
K&L GATES
OVERRIDING INTEREST
Spring 2018
Highlighting developments and issues in the real estate industry

IN THIS ISSUE

KEY CONTACTS

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NEW LEGISLATION TO COMBAT UNFAIR RESIDENTIAL PRACTICES

In December 2017, the Department for Communities and Local Government published a summary of consultation responses and Government response in relation to tackling unfair practices in the leasehold market.

In his ministerial foreword, Sajid Javid comments that over the past 20 years, the proportion of new-build houses sold as leasehold has more than doubled, huge numbers of properties are being sold as leasehold simply to create a reliable revenue stream for the freeholder and that in some parts of the country it is now almost impossible for a first time buyer to purchase a new-build home on any other basis. He goes on to say that some of these leases contain exceptionally onerous terms, creating future liabilities that can leave homeowners stranded and unable to find a buyer. He calls these practices "feudal and entirely unjustifiable". The document sets out how the Government proposes to bring forward legislation "as soon as Parliamentary time allows" to enact measures to address these problems and says that the Government will be working closely with the Law Commission on a wider programme of reform.

The main points are as follows:

1. Legislation will prohibit new residential long leases from being granted of houses, whether new-build or existing freehold houses. The ban on the sale of leasehold houses will apply to land that is not subject to an existing lease at the date of publication of the consultation (December 2017).
2. Some exemptions may be appropriate and, where they are allowed, the Government will work with the sectoral partners to ensure that properties are provided on acceptable terms to the consumer.
3. Legislation will provide that ground rents on newly established leases of houses and flats are set at a peppercorn. Any management costs would have to be dealt with through a service charge or a marginally higher sale price. The idea of capping ground rents has not been considered acceptable, as presumably being too "feudal".
4. The Government wants to make it easier for leaseholders to be able to exercise their right to buy their freehold or extend their lease and for this right to be available as soon as possible. They will prioritise solutions for lessees of houses. The Government proposes to work with the Law Commission and consult on introducing a prescribed formula that provides

fair compensation to the landlord whilst also helping leaseholders avoiding incurring additional court costs. The Government will also consider introducing a right of first refusal for house lessees. Presumably this will be similar to that applicable to blocks of flats contained in notoriously badly drafted Landlord and Tenant Act 1987. If the Government wanted to take the opportunity to simplify and clarify the 1987 Act that would be welcome.

5. Legislation will ensure that freeholders who pay charges for the maintenance of communal areas and facilities on a private or mixed use estate can access equivalent rights as leaseholders to challenge the reasonableness of service charges. This seems to be a sensible extension of the rights available to leaseholders of flats and leaseholders of houses.

6. The Government also intends to ensure that where a freeholder pays a rentcharge, the rentcharge owner is not able to take possession and grant a lease on the property. Estate rentcharges have become more popular in recent years notwithstanding the draconian remedies available to a rentcharge owner and so protection for the rentcharge payer is welcome.

7. Concerning future issues, the Government states that it is committed to improving the situation of leaseholders and have outlined three ways of doing this:

   (i) helping to professionalise managing agents and tackle unfair service charges;

   (ii) looking at ways at modernising the home-buying processes; and

(iii) re-invigorating commonhold. In the Government's view, one of the reasons commonhold was not successful when first introduced was because of the financial incentives for developers in building leasehold. In addition they identify access to finance and consumer awareness as problems. Forms of strata title are well understood by overseas investors for example and in our view it may not be so much consumer awareness as the inflexibility of the model and lack of engagement by lenders that are the issues that need to be addressed.

Given some of the horror stories that have emerged over the last year or so about ground rents, it should come as no surprise that the Government has taken this stance. However, whether it amounts to an over-reaction to certain specific abuses remains to be seen and may risk, to some extent, deterring future investment in the sector.

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THE ELECTRONIC COMMUNICATIONS CODE

On 28th December 2017 the new Electronic Communications Code came into force—with only two weeks' notice. Ofcom has published final versions of its code of practice on the Code, standard terms that may be used by Code operators and landowners and occupiers when negotiating agreements and template notices.

The old Code was perceived as often creating difficulties and delays for landowners, especially in the context of pursuing redevelopment opportunities. The new Code addresses some of the issues with the old Code but also has the potential to create new uncertainties—see our **Alert**. The Ofcom code of practice goes some way towards addressing these issues.

Ofcom's code of practice deals with what the parties should expect from each other in the context of:

- New agreements for the installation of apparatus
- Ongoing access for the operations, maintenance and upgrading of sites
- Decommissioning sites
- Redevelopment by landowners

Central to the code of practice is the maintenance of good communications. It emphasises the need for all parties to treat each other professionally and with respect because the goal is to improve essential communications for all. Whether this is aimed at the perceived risk of operators acting in a high handled manner or at reluctant landowners is not clear.

In relation to new agreements, the code of practice sets out the process, beginning with access for a site survey, consultation and agreement with landowners, and deployment. Although the Code provides a mechanism for a court to impose terms of occupation on a landowner, the parties should make every effort to reach voluntary agreement first.

In relation to the ongoing operations phase, the code of practice says that the parties should clarify what rights of access are needed and that persons entering the land should carry ID and be able to explain why they are there. Where operators are sharing a site, although the

Code does not require the landowner's consent for this, the operator should notify the landowner of the contact name and address of other sharers and users. These recommendations address one of the key concerns about the Code which is that the landowner may not know who is in actual occupation and who may or may not be entitled to be on their property.

Where a landowner wishes to redevelop, the Code requires them to give the operator at least 18 months' notice of the intention to do so. The Code deals with how landowners may proceed to obtain vacant possession but the code of practice once again encourages parties to act reasonably, with landowners giving as much notice as possible and operators acting in a timely manner to locate new suitable sites. Landowners are encouraged to consider the possibility of incorporating the communications apparatus within the landowner's site if this is a reasonable and practical option.

In summary, the Ofcom code of practice provides a framework that should make it easier for all parties to reach agreement about the siting of apparatus on a voluntary basis rather than resorting to Code rights as such. What it does not do, and expressly says that it does not attempt, is to address the financial aspects of the landowner/operator relationship which is where many of the problems will start and end.

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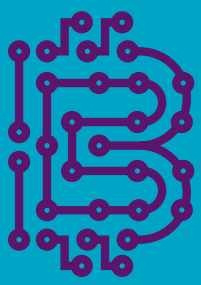
K&L GATES BECOMES ONE OF F
IMPLEMENT OWN PRIVATE BLO

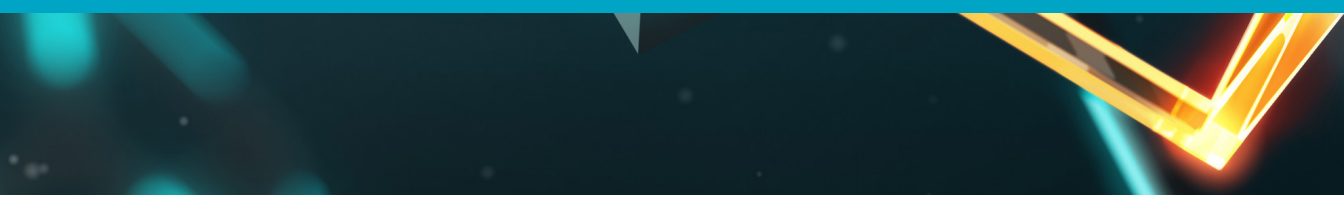
Boston—Global law firm K&L Gates LLP has undertaken plans to establish an internal, private and permissioned blockchain to assist in the exploration, creation, and implementation of smart contracts and other technology applications for future client use.

"We are hearing from our lawyers globally who are excited about getting hands-on experience working with blockchain applications," commented K&L Gates Global Managing Partner James Segerdahl. "By investing in this technology that is expected to significantly impact the practice of law, K&L Gates is committed to finding practical and timely solutions that benefit both our clients and the firm."



K&L Gates plans to utilize identity, asset, and encryption modules from UK/Swedish technology company Chainvine in order to allow K&L Gates lawyers and IT staff to explore and create intelligent contracts.

Judith Rinearson, a partner in K&L Gates' New York and London offices and one of the co-chairs of the firm's Fintech practice leading the project, said: "The first stage of our blockchain initiative will be a



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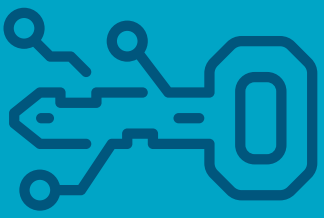
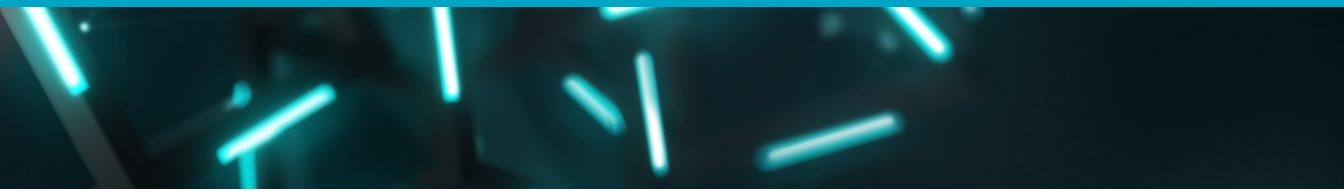
'sandbox' that will allow our lawyers from around the world to get direct experience working with blockchain applications. We are next planning to develop use cases that our clients want and need, working both with Chainvine and clients to explore and build on the distributed ledger platform."



The final step in K&L Gates' blockchain initiative will be to create an internal private permissioned blockchain, a commitment that very few, if any, other major law firms have made.

"We are delighted to be working with such a leading global Fintech law firm as K&L Gates," stated Chainvine Chief Executive Officer Oliver N. Oram. "It is extraordinarily prescient of K&L Gates to recognize early-on the importance of both understanding and accessing blockchain technology."

K&L Gates is a fully integrated global law firm with lawyers located across five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals.



NEW JOINERS

Luca Sommariva is a partner in the firm's Milan and London offices and focuses his practice on domestic and international construction projects, advising employers, engineers/architects, contractors and sub-contractors in negotiating and drafting a broad variety of construction-related contracts, managing claims during the performance of the work and representing clients in highly complex disputes including contractual, corporate and bankruptcy litigation. A visiting lecturer with the University of Stuttgart Master of Business Engineer program International Construction: Practice and Law, Luca speaks Italian, English and French and will spend a significant amount of time at the firm's London office.

Jennifer Degotardi is a partner in the firms Sydney office and has extensive experience in all aspects of commercial property with a focus on development, property management and leasing. She acts for both government and private clients across a range of industry sectors and has particular experience in complex sales and acquisitions, due diligence, joint ventures, asset and facilities management agreements, property development, leasing and the property aspects of infrastructure projects.

Sam Brown is a partner in the firms Sydney office and has extensive real estate experience includes advising clients on acquisitions and disposals of development land and built form assets; government tenders; major project and development agreements; fund through arrangements; property developments (commercial, mixed use, and residential); commercial, industrial, and retail leasing; land use and access rights; property due diligence; large-scale infrastructure transactions and property funds. He also counsels receivers on the stabilisation and sale of assets.

PAST EVENTS

Annual Real Estate Breakfast Seminar—12 September 2017

In September we held our annual real estate breakfast seminar which was focused on Global Real Estate Trends, Africa and Opportunities for 2017/2018. The seminar included an analysis and a discussion around operating in energy markets—Africa and opportunities. Panellists and Speakers included Steven Cox, Of Counsel, K&L Gates LLP, Sabina Kalyan, Global Chief Economist and Head of EMEA Strategy & Market, CBRE Global Investors; James Green, Partner, K&L Gates LLP; Adri Kerciku, Investment Consultant, M3 Capital Partners (UK) LLP; Mike Phillips, UK Editor, Bisnow; Nathalie Villette, Group Head, Global Corporates, Ecobank and Gaimin Nonyane, Head of Economic Research, Ecobank. The event was attended by over 100 professionals within the real estate industry.

Please look out for details of our seminar in September 2018.

For more information please contact:
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CREFC Winter and Spring Conferences—January and April 2018

We recently sponsored the Commercial Real Estate Finance Council (CREFC) America two day Winter Conference in Miami in January. A team of lawyers from the global real estate finance group attended to meet with clients and main players in the industry. This is a marquee event that provides a platform for commercial real estate finance market professionals to come together to learn about and discuss the latest trends and challenges facing the industry. In April, the London office will once again be sponsoring CREFC's Europe's two day Spring Conference and a team of London lawyers will be attending.

For more information please contact:
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UPCOMING EVENTS

Hedging of Known Risks in Real Estate and Corporate Transactions (K&L Gates, Marsh GmbH and AIG Europe Limited)—13 February 2018

On 13 February, our Berlin office hosted a breakfast seminar titled 'Hedging of known risks in real estate and corporate transactions' to discuss novel hedging options for real estate and corporate acquisitions and exchange views with panellists from Marsh GmbH and AIG Europe Limited.

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"How Ethical is Islamic Finance? UKIFC & ISRA Thematic Workshop 2018, in association with K&L Gates"—21 February 2018

On 21 February, our London office will host a full day Islamic Finance conference titled, "How Ethical is Islamic Finance? UKIFC & ISRA Thematic Workshop 2018, in association with K&L Gates" The conference will review and reflect on a number of key areas to explore the question of "How Ethical is Islamic Finance?" Over 20 industry speakers are lined up to present on the day alongside Jonathan Lawrence, Natalie Boyd and Barry Cosgrave from K&L Gates.

For more information please contact:
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K&L Gates, Dataminr, Another Day and Arthur J. Gallagher Crisis Management Workshop—1 March 2018

On 1 March, K&L Gates, Dataminr, Another Day and Arthur J. Gallagher will host a Crisis Management Workshop in the London office of K&L Gates. The event will address crisis management from the different perspectives of four presenters and will cover several key themes including: social media listening and reaction; crisis preparedness and planning; crisis management and insurance placement; and legal considerations in managing pre and post-crisis situations. Speakers will include: Tim Willis, Director, EMEA Corporate Security, Dataminr; Simon Davison, Director of Investigations, AnotherDay; Justin Priestley, Executive Director, Arthur J. Gallagher and David Savell (Partner, Investigations, Enforcement and White Collar Crime) and an introduction from Barry Cosgrave (Partner, Distressed Investments and Special Situations), K&L Gates LLP.

For more information please contact:
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‘The General Data Protection Regulation (GDPR) in the Real Estate Industry—What Do You Have to Consider?’ Breakfast Seminar Real Estate 2018—1 March 2018

On 25 May 2018, the new Regulation on the harmonisation of data protection throughout Europe will enter into force. Our Berlin office is hosting a breakfast on 1st March to discuss ‘The General Data Protection (GDPR) in the Real Estate Industry—What Do You Have to Consider?’ The session will cover the following topics: information obligations to those affected, creation of processing directories, big data in building surveillance, data security and sharing data with third parties.

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MIPIM 2018

A team from our European platform will be attending MIPIM in Cannes during 13-16 March 2018. Details of the team can be found on page 16.

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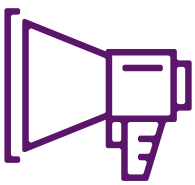

GLOBAL REAL ESTATE TEAM MIPIM 2018

Members of the Real Estate, Planning, Finance and Tax teams look forward to seeing you at MIPIM 2018.

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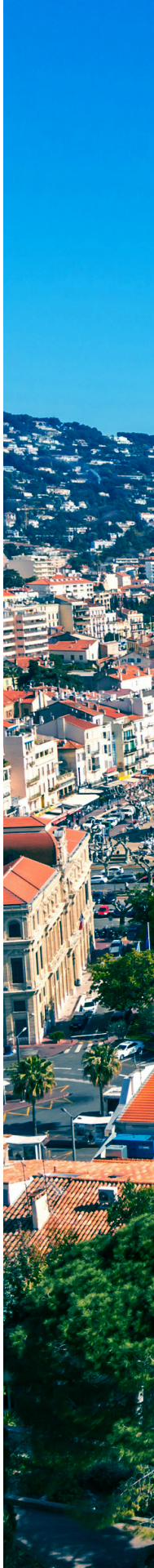

CASES

SPARKS V BIDEN [2017]

Facts of the Case—This case concerned an option agreement. This required the buyer to pay the seller overage when any new house constructed as part of a development was sold. However, the option agreement did not contain an express term requiring the Defendant to sell the houses which would trigger the overage provisions. The Defendant's position was that he was not required to sell the houses and that overage was not payable until a sale took place, if ever. Instead of selling the new houses, the buyer let them and occupied one himself. The Court was asked by the Claimant to decide whether it should imply a term requiring the Defendant to sell.

Decision of the Court—The Court decided that an express term requiring the Defendant to market and sell the houses within a reasonable period of time should be implied into the option agreement. The agreement required the Defendant to use all reasonable endeavours to obtain planning permission, to proceed with construction as soon as practicable and then to pay overage. The Court considered that it was difficult to see why the parties would have agreed to these obligations unless the sale of the houses, and therefore the overage payment, would follow. It considered that such term was necessary as a matter of business efficacy, that without it the option agreement lacked practical or commercial coherence and the term was so obvious that it went without saying. Although the Court accepted that the "entire agreement clause" was a factor against implying the term, it was only a factor and not a very strong one in the circumstances.

JONES V OVEN [2017]

Facts of the Case—This case involved a neighbour dispute concerning a strip of land. The strip had been part of a parcel of land sold and transferred by the claimants in 2003 to the defendants' predecessors in title for the purposes of a residential development. The contract contained a provision that if a barn on the land transferred was demolished at any time, the defendants' predecessors would re-transfer the strip to the claimants. The claimants also entered into restrictive covenants binding part of the land

which they had retained (the "retained land") by prohibiting the carrying on of activities which would be normal in an agricultural setting, but which would be a nuisance to residential estate neighbours. The defendants' predecessors in title constructed a residential property which they sold to the defendants in 2005. The defendants were required

to transfer the strip to the claimants in the event of demolition of the barn. In 2009, the defendants demolished the barn. The parties were unable to agree on whether a transfer of the strip would or should involve the imposition of the same restrictive covenants on the strip as undoubtedly apply to part of the rest of the land which the claimants retained in 2003.

Decision of the Court—The High Court held that the retained land burdened by restrictive covenants included land which was not at that time retained by the transferor. The parties' intention had been for the owners' retained land to be burdened by covenants in order to make the neighbouring defendants' land viable for residential development, and a literal reading of the covenants would negate that purpose. We understand that this is case is currently subject to an appeal.

S FRANSES LIMITED –V- THE CAVENDISH HOTEL (LONDON) LIMITED [2017]

Facts of the Case—The Cavendish Hotel (London) Ltd., is the long-lessee of a hotel in London. S. Franses Ltd. is its subtenant, occupying a retail unit on the ground floor and basement under two leases. The landlord made no attempt to hide the fact that it wished to regain possession from the tenant under Ground (f) to give itself a freer hand should it decide to undertake a more extensive redevelopment of the hotel as a whole in the future. The landlord's evidence accepted that much of the scheme of works it relied on for the refusing the tenant a new tenancy under Ground (f) was being undertaken to satisfy that ground and had no other commercial purpose.

Decision of the Court—The High Court held that a landlord is entitled to refuse the grant of a new tenancy to a protected business tenant on redevelopment grounds even in circumstances where the scheme of development is devised solely for the purpose of evicting the tenant and

confers no other benefit on the landlord. The High Court held that the court was only concerned with the landlord's intention to carry out the works, not its motive in doing so. We understand that S Franses Ltd has been granted a certificate by the Queens Bench Division for a leapfrog appeal to the Supreme Court.

POWYS COUNTY COUNCIL V. PRICE AND HARDWICKE [2017]

Facts of the Case—This case concerned the Contaminated Land Regime. A Welsh local authority appealed against a decision that it was the "appropriate person" responsible for remedial works on land which had been contaminated by its predecessor. Until 1993, the appellant's predecessor had operated a landfill site on a farm owned by the respondents. In 1996, a local government reorganisation took place in Wales under which the appellant was created and its predecessor was abolished. The Respondents had sought a declaration from the High Court that the "liabilities" transferred to Powys included liability for acts of its predecessor so that Powys was a Class A appropriate person, should the site ever be identified as contaminated land; the High Court held in 2016 that Powys was indeed liable.

Decision of the Court—The Court of Appeal reversed the High Court's decision. The court found that, whilst the rights and liabilities of its predecessor had passed to Powys under the statutory order for the reorganisation, liabilities under the Contaminated Land Regime had not been passed to Powys, because the Contaminated Land Regime did not exist in 1994 at the time of the reorganisation. Since its predecessor's liability had not been transferred to Powys but remained with its predecessor (a body that no longer existed) and no other "causers or knowing permitters" were identified then, under the Contaminated Land Regime, the liability fell to the current owner and occupier of the land.

BLUE V ASHLEY [2017]

Facts of the Case—This case concerns a party that you will likely be familiar with, Mike Ashely—the Chairman of Newcastle United FC. Mr Ashley, the Defendant, owned the majority of the shares in a sports retail company. The claimant was appointed to provide consultancy services to the company and became involved in investor relations. The company needed a corporate broker. In January 2013, the claimant and defendant had an informal meeting in a pub with three representatives of a potential broker. Most of the group were drinking alcohol. During a conversation described by the broker's representatives as "banter", the defendant allegedly agreed to pay the claimant £15 million if he was able to raise the company's share price to £8. It was then around £4. In February 2014, the price hit £8. The claimant says that Mr Ashley acknowledged this obligation by paying him a sum of £1 million on 27 May 2014 as an interim payment, but that Mr Ashley had since gone back on the deal.

Decision of the Court—The Commercial Court, dismissed the claim and delivered a useful reminder of the approach of the English courts to the issue of intention to create legal relations. The Court reaffirmed the principle that when considering whether there is such an intention, the test is an objective one, with the "touchstone" being "how the words used, in their context, would be understood by a reasonable person. For this purpose the context includes all relevant matters of background fact known to both parties." The Court decided it was clear that an intention to make a contract could not be shown. An evening in an informal setting, with heavy drinking and "banter" did not constitute the setting for the formation of legal relations. The Court held that no reasonable person present in the pub that night would have thought that the offer to pay the Claimant £15 million was serious and was intended to create a contract. In fact, everyone thought it was a joke and Mr Blue had since convinced himself that the offer was a serious one.

K&L GATES

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