

Property quarterly update – April to June 2019

The latest property quarterly update aimed at in house lawyers (and other professionals) practising in the property / real estate sector.

03 July 2019

Cases

Churston Golf Club v Haddock [2019] EWCA Civ 544

The Court of Appeal has reinstated conventional wisdom by ruling that a standard fencing covenant should not be treated as a fencing easement.

[Read our case update](#)

Mears Ltd v Costplan Services (South East) Ltd and others [2019] EWCA Civ 502

A breach of a room size tolerance provision in an agreement for lease does not necessarily give the tenant a right to refuse to complete the lease.

[Read our case update](#)

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

One of the covenants given by a guarantor in a licence to assign was construed as a sub-guarantee and was therefore valid.

[Read our case update](#)

Windsor-Clive, Earl of Plymouth and others v Rees and another [2019] EWHC 1008 (Ch)

A widely drafted landlord's reservation of a right of entry was given a narrow interpretation by the court.

[Read our case update](#)

Loxleigh Investments Ltd v Dartford Borough Council [2019] EWHC 1274 (Ch)

The court considers the meaning of the phrase "detailed planning permission" in an overage agreement.

[Read our case update](#)

TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) Ltd and others [2019] EWHC 1363 (Ch)

A rare case on the validity of the process to contract out of the security of tenure provisions contained in sections 24 to 28 of the Landlord and Tenant Act 1954.

Legislation, consultation and guidance

Government response to consultation on overcoming the barriers to longer tenancies in the private rented sector

This consultation was launched by the Ministry of Housing, Communities & Local Government in July 2018.

The initial consultation proposed a minimum three year tenancy term, with a six month break right for either party. However, the responses to the consultation showed no consensus around a mandatory tenancy length.

The government is therefore proposing instead to repeal section 21 of the Housing Act 1988 (the 1988 Act), which currently allows a landlord to terminate an assured shorthold tenancy at the end of the contractual term by giving the tenant at least two months' notice, without having to prove any fault on the tenant's behalf. In addition, the government is also proposing to strengthen the existing grounds for eviction under section 8 of the 1988 Act (to include where owners wish to sell or move in themselves) and to simplify the court processes to make it easier for landlords to obtain possession.

The next stage is the launch of a new government consultation on the details of these proposed reforms.

A copy of the government's response to the initial consultation can be viewed from [here](#).

Code for leasing business premises in England and Wales 2019

The RICS has published another consultation on a new code to replace the existing 2007 code (it has been significantly amended since the initial consultation last year). For the first time, it 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 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 are as follows:

- the identity and extent of the premises (with a Land Registry compliant plan if the lease is registrable) and any special rights to be granted;
- the length of term, whether the Landlord and Tenant Act 1954 will apply, any options for renewal and any break rights;
- any requirements for a guarantor or a rent deposit;
- the amount of rent and frequency of payment;
- whether the landlord intends to charge VAT on the rent;
- any rent-free period or other incentive;
- rent review frequency and the basis of review;
- liability to pay service charge, insurance premiums and business rates;
- rights to assign, sublet, charge or share the premises;
- repairing obligations;
- the initial use to be permitted;
- rights to make alterations;
- any initial alterations or fit-out; and
- any conditionality of the letting (e.g. surveys, board approvals or planning permission).

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 current code, the new code also contains provisions 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 the provisions).

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 (describing some of the main factors for the parties to consider when agreeing a lease).

The consultation ran until 5 May 2019. A copy of the draft professional statement can be downloaded from [here](#).

The House of Commons and House of Lords Joint Committee (the Committee) report on the draft Registration of Overseas Entities Bill (the Bill)

This report follows the Committee's pre-legislative scrutiny of the Bill, which will establish a public register of beneficial owners of overseas entities that own or buy land in the UK (to be maintained by Companies House) by 2021.

Key points made in the report include the following:

1. Clarity is needed on the scope of overseas entities subject to the registration requirements. The Committee recommends that the government publishes guidance on how the definition of overseas entities should be interpreted and brings in a pre-clearance mechanism for confirming in advance whether entities are registrable.
2. The Committee expresses concern that trusts are outside of the scope of the Bill and could be used as a vehicle to circumvent the registration obligations. The Committee calls on the government to clarify which arrangements for holding UK land involving trusts will be covered by the Bill and which will be covered by the UK's implementation of the Fifth Money Laundering Directive ((EU) 2018/843).
3. Serious consideration is given to lowering the proposed 25% ownership and voting thresholds in the Bill when working out what is a registrable beneficial interest.
4. Overseas entities should have to update the register before disposing of land in the UK (this would be in addition to the requirement to update the information annually already in the Bill).
5. The government should bring in mechanisms to verify the information submitted to the register and should delegate verification responsibilities to Companies House or regulated professionals.
6. The government should bring in civil penalties for breaches of the obligations under the Bill (which could be backed up by criminal sanctions for non-payment).

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

Precedents

CPSEs

New versions of CPSE.1 (3.8), CPSE.2 (3.4), CPSE.4 (3.3), CPSE.5 (3.3) and CPSE.7 (1.3) have been published. The changes are minor and mainly remove references to the Carbon Reduction Commitment Energy Efficiency Scheme. There is also an additional enquiry 32.10 in CPSE.1 to cover the new capital allowances on structures and buildings.

Model Commercial Lease (MCL)

A new version (1.4) of the MCL has been published. It can be downloaded (in its different guises) from [here](#).

A document summarising the main changes from the previous version can be downloaded from [here](#) (along with a redline version of the changes made to the lease of part of an office and a summary of the changes to the interpretation provisions).

Particular points to note are as follows:

1. The references to the 3rd edition of the RICS service charge code (2014) have been replaced by references to the new RICS professional statement "Service Charges in Commercial Property" (1st Edition, September 2018).
2. There is now an explicit distinction between those landlord services which are mandatory and those which are discretionary.
3. A service charge statement must now include a certificate that it gives a true and fair summary of the matters to which it relates.
4. The default position for reinstatement of a tenant's alterations is now that the tenant must reinstate unless the parties agree otherwise.
5. A landlord must now enter into a wayleave agreement with a telecommunications operator in relation to common parts where a tenant

reasonably requests a landlord to do so.

6. A landlord will now not be liable for any breach of its obligations once it has parted with the whole of its reversion.

Completion information and undertakings (3rd edition) (Form TA13)

The Law Society has updated this form to coincide with the new Code for Completion by Post (the Code) which took effect on 1 May 2019. Although the changes are minor, it is important that the latest version of the form is used (apart from anything else, the paragraph numbering in the Code has changed, so the old 2nd edition form now refers to wrong parts of the Code).

Land Registry

Execution of deeds by companies and LLPs

The Land Registry has announced that from 20 September 2019, it will no longer accept prescribed forms (e.g. a TR1 or a TP1) submitted for registration executed by a company or an LLP where the execution clause uses the words "signed as a deed". Instead, the words "executed as a deed" must be used.

Miscellaneous

Public pledge for leaseholders

Over 40 property developers and freeholders have signed a government-backed industry pledge committing themselves to helping leaseholders that are trapped by onerous lease terms.

Amongst other things, freeholder signatories undertake proactively to identify leases in their portfolio where the ground rent doubles more frequently than every 20 years, to contact the affected leaseholders and to offer to amend any increase to one linked to the retail prices index. Freeholder and developer signatories also commit to not including such clauses in new leases.

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

London Property Support Lawyers Group (LPSLG) protocol on client identity

This has been published by the LPSLG in an attempt to agree a common industry wide approach to the issue of property fraud, particularly in the light of recent case-law.

The protocol itself is very short (just the four bullet-points on the second page). Basically, it states that buyer's solicitors should not as a matter of routine ask for confirmation of identity or anti money-laundering checks from the seller's solicitors. Instead, the contract should include a clause requiring the seller's solicitors to give an undertaking on completion that they have the seller's authority to receive the purchase money on completion (which can be achieved by adopting the Law Society Code for Completion by Post (2019)).

The form of suggested contract wording is at the end of the protocol.

A copy of the protocol can be downloaded from [here](#).

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