

Real estate quarterly update - April to June 2020

Read more about our latest real estate update aimed at in house lawyers (and other professionals) practising in the property / real estate sector.

01 July 2020

Cases

Duval v 11-13 Randolph Crescent Ltd [2020] UKSC 18

A landlord in a block of flats breached a mutual enforcement obligation by licensing one flat tenant to carry out alterations where there was an absolute prohibition against those alterations.

[Read our case update](#)

Dreams Ltd v Pavilion Property Trustees Ltd and another [2020] EWHC 1169 (Ch)

Whilst a failure by a tenant to pay damages for dilapidations was not a condition of completion of an agreement to surrender a lease, a failure by the tenant to deliver vacant possession was.

[Read our case update](#)

Cardtronics UK Ltd and others v Sykes and others (Valuation Officers) [2020] UKSC 21

The Supreme Court has upheld the Court of Appeal's decision that the sites of ATMs both inside and outside of shops should not be separately assessed for business rates.

[Read our case update](#)

Rees v 82 Portland Place Investments LLP and another [2020] EWHC 1177 (Ch)

The sanctity of the title register prevails – the court refuses to allow the register to be rectified despite the serious financial consequences that result.

[Read our case update](#)

Monosolar IQ Ltd v Woden Park Ltd [2020] EWHC 1407 (Ch)

The court generously comes to a tenant's aid when interpreting an index-linked rent review clause.

[Read our case update](#)

Trecarrell House Ltd v Rouncefield [2020] EWCA Civ 760

A landlord's failure to provide its tenant with a gas safety certificate before the tenant took occupation did not permanently bar the landlord from serving a notice terminating the tenancy under section 21 of the Housing Act 1988.

[Read our case update](#)

Legislation, consultation and guidance

COVID-19 specific measures

Restrictions on forfeiture and use of Commercial Rent Arrears Recovery (CRAR)

The temporary restriction on a landlord forfeiting a business tenancy for non-payment of rent or any other sum due under a lease (in section 82 of the Coronavirus Act 2020) has been extended until 30 September 2020 (from 30 June 2020).

In addition, the temporary restriction on the use by a landlord of CRAR (in the Taking Control of Goods Regulations 2013) has also been extended until 30 September 2020 (from 30 June 2020), with the minimum net unpaid rent that must be outstanding before CRAR may take place being increased from 90 days to 189 days (in normal circumstances, this is only 7 days).

Code of Practice for commercial property relationships during the COVID-19 pandemic

This voluntary code has been developed by the Government (in collaboration with the retail, hospitality and property sectors) to provide clarity for businesses when discussing rental payments and to encourage best practice so that all parties are supported. It will apply until 24 June 2021 to all commercial leases that have been seriously impacted by the current crisis (although it is expected that the hospitality, leisure and parts of the retail sector will need it most).

Under the code, in all dealings with each other, both landlords and tenants should act reasonably, swiftly, transparently and in good faith. Tenants who are able to pay rent in full should do so. However, tenants who are unable to pay in full should seek agreement from their landlords to pay what they can. When seeking concessions, tenants should be transparent and provide their landlords with relevant financial information about their business. Landlords should provide concessions where they reasonably can (taking into account their own fiduciary duties and financial commitments) and, if they refuse, they should provide a reasonable explanation taking into account the information provided by the tenant.

The code suggests various options for new rental arrangements (e.g. rent-free periods, rent deferrals, monthly rents or rent payments in arrears, turnover rents etc.) and suggests other arrangements that could be offered in return (e.g. a reversionary lease, the removal of a tenant's break right or the extension of a lease).

The code also considers service charge and insurance arrangements and says that, unless otherwise agreed, service charge and insurance should be paid in full by tenants. Where possible, the frequency of tenant service charge payments should be spread over shorter periods and where there is a known net reduction in overall service charge due to lack of use of a property, this reduction should be passed on to tenants as soon as possible ahead of the end of year reconciliation.

A copy of the code can be viewed from [here](#).

Extension of the time period for registering a charge at Companies House

Under Regulation 18 of the Companies etc. (Filing Requirements) (Temporary Modifications) Regulations 2020, the time period for registering a charge created by a company at Companies House has been extended to 31 days beginning with the day after the creation of the charge (ordinarily the time period is 21 days). This extension lasts until 5 April 2021.

Corporate Insolvency and Governance Act 2020

Although this Act deals with a number of areas of insolvency and corporate governance (some permanent and some temporary), the two main areas of interest for Real Estate practitioners are the new business rescue moratorium and the temporary restrictions on winding-up companies.

New business rescue moratorium

This is available to all UK companies not subject to recent insolvency proceedings, with certain exceptions. The company's directors can obtain a moratorium by filing at court a statement from the directors that, in their view, the company is or is likely to become unable to pay its debts and a statement from an insolvency practitioner (who will act as a monitor) that in the proposed monitor's view, it is likely that a moratorium will result in the rescue of the company as a going concern.

The moratorium will last for an initial period of 20 business days, but may be extended, without creditor consent, for a further period of 20 business days and may be extended by up to one year with the consent of creditors or for a longer period with the consent of the court.

The key protections available to a company during the moratorium are as follows:

1. The company will have a payment holiday for pre-moratorium debts which fell due before the moratorium or which fall due during the moratorium, although a company will have to pay rent during the moratorium and will have to pay for goods and services supplied during the moratorium.
2. A winding-up petition cannot be presented against the company (except by the directors).
3. An administration application cannot be made in respect of the company (except by the directors) and no notice of an intention to appoint an administrator may be filed at court.
4. An administrative receiver of the company cannot be appointed.
5. A landlord cannot forfeit the company's lease without the consent of the court.
6. Security cannot be enforced over the company's property without the consent of the court.
7. Legal processes against the company cannot start or continue without the consent of the court.

Unlike with administration, the company will continue to be run by its directors during the moratorium (albeit overseen by an insolvency practitioner).

Restrictions on winding up companies

In April, the Government announced that it intended to implement new measures to safeguard the High Street against aggressive debt recovery actions during the coronavirus pandemic. However, despite this, the restrictions apply to all creditors (not just landlords).

The key points to note are as follows:

1. A creditor cannot present a winding-up petition on or after 27 April 2020 on the basis of a statutory demand served during the period running from 1 March 2020 to 30 September 2020 (known as the "relevant period").
2. In addition, a creditor cannot present a winding-up petition during the relevant period on any ground unless it has reasonable grounds for believing that coronavirus has not had a financial effect on the company or that the debt issues would have arisen even if coronavirus had not had a financial effect on the company. Coronavirus has a financial effect on a company if the company's financial position worsens in consequence of (or for reasons relating to) coronavirus. This will be a very difficult test for creditors to satisfy given that coronavirus must have had a financial effect on most companies.
3. Where the court disagrees with a petitioning creditor's assessment that coronavirus has not had a financial effect on the company, the court still has discretion to make a winding-up order if it is satisfied that the company's inability to pay its debts would have arisen even if coronavirus had not had a financial effect on the company.
4. These provisions have retrospective effect in that where a petition was presented between 27 April 2020 and 25 June 2020 (the day before the Act came into force) and where the creditor did not have the reasonable grounds mentioned above, the court can make a remedial order to restore the position as if a petition had not been presented.

5. In addition, an existing winding up order is retrospectively declared void if made between 27 April 2020 and 25 June 2020 if the court would not have made the order under the new restrictions.

Tenant Fees Act 2019

This Act came into force on 1 June 2019. At the time, it only applied to new tenancies. However, from 1 June 2020, it applies to all tenancies, whenever granted.

As a reminder, the Act applies (in England) to assured shorthold tenancies (excluding long leases and social housing), student accommodation and most licences to occupy. Subject to a number of exceptions, it prohibits letting fees paid by tenants. Exceptions include rent, a tenancy deposit (not exceeding five weeks' rent (or six weeks' rent where the annual rent exceeds £50,000)), a holding deposit (not exceeding one week's rent), interest on late payments of rent (not exceeding 3% above base rate and only where more than 14 days late), payments for council tax, utilities, TV licences and communication services and the reasonable cost of replacing lost keys.

From 1 June 2020, any term of a tenancy (whenever granted) requiring a tenant to pay fees which are not permitted under the Act is unenforceable. In addition to a penalty of £5,000 for breach of the Act, a landlord will be unable to serve a section 21 notice (the so-called 'no fault' ground for possession) until any prohibited payments have been repaid to the tenant. Successive breaches can result in a criminal offence and an unlimited fine.

Land Registry

Execution of deeds

The Land Registry has announced that, from 4 May 2020, it will "until further notice" accept for registration transfers or other dispositionary deeds and certain other deeds and documents signed remotely using the procedure set out in the February 2010 Law Society Practice Note: Execution of documents by virtual means (option 1) (the so-called 'Mercury signing approach'). This involves sending to the signatory a copy of the agreed form of document and another copy of just the signature page. The person signing prints off the signature page, signs in wet-ink (with a witness physically present where required) and then emails back a PDF/JPEG or other suitable copy of the signed signature page with a copy of the final form of document (it is crucial that this email contains both documents). The conveyancer then combines both documents either electronically or by printing them out and physically combining them. For the purposes of certifying to the Land Registry that the document is a true copy of the original, this combined document is treated as the original document.

The new process is set out in full in paragraph 12 of Practice Guide 8 which can be viewed from [here](#). It includes a process to satisfy the Land Registry's requirements for the signing of plans by a disponent. A plan can either be signed by the disponent's conveyancer as agent before emailing the final copy of the agreed form of document to the signatory or the disponent can type their name on the plan by way of signature before returning the final agreed form of document and the signed signature page to their conveyancer.

Evidence of identity

The Land Registry has published a new Practice Guide 67A on changes to its evidence of identity requirements.

The main points to note are as follows:

1. The Land Registry will not reject an application where evidence of identity is missing (it will raise a requisition instead).
2. People who work (or did work before retiring) in certain professions can now verify identity (see paragraph 1.3 for a list of those professions). They must complete a new form ID3 (for a private individual) or ID4 (for a corporate body).
3. ID1 and ID2 forms are valid for six months (as opposed to three).
4. Verification of identity can now be done by video call. If a conveyancer does that, they must complete a new form ID5.
5. The changes are described as "temporary" and may be modified or withdrawn at short notice.

The new Practice Guide can be viewed from [here](#).

Miscellaneous

Property Information Form (TA6)

The Law Society has published a second revision of the fourth edition of this form (originally published in February 2020).

Enquiry 12.5 asks if sewerage for the property is provided by a septic tank. The form now goes on to warn that if the answer is yes, the property is in England and the septic tank discharges directly into surface water, the owner must as soon as possible:

- connect to a mains sewer; or
- install a drainage field (also known as an infiltration system) so the septic tank can discharge to ground instead; or
- replace the septic tank with a small sewage treatment plant.

The owner must have plans in place to carry out this work within a reasonable timescale, typically 12 months.

Law Society Practice Note: Property and Registration Fraud

The Law Society (in conjunction with the Land Registry) has updated this practice note (the previous version was published in 2010).

The note highlights the continued threat of fraudsters targeting the properties of both individuals and companies. Amongst other changes, the note clarifies that a written risk assessment should be carried out at the start of a transaction and should be updated and amended as the details of the transaction become known. The note also reaffirms the importance of undertaking thorough anti-money laundering checks (referring to existing Law Society, Land Registry and Legal Sector Affinity Group guidance where appropriate).

Various sections in the note have been expanded and the note suggests how conveyancers can encourage clients to be more aware of how they may protect their property interests against fraud.

A copy of the practice note can be viewed from [here](#).

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Related expertise