K&L GATES

OVERRIDING INTEREST
SUMMER 2024

Highlighting developments and issues in the European real estate industry

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NEW JOINERS

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Paris

Thomas Ehrecke is a partner in the firm's Real Estate practice. With more than 15 years of experience, Thomas Ehrecke advises clients on a variety of large-scale international transactions in real estate financing, structured finance (particularly leveraged buyouts and unitranche), debt restructuring, and non-performing loan portfolios. His clients are French, German, and international banks and funds.

Jennifer Mazawey

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Jennifer Mazawey is a partner in the firm's Real Estate practice. Her experience includes working with developers in a number of asset classes, including mixed-use residential, retail, industrial, and office. Jennifer advises clients on all aspects of the development process, including zoning analyses, zoning changes, local planning board and zoning board approvals, and permit acquisitions.

Justin O'Callaghan

Partner
Brisbane

Justin O'Callaghan is a partner in the firm's Real Estate practice. He focuses on transactional work, strategic advice, and asset delivery for projects. He has a particular focus in energy, infrastructure, natural resources, and real estate.

Chiara Anceschi

Partner
Milan

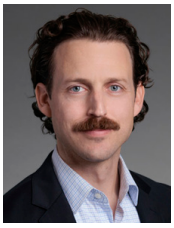
Chiara Anceschi is a partner and a member of the Finance practice. She focuses on the debt sector and has worked extensively with banks, debt funds, alternative lenders, and borrowers on lending, structured finance, debt restructuring, and distressed asset management transactions.

She has a long-time experience assisting various stakeholders in the lending industry, and in corporate and real estate transactions by providing debt solutions to lenders, real estate funds, borrowers, and alternative debt providers.

Landon O. Sullivan

Counsel
Seattle

Landon Sullivan is a counsel in the firm's Real Estate practice. He is a pragmatic real estate transactions lawyer with over a decade of combined in-house and private practice experience counselling clients in connection with various transaction types (including leases, acquisitions and dispositions, mortgage-based financing, and economic development incentives) and essentially all asset classes (ranging from industrial, data centre, retail, office, and other commercial uses to multifamily and mixed uses).



David S. Rubenstein

Counsel
Seattle

David Rubenstein is a counsel in the firm's Real Estate practice. He focuses on land development issues, especially as they relate to residential subdivisions, condominiums, and data centres. David's practice has encompassed all aspects of real estate, including acquisitions, dispositions, development, joint ventures, leasing, financing, easements, property management, and subdivisions. He has represented major institutional landlords, small businesses, and individuals in addressing their real estate needs.

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Sandra Cooke is a special projects lawyer based in the firm's Real Estate practice in the Seattle office.

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Wesley Houston is a senior associate in the firm's Real Estate practice in the Sydney office.

Rizelène Ali-Moussa

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Rizelène Ali-Moussa is an associate in the firm's Real Estate practice. Rizelène has gained experience in real estate law with regard to financing real estate investments, real estate litigation, and leases as a trainee at a multinational law firm.

NEW JOINERS

Loris Cohen

Lawyer
Sydney

Loris Cohen is a lawyer in the firm's Real Estate practice. His focus is in construction law, spanning both front-end and back-end construction matters. Loris has established experience advising parties to Australian standard contracts (including design and construct, construct only, and minor works agreements) and bespoke construction contracts. He is also experienced in contentious matters, having acted for parties in litigating and defending claims in courts and tribunals in New South Wales (NSW) and Victoria (including claims under the Design and Building Practitioners Act 2020 (NSW)), and he has frequently acted for both claimants and respondents in adjudications under the Building and Construction Industry Security of Payment Act 1999 (NSW).

Mary E. Davis

Associate
Pittsburgh

Mary Davis is an associate in the firm's Real Estate practice and works on a wide range of transactional real estate matters, including acquisitions, dispositions, leasing, and financing. She has experience working on a variety of real estate assets, including renewables, natural resources, airport hangars, office, retail, and industrial. Her practice includes drafting primary transaction documents (e.g., purchase and sale agreements, option agreements, leases, and financing documents) and conducting and coordinating due diligence. In the renewables and natural resource sector, Mary has represented clients in connection with wind and solar projects, among others.

Emmett A. Egger

Associate
New York

Emmett Egger is an associate in the firm's Real Estate practice. Emmett has represented real estate investment trusts, private equity funds, developers, and lenders in a variety of commercial real estate investment, disposition, development, financing, and leasing matters, ranging from hospitality to senior housing and office buildings to multifamily projects. In addition, he has experience counselling clients on the real estate aspects of mergers and acquisitions.

Isabella C. Forcino

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Seattle

Isabella Forcino is an associate in the firm's Real Estate practice. She works on a wide range of real estate transactional matters, including acquisitions, dispositions, leasing, financing, and regulatory. Isabella maintains an active pro bono practice focused on Indigenous rights, immigration justice, and civil rights.

Katarzyna M. Goebel

Associate
Pittsburgh

Katarzyna Goebel is an associate in the firm's Real Estate practice. Prior to joining the firm, she served as counsel with a national provider of freight railroad-related services. She has also served as an associate with another international law firm where she prepared, reviewed, and ensured regulatory compliance within commercial real estate leases.

Albert Jaucian

Lawyer
Sydney

Albert Jaucian is a lawyer in the firm's Real Estate practice. He focuses on commercial property transactions. He has acted for various clients from small- and medium-sized enterprises and property developers to large corporations in relation to the acquisition and disposal of commercial, residential, and rural property. Albert has extensive experience in negotiating and drafting various commercial agreements and lease documentation, as well as advising clients on off-plan property developments, capital transactions, and preparing high-level legal due diligence reports for financiers and landlords.

ARTICLES OF INTEREST

NEW RIGHTS OF LIGHT PROTOCOL

A new **Rights of Light Protocol** (the Protocol) has recently been launched to help pave the way for a more straightforward system for developers to follow with the aim of resolving potential rights to light issues on development projects swiftly and cost effectively. The launch of the Protocol applies where either:

(i) An owner (**the Developer**) wishes to extend or develop its property in a way that may infringe rights of light and wishes to resolve rights of light issues prior to commencing development; or

(ii) An owner (**the Adjoining Owner)** believes that its rights of light may be infringed by a neighbouring development but has not yet been approached by the Developer to resolve rights of light issues.

The aim of the Protocol is to provide a process, which seeks to ensure that the Developer and the Adjoining Owner exchange information in a timely manner to minimise the scope for disputes between them and to enable any such disputes to be promptly resolved, keeping costs to a minimum. It assumes that, prior to embarking on the steps contemplated by the Protocol, the Developer will have engaged a suitably qualified or Royal Institution of Chartered Surveyors (RICS) registered rights of light surveyor (**a Surveyor**) or solicitor to act on its behalf. Each case is different, and there may be cases in which it is inappropriate for the parties to follow all or part of the Protocol. In particular, there may be circumstances in which a party is advised to issue court proceedings as a matter of urgency. In those cases, the parties should consider the extent to which they are nonetheless able to comply with the spirit of the Protocol without prejudicing their position, and they should endeavour to do so where reasonable. It is not the function of the Protocol to provide advice to the parties. Rights of light disputes frequently involve complex legal and technical issues and specialist advice should be sought. Where a Developer has (or is considering taking out) an insurance policy in respect of rights of light claims, then the terms of the policy should be studied carefully and specialist advice taken before taking any of the steps contemplated by the Protocol. Insurance has been a common way of addressing some rights of light issues, but as many neighbour-type issues have increasingly ended up in court proceedings, increasing premium prices, then this Protocol has come at a suitable time as other options are explored. This includes the parties involved negotiating rights of light releases, and the Protocol is helpful in advising on best practice. The RICS has incorporated the Protocol into the latest edition of the RICS Rights of Light Guidance Note (effective from 1 June 2024).

GREEN LEASES AND GREEN LEASE CLAUSES IN THE UK COMMERCIAL REAL ESTATE SECTOR

By: Alexander I. Currie, Bonny Hedderly

The commercial real estate sector in the United Kingdom is increasingly focusing on sustainability and environmental responsibility. A key development in this area is the adoption of "green leases" and "green lease clauses." These terms refer to lease agreements that include provisions aimed at improving the environmental performance of buildings. This article provides an overview of green leases, their significance, and their implications for commercial real estate stakeholders.

WHAT ARE GREEN LEASES?

When trying to pin down a definition of an offense that is beyond the scope of this article, Supreme Court Justice Potter Stewart famously commented, "*I know it when I see it.*" In much the same way that Justice Stewart was attempting to grapple with a seismic social revolution, the forces of the property industry have been trying to flesh out what it means to have a green lease.

Green leases are standard lease agreements that incorporate specific clauses promoting sustainable and environmentally friendly practices. These leases are designed to align the interests of Landlords and Tenants towards achieving greater energy efficiency, reducing carbon footprints, and promoting sustainability in building operations. Whilst there is no singular clause that a lease must contain to make it green, there is broad consensus over what a green lease does (or at least intends to do). The Law Society of England and Wales (the Law Society) has offered that a "*green lease [is one] that provides for the Landlord and the Tenant to undertake specific responsibilities and obligations to minimise carbon emissions arising from the sustainable development, operation and occupation of a property,*" which has been added to by RICS, who have commented that green leases include "*provisions relating to sustainability and the environment that urge cooperation throughout the lease term between the Landlord and the Tenant to ensure that the property is used as sustainably as possible.*"

By those definitions, a green lease is one that (i) promotes environmental sustainability in the occupation and use of a property, and (ii) requires input from both the Landlord and the Tenant.

KEY COMPONENTS OF GREEN LEASE CLAUSES

Green lease clauses can vary but typically include:

1. Energy Efficiency Measures: Provisions requiring regular energy audits, use of energy-efficient lighting and appliances, and targets for reducing energy consumption.
2. Water Conservation: Requirements for the installation of water-saving fixtures and regular monitoring of water usage.
3. Waste Management: Clauses promoting recycling, waste reduction, and responsible disposal practices.

4. Sustainable Materials: Stipulations on the use of sustainable or recycled materials for any building modifications or refurbishments.

5. Indoor Environmental Quality: Measures to ensure good air quality, adequate natural lighting, and other factors that contribute to a healthy indoor environment.

6. Renewable Energy: Encouragement or requirements for the installation and use of renewable energy sources such as solar panels.

DIFFERENT SHADES OF GREEN

The Law Society has recognised this issue and has come up with a (all green) traffic light system for assessing the green-ness of a lease.

Light green: Both parties commit to the principles, which are usually not legally binding and are aspirational or limited in scope.

Medium green: These may create obligations but are not intended to impose an unreasonable economic burden upon the parties or require them to act commercially unreasonably.

Dark green: These are specific in nature and can be legally binding and place a greater onus on both parties. The Law Society has even suggested that a breach might result in forfeiture of the lease.

BENEFITS FOR LANDLORDS AND TENANTS

- Cost Savings: Reduced utility bills through improved energy and water efficiency.
- Compliance and Incentives: Adherence to government regulations and potential eligibility for green building certifications and incentives.
- Marketability: Enhanced property value and attractiveness to environmentally conscious Tenants.
- Corporate Responsibility: Alignment with corporate social responsibility goals and sustainability commitments.

IMPLICATIONS FOR THE COMMERCIAL REAL ESTATE SECTOR

1. Regulatory Compliance: With increasing regulatory pressures, such as the United Kingdom's Minimum Energy Efficiency Standards, green leases help ensure compliance with environmental regulations.

2. Investment Appeal: Properties with green leases are often more attractive to investors who are prioritising environmental, social, and governance criteria.

3. Tenant Retention: Environmentally responsible buildings are likely to attract and retain high-quality Tenants, especially those with strong sustainability commitments.

4. Operational Efficiency: Improved building performance and operational efficiencies through sustainable practices can result in long-term cost savings.

THE GREEN LEASE TOOLKIT

The Better Buildings Partnership (**BBP**), a UK industry body of leading property owners, has launched an updated version of its Green Lease Toolkit, a collection of green lease provisions and guidance aimed at improving the sustainability of commercial buildings. It has been over 15 years since the BBP published its first Green Lease Toolkit, and the world has moved on significantly during that time in embracing a new era of environmental outlook. The number of green clauses in agreements for lease and leases has definitely increased. Whilst the BBP's recommendations have not been fully embraced as a single market norm, a spectrum of green provisions has developed in the industry, and the market continues to adapt and develop.

CONCLUSION

The adoption of green leases and green lease clauses represents a significant shift towards sustainability in the UK commercial real estate sector. By fostering collaboration between Landlords and Tenants to achieve environmental objectives, these leases not only contribute to broader sustainability goals but also offer tangible benefits such as cost savings, regulatory compliance, and enhanced property value. Stakeholders in the commercial real estate market should consider integrating green lease clauses into their lease agreements to stay ahead of regulatory requirements and market trends.

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For more information or assistance with incorporating green lease clauses into your lease agreements, please contact members of our Real Estate practice.

BUILDING SAFETY ACT

By: James Kane and Bonny Hedderly

Over six months has passed since many of the principal measures in the Building Safety Act 2022 (BSA) came into force on 1 October 2023 in what was one of the most comprehensive reforms of building safety legislation in the last 50 years. Our previous **alert**, published on 2 February 2023, provided a summary of the main changes introduced by the new regime.

Participants in the property sector have now become well-acquainted with the requirements of the BSA, and procedures for best practice are now emerging, along with some potential areas for difficulties. This note looks at the practicalities of registration of higher risk buildings, some areas of complication when identifying duty-holders under the BSA and the role of the managing agent in assisting with compliance.

REGISTRATION WITH THE BUILDING SAFETY REGULATORS

One of the key changes introduced by the BSA is the requirement for registration of a higher risk building with the Building Safety Regulator. Buildings that are at least 18 meters, or seven stories, high and contain two or more residential units will qualify as higher-risk buildings, subject to a few limited exceptions (hospitals, care homes, secure residential institutions, hotels and military barracks).

Registration of a higher-risk building with the Building Safety Regulator is a precondition to occupation. This caused concerns in the early days of the regime because a delay in effecting the registration of a higher-risk building could either delay occupation or completion of certain transactions where compliance with pre-occupation statutory requirements is a condition precedent to completion. We are pleased to report that in our experience most applications have been dealt with in a timeframe that can be measured in days rather than months, though developers need to ensure that this step is accounted for in their build programmes, especially where any unexpected delays may have ramifications on the completion of transactions or stabilisation of the asset.

DIFFICULTIES IDENTIFYING THE PRINCIPAL ACCOUNTABLE PERSON

A potential difficulty when registering a higher-risk building with the Building Safety Regulator is that the principal accountable person will need to be identified and named on the application form before an application can be lodged. To recap on the roles of the accountable person and the principal accountable person:

- Any person who holds a legal estate in possession of any common parts or who is under a repairing obligation in relation to any part of the common parts will be an accountable person in relation to a higher-risk building. The repairing obligation must either be imposed by statute or arise by virtue of being a party to a lease, which becomes important when we turn to the role of the managing agent later in this note.

- Where there are multiple accountable persons, the principal accountable is the person who owns or has a legal obligation to repair the structure and exterior of the building. While there can be many accountable persons, there can only be one principal accountable person.
- The identity of the principal accountable person is often evident for simpler ownership structures, though determining who fulfils this role can become complex in more convoluted ownership structures. As an example, the owner of a building may wish to create a structure under which a management company is responsible for the repair and maintenance of the structure of a building, though the building owner may be required to step in to assume responsibility for repairs in case of default by the management company (and may have its own obligations under a headlease to keep the structure in repair). In these circumstances, the building owner may be keen to ensure that the management company is registered as the principal accountable person so that the onerous burden of compliance can be passed to the management company, though under the letter of the legislation this role may fall on the building owner regardless of their intentions.
- A dispute as to the identity of an accountable person or a principal accountable person may be referred to the First-Tier Tribunal by any interested party, though questions of interpretation risk delaying the registration and hence occupation of higher-risk buildings. Parties to a development will therefore need to consider the identity of accountable persons at an early stage when creating more complex ownership structures in order to make sure that parties do not find themselves forced to accept onerous statutory duties against their intentions. The First-Tier Tribunal recently made its first decision as to the identity of an accountable person in *Octagon Overseas Limited and others v Mr Sol Unsdorfer*, and practitioners will be interested to see further cases emerge to provide much needed assistance in resolving interpretative questions about the legislation.

THE ROLE OF THE MANAGING AGENT

Many building owners rely on managing agents appointed under a property management agreement to meet their statutory and maintenance responsibilities. A building owner may expect that the managing agent will discharge the statutory duties falling on accountable persons and principal accountable persons under the BSA as a part of their role. Here, a contrast needs to be drawn between the position under the BSA and under fire safety regulation, as a contractually appointed managing agent will not be an accountable person under the BSA (but may well be a responsible person under the Regulatory Reform (Fire Safety) Order 2005).

This means that while a managing agent can assist a building owner in meeting its obligations under the BSA, a building owner cannot delegate its statutory duties under the BSA. The consequences of a breach of these statutory duties will fall on the building owner even if the breach arose due to underperformance by the managing agent. The penalties for breach can be severe (including significant fines and potentially prison sentences), so building owners need to ensure they take an active role in ensuring their managing agents properly assume and fulfil the duties they are expected to take on under the property management agreement.

To ensure they fulfil their statutory duties, building owners who are accountable persons should raise questions about compliance with the requirements of the BSA at an early stage when appointing managing agents and thoroughly review a managing agents' credentials for taking on a role that includes ensuring BSA compliance. Market practice regarding compliance with these obligations is still emerging, so there is scope for disagreement as to what exactly the role of the managing agent should be in assisting with compliance with the BSA. As always, building owners should be clear about their expectations at an early stage in the tendering process to avoid surprises during negotiations with managing agents (such as requests for additional fees for assisting with compliance with duties under the BSA). The contractual documentation will need to allocate responsibilities clearly to ensure there is no uncertainty as to who exactly is required to take action to fulfil which duties to ensure no duties fall through the cracks, especially where there are multiple accountable persons.

BSA – ISSUE OF SECOND STAIRCASES

One particular area of concern relating to the BSA has been the position relating to the requirement for second staircases in tall residential buildings, as developers were faced with uncertainty surrounding the technical requirements for second staircases to be built in tall residential buildings. The publication of the amendments to Approved Document B clarifies that, from 30 September 2026, all residential buildings over 18 metres high must have two staircases. The UK government had initially consulted on a requirement for second staircases in new residential buildings over 30 metres in December 2022, and there was some uncertainty as to when that took effect. The government then confirmed in July 2023 that the height limit would in fact be 18 metres (which is in line with the threshold for a "higher-risk building" under the BSA), but they did not issue any further guidance. This caused a huge amount of uncertainty, with some schemes even being put on hold. In March 2024, the long-awaited amendments to Approved Document B: Fire Safety were published. This states that residential buildings over 18 metres in height should have more than one common stair. The guidance confirms that interlocked stairs (otherwise known as scissored or stacked stairs) count as one stair. The changes do not take effect until 30 September 2026.

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EVENTS

UPCOMING 24 SEPTEMBER 2024 REAL ESTATE BREAKFAST SEMINAR

Our annual Real Estate Breakfast Seminar, an in-person event, will be hosted in our London office near St. Paul's Cathedral. We hope you will be able to join us—please find the relevant information and registration on the next page.

PROPERTY RACE DAY – 12 JULY 2024

On 12 July, the London Real Estate team will be attending the Property Race Day at Ascot Racecourse. The Property Race Day is an established key date on the property calendar, and the principal aim is to raise funds for selected charities. It is the perfect opportunity for networking within the sector while enjoying a day at one of the finest racecourses in the world.

For more information, please contact:

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EXPO REAL CONFERENCE OCTOBER 2024

On 7–9 October, members of our European Real Estate team will attend the EXPO REAL conference in Munich, Germany. The conference is Europe's largest real estate and investment trade fair and provides an opportunity to meet with key players in the real estate market in Europe and discuss current trends within the sector.

For more information, please contact:

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ANNUAL REAL ESTATE BREAKFAST SEMINAR

Global Real Estate Trends and Opportunities for 2024/2025

We hope you will be able to join us for our Annual Real Estate Breakfast Seminar this September, where our panel will discuss real estate trends and opportunities during 2024 and looking forward to 2025.

Panelists:

- **Sabina Reeves**, Chief Economist, CBRE Investment Management
- **Mike Phillips**, UK Editor, Bisnow
- **Chiara Del Frate**, Special Counsel, K&L Gates LLP, Luxury real estate sector – the changing landscape

RSVP ONLINE

Please register your interest so that we can provide further detail on this September seminar and future seminars and newsletters. Your name, title and organisation will be printed on a guest list, which will be provided at the seminar, unless you notify us in advance that you do not wish to be listed.

Tuesday, 24 September 2024

8:30 AM BST: Registration and breakfast
9:30 AM BST: Seminar commences
10:30 AM BST: Seminar concludes followed by coffee and networking

Location

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Map

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CASE REPORTS

GILL V LEE NEWS LTD [2023] EWCA CIV 1178

Summary

State of repair should be considered at the date of hearing, as well as the date of notice for an application for the grant of a new tenancy under the Landlord and Tenant Act 1954.

Facts

The appellant Landlord appealed against the grant of a new tenancy to the Tenant. The Tenant had failed to comply with its obligations to keep the premises in a state of repair. The Tenant also persistently delayed in paying rent and had breached other covenants under the lease.

The Tenant remedied the disrepair by the date of the hearing in 2021. The Judge found this to be significant. Taking a holistic approach, the Tenant's other breaches were considered to be of minor importance. In the context that the Tenant's premises were its livelihood, the Judge granted the tenancy. The decision was appealed.

Decision

Appeal dismissed. The court held that what happened between the date of the notice and the date of the hearing was relevant, and it should be given substantial weight. A breach should not be ignored even if it is remedied before the hearing date. However, the wording of s.30(1)(a) does not refer to a set point in time. The material time may be the date of the hearing. The court is also entitled to consider future promises. The particular context of each case must also be taken into account. This can be done so holistically.

Comment

Landlords may face difficulties in opposing applications for lease renewal. Even where there are clear breaches of repair covenants, if the Tenant rectifies those breaches before the hearing, they may be successful. The particular circumstances of the case must be considered.

UNSDORFER V OCTAGON OVERSEAS LTD [2024] UKUT 59 (LC)

Summary

The Upper Tribunal (Lands Chamber) held that a manager of a higher-risk building appointed by an order of the Tribunal could not be an "accountable person" for the purposes of the BSA s.72.

Facts

The management of building safety risks in higher-risk buildings is the responsibility of an "accountable person." An "accountable person" owns or has obligations to repair any of the common parts of a higher-risk building. This obligation may exist under a lease or by virtue of enactment.

The appellant had been appointed by an order of the First-Tier Tribunal to be manager of an estate which included "higher-risk" buildings. This order was made under the Landlord and Tenant Act 1987 s.24. When asked, the First-Tier Tribunal determined that the manager was not an "accountable person" for the purposes of the BSA 2022. The point was appealed for determination to the Upper Tribunal.

Decision

Appeal was dismissed. The manager was not an "accountable person" for the purposes of the BSA. The First-Tier Tribunal correctly construed the legislation. However, there may be an overlap whilst orders made by the First-Tier Tribunal before the commencement of the BSA 2022 subsist. This would occur where the responsibilities now given to the "accountable person" are already those of the manager. Once the original order expires, all responsibilities revert to the "accountable person."

Comment

Responsibility for the management of building safety risks in higher-risk buildings will typically fall on the Landlord as the "accountable person." However, whilst pre-2022 First-Tier Tribunal orders continue, there may be an overlap.

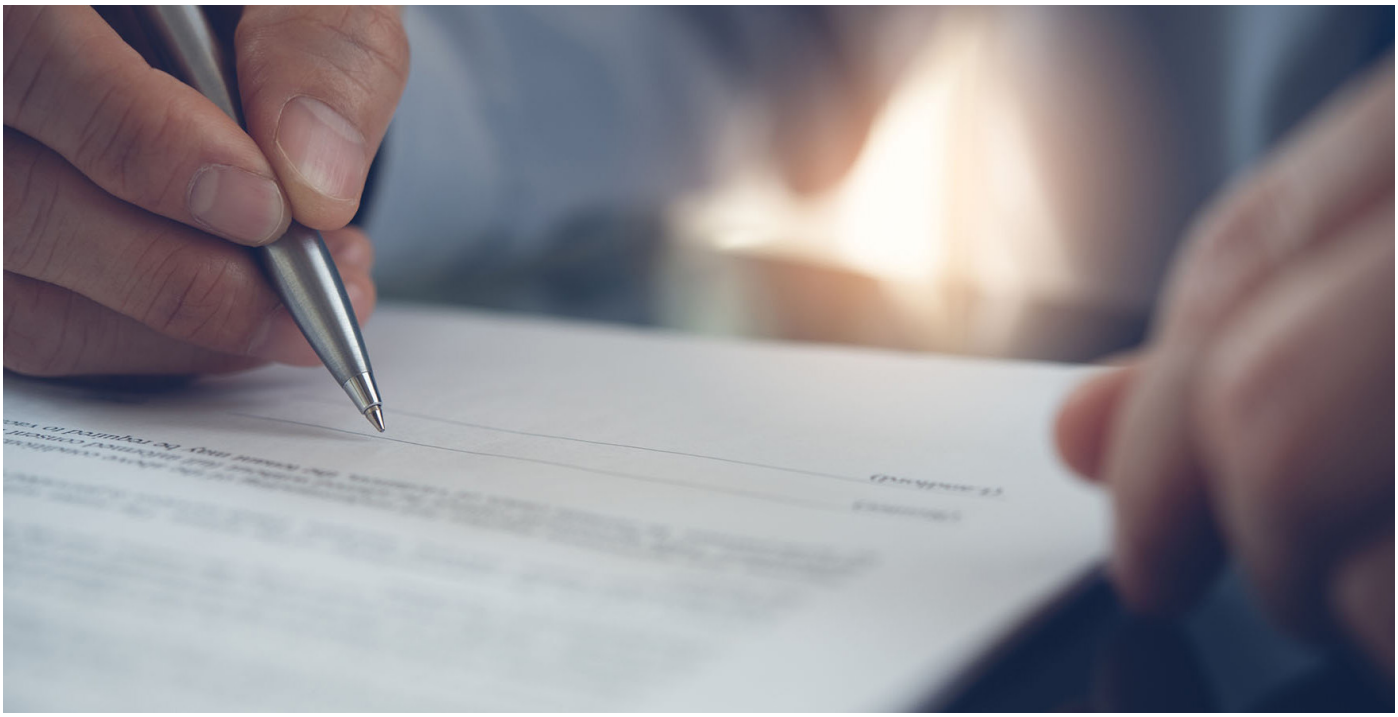
B&M RETAIL LTD V HSBC BANK PENSION TRUST (UK) LTD [2023] EWHC 2495 (CH)

Summary

An immediately exercisable break clause may be incorporated into a lease granted under the Landlord and Tenant Act 1954.

Facts

The Tenant served on the Landlord a s.26 notice requesting a new tenancy. Due to an internal error, no counter-notice was served. The Landlord then entered into an agreement for lease (AFL) of the property with a third party that involved redevelopment of the site. The AFL was agreed as conditional upon vacant possession and the obtaining of relevant planning permission. The Tenant applied for the grant of a new tenancy, and the Landlord applied for planning permission.



CASE REPORTS

The Judge at first instance favoured the Landlord's request that an immediately exercisable break clause may be incorporated into the lease. This was appealed by the Tenant, who claimed the Judge had not sufficiently considered the Tenant's claim to security of tenure.

Decision

Appeal dismissed. The court opined that there may be circumstances where it would be reasonable to delay the operation of a break clause. However, the court has discretion over when it may use those powers. The Landlord's development plans and the effects of delay were persuasive. The approach taken of balancing competing interests was considered to be consistent with the original purpose of the Act.

Comment

The court has reaffirmed that whilst the Landlord and Tenant Act 1954 is designed to give security of tenure, protection is balanced against Landlord interests. The court may find the inclusion of immediately exercisable break clauses reasonable, especially with well-progressed redevelopment plans.

ADRIATIC LAND 5 LTD V LONG LEASEHOLDERS AT HIPPERSLEY POINT [2023] UKUT 271 (LC)

Summary

The costs of a Landlord application to dispense with the consultation requirements under the Landlord and Tenant Act 1985 s.20 cannot be recovered via the service charge.

Facts

The Landlord was the freehold owner of a 10-storey mixed-use building. The First-Tier Tribunal granted at first instance an unconditional dispensation. However, the tribunal prevented the Landlord from recovering its costs for the application. These costs would otherwise have been recovered via the service charge.

Upon review, the First-Tier Tribunal removed the order. However, the Tribunal imposed a condition that had the same effect. The Landlord was still unable to recover its costs of the dispensation application.

The Landlord appealed on two grounds: (i) that the tribunal had erred in law by imposing the costs sanction, and (ii) that the costs were irrecoverable in any case under BSA Sch.8, para.9.

Decision

Appeal was allowed in part. The costs for the application were assumed to be reasonable. Being so, they could be legitimately described as promoting the safety of the Leaseholders. They were therefore an essential expenditure. However, those same costs were caught by the scope of BSA Sch.8, para.9. As they arose from a relevant defect, they could not be recovered through the service charge. The schedule was capable of applying to costs incurred before 28 June 2022.

Comment

Landlords should be aware of the BSA 2022's retrospective effects on recovery of costs via the service charge.

MERTON LBC V NUFFIELD HEALTH [2023] UKSC 18

Summary

The assessment of a charity's entitlement to mandatory relief from business rates is against its purposes and activities overall, not a specific site.

Facts

The Respondent was a registered charity with a members-only gym located in the Appellant local authority's borough. Outside of the gym, the Respondent operated a variety of health-oriented premises and hospitals. The gym itself charged fees at a rate that excluded some from participating. The local council took the view that the public benefit requirement was therefore not met by the gym. It argued that mandatory relief from business rates under Local Government Finance Act 1988 Pt III, s.43(6) should not apply.

The Judge at first instance found in favour of the Respondent. The public benefit requirement is a prerequisite of charitable status. It requires the charity's purpose to be beneficial and its benefits to be for the public in general or a sufficient section of the public. It was undisputed that the purpose of the Respondent was beneficial. The Judge found that the "public aspect" must be considered in the wider context of the charity's activities. The wording of s.43(6) did not restrict analysis to the particular hereditament (i.e., building) in question. As such, the "public aspect" was met.

Decision

Appeal dismissed. The public benefit requirement is to be assessed in the charity's wider context, not on a site-by-site basis. The wording of s.43(6) does not require any deviation. The charity fulfilled its essential charitable purposes, and the gym was used as part of the fulfillment of those purposes. The "public aspect" was met by considering the charity's overall activities, of which the gym's operation was one part.

Comment

The Court has affirmed in charities' favour the business rates tax relief position. However, each charity must consider whether its overall activities meet the "public aspect" of the public benefit requirement.

CASE REPORTS

SAINSBURY'S SUPERMARKETS LIMITED V MEDLEY ASSETS LIMITED CENTRAL LONDON COUNTY COURT CASE NO. H00MK414, 25 MARCH 2024

Summary

Where a Landlord opposes the grant of a new lease under the Landlord and Tenant Act 1954 on ground (f), the Tenant may overcome this by moving its business to an unaffected part of the demised premises.

Facts

The Tenant was a local supermarket. At the time of the hearing, the Landlord's stated intention was to implement basement planning consent in conjunction with a refurbishment of the upper floors. The Tenant only occupied the ground floor, and the refurbishment would convert the disused space above the Tenant into offices.

The Landlord asserted that a widening of the ground floor staircase was required as part of its plans. The Landlord therefore attempted to rely on ground (f) to oppose the grant of a new tenancy. Instead, the Tenant restricted its use of the demised premises, boxing off the affected area with stud walls.

Ground (f) is used where the Landlord "intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises… [and] could not reasonably do so without obtaining possession of the holding."

Decision

Opposition to the grant of a new lease was unsuccessful. The Judge explained that, following the Supreme Court, the legal test that the Landlord must overcome is threefold: (i) at the date of the hearing, the Landlord must have a genuine and settled intention to carry out the works; (ii) the Landlord must be practically able to carry out those works; and (iii) the purpose of those works is not just to successfully oppose an application for a new tenancy. The Landlord failed on the first two parts of the test.

In obiter comments, the Judge concluded that if the Tenant moves its business to an unaffected part of the demised premises prior to trial, that unaffected part comprises the "holding" for the purpose of ground (f).

Comment

The Judge's obiter comments clarify what is to be understood as the "holding" for the purposes of the Landlord and Tenant Act 1954. If both the Tenant's business and the Landlord's construction plans can be accommodated, then the Landlord cannot rely on those plans to deny the grant of a new lease.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