

InFocus

Getting to grips with the latest developments

Our Real Estate Dispute Resolution update



Welcome to the Summer 2019 edition of Eversheds Sutherland InFocus.

In this issue we look at:

- horizon scanning – what legal changes or updates we can expect to see over the coming months
- how to ensure that notices which are served are valid
- how adverse possession can be used to obtain possession of land
- the court's decision in respect of fencing easements
- another opposed lease renewal on proposed development grounds, following *S Franses v Cavendish*
- whether a nuisance can infringe a right to privacy
- the terms of relief in an application for relief from forfeiture
- an update from the court on the latest business rates case
- AGAs and GAGAs – do you know the difference?
- compensation in respect of Scottish easements
- whether aesthetics matter for the purpose of repairing covenants

Also, you will see we have inserted some videos in the soft copy of this edition which we hope you will enjoy!

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Including a review of the above cases, and what to expect in 2019, this edition focuses on:

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Please do contact any member of the team if you would like to discuss any of the content in this edition further.



The key highlights which you need to know from this edition are:

Did you know?

- 1** The court has held that a notice served on a receptionist of a managing agent, which was then emailed by the receptionist to a director of the relevant building owner was unusually valid.
- 2** The Court of Appeal has recently found that by paving an area, an individual had done enough to establish that she had acquired the land by adverse possession.
- 3** The Court of Appeal has overturned both the High Court and earlier County Court decisions and found that a covenant to fence should not be treated as a fencing easement capable of binding successors in title.
- 4** Tenants of an airfield recently failed in their appeal to the High Court to show that their landlord wasn't able to oppose new leases being granted to them pursuant to the Landlord and Tenant Act 1954.
- 5** The High Court has dismissed a claim by residents of luxury glass-fronted flats that their privacy was infringed by being overlooked by the Tate Modern's panoramic viewing platform.
- 6** The County Court has recently granted what was BHS, which was looking to dispose of its leasehold interest, relief from forfeiture conditional upon it assigning its lease within 3 months of the hearing.
- 7** The Supreme Court has held that, when assessing the rateable value of premises which are vacant and for which there is no actual demand, the rating hypothesis allows for demand to be assumed where it can be demonstrated that there is a demand for similar properties with similar characteristics.

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- 8** The Court has confirmed that a guarantee of a former tenant's obligations following the assignment of a lease under an AGA, known as a "GAGA", was valid under the terms of the licence but other provisions, which sought to impose additional obligations, were not.
 - 9** BP were successful in defending a court action raised by a landowner who sought compensation for their inability to develop land due to a presence of an oil pipeline. The proposed development was a 5 star, 35 bedroom hotel.
 - 10** The High Court has confirmed that landlords must consider aesthetic appearance when assessing a landlord's covenant for repair, as they may be obliged to reinstate original design features.

What's on the horizon for the rest of 2019?

- 1** Alexander Devine Children's Cancer Trust v Housing Solutions Ltd [2018] EWCA (Civ) 2679 – Permission to appeal to the Supreme Court was recently secured in this case relating to Housing Solutions Ltd's failed application to modify a restrictive covenant. This will be the first time that the provisions of s.84 of the Law of Property Act 1925 will be directly considered by the House of Lords or the Supreme Court.
- 2** Manchester Ship Canal Company Ltd v Vauxhall Motors Ltd (formerly General Motors UK Ltd) [2018] EWCA Civ 1100 – the Supreme Court heard the appeal on 9 and 10 July 2019. The Court of Appeal decided that a licensee did have a right to relief from forfeiture as the licence (to discharge water and trade effluence into the appellant's canal) conferred a possessory interest. We await the Supreme Court's judgment.
- 3** Cardtronics Europe Ltd and others v Chris Sykes and others (Valuation Officers) [2018] EWCA Civ 2472 – the Valuation Officers were recently granted permission to appeal in this case where the Court of Appeal had ruled that certain ATMs located in supermarkets should not be separately assessed for the purpose of business rates. We will be following its progress in the Supreme Court.
- 4** Fearn and others v Board of Trustees of the Tate Gallery [2019] EWHC 246 (Ch) – claims by the owners of flats which were overlooked by a public viewing gallery in the Tate Modern building were rejected by the High Court. The Court of Appeal is to hear the appeal by 4 June 2020. Our article on the case is at pages 14-15.

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- 5** Duval v 11–13 Randolph Crescent Ltd [2018] EWCA Civ 2298 – We await a hearing date for the Supreme Court’s consideration of this case where the Court of Appeal found that a landlord was in breach of its covenant in other leases when it granted consent to works where there was an absolute covenant against such works. The other leases contained landlord covenants to enforce such absolute covenants. Permission to appeal was granted in March 2019.
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- 6** On 1 September 2019 the Renting Homes (Fees etc.) (Wales) Act 2019 comes into force. The Act restricts landlords’ and letting agents’ ability to charge fees to tenants and prospective tenants of privately rented residential property in Wales. Restrictions on charging various letting fees have existed in Scotland since 1984 and in England since 1 June this year.
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- 7** On 24 May 2019, the Welsh Government published a consultation seeking views on the categories of additional default payments which may be permitted if a tenant breaches their tenancy agreement and what information a landlord or an agent must provide to a prospective tenant before taking a holding deposit. The consultation closes on 19 July 2019 and applies in Wales only.
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- 8** The Supreme Court will be sitting in Wales for the first time at the end of July of this year. It sat in Scotland in 2017 and in Northern Ireland in 2018. Travelling to other parts of the UK is seen to be a key way to promote access to the UK’s highest court.
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Make sure you get good service



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From possession to paving to proprietor

Shirley Ann Thorpe v (1) Harald Nobert Frank (2) Lesley Frank [2019] EWCA Civ 150

The Court of Appeal has recently found that, by paving an area, an individual had done enough to establish that she had acquired the land by adverse possession.

The Claimant, Mrs Thorpe claimed to have acquired, by adverse possession, a triangular piece of land in front of her property (No.9) and the adjoining property (No.8), owned by the Defendants, Mr & Mrs Frank.

She applied to the Land Registry for registration as freehold proprietor of that land as part of her title to No.9. In support of her application, she stated that she had the area repaved in 1986, without objection from the owners of No.8, and had fenced it off in 2013.

The FTT ("First Tier Tribunal") held that Mrs Thorpe had achieved the necessary "factual possession" of the land and established her claim to possessory title. Accordingly, the land was registered on the title to No.9.

The UT ("Upper Tribunal") overturned the FTT's decision as there were doubts and uncertainties as to the evidence provided and to the FTT's findings on the issue of possession after the paving work was completed in 1986.

The Court of Appeal, however, found in favour of Mrs Thorpe; the land in issue had always been open plan in character, and its paving with a permanent surface was an assertion of possession within the Limitation

Act 1980. The activities involved in laying the paving constituted a clear interference with the rights of a paper title owner and asserted a momentary and future control of that land.

Key points:

- what constitutes a sufficient degree of exclusive physical control depends on the nature of the land and the manner in which land of that nature is commonly used or enjoyed
- in the case of open land, it is generally impossible to secure every part of the boundary so as to prevent intrusion
- it is known by a number of authorities that making physical changes to the surface of land is material in determining whether adverse possession has been established and usually a squatter would enclose the land in question to demonstrate possession. This case, however, shows that it is not an absolute requirement and it is not the only way in which possession can be asserted and achieved

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Do fence me in!

Churston Golf Club Ltd v Richard Haddock [2019] EWCA Civ 544

The Court of Appeal has overturned both the High Court and earlier County Court decisions and found that a covenant to fence should not be treated as a fencing easement capable of binding successors in title.

The claimant, CGC, was the tenant of a golf club, with the defendant, Mr Haddock, being the tenant of the neighbouring farm. The covenant in question was contained in a 1972 conveyance of the golf club's land from former owners to the local authority. It provided that the local authority and all those deriving title under it covenanted to maintain and "forever hereafter keep in good repair" the fencing along certain marked boundaries with neighbouring land.

Mr Haddock sought a declaration that CGC and its landlord were liable to erect and maintain a fence or hedge between the parties' land and sought damages for losses caused to his farming operations as a result of their failure to date to do so.

The County Court and High Court decided that (i) a fencing easement could be created by express grant (as opposed to only by

custom or prescription) and (ii) that the provision in the 1972 conveyance created such an easement.

The Court of Appeal disagreed that the provision, expressed to be a covenant, had been converted into an easement. The reference to the covenant being binding on successors in title did not change this even when it was settled law that positive covenants (such as this one to fence) do not bind successors.

Key to the Court's decision was the fact that recent Supreme Court decisions on the interpretation of professionally drawn documents confirm that the words used will normally be given their conventional meaning. The obligation here was expressed to be, and therefore was, a covenant.

The appeal was allowed and the earlier decisions overturned.

In the circumstance the Supreme Court felt it unnecessary to consider the question of whether it was possible to create a fencing easement by express grant. This was left for another case.

Key points:

- fencing easements differ from “true” easements as they do not allow the owner of one land (the dominant land which enjoys the easement) to do something over a neighbour’s land (the servient land over which the easement is exercised) which is a key characteristic of easements. What they do is impose an obligation on the owner of the servient land which the dominant land owner can enforce. Further, easements do not usually require the owner of the land over which the easement is enjoyed to spend money
- the case brings relief to some landowners and to property lawyers drafting such arrangements

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Reasonable prospect of development taking off at airfield



Warwickshire Aviation Ltd & 6 Ors v Littler Investments Ltd [2019] EWHC 633

Tenants of an airfield recently failed in their appeal to the High Court to show that their landlord wasn't able to oppose new leases being granted to them pursuant to the Landlord and Tenant Act 1954 ("1954 Act").

The landlord, the Littler family, had owned the airfield since before World War II and now wanted to maximise the value of the site as it only generated a modest income as an airfield. It served notices to terminate the tenancies and opposed new ones on the ground that it intended to demolish the buildings and promote the site for residential development.

Each of the tenants had oral monthly periodic tenancies which could only be terminated in one of the ways set out in the 1954 Act. Littler relied on ground (f) of the 1954 Act which required that it demonstrate an intention to demolish/reconstruct the premises and also that it had a "reasonable prospect" of delivering upon that intention.

The tenants argued that the landlord couldn't make out that it had a "reasonable prospect" of obtaining the planning permission necessary to carry out the redevelopment works as the local authority's stated

development plan was to retain and support aviation-related facilities at the airfield. They submitted that "reasonable prospect" meant a greater than one in three chance of obtaining planning permission.

The County Court did not agree and its decision was upheld by the High Court. The High Court agreed with the District Judge that:

- to give a percentage figure was not helpful as the words "reasonable prospect" spoke for themselves
- the development plan conferred a discretion on the decision maker not a mandatory obligation to retain airfield use
- when considering a planning application for use of land for a purpose which is not the local planning authority's preferred use (here as allocated in the plan), a material consideration will be the likelihood of the land actually being used for the preferred use. In this case the landlord did not wish to use the land for aviation-related use if consent for demolition was refused. Planning control could not be used to force the landlord to reinstate aviation use

- in any event there were alternative uses for the land which did not require planning permission
- given the above, the High Court found that the landlord had established a reasonable prospect of obtaining permission to demolish and the appeal was dismissed

Key points:

- the test of “intention” in ground (f) cases requires the court to review the landlord’s subjective intention – what does it intend to do – and its objective intention – what is the likelihood of it being able to do it. This case is an interesting illustration of these two elements and how they can intertwine
- it is also useful guidance as to how land that is allocated within a local plan might be treated by the court for the purpose of the test of intention. The wide discretion conferred on the local planning authority was a material factor and one which could feature in many similar cases
- the tenants have sought permission to appeal to the Court of Appeal

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(Ad)vantage Point

(1) Giles Duncan Fearn (2) Gerald Kraftman (3) Ian Mcfadyen (4) Helen Claire McFadyen (5) Lindsay Urquart –v- The Board of Trustees of the Tate Gallery [2019] EWHC 246 (Ch)

The High Court has dismissed a claim by residents of luxury glass-fronted flats that their privacy was infringed by being overlooked by the Tate Modern's panoramic viewing platform.

The owners of four luxury flats in the prestigious Neo Bankside development adjacent to the Tate Modern sought an injunction restricting use of the Tate's 360 degree viewing platform on the 10th floor of its new Blavatnik Building to prevent visitors "observing" them in their flats. The platform was designed to afford visitors to the Tate a panoramic vista over London, but incidentally also afforded a direct view into a number of flats in Neo Bankside – and in particular into triangular glass-fronted areas of the flats known as the "winter garden", being a form of indoor balcony. The owners of the

flats complained that they were subject to being "more or less constantly watched", with Tate visitors using binoculars to peer into the flats, taking photographs, waving and occasionally making obscene gestures.

The Court dismissed the claim, finding that whilst the platform allowed visitors to view the interior of the flats, that was not its primary purpose. Had the flats incorporated less glass, there would have been no nuisance claim because external viewing would not be attracted in the same way. In effect, the "price" that the owners of the flats paid for the views afforded by the glass-frontage to their flats was that it necessarily exposed them to increased privacy sensitivity. It would be wrong for a liability in nuisance to be created by such self-induced exposure.

Key points:

- “Overlooking” can be an actionable form of nuisance, however whether or not it amounts to an invasion of privacy depends on whether and to what extent there is a legitimate expectation of privacy
- those choosing to buy properties - particularly in an urban environment - that create a reduced level of privacy by virtue of their design, cannot then use that to seek to limit use of neighbouring properties on privacy grounds
- there were clearly some issues with the way in which the potential interaction between the two developments in this

case had been dealt with: developers and property owners should take care to ensure that all necessary representations are made at the planning stages of buildings to head-off potential neighbour disputes in the future

- the owners’ have filed an appeal which is due to be heard by the Court of Appeal by 4 June 2020

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A little bit of relief for BHS

(1) SHB Realisations Ltd and (2) GB Europe Management Service Ltd v (1) Cribbs Mall Nominee (1) Ltd and (2) Cribbs Mall Nominee (2) Ltd. (County Court)

The County Court recently considered a claim for relief from forfeiture involving premises previously occupied by BHS (now SHB Realisations Limited and in liquidation). The lease in question had over 100 years left to run having originally been granted for a premium and at a peppercorn rent. It had been forfeited by the defendant landlords for breach of a keep open covenant following the insolvency of SHB. SHB and its mortgagee, GB, now sought relief.

It was common ground that SHB could not remedy the breach in the circumstances, and its only option was to assign the lease at a premium in the hope of recovering some of the mortgagee's secured debt. Efforts over the 32 months period up to the date to assign had not been successful but the Court acknowledged that there was a prospect of assignment in the future.

In applying its wide discretion the Court noted SHB and GB's questionable conduct in creating a "phantom purchaser" in the hope of triggering the landlords' pre-emption rights in the lease. It was also conscious of the ongoing damage to the landlords of having the property vacant but, on the other hand, also of the potential windfall (estimated to be £1 million) that they could secure by recovering the property.

The Court granted relief but it is conditional upon SHB assigning the lease within three months (not the 6 months SHB and GB argued they should be given) of the judgment and payment of various costs.



Key points:

- the courts have historically shown a willingness to exercise its discretion and grant relief in circumstances involving long leases granted at premiums on the basis that the tenant would lose a valuable asset and the landlord, in contrast, would obtain a windfall. However, the case demonstrates that forfeiture should be considered by landlords even in circumstances involving long leases granted for a premium
- the case further reminds us of the court's wide discretion in granting relief (even in circumstances involving an irremediable breach), and upon what terms (for example, conditional relief as in this case)
- when relief is granted, the lease is restored as if forfeiture had never taken place. When conditions are placed on relief orders with long stop dates for compliance with conditions (as happened in this case), the tenant will not obtain that relief until it has complied with the conditions

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No place for the real world in this business rates negotiation

Telereal Trillium v Hewitt (Valuation Officer) [2019] UKSC 23

By a majority 3:2 decision, the Supreme Court has overturned the decision of the Court of Appeal in the case of *Telereal Trillium v Hewitt (Valuation Officer)* [2018] EWCA Civ 26.

The case concerns a substantial three-storey block of offices in Blackpool. Not only were the premises vacant as at the Material Date, it was agreed that in the real world there was no demand for the premises. It was considered that only the public sector would be interested in taking premises of this nature, but that all public sector demand was being met by the occupation of other similar premises elsewhere.

The difficulty that arises is this: the basis of rating valuation requires an imagined hypothetical negotiation between a willing landlord and a willing tenant. How does, however, one apply this principle where, in the real world, there simply is no demand?

The ratepayer argued that the rating hypothesis should not be used to create

demand where in actual fact no such demand exists. The Valuation Officer argued that, although there was no identifiable demand for these particular premises, there was a 'general demand' in that there were other similar properties in the region which were beneficially occupied.

The Court of Appeal agreed with the ratepayer, with the result that the rateable value was altered to a nominal £1.

In overturning the decision, and restoring a rateable value of £370,000, the Supreme Court has said:

"Even in a 'saturated' market the rating hypothesis assumes a willing tenant, and by implication one who is sufficiently interested to enter into negotiations to agree a rent on the statutory basis. As to the level of that rent, there is no reason why, in the absence of other material evidence, it should not be assessed by reference to 'general demand' derived from occupation of other office properties with similar characteristics."

Key points:

- the decision will come as a blow to owners with vacant and/or difficult to let buildings
- in certain circumstances however, there may still be scope to argue that a building has become genuinely obsolete, such that not only is there no specific demand for it but also that there is no 'general demand' for a building of that type
- owners of vacant buildings should also consider other options to legitimately mitigate rates liability

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Do you know your AGAs from your GAGAs?

Co-operative Group Food Ltd v A & A Shah Properties Ltd [2019] EWHC 941 (Ch)

A recent case saw the court wrestle with the difficulties sometimes encountered with guarantee provisions and the way in which they are drafted.

The landlord A & A Shah Properties Limited ("Shah") granted a lease to Somerfield Stores Limited ("Somerfield") under which Somerfield Limited stood as guarantor. Cooperative Group Food Limited ("Co-Op") assumed liability under the guarantee pursuant to a transfer of engagements.

When Somerfield later assigned the lease to 99p Stores a Licence to Assign and Authorised Guarantee Agreement ("AGA") was entered into. Under the Licence Co-Op entered into guarantee obligations in relation to the future performance of the lease obligations.

Following Somerfield and 99p Stores entering into administration, Shah looked to take action against Co-Op as guarantor.

Guarantee provisions have been the subject of recent reported decisions including the well-known Good Harvest case and the K/S Victoria Street case. Such cases have concluded (amongst other things) that:

1. guarantees whereby a former tenant guarantees the obligations of an assignee (i.e. an AGA), and the guarantor (Co-Op in this case) guarantees the obligations of that former tenant under the AGA (sometimes referred to as a "GAGA"), are valid.
2. guarantees whereby an original guarantor directly guarantees the obligations of an assignee (sometimes referred to as a "repeat guarantee"), are invalid.

In this case there was a dispute as to whether Co-Op's guarantees were GAGAs or repeat guarantees. Having construed the wording of the Licence the Court decided, on appeal, that there were valid guarantee obligations under which Co-Op was liable.

Key points:

- whilst some provisions in the Licence were found to be valid guarantees, a provision which saw Co-op covenant to observe and perform obligations set out in the AGA immediately after completion of the assignment was found to be void. It is important therefore not to assume that all guarantee provisions are valid and enforceable
- guarantees need to be carefully drafted to ensure that they do not fall foul of the Landlord and Tenant (Covenants) Act 1995 and the case law which has developed over the last 5-10 years
- of course, landlords should always consider if the tenant/assignee has the means to meet the rent and other covenants and if there is doubt, consider taking a guarantee or other security

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Is compensation in the pipeline?

Ury Estate Limited v BP Exploration Operating Company Limited [2019] CSOH 36

A landowner raised a court action against BP seeking compensation for their inability to develop land due to the presence of an oil pipeline. The proposed development was a 5 star, 35 bedroom hotel. The claim was based on rights granted in a servitude (the Scottish equivalent of an easement).

The servitude entitled the landowner to compensation if: (i) its proposed development was prevented from doing so only by the existence of the pipeline; (ii) it served a notice on BP providing details (including the development plans and reasons for rejection of the planning application); and (iii) within 6 months of the notice BP did not divert or agree to divert the pipeline.

While the court accepted that the landowner had a genuine wish to develop, the landowner did not prove that the only factor preventing development was the pipeline.

The court took the view that there was no acceptable evidence that the development could be funded and the development was practically unworkable in its proposed form. This meant that the trigger for compensation set out in the servitude was not met.

The court also considered the proper measure of loss, had compensation been payable. This was not the total profit expected to be generated by the hotel. Instead it was the difference between the profit generated by the hotel which had been refused and the development that had been approved, as the ordinary and natural reading of the word loss means the diminution resulting from the planning decision.

Key points:

- servitudes are access rights granted over one piece of land in favour of a neighbouring piece of land
 - it is common for landowners to be entitled to claim compensation but the servitude will usually set out the circumstances in which compensation is payable and the factors that must be met
 - even if compensation is payable there can be issues about the calculation of loss, e.g. the date at which the loss should be valued etc
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Repairing covenants – does aesthetic appearance matter?

Blue Manchester LTD v North West Ground Rents LTD [2019] EWHC 142 (TCC)

The High Court confirmed earlier this year that landlords must consider aesthetic appearance when assessing repairs as they may be obliged to reinstate original design features.

The case concerned The Beetham Tower, a landmark skyscraper in Manchester, and its external facades which are made up of glass panels to form a “wall of glass”.

In 2014, the structural sealant used to fix the glass panels to the Tower began to fail. The landlord implemented a temporary solution, which included fitting stitch plates to the panels and erecting ground level safety hoardings.

A dispute arose between the landlord and tenant regarding the extent of the landlord’s repairing obligations.

The tenant contended that the landlord was obliged to undertake permanent repairs to the façade to bring it back to its original appearance. It brought claims against the landlord for, amongst other things, specific performance.

The landlord argued that the temporary repairs satisfied its repairing obligations as it stood. Its hope was to pursue claims against the insurers of the main contractor of the Tower, Carillion (now in liquidation), to enable it to fund a permanent solution.

The court held that the existing temporary repairs were insufficient, partly due to aesthetic considerations. As a result, the court made an order for specific performance requiring the landlord to restore the façade to its original condition, giving it 18 months for it to do so. Whether the cost of repairs could be recovered from Carillion, was a separate issue.



Key points:

- the case therefore serves as a reminder for investors purchasing on this basis to consider the potential risk and cost implications of having to carry out works. It is possible that such costs could be recovered from tenants by means of service charge payments. Where the arrangement allows, it should be considered, alternatively, whether a managing company owned by the tenant should hold such repairing responsibilities
 - a temporary solution to disrepair might be appropriate but only if the more permanent solution is also being pursued
 - claims against contractors relating to design/construction defects should be pursued promptly, in order to avoid any insolvency issues arising
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Snapshots

Canary Wharf (BP4) T1 Ltd v European Medicines Agency [2019] EWHC 335 (Ch)

The EMA has withdrawn its appeal of the High Court decision where it was decided that Brexit will not frustrate the lease between EMA as tenant and Canary Wharf Group as landlord. The Court of Appeal was set to hear the appeal by 16 March 2020. EMA have agreed to sub-let the entirety of its premises to WeWork for the remainder of the term of its Lease. As such the widely reported High Court decision, which came as a welcome relief to not only Canary Wharf Group but to many others in the property and legal market, stands.

Ashtead Plant Hire Company Limited v Granton Central Developments Limited [2019] CSOH 7

The Court recently considered a dispute over the proper construction of the rent review provisions in a lease of commercial premises in Scotland which provided that the valuation of "open market rent" should be

calculated disregarding "the effect on any rent of the value of any buildings or other constructions erected on... the subjects of the lease". The question was whether this meant that buildings already present on the premises at the outset of the lease should be disregarded for the purposes of a rent review calculation. The lease term ran to 2096 so the outcome was significant.

The court restated the general principles of contractual interpretation and it was also referred to four English cases on rent review provisions. Both parties accepted that the general rule for valuation of the 'open market rent' is that the valuation includes any buildings as well as the land but that this rule could always be contractually displaced. Ultimately the court's decision was that the disregard at issue was effective to exclude the existing buildings or other constructions on the premises for the purpose of deciding open market rent.

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Cine-UK Limited v Union Square Developments Ltd [2019] CSOH 3

In this Scottish case, a tenant tried to challenge a lawyer's findings (in this case as to rent review), arguing that she had erred in law and that having, allegedly, answered the wrong question, her decision was open to challenge. The lease provided, however, that a lawyer's determination was to be "final and binding ... on fact and law".

The Court "had no hesitation" in finding that the lawyer's decision was final, conclusive and not subject to review. In reaching its decision the Court highlighted that the lease did not require her to give reasons for the decision – which was consistent with not having a right of appeal; reasons are relevant in assessing whether there is a challenge. The lease also did not limit the types of disputes which could be referred to the lawyer, indicating all disputes remitted to the lawyer were to be final both on fact and law.

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Snapshots

EE Limited and Hutchison 3G Limited v The Mayor and Burgesses of the London Borough of Islington [2019] UKUT 53 (LC)

EE and Hutchison 3G sought rights under the Code to install and operate electronic communications apparatus on the rooftop of a block of flats owned by the London Borough of Islington ("LBI") who objected to the grant of Code rights.

The Tribunal was asked to address the following points:-

- whether the Operators were entitled to a Code Agreement in the form of a lease
- the terms of the Code Agreement to be imposed
- and the consideration and compensation payable under the Code Agreement to be imposed

The Tribunal decided that it did have the power to impose a Code Agreement in the form of a lease. The Code contained no express restriction on the type of agreement by which Code rights may be imposed.

As regards the assessment of consideration payable under a Code Agreement the Court applied paragraph 24 of the Code which makes provision for the determination of consideration. LBI had contended for consideration of £13,250 per annum. The operators offered £1 but subsequently increased the proposed payment to £2,551.77 per annum. The Tribunal determined consideration at £1,000 per annum but set consideration at the level of £2,551.77 per annum offered by the operators.

LBI's entitlement to compensation for its reasonable legal and surveying fees and for loss and damage caused by the installation of the apparatus were also considered by the Tribunal, but there was no order made in this respect.

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Wells v Devani [2019] UKSC 4

Earlier this year the Supreme Court unanimously decided that Devani, an estate agent, and Wells, a property developer, had entered into a binding oral contract by which it was agreed that if Devani found a purchaser for the flats he would be paid his commission.

The oral contract was formed during a telephone conversation between the parties during which Devani had informed Wells that he was an estate agent and notified Wells of his commission rate. Following this call Devani made contact with a housing trust which expressed an interest in Wells' properties and a sale was agreed following this introduction.

Wells, however refused to pay Devani's commission claiming that he was not obliged to pay anything to Wells as no agreement had been concluded between them.

The Court concluded, however, that a binding agreement was reached during that call. Interestingly, Lord Kitchin noted that in cases such as this there was no need to imply a term into the agreement as to when payment would be triggered as it would naturally have been understood that payment would be due at the point of completion of the transaction.

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Snapshots

New Crane Wharf Freehold Ltd v Jonathan Mark Dovener [2019] UKUT 98 (LC)

A lease covenant requiring the tenant defendant, Mr Dovener, to "permit" its landlord "...at all reasonable times on giving not less than forty eight hours' notice ...to enter the demised premises..." was recently found not to require him to grant advance permission but permission on the date and at the time access was required.

The landlord, New Crane, had argued that Mr Dovener's failure to respond to their two notices requiring access to inspect amounted to a breach of covenant.

Upholding the First-tier Tribunal's ("FTT") decision the Upper Tribunal ("UT") dismissed the appeal and decided that there was no such breach.

The UT and FTT agreed that there was nothing in the covenant which indicated or implied that New Crane was required to secure Mr Dovener's confirmation that a chosen day/time for access is convenient. Whilst granting permission required a positive act, the time for that act was the date and time for the requested access as given in the notice.

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***Alexander Kuznetsov v Camden
London Borough Council [2019]
EWHC 805 (Ch)***

In an application for relief from sanctions, the Claimant tenant, Kuznetsov, persuaded the High Court that it had a real prospect of establishing at trial that a letter between him and the Defendant landlord, Camden Council, amounted to a contract for the sale of his lease.

Kuznetsov, who had a long lease of a flat on an estate owned by the Council, claimed that a binding sale and purchase agreement had been reached between him and the Council and referred the Court to a letter from the Council to Kuznetsov in which the Council made an offer to him to purchase the property for a price to be determined by a surveyor carrying out a "Red book" valuation. The letter had been countersigned and dated by Kuznetsov and returned to the Council with the wording "Thank you! I accept your offer and will instruct a valuer, as requested".

Kuznetsov wanted the Council to honour that agreement and applied to the Court for specific performance of the contract. The Council, however, sought and secured an order striking out the claim as originally drafted. It was Kuznetsov's application for relief from strike out which now came before the Court. The court concluded that there was a real prospect that Kuznetsov could establish at trial that an open contract for sale had been reached. The order to strike out was set aside and the application for specific performance could proceed.

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Snapshots

Ramoyle Developments Limited v Scottish Borders Council [2019] CSOH 1

A local authority in Scotland entered into a contract to sell an area of land for regeneration. Either party to the contract was entitled to withdraw from the sale if the purchasers failed to "submit" an appropriate planning application within 6 months. The planning application had to be submitted to the seller, in its role as planning authority.

The 6 months expired at 23.59 on 22 November 2017. Only two seconds later the authority sought to withdraw. The purchasers had lodged their application via the on-line portal on 20 November but hadn't yet paid the planning fee, so the authority said the planning application hadn't been "submitted" on time.

Perhaps unsurprisingly, given that the purchasers had received email confirmation that their application was "successfully submitted", the court decided that payment of the planning fee was not required for the application to be "submitted".

The online system allowed an application to be submitted before the fee was paid and while the relevant planning regulations require an application to be accompanied by the fee, for the purposes of the contract,

online submission in advance of payment was enough and the local authority could not back out of the contract to sell.

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Windsor-Clive v Rees [2019] EWHC 1008 (Ch)

In considering the scope of a landlord's reserved right to enter premises let to their tenant "for all reasonable purposes", the High Court has held that the right to do so must be connected with the parties' rights and obligations under the relevant tenancy. It does not extend to all purposes that are reasonable merely in the landlord's interests.

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***TFS Stores Limited v BMG
(Ashford) Limited et al [2019]
EWHC 1363 (Ch)***

The High Court recently considered whether six leases had been validly contracted out of the protection of the Landlord and Tenant Act 1954 ("1954 Act"). The procedure for contracting out is set out in Schedule 1 of the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 and, briefly, requires a notice to be served by the landlord warning the tenant of the consequences of contracting out of the 1954 Act and for the tenant to make a declaration acknowledging that it is losing its 1954 Act protection.

The parties had followed the procedure before entering into the leases but when the leases in question expired, and the landlord decided not to grant new leases, the tenant claimed that the procedure was not correctly followed and as such the leases were protected by the 1954 Act.

The Court disagreed. On the three points raised by the tenant in support of its claim it found that: 1) the tenant's solicitor did have authority to receive warning notices; 2) the tenant representative signing the declaration similarly had authority to

do so and 3) the declarations were not invalid for failing to specify the commencement date of the term of the proposed tenancies correctly. On the final point the Court stated that the purpose of the wording in question in the declaration was to allow the tenancy concerned to be identified. It was sufficient to identify the tenancy by either the date the interest commenced or the date from which the term is calculated. This case is a welcomed clarification from the Court on the procedure for contracting out of the 1954 Act.

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Motion pictures

Alex Wright, David McGuirk and Carly Fishwick in the Manchester office together with our colleagues in France, Germany and Hong Kong have been assisting a number of clients to relocate their corporate HQs in city locations, serving high value break notices and working to compromise tens of millions of pounds of potential liabilities.

Lisa Barge and Samantha Miller, in the Birmingham team, have been advising on unlawful forfeiture and relief from forfeiture applications in respect of its restaurant in the well-known Cube building in Birmingham. They successfully managed to get our client back into occupation of its demise within a matter of days and are now pursuing a significant damages claim for loss of profits on behalf of our client against its landlord.

Andrew Todd and Natalie Ingram successfully secured the discharge of an injunction obtained against the receivers of a portfolio of Belgravia properties. The court process was unusual – the Applicant (serving a sentence of life imprisonment) was acting via a power of attorney granted in favour of his father.

Stuart Wortley, in the Cambridge office, is acting on behalf of the owners of the Shard in respect of a

contempt of court action following the most recent, highly publicised, incident of free-climbing where an individual scaled the side of the Shard.

The Cardiff team have acted for High Speed Two (HS2) Limited in an application to vary and extend an interim injunction granted on 19th February 2019 in relation to a site being developed in connection with the HS2 project. The Cardiff team have also been acting for a major energy sector client in relation to contempt proceedings brought following breach of an injunction ordered by the court.

The London team have been successfully avoiding a claim for injunctive relief for a developer of a large mixed use scheme in Clerkenwell, North of the City of London, which required over-sailing multiple neighbouring properties with scaffolding and cranes and also advising on High Court proceedings seeking the removal of a light obstruction notice registered against a prominent building in the City occupied by Goldman Sachs in relation to a neighbouring owner's development plans which would impact on our client's rights to light. The case involves complicated issues of transference and the extent of the application of the Custom of London.



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This briefing is correct at **31 July 2019**. It is intended as general guidance and is not a substitute for detailed advice in specific circumstances.

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