

Real estate quarterly update - January to March 2021

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

07 April 2021

Cases

Criterion Buildings Ltd v McKinsey & Company Inc. (United Kingdom) and another [2021] EWHC 216 (Ch)

A landlord's subjective determination of the 'fair proportion' of its total costs payable by the tenant by way of service charge could not be challenged by the tenant.

[Read our case update](#)

Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd and another [2021] EWCA Civ 90

An agreement under Part 4 of the Electronic Communications Code 2017 could not be imposed in favour of an operator who was holding over under section 24(1) of the Landlord and Tenant Act 1954 when the Code came into force.

[Read our case update](#)

Faiz and others v Burnley Borough Council [2021] EWCA Civ 55

The demand and acceptance of rent with knowledge of a breach of covenant will waive the right to forfeit if the rent accrued due after the breach but before the landlord had knowledge of the breach.

[Read our case update](#)

Bernel Ltd v Canal and River Trust [2021] EWHC 16 (Ch)

A developer was unable on the facts to establish a right to drain onto its neighbour's land without permission.

[Read our case update](#)

Legislation

SDLT surcharge for overseas buyers of residential property

This surcharge is 2% higher than the current SDLT residential rates and applies (subject to some transitional provisions) to transactions with an effective date on or after 1 April 2021 where:

- the buyer is non-resident in the United Kingdom (UK);
- the transaction involves a major interest in one or more dwellings (or a major interest in one or more dwellings and other property) which is not a lease with an unexpired term of 7 years or more; and
- the chargeable consideration is £40,000 or more (or, if the consideration consists of or includes rent, the annual rent is £1,000 or more).

Individual buyers will be deemed UK resident if they are present in the UK on at least 183 days during any continuous period of 365 days. These 365 days must fall within the two-year period beginning a year before the effective date of the transaction and ending a year after the effective date of the transaction. Generally, joint buyers are subject to the surcharge if just one of them is non-UK resident. However, spouses are both deemed UK resident provided at least one of them meets the residency criteria.

Generally, a company is UK resident for the purposes of the surcharge if it is either incorporated in the UK or its central management and control is in the UK. However, special rules apply to UK close companies that are under the control of non-UK residents (to prevent non-UK residents buying a property via a UK company).

Trusts are generally treated as non-UK resident if any trustee is non-UK resident. However, where the trust is a bare trust or where a beneficiary is entitled to a life interest in the relevant property, the residence of the beneficiary determines whether the surcharge applies.

Extension of temporary increase in SDLT residential nil rate band

The Chancellor of the Exchequer announced in the Budget that the temporary increase in the residential SDLT nil rate band to £500,000 (which was due to expire on 31 March 2021) has been extended to 30 June 2021. From 1 July 2021, it will reduce to £250,000 before returning to £125,000 on 1 October 2021.

Restrictions on forfeiture, use of Commercial Rent Arrears Recovery (CRAR) and winding-up companies

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 again until 30 June 2021. The temporary restrictions on serving a statutory demand and presenting a winding-up petition in the Corporate Insolvency and Governance Act 2020 have also been similarly extended.

In addition, the temporary restriction on the use by a landlord of CRAR has also been extended again until 30 June 2021, with the minimum net unpaid rent that must be outstanding before CRAR may take place (under the Taking Control of Goods Regulations 2013) now standing at 457 days (where CRAR takes place on or before 23 June 2021) or 554 days (where CRAR takes place on or after 24 June 2021) (in normal circumstances, this is only 7 days).

Notice period for seeking possession under a residential tenancy and restrictions on residential evictions

The requirement generally for six months' notice to be given when seeking possession of property in England let under a residential tenancy agreement (in Schedule 29 of the Coronavirus Act 2020) has been extended to 31 May 2021. Exceptions continue to exist where the grounds for possession relate to anti-social behaviour, domestic violence, fraud or where at least six months' rent is outstanding at the date on which the notice seeking possession is served.

In addition, subject to certain exceptions, the ban on attending at a dwelling-house in England for the purposes of executing a writ or warrant of possession or delivering a notice of eviction has also been extended to 31 May 2021.

Telecommunications Infrastructure (Leasehold Property) Act 2021

This Act has now received Royal Assent, although its main provisions are not yet in force.

It amends the Electronic Communications Code 2017 (the Code) to allow operators to apply to the Upper Tribunal (Lands Chamber) (UT) for interim code rights in respect of premises forming part of a building which contains two or more separate dwellings (or other premises to be specified in regulations) where a tenant in that building has made a service request to the operator and the landlord has repeatedly failed to respond to the operator's formal notices requesting access.

Any interim code rights granted will be for a maximum period of 18 months, allowing the operator time to seek a more permanent agreement with the landlord or to apply to the UT to have rights imposed under the existing provisions of the Code.

Consultation and guidance

Enfranchisement reform

Following on from Law Commission reports in January and July 2020, the Secretary of State for Housing, Communities & Local Government (Robert Jenrick) has stated in a press release that leaseholders (of houses and flats) will be given the right to extend their leases by a maximum term of 990 years at zero ground rent. He also confirmed changes to the way the premium is calculated on enfranchisement so that:

- a cap will be introduced on the ground rent payable when a leaseholder chooses either to extend their lease or become the freeholder (the premium being affected by the amount of that ground rent);
- prohibitive costs like 'marriage value' will be abolished and the calculation rates set to ensure they are fairer, cheaper and more transparent (an online calculator will be introduced to allow leaseholders to calculate the cost of buying their freehold or extending their lease); and
- leaseholders will be able voluntarily to agree to a restriction on future development of their property to avoid paying 'development value'.

In addition, the press release confirms that legislation will be brought forward in the current session of parliament to set future ground rents to zero (and this will now include leasehold retirement properties).

The press release also states that a Commonhold Council will be set up (a partnership of leasehold groups, industry and government) to prepare homeowners and the market for the widespread take-up of commonhold.

Access to land: consultation on changes to the Electronic Communications Code

This consultation on proposed changes to the Electronic Communications Code 2017 (the Code) was launched by the Department for Digital, Culture, Media & Sport and ran until 24 March 2021.

The government believes that certain areas of the Code are not operating in the way that was originally intended. The particular areas of concern identified are:

1. Issues relating to obtaining and using Code agreements. The government has proposed changes to support faster and more collaborative negotiations, to help ensure best practice guidance is adhered to, to provide efficient ways for disagreements to be dealt with, to address failures to respond to requests for Code rights and to ensure that completed agreements can operate effectively.
2. Rights to upgrade and share. The government proposes to review when the automatic rights to upgrade and share should be available and how they might be clarified. It also wishes to clarify the position where the conditions for the automatic rights to upgrade and share are not met and to consider the benefits of introducing limited retrospective rights to share where equipment was installed before December 2017 (when the current version of the Code came into force).
3. Difficulties relating to the renewal of expired agreements. The government believes there is a need for greater certainty about what happens when an agreement comes to an end and a need for greater consistency in the way that disagreements about the renewal of Code rights are dealt with.

The consultation does not set out detailed proposals for change. It outlines what the government believes are the key issues impacting the effectiveness of the Code and the potential changes needed to make the Code work effectively for both landowners and operators.

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

Right to Regenerate: reform of the Right to Contest

This consultation on the regeneration of unused or underused publicly owned land was launched by the Ministry of Housing, Communities & Local Government and ran until 20 March 2021.

The new Right to Regenerate will enlarge the existing Right to Contest (which has existed since 1980 but is little used) under which the public can request that the government considers whether certain publicly owned land is unused or underused, and if so, direct that it be sold. It will provide a quicker and easier route for individuals, businesses and organisations to identify, purchase and redevelop underused or empty land in their area owned by local authorities and the public sector. It will also potentially include a right of first refusal for members of the public to purchase underused land.

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

Government plan to bring an end to unsafe cladding

This plan was announced by the Secretary of State for Housing, Communities & Local Government (Robert Jenrick) in the House of Commons on 10 February 2021. The key points are as follows:

1. By making a £5 billion investment in building safety, the government will pay for the removal of unsafe cladding for leaseholders in all residential buildings 18 metres (6 storeys) and over.
2. For buildings between 11 and 18 metres (4-6 storeys), cladding removal can be financed through a long-term, low interest government-backed financing arrangement. This arrangement will mean that no leaseholder will ever pay more than £50 a month towards the cost of removal of unsafe cladding.
3. The government will introduce a developer levy when developers seek permission to develop certain high-rise buildings.
4. A new tax will be introduced for the residential property development sector which will raise at least £2 billion over a decade to help pay for cladding remediation costs. The government will consult on the policy design in due course.
5. The government will bring forward legislation this year to tighten the regulation of building safety and to review the construction products regime.
6. The government will work towards a targeted, state-backed indemnity scheme for qualified professionals unable to obtain professional indemnity insurance for the completion of EWS1 forms (the form introduced to help lenders value high-rise buildings by providing confirmation from a suitable expert that an external wall system has been assessed for safety).

Non-domestic private rented sector minimum energy efficiency standards: EPC B implementation

This consultation has been published by the Department for Business, Energy and Industrial Strategy and runs until 9 June 2021.

It seeks views on the proposed framework for implementing the government's policy requirement for private rented non-domestic properties to obtain a minimum energy efficiency standard (MEES) of a B rating (on an energy performance certificate) by 2030.

In particular, the consultation focuses on improving the implementation and enforcement of MEES and ensuring that the government's policy can be delivered in practice.

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

Introducing a performance-based policy framework in large commercial and industrial buildings in England and Wales

This consultation has also been published by the Department for Business, Energy and Industrial Strategy and also runs until 9 June 2021.

An energy performance certificate (EPC) measures the quality of a building's fabric and services and models how the building might perform based on the behaviour of a typical occupant. As a result, there can be little correlation between a building's EPC score and its actual energy and carbon performance in practice.

The government is therefore looking to introduce an actual performance-based policy framework for assessing energy use and carbon emissions in large commercial and industrial buildings above 1,000 square metres in England and Wales. The framework will require owners and single tenants of buildings to obtain an annual rating and to disclose it publicly online and in the building.

The government intends to introduce this new performance-based framework in phases across sectors. Phase one will apply to offices (from 2022/23). The Department for Business, Energy and Industrial Strategy has also published a consultation on how the proposed framework could be implemented in the office sector.

Copies of both consultations can be downloaded from [here](#).

Law Commission review of the Land Registration Act 2002: government full response

The government has published its full response to the Law Commission's 53 recommendations on updating the Land Registration Act 2002 published in July 2018. The government has accepted 40 of the recommendations, rejected 3 and at present not reached a clear conclusion on the other 10.

One of the recommendations which the government has accepted (and which will be very welcome amongst the profession) is that where a lease is not a registrable disposition (e.g. most leases for a term not exceeding 7 years), easements created by the lease and which benefit the lease should not have to be completed by registration to take effect at law.

The government's full response can be viewed from [here](#).

Land Registry

Replying to requests for information (requisitions)

The Land Registry has extended from 11 January 2021 the time for replying to requisitions. In most cases, customers will now have 40 working days to reply to a requisition letter, after which they will receive a reminder of cancellation notice allowing a further 20 working days in which to reply (after which an application will be cancelled). Practice guide 50 (requisition and cancellation procedures) has been updated to reflect this.

Request an expedite

The Land Registry has produced some guidance on asking for an application to be expedited. The guidance explains when the expedite process is available, how to request it (via the portal), the evidence to submit in support of the request and the expected timescale for processing the expedited application (generally 10 working days).

The guidance can be viewed from [here](#).

Practice guide 81 (encouraging the use of digital technology in identity verification)

This new practice guide launches the Land Registry's new standard for identity checking known as the 'HM Land Registry digital identity standard'. Its requirements involve biometric and cryptographic checking of identity and verification that a signatory on a document is the true owner of a property or otherwise a genuine party to a registrable transaction.

Whilst not compulsory, the Land Registry will not pursue any recourse claim against a conveyancer who follows the standard where a fraudulent transaction is subsequently registered (providing the conveyancer with what the Land Registry calls a 'Safe Harbour').

The requirements are not mandatory and the Land Registry acknowledges that take up is unlikely to be immediate as the technology market needs time to develop appropriate solutions and conveyancers need time to see what is available and incorporate these methods into their processes.

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

Contact

David Harris

Professional Development Lawyer

david.harris@brownejacobson.com

+44 (0)115 934 2019

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