period would be six years and not twelve. The Act requires a witness to observe the act of signing, the witness then attests by also signing the deed and, typically, also adds his or her details, including name, address and occupation. There is no requirement for the attestation clause to use specific words and the use of the words "witnessed by" is sufficient. In this case, a single witness had signed the deed once. The issue was whether all three signatures had been properly witnessed and attested.

On the balance of probabilities, the court found that all the guarantors had signed the guarantee together and all the signatures had been witnessed by the one witness. The court confirmed that a person witnessing more than one signature can attest them collectively and only needs to sign once. The decision also confirms that the key issue is whether the signature of the party was witnessed. Although it is possible for the witness to subsequently attest the signature in the absence of the signatory, it is best practice for the witness to sign and add his or her details immediately after witnessing the relevant signature. The court found that the witness had attested all three signatures by signing the guarantee on the same day. Remember that a witness must be physically present and should not witness the signature remotely.

Do you really want to hurt me?

Landlord failed to prove financial means to carry out redevelopment

Man Limited v Back Inn Time Diner Limited: [2023] EWHC 363 (Ch)

The tenant had served a S26 notice requesting a new tenancy of restaurant premises under the Landlord and Tenant Act 1954. The landlord served a counternotice citing the S30(1)(f) redevelopment ground as the basis

for its opposition to a new tenancy. The landlord contended that it wished to build a new development. Planning had been applied for and refused but the landlord had appealed that decision. Although the landlord had the requisite subjective intention to redevelop it had failed to establish the objective intention. The judge was satisfied that, in addition to there being no realistic prospect of planning consent, the landlord had failed to provide evidence that it had the funds to carry out the project. Contrary to expectations, the landlord's planning appeal proved to be successful before the final judgment was handed down. However, the judge confirmed that this did not affect his decision as the landlord had still failed to prove that it would be able to fund the development within a reasonable time after the end of the tenancy.

The High Court rejected the landlord's appeal and considered the issue of funding. The landlord had only produced bank statements showing evidence of funds at the start of its evidence at trial and these statements had not been admitted. Although evidence had been provided that the landlord owned another property there was no evidence linking this to the provision of funding for the development. The landlord had failed to show that it had a realistic prospect of implementing its intention to redevelop. The objective intention test was often focussed on planning approval but the same test also applied to the availability of finance.

OUR RECENT TRANSACTIONS

We are advising Derwent London on the pre-letting of 25 Baker Street to PIMCO.

We are advising Clifford Chance and Reed Smith on their respective new headquarters at Aldermanbury Square and Blossom Yard & Studios.

We advised John Lewis Partnership on its £500m residential rental homes joint venture with abrdn.

AND FINALLY

Eight-legged groove machine

The UK's south coast has experienced an octopus population boom. A fisherman at Mevagissey, Cornwall reported catching 150 in a single day. In most UK waters an octopus is considered an occasional by-catch.

Home sweet home

An artist is living in a house built on a skip to draw attention to the cost of living in London. The artist also has a portaloo and intends to shower at work or the gym.




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