

## Real estate quarterly update - January to March 2020

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

07 April 2020

### Cases

#### **Bate and another v Affinity Water Ltd [2019] EWHC 3425**

Extrinsic evidence can be used to identify the dominant tenement in a deed of easement and a water company's whole undertaking can constitute that dominant tenement.

[Read our case update](#)

#### **Fearn and others v The Board of Trustees of the Tate Gallery [2020] EWCA Civ 104**

Overlooking by a neighbour does not fall within the tort of private nuisance.

[Read our case update](#)

#### **Yuen v Wong (2020) First-tier Tribunal 2016/1089, 8 January 2020**

Witnessing the execution of a deed by video link is not permitted under the current law.

[Read our case update](#)

#### **Pease v Carter and another [2020] EWCA Civ 176**

An error in a statutory notice served under section 8 of the Housing Act 1988 was saved by the application of the 'Mannai' principle.

[Read our case update](#)

#### **Beaumont Business Centres Ltd v Florala Properties Ltd [2020] EWHC 550 (Ch)**

The court was prepared to grant an injunction requiring a development that interfered with rights to light to be cut back.

[Read our case update](#)

### **Legislation, consultation and guidance**

# The Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020

These regulations will apply to new tenancies from 1 July 2020 and will apply to existing tenancies from 1 April 2021. The key points to note are as follows:

1. The regulations will apply to any tenancy of residential premises that grants one or more persons the right to occupy all or part of the premises as their only or main residence and which provides for payment of rent. Certain tenancies are, however, excluded from the regulations. These include tenancies granted by social or resident landlords, long leases or tenancies granting a right of occupation for a term of seven years or more, student lettings in halls of residence and tenancies granted to occupiers of hostels, refuges, care homes, hospitals or hospices.
2. The regulations require landlords to ensure the electrical safety standards in the 2018 edition of the IET Wiring Regulations (BS7671:2018) are met whenever premises are let.
3. The regulations also require landlords to ensure that a qualified person inspects every fixed electrical installation at least every five years and issues a report. The landlord must supply a copy of the report to each existing tenant within 28 days of the inspection. If remedial work is required, the landlord must carry it out within 28 days (or sooner, if indicated by the report).
4. The regulations will be enforced by local authorities. They will be able to impose civil penalties on private landlords for breach of their obligations (up to a maximum of £30,000).

## Consultation on the design and delivery of First Homes

This consultation, launched by the Ministry of Housing, Communities & Local Government, considers the creation of a First Homes scheme and options for its implementation. The proposals relate to England only and aim to deliver discounted homes to local people who wish to stay in the community where they live or work but are struggling to buy a home at market prices.

The main proposals in the consultation are as follows:

1. Flats and houses on new developments will be sold with a discount of at least 30% (local areas will be able to set larger discounts to ensure that homes are affordable to local people)..
2. Priority will be given to first-time buyers, serving members and veterans of the Armed Forces and key workers (e.g. nurses, police and teachers).
3. Buyers will purchase First Homes in the usual way and will have access to conventional mortgage products.
4. Buyers will have to use the homes as their sole or primary residence.
5. The discounted value will be preserved on a sale. When owners of First Homes decide to move, their home will be independently valued. When they sell, the discount will be passed on to the new owner with the discount applied to the new value (so more people can be helped onto the property ladder).

The consultation runs until 3 April 2020. A copy of the consultation can be viewed from [here](#).

## RICS Code for Leasing Business Premises in England and Wales (RICS professional statement 1st edition)

The RICS has published a new code to replace the existing 2007 code. It will take effect on 1 September 2020 and will apply to all business lettings in England and Wales except agricultural lettings, lettings of premises that will only be used to house plant and equipment or advertising media, lettings of premises that are intended to be wholly sublet by the tenant and lettings of premises for a period of not more than six months.

For the first time, the code will form part of an RICS professional statement, setting specific mandatory requirements for members, as well as other best practice recommendations. The objective is:

*“to improve the quality and fairness of initial negotiations on lease terms and to promote the issue of comprehensive heads of terms that should make the legal drafting process more efficient”.*

One of the mandatory requirements in the professional statement is that lease negotiations must be approached in a constructive and collaborative manner. Another provides that where a party is unrepresented, it must be advised about the existence of the code and its supplemental guide and must be recommended to obtain professional advice.

The professional statement provides that the landlord (or its letting agent) is responsible for ensuring that heads of terms are in place before an initial draft lease is circulated. It goes on to set out the minimum details that must be included in written heads of terms for a vacant possession lease (stated to be ‘subject to contract’). These details must also be included in heads of terms on lease renewal or extension, except for any terms that are stated to follow the tenant’s existing lease subject to reasonable modernisation.

As with the 2007 code, the new code also contains recommendations on best practice for lease negotiation (these are not mandatory and the RICS recognises that there may be exceptional circumstances where it is appropriate for RICS members to depart from them). These recommendations should be more acceptable to institutional landlords than their equivalent provisions in the 2007 code and include specifically new recommendations on ‘Management and operational performance’, ‘Energy Performance Certificates and ‘Landlord’s title’.

As well as the new code, the professional statement also contains a template heads of terms that mirrors the code, a minimum heads of terms checklist (for use where landlords or their agents wish to use their own template) and a supplemental guide for landlords and tenants (describing some of the main factors for the parties to consider when agreeing a lease).

A copy of the RICS professional statement can be viewed from [here](#).

## **Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 - the Minimum Energy Efficiency Standard (MEES)**

From 1 April 2020, MEES applies to existing leases of domestic properties (in addition to the grant of new leases). It is unlawful for a landlord to continue to let a sub-standard domestic property (i.e. one with an ‘F’ or ‘G’ EPC rating) unless an exemption applies. MEES applies to properties let under an assured tenancy (including an assured shorthold tenancy), a regulated tenancy and certain agricultural tenancies.

In relation to non-domestic properties, MEES will not apply to existing leases until 1 April 2023.

## **The Competition and Markets Authority (CMA) updated report on leasehold housing**

The CMA has been investigating concerns that some housing developers have treated leasehold homeowners unfairly and have misled prospective buyers (and is completing the legal work needed to launch direct enforcement action against companies it believes have broken consumer protection law). A report and an accompanying press release on its findings to-date have been published.

The CMA’s concerns include the following:

1. Leasehold owners having to pay excessive escalating ground rents which may leave owners struggling to sell or mortgage their homes. The ground rents may reach levels where the leases qualify as assured tenancies under the Housing Act 1988, which can, in turn, leave the owners vulnerable to losing their homes.
2. Developers misleading buyers about the cost of buying the freehold of their leasehold homes, with some buyers initially told that buying the freehold would cost only a small sum (when the price quoted later was thousands of pounds).
3. Developers misleading buyers about the interest they are buying and the nature of leaseholds, with some buyers not told about the differences between freehold and leasehold ownership when asked and some buyers even told that there was no difference (by the time buyers find out the truth, it is often too late easily to pull out of a purchase).

4. Excessive and disproportionate fees charged for things like the routine maintenance of a building's shared spaces or consents for home improvements (the process for challenging these being difficult and costly).

The CMA is also developing consumer advice for people who own (or are looking to buy) a leasehold property and will continue to work with the government on its planned reforms of the leasehold housing market (including supporting the move to ban the sale of new leasehold houses and to reduce ground rents for new leases to zero).

The report also recommends further government action in certain areas, including:

1. Improving the existing system of redress for leaseholders, to make it simpler and cheaper for them to contest permission fees and service charges that they think are unreasonable or excessive.
2. Legislating to deal with the 'trap' where a residential tenant paying a ground rent in excess of £250 per year (or £1,000 per year in London) may have a lease that qualifies as an assured tenancy.
3. Improving the quality of information available to prospective buyers early in the conveyancing process (including information about the tenure of the property, the price (including the costs of buying) and the annual cost of ownership).

The CMA's investigation into leasehold housing is continuing and further measures are likely to be announced in due course.

A copy of the report can be viewed from [here](#) and a copy of the accompanying press release can be viewed from [here](#).

## Searches and enquiries

# Law Society Property Information Form (4th edition) (TA6)

A new version of this form and the accompanying explanatory notes have been published by the Law Society.

The main changes to the form concern enquiry 7.8 (which asks whether the property is affected by Japanese knotweed). Both the form and the notes stress that Japanese knotweed consists of both visible above-ground growth and a rhizome (root) below ground. The notes warn that if a seller is unsure about the existence of knotweed above or below ground (or whether it has been managed previously) they should answer 'not known'. The notes also warn that if a seller answers 'no', they must be certain there is no root present at the property or within three metres of its boundary, even if there are no visible signs above ground.

In addition to a copy of any management plan, enquiry 7.8 also asks the seller to supply a copy of any related insurance cover.

The changes to enquiry 7.8 are apparently interim amendments which the Law Society says it will review again once the Department for Environment, Food and Rural Affairs has completed its research into how other jurisdictions deal with Japanese knotweed in conveyancing.

The Law Society has also updated the notes to enquiry 7.4 (radon), enquiry 12.5 and its notes (septic tanks) and has flagged the government's online flood risk check.

## Tax

# Payment of Capital Gains Tax (CGT)

From 6 April 2020, UK residents who dispose of residential property will have to report the gain and pay any CGT due on the disposal within 30 days of the disposal. Failure to comply may trigger a penalty and may incur interest on unpaid CGT.

This 30 day deadline is disapplied if any of the following apply:

- a legally binding sale contract was made before 6 April 2020;
- the principal private residence relief is available;
- the disposal was made to a spouse or civil partner;
- the capital gain (together with any other chargeable residential property gains in the same tax year) are within the annual CGT tax free allowance;
- the property was sold at a loss; or

- the property is outside the UK.

Similar rules were introduced for non-UK residents in relation to disposals on or after 6 April 2019 (with the 30 day reporting deadline applying irrespective of whether any CGT is due).

## Stamp Duty Land Tax (SDLT) surcharge for non-resident buyers

The Chancellor announced in the Budget that an SDLT surcharge of 2% will be introduced for non-UK resident buyers of English (and Northern Irish) residential property with effect from 1 April 2021. The measures will be included in the Finance Bill 2021.

This follows on from a government consultation launched in February 2019, which initially proposed a 1% surcharge (although the Conservatives subsequently pledged in their election manifesto that it would be set at 3%). The government will publish a summary of the responses to this consultation in due course.

### Land Registry

## Update to Practice Guide 19 (notices, restrictions and the protection of third-party interests in the register)

In March 2019, the Land Registry amended paragraph 3.1.1 of this Practice Guide to provide that, from 1 April 2020, any consent given by a third party under a restriction must be a consent to registration of the relevant disposition (rather than consent to the disposition itself).

Following feedback from customers and stakeholders, the Land Registry has now gone back on that decision and will interpret consents to registrable dispositions as including consent to their registration.

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