K&L GATES

OVERRIDING INTEREST

Summer 2021

Highlighting developments and issues in the real estate industry

IN THIS ISSUE

WELCOME TO THE LATEST EDITION OF OVERRIDING INTEREST

KEY CONTACTS

Steven Cox
+44.(0)20.7360.8213
steven.cox@klgates.com

Bonny Hedderly
+44.(0)20.7360.8192
bonny.hedderly@klgates.com

NEW JOINERS

Denis Charles
Partner
Paris

Denis Charles is a partner in the firm's Paris office. He is a member of the Real Estate practice. Denis focuses his practice on real estate transactions including corporate real estate matters and fund structuring. He has extensive experience advising on the real estate aspects relating to local and cross-border acquisitions and disposals, and on the negotiation and drafting of real estate contracts. Denis advises clients in a wide range of industries, including logistics, retail, offices, and hospitality.

Alan Schacter
Counsel
New York

Alan Schacter is counsel in the firm's New York office and a member of the Real Estate practice. Alan represents clients in all areas of the real estate industry, including institutional investors, sponsors, borrowers and lenders, buyers, participants, sellers, landlords and tenants. His experience includes working with clients on joint ventures, structured secured loan transactions, hotel and commercial acquisitions, dispositions, financings, management agreements, and more.

Cheryl Choice
Associate
Pittsburgh

Cheryl Choice is a member of the Real Estate practice in the Pittsburgh office. She advises on all aspects of transactional real estate law, including acquisitions and dispositions, commercial leasing, real estate financing and development, and renewable energy matters.

Mary Nicholas
Associate
Pittsburgh

Mary Nicholas is an associate at the Pittsburgh office, where she is a member of the Real Estate practice.

Daniel Greenaway
Partner
London

Daniel Greenaway is a Partner in our London office. He is a member of the Asset Management and Investment Funds practice and concentrates on launching funds and investment platforms for clients that raise capital across a global, primarily institutional, investor base.

Luke Salem
Senior Associate
Sydney

Luke Salem is an environment and planning lawyer in our Sydney office. He has experience advising on planning, pollution and contamination, environment incidents, and acquisition of land.

Alexander Currie
Associate
London

Alexander Currie is an associate at the firm's London office, where he is a member of the Real Estate practice group. Alex has experience working on a wide variety of commercial real estate matters including general landlord and tenant work (acting for both landlords and occupiers) and acting for investors and property companies on the acquisition and disposal of commercial property.

Wilson Twist
Associate
Brisbane

Wilson Twist is an Associate in the Brisbane office, he has experience across a range of commercial real estate matters including property transactions, development and leasing.

MINIMUM ENERGY EFFICIENCY STANDARD (MEES) UPDATE FOR EUROPE

SUMMARY

The government wants all non-domestic rented buildings to meet an EPC B by 2030 (currently the requirement is EPC E). It is consulting on how to implement this and to improve the compliance and enforcement process for EPCs. The change will affect one million properties.

WHAT IS AN EPC?

An energy performance certificate, or EPC, shows the energy efficiency levels of a property, enabling a prospective tenant to learn and compare the relative running costs of renting a property. The certificate will give each building a standard assessment procedure (known as an SAP) and a rating, which is graded from A to G (A is very efficient and G is very inefficient). The certificate contains information including an estimation of the energy the property potentially uses, fuel costs (i.e., an indication of how much it will cost to heat a property), details of savings that could be made if energy efficiency improvements are put in place, and CO_2 emissions.

BACKGROUND

The Energy Efficiency (Private Rented Property, England and Wales) Regulations set a minimum energy efficiency standard (MEES) of EPC E for private rented properties. The requirement that a property must be EPC E has applied since 1 April 2018 to properties let on new tenancies (including renewals), and from 1 April 2023 will apply to all privately rented properties, even where there has been no change in tenancy.

The government published a consultation in 2019 on how best to improve the energy performance of non-domestic private rented buildings through tighter MEES. The Government's preferred option was for all non-domestic rented buildings to meet an EPC B by 2030. This has evidently received wide support and the government is consulting on the framework to implement this new requirement and improve the compliance and enforcement process.

The intention is that this will result in buildings that are cheaper to run, responsible for fewer carbon emissions, and closer to being able to accept low-carbon heating systems.

The EPC B requirement will see the proportion of the non-domestic rented stock within scope of the Regulations increase from around 10 percent to around 85 percent. That is approximately one million buildings across England and Wales.

WHAT IS COVERED?

The consultation covers:

- A phased implementation of the EPC B by 2030 requirement, with EPC C by 2027 set as an interim milestone
- The introduction of two-year 'compliance windows.' The 'compliance window' will begin with the requirement for landlords to present a valid EPC and closes with the presentation of a valid EPC of the requisite rating. For EPC C, Government proposes the compliance window should be 2025-2027, and for EPC B 2028-2030
- A move away from enforcement at the point of let. Non-domestic EPCs will follow the proposed domestic changes, such as the requirement for non-domestic rental properties to continually have an EPC, and the need to commission a post-improvement EPC to demonstrate compliance
- A new exemptions and compliance database to provide the data that local authorities will require for enforcement and compliance monitoring
- Updates to the penalty framework to enforce the new requirements
- The three quotes system for the seven-year payback will be replaced by a more efficient and user-friendly payback calculator

TIMING

The consultation closed on 9 June 2021, followed by draft regulations. Changes are expected to come into force in April 2025.

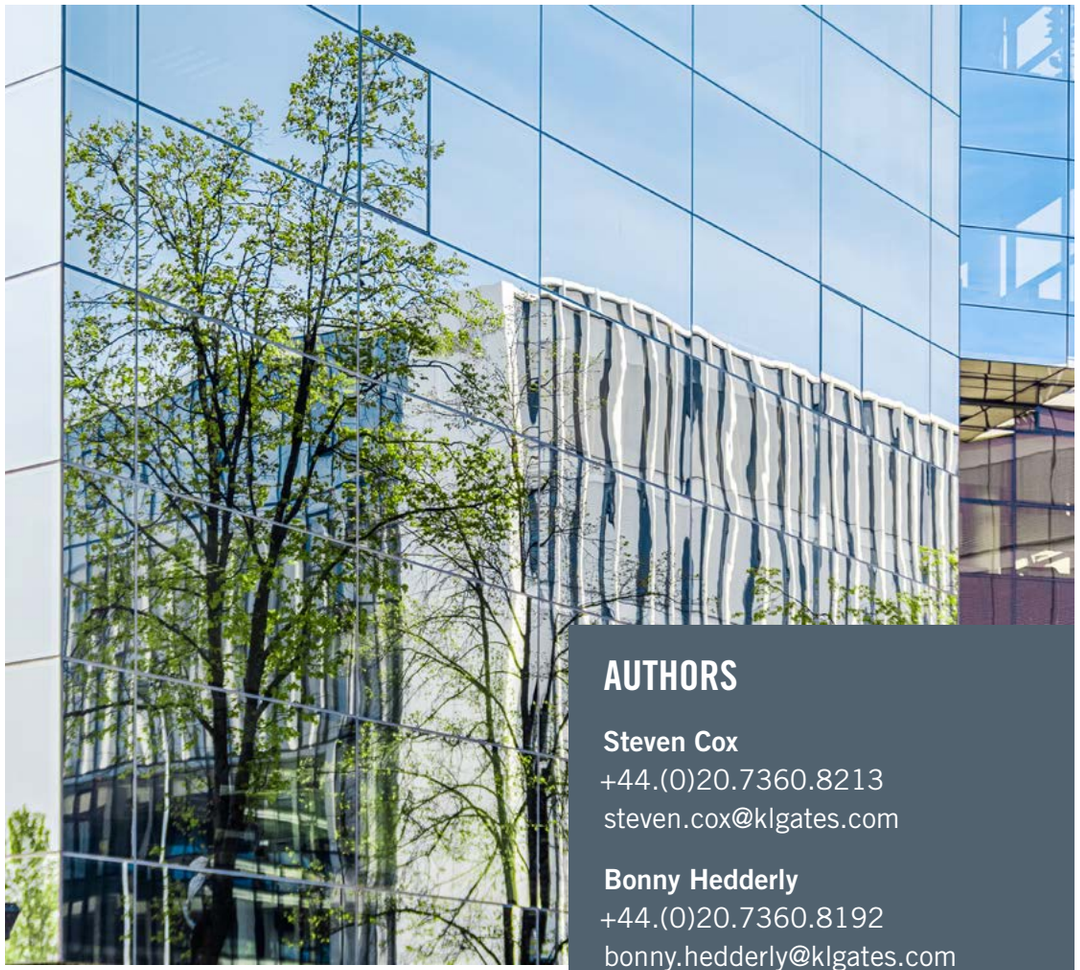
COMMENT

This government, and no doubt any replacing it in the future, has a green, low carbon agenda. These changes are part of that agenda and represent a stick approach to the property industry which, seemingly, has been reluctant in the past to engage with the issue of the energy

efficiency of its buildings. It is not clear whether there will be any carrots, as with the United States where the availability of grants and incentives is widespread. The motivation for landlords to upgrade their buildings as a result of increasing demand from tenants seeking more efficient, greener buildings has only impacted prime properties until relatively recently, but the changes made by these regulations will impact many secondary properties and force landlords to retrofit them, unless they can come within the exemptions. Although nine years may seem a long way off, landlords will need to act soon to be ready.

It is not immediately apparent how the phased implementation will help, and the government themselves express the hope that landlords will carry out works to go straight to an EPC B rather than achieving an EPC C first.

With so many more properties brought within the scope of the regulations and with many more exemptions being sought, the cost of enforcement and monitoring compliance is likely to rise significantly. This will be borne by local authorities. No doubt they will want central government to help with funding.



AUTHORS

Steven Cox
+44.(0)20.7360.8213
steven.cox@klgates.com

Bonny Hedderly
+44.(0)20.7360.8192
bonny.hedderly@klgates.com

COVID-19: GOVERNMENT EXTENDS MORATORIUM ON COMMERCIAL LEASES UNTIL MARCH 2022

SUMMARY

The commercial rent moratorium was due to come to an end on 30 June 2021 - see previous alerts:

- **COVID-19: Government extends the eviction ban for commercial leases to 30 June 2021**
- **COVID-19: Government extends the eviction ban for commercial leases to 31 December 2020**
- **COVID-19: Government issues new code of practice for landlords and tenants**

Many businesses, particularly travel and hospitality are still struggling to operate, and with the extension of the lockdown period also now having been announced, certain sectors such as hospitality and leisure particularly, have never been in as precarious a position. Commercial landlords and tenants have been operating under government guidance such as the commercial lease code of practice referred to above, in order to manage their respective lease obligations, but that has guidance status only. Many landlords and tenants had not been able to reach a consensus agreement on how their leases would work moving forward. So there has clearly been tension between landlords and tenants with the deadline of 1 July approaching.

BACKGROUND

Earlier in March this year, the Rt Hon Robert Jenrick MP (Secretary of State for Housing, Communities and Local Government) and Rt Hon Kwasi Kwarteng (Business Secretary), announced that:

- The protection from forfeiture of business tenancies for non-payment of rent under s82 of Coronavirus Act 2020 due to expire on 31 March would be extended to 30 June 2021 and the Ministry of Justice also laid a Statutory Instrument to extend the restrictions on the exercise of Commercial Rent Arrears Recovery (CRAR) similarly to 30 June 2021. Our previous Alerts above set out the practical implications of the extension.
- The full statement outlined that the government's current position was to support commercial landlords and tenants to agree on their own arrangements for paying or writing off rent debts by 30 June. However, the government also made it clear that where businesses could pay their rent, they should do so, consistent with the message contained in the Code of Practice for the Property Sector.
- Significantly in the announcement on 10 March, the government also

stated that if discussions between landlords and tenants didn't happen they were prepared to take further steps. They launched a "call for evidence on commercial rents" aimed at monitoring progress of negotiations, and anticipated the steps that could be taken after 30 June. There was mention of a potential "phased withdrawal" of protections being considered.

In the period leading up to the latest announcement the government had monitored the "call to evidence" to check whether landlords and tenants had been having productive discussions around their lease agreements. They had invited opinion and comment from the industry and had indicated that if the evidence showed that landlords and tenants had not had productive conversations then the government would intervene. Commentary suggested that the government may see the support extended so for example there would be a phasing out of the rent moratorium, or new measures introduced. It has been reported that the government got over 500 responses to the call for evidence, but that those didn't push them towards any option in particular. The British Property Federation estimated that there could be up to £7 billion pounds in unpaid rent arrears if the rent moratorium was extended beyond the end of 30 June.

LATEST ANNOUNCEMENT

On June 16th **the announcement was made** which now sets out what the latest measures will be:

- The legislation introduced last year to prevent landlords of commercial properties from being able to evict tenants for not paying rent will now be put in place until 25 March 2022 alongside the restrictions on landlords' abilities to recover rental arrears through the seizure of goods. Restrictions on the service of statutory demands and winding-up petitions, implemented through the Corporate Insolvency and Governance Act 2020, are also set to be extended.
- Legislation will be introduced to ring-fence outstanding unpaid rent that has built up when a business has had to remain closed during the pandemic. Landlords are expected to make allowances for the ring-fenced rent arrears from these specific periods of closure due to the pandemic, and share the financial impact with their tenants.
- The extension applies to all businesses, but the new measures that will be introduced by primary legislation will only cover those impacted by closures. This means that rent debt accumulated before March 2020 and after the date when relevant sector restrictions on trading are lifted, will be actionable by landlords as soon as the tenant protection measures are lifted. This means that once the legislation is in place the moratoriums will be lifted for any non-ring-fenced arrears, but without a timescale given for legislation, March 2022 is the only date which is currently set.

- The government state that the legislation will help tenants and landlords work together to come to an agreement on how to handle the money owed – this could be done by waiving some of the total amount or agreeing a longer-term repayment plan.
- This agreement should be between the tenant and landlord and, if in some cases, an agreement cannot be made, the law will ensure a binding arbitration process will be put in place so that both parties can come to a formal agreement. This will be a legally binding agreement.
- In order to ensure landlords are protected, the government is making clear that businesses who are able to pay rent, must do so. Tenants should start paying their rent as soon as restrictions change, and they are given the green light to open.
- Statutory demands and winding up petitions will also remain restricted for a further three months to protect companies from creditor enforcement action where their debts relate to the pandemic.
- The government have stated that they welcome ongoing negotiations between landlords and tenants about accrued rent and to support these, they are now providing a new backstop.
- The arbitration process will be delivered by private arbitrators

but in accordance with guidelines which the government will set out in the legislation, and they will have to go through an approval process to prove their impartiality.

- A government response to the call for evidence on commercial tenancies will be published in due course.
- The review of commercial landlord and tenant legislation will be launched later this year and will consider a broad range of issues including the Landlord & Tenant Act 1954 Part II, different models of rent payment, and the impact of Coronavirus on the market.
- The Ministry of Justice have confirmed that the restriction on the use of the Commercial Rent Arrears Recovery (CRAR) process by landlords will also be extended. The total number of days' outstanding rent required for CRAR will remain at 554 days. This measure will continue to provide protection to tenants of commercial leases with rent arrears accumulated during the coronavirus period, while protections from forfeiture for business tenancies are in place under the Coronavirus Act 2020.

COMMENT

Landlords are still better off in the first instance trying to come to agreements with their tenant, as government intervention may only delay rent payments further. Landlords and tenants have a common interest in ensuring survival of any struggling sector and principles of ongoing flexibility and negotiation continue to apply.

LINKS

Eviction protection extended for businesses most in need

Commercial Rent Arrears Recovery (CRAR) – The Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020

Statutory demands and winding-up – The Corporate Insolvency and Governance Act

AUTHORS

Steven Cox
+44.(0)20.7360.8213
steven.cox@klgates.com

Bonny Hedderly
+44.(0)20.7360.8192
bonny.hedderly@klgates.com

Wayne Smith
+44.(0)20.7360.8201
wayne.smith@klgates.com

REFORM TO RETAIL PRICES INDEX (RPI)

SUMMARY

The Retail Prices Index (RPI) is often used in property documents, for example for index-linked rents or adjustments to service charge caps. The Chancellor has said that RPI will be abolished in 2030. This article considers what might replace it.

BACKGROUND

RPI is a measure of inflation which measures the change in the cost of a representative sample of retail goods and services. In real estate transactions RPI is used to measure increases in rent, service charge caps (these are often index-linked by reference to RPI) and other payments and contract values, like ground rent. The RPI is the oldest measure of consumer prices in the United Kingdom, and is used across the entire economy, and in other financial contracts. It is calculated and published by the Office of National Statistics (ONS).

There have been long term recognised problems with the RPI in that it does not always accurately reflect the rate of inflation, sometimes underestimating inflation, but also significantly overestimating inflation. As far back as 2015 a review of price indices by the Institute for Fiscal Studies recommended to the ONS that RPI should be maintained as a legacy measure only, and in 2017 the Consumer Prices Index (CPI) including owner occupiers housing costs (CPIH) became the lead inflation index in ONS's statistical releases.

The CPI is a measure that examines the weighted average of prices of a basket of consumer goods and services such as transport, food and medical care. It is calculated by taking price changes for each item in the pre-determined basket and averaging them.

A number of consultations were launched in 2018/19 on whether for example pension schemes could move from RPI to CPI. Changes to the RPI can, in certain circumstances, require the consent of the Chancellor of the Exchequer before implementation. The UK Statistics Authority (UKSA) wrote to the Chancellor recommending that RPI should cease, and given the time constraints associated with the RPI ceasing (as legislation would be required to change it), in parallel RPI should be aligned with CPIH.

The rationale for the 2030 date is that the Chancellor had explained making changes before then would not be fair because holders of index linked government gilts (which don't mature before then) could lose out. The consultation proposed RPI continues, but the methodology should be changed to align the RPI with CPIH, so that any increases would be the same.

In November 2020 a response to the consultation was published.

SO WHAT SHOULD BE AN ALTERNATIVE TO RPI AND HOW WOULD IT BE MEASURED?

The Chancellor confirmed that the changes to RPI would take place so that the RPI index values will be calculated using the same methods and data sources as used for CPIH. The change will bring the methods and data sources of the CPI including CPIH into the RPI.

Over the previous decade CPIH has given a lower measure of inflation than RPI, around one percent lower per year on average. From 2030, the RPI measure of inflation is likely to be lower than it would otherwise have been by an average of one percent per annum, dependent on the economic climate. The RPI and CPIH will continue to be calculated and published as separate indices.

After 2030 the UKSA would no longer need the Chancellor's consent to implement the RPI proposed reforms.

HOW DO THE CHANGES IMPACT REAL ESTATE?

Because the CPIH gives a lower measure of inflation, rental increases are likely to be lower and so the returns will not be as great. Interestingly what came out of the response to the consultation was the focus on economic impacts and the value of those in coming up with a new measure.

Paragraph 44 of the response (see links below) sets out that in arguing that the consultation was too narrow, or that statistical rigor was irrelevant, many felt that the economic impacts should be the primary consideration. These economic impacts are discussed in more detail in section 6 of the response. However, to minimize such impacts, some respondents focused on the idea of setting the RPI equal to the CPIH plus an additional amount to reflect the difference in levels between the RPI and the CPIH. This idea was often summarized as 'CPIH+X'. Respondents primarily suggested that 'X' should be the average difference between the CPIH and the RPI, sometimes known as the "wedge", or directly using 100 basis points, 1 percent in addition to the CPIH. This theme was present in 23 percent of the responses to question 1, and 10 percent of all responses. This was postulated equally by individuals and organisations. Landlords may want to incorporate this in their lease negotiations.

Economic factors are likely even more significant given the COVID-19 pandemic. It will be interesting to see if this impacts on the drafting in the months ahead.

USEFUL LINKS

Click the link to access the **response** to the consultation along with worked examples of methodology.

Click the link to access the **Inflation and price indices**.

AUTHOR

Bonny Hedderly
+44.(0)20.7360.8192
bonny.hedderly@klgates.com

THE DESIGN MUSEUM

Image provided by the Design Museum.

We are delighted to have advised The Design Museum on a pro bono basis on its 'Creativity is Essential' supermarket collaboration with Bombay Sapphire. The museum's visitor shop has been re-imagined as a pop-up food store, selling a selection of essential products, including Bombay Sapphire gin, wrapped in bespoke designs. The object of the collaboration was to demonstrate that creativity is essential and to highlight the role that culture has to play in contributing to both the economy and well-being. The project has been a tremendous success with queues around the block and extensive media coverage. The K&L Gates team comprised Richard Dollimore, Steven Cox, Emma Cooper, Sunny Kumar, and Keisha Phippen.

Images provided by the Design Museum.

FIRM NEWS

NASHVILLE OFFICE LAUNCHED WITH HIRE OF 25+ LAWYERS

We are delighted to announce the opening of our office in Nashville, a city that has experienced remarkable growth and in which we have deep connections with many existing clients. We launched the new location by hiring more than 25 lawyers across a variety of practices, including health care, litigation, corporate, intellectual property, finance, and construction, among others. The office—our 24th in the United States and 45th worldwide—provides our firm and our clients access to one of the nation's fastest-growing markets in areas such as health care, technology, and investment.

LEARN MORE

PARIS OFFICE FURTHER STRENGTHENED WITH ADDITION OF REAL ESTATE PARTNER

Our Paris office welcomed **Denis Charles** as a partner in the real estate practice. He joined us from Pinsent Masons LLP, and was among a series of strategic additions to the office that also included complex commercial litigation partner **Barthélemy Cousin** and his team and corporate partner **Raphaël Bloch**. Mr. Charles is accompanied in his move by associate **Julien Chabanat**.

LEARN MORE

NUMEROUS K&L GATES DIVERSE AND WOMEN LAWYERS RECOGNIZED FOR LEADERSHIP AND LEGAL ACCOMPLISHMENTS

We congratulate a number of diverse and women lawyers across our firm's global platform who recently have been honored for their accomplishments within the legal industry. These honors have included selections to the Minority Corporate Counsel Association's Rainmakers list, Legal Eagles Hall of Fame, the American Law Institute, Lawyers of Color's Power List, The National Black Lawyers' Top 40 Under 40, and the boards of the Chicago Bar Association and New Jersey Women Lawyer's Association, as well as awards from the National Bar Association's Young Lawyers Division and the U.S. Office of the Secretary of Defense, among others. The recognitions coincide with several honors K&L Gates itself recently has received, including a Chicago Committee on Minorities in Large Law Firm's Diversity Award and a Liberty and Hope Award from the Oregon League of Minority Voters.

LEARN MORE

EVENTS

Ongoing – Global Virtual GC Roundtables - What Next? Looking Forward with Purpose

In continuation of our COVID-19 virtual rountables , watch for details about our upcoming exclusive series titled, What Next? Looking Forward with Purpose. These discussions cover a range of topics with general counsels and C-suite level executives from different jurisdictions across the globe, facilitating intimate, informal conversation around the current business environment, with a focus on opportunities ahead, adapting your role and innovation.

For more information, please check our **events hub** or contact **Chantelle Shokar.**

BISNOW – Upcoming – UK INDUSTRIAL & LOGISTICS REVIEW

What's Next For This Booming Sector? K&L Gates partner Richard Dollimore will be speaking at the upcoming BISNOW – UK Industrial & Logistics review conference. This event is to be an in-person event and will be held later this year, date tbc.

Upcoming – 16 September 2021 – Real Estate Breakfast Seminar

Our Annual Real Estate Breakfast Seminar will be hosted in our London office in St Pauls. We hope you will be able to join us. Please find the relevant information and registration on the next page.

SAVE THE DATE: ANNUAL REAL ESTATE BREAKFAST SEMINAR

Global Real Estate Trends and Opportunities for 2021/2022

We hope you will be able to join us for our Annual Real Estate Breakfast seminar this September.

The Seminar will include an analysis of:

- Global Real Estate Trends
- Pan European Transactions and Sectors

Panellists:

- **Sabina Kalyan**, Global Head of Strategy & Research, Global Chief Economist at CBRE Global Investors
- **Mike Phillips**, UK Editor, Bisnow
- **Denis Charles**, Partner, K&L Gates, Paris

Register your interest in attending this event below:

REGISTER

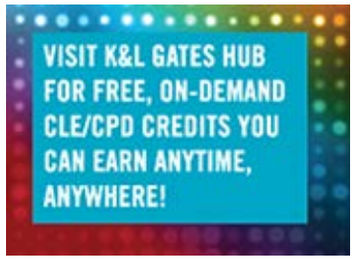
16 September 2021

8:30 a.m. – Registration and Breakfast

9:30 a.m. – Seminar commences

10:30 a.m. – Seminar concludes followed by coffee/ networking

Location
One New Change
London
EC4M 9AF



DIVERSITY AND INCLUSION & FIRM INITIATIVES

K&L GATES LONDON OFFICE DIVERSITY AND INCLUSION INITIATIVES

The last year has been tumultuous, and as the world has adapted so have we. Our diversity committee in London has been extremely active during the pandemic to ensure we have a full and lively (external and internal) programme, and continue to strengthen the firms commitment to diversity. Highlights include:

International Women's Day (IWD) - Entrepreneurship, Corporate Culture and the Gender Agenda. This year's IWD theme calls on individuals and organisations to **#ChooseToChallenge** inequality, call out bias, question stereotypes, and help forge an inclusive world. We hosted a virtual panel discussion where we explored the theme through the lens of entrepreneurship. We were delighted to be joined by four inspiring entrepreneurs who exchanged insights and experiences on how individually and collectively we can: **#ChooseToChallenge** the values that make a "successful" business **#ChooseToChallenge** outmoded corporate cultures, and explore approaches entrepreneurs take when given the opportunity to define their own cultures.

#ChooseToChallenge traditional models of leadership and decision-making.

Women in Property - We hosted a virtual wine tasting event for our Women in Property network. This was a great platform for us to connect the network and share ideas and industry updates.

International Day Against Homophobia, Transphobia, and Biphobia Discussion - As part of our celebration of International Day Against Homophobia, Transphobia, and Biphobia, we hosted lunchtime webinar discussion with Stephanie Fuller, General Manager of the LGBT+ helpline. The switchboard has been supporting the UK's LGBTQ+ community since 1974, and throughout this time has been at the forefront of supporting these communities in facing the issues of the day.

Our commitment to diversity and inclusion continues across our global platform with the introduction of our new speaker series titled, Conversations About Race and Conversations for Women to convene voices around diversity launched during the pandemic.

Hosting Conversations About Race

We hosted a speaker series, Conversations About Race, that focused on the historical subjugation of Black people and the lingering effects of systemic racism in our society. We are pleased to share the recordings of the leaders who educated and inspired us as part of that series: Derrick Johnson, President and Chief Executive Officer of National Association for the Advancement of Colored People; Dr. Harry Williams, President and Chief Executive Officer of the Thurgood Marshall College Fund; the Honorable Bernice B. Donald of the U.S. Sixth Circuit Court of Appeals; North Carolina Supreme Court Chief Justice Cheri Beasley; and Dean Kevin R. Johnson of UC Davis Law School.

Hosting Conversations for Women

K&L Gates' Women in the Profession (WIP) Committee presented a series of conversations for its women lawyers and others focused on issues affecting women, in both their careers and families. This has included discussions around topics such as the impact of COVID-19 on the careers of women lawyers from two former Chairs of the ABA Commission on Women in the Profession, Bobbi Liebenberg and Stephanie Scharf, and ABA Past President Paulette Brown. Additional topics included helping children and families cope with change presented by psychologist Dr. Kristen Ohlenforst.

Further details of our work can be found on our website: **http://www.klgates.com/aboutus/diversity/**

FIRM INITIATIVES

K&L Gates Sustainability, and Environmental, Social, and Governance (ESG)

We have synergized our robust environmental, social, and governance (**#ESG**) capabilities into an integrated, multidisciplinary approach. This has strengthened the way K&L Gates advises clients on environmental, social, and corporate governance (ESG) issues by structuring its broad scope of services within coordinated and collaborative areas of focus. The structure, which will evolve with changing client needs, currently includes corporate governance, investing, energy, and agriculture.

Learn more about our integrated approach by visiting our new **web page** devoted to ESG outlining key areas of focus and the ESG issues they address. Our experience ranges from legislative, regulatory, and policy matters, and includes fund launches and environmentally responsible corporate initiatives.

To learn more about the firm's ESG capabilities, visit **klgates.com/ESG** or these area-specific pages:

- **ESG - Corporate Governance**
- **ESG - Sustainable Agriculture**
- **ESG - Sustainable Investing**
- **ESG - Sustainability and Renewable Energy**

CASE REPORTS

RITTSON-THOMAS AND OTHERS (RESPONDENTS) V. OXFORDSHIRE COUNTY COUNCIL (APPELLANT) UKSC 13 ON APPEAL FROM: [2019] EWCA CIV 200

Summary

This case concerned 'section 2 reverter' and its interplay with section 14, under the School Sites Act 1841 (the Act). In this case, Supreme Court judges found in favour of the Council so they unanimously allowed the appeal. The Act enables owners of land to donate land for the purposes of education. Section 2 means landowners can do this in a straightforward way through a statutory charitable trust. Section 2 also allows the donated land to be returned to a landowner or their heirs by way of a statutory reverter if it is no longer being used for educational purposes. Section 14 of the Act allows trustees of the statutory charitable trust a power of sale or exchange of the donated land in order to enable the school to move to a more appropriate site.

Facts

Land was donated to Oxfordshire County Council (the Council) by a local landowner under section 2 of the Act to allow a school to be built. The Council later decided to relocate the school to a site next door/ nearby. The school remained on the original site until 2006, and then moved to the adjacent site, and at the time the original site remained vacant, but not sold. The Council sold the original site in 2007, after the new school was occupied, in order to help finance the costs of the new school. Heirs of the original land owner came forward and asserted that the land had reverted back to them once it had ceased being used, and they were therefore entitled to 2007 sale proceeds. At first instance in the High Court the claim by the heirs was dismissed, so they went to the Court of Appeal who allowed their claim. The Council appealed to the Supreme Court.

Decision

The Supreme Court found that a section 2 reverter had not been triggered and allowed the Councils appeal. Their decision was based on intention throughout by the Council, evidenced by notes etc., that they would apply the sale proceeds in the improvement of the new school premises. On the facts of the case, section 14 of the Act applied, and this permitted the original land to be sold with vacant possession and the proceeds to be used to pay off the costs of developing the new site. Effectively the Supreme Court, allowing the appeal, decided that when section 14 is invoked, it is not necessary for the site to be sold before the school is closed and moved to another site. Local Authorities will be pleased with the Supreme Court's judgment, as the appeal raised and resolved important questions

of the sequences of events, which must occur to take advantage of section 14, and the circumstances in which section 2, the reverter is implemented. It is also serves as a useful reminder that in these situations it is important for there to be a good paper trail, and that intentions are very well documented.

WIGAN BOROUGH COUNCIL V. SCULLINDALE GLOBAL LTD AND OTHERS [2021] EWHC 779 (CH) (01 APRIL 2021)

Summary

This High Court case dealt with terms implied into break right that limited the landlords right to exercise the break right within a set timeframe. In this case the Council landlord sought mesne profits (defined as sums of money paid for the occupation of land to a person with a right of immediate occupation, where no permission has been granted for that occupation) as the tenant had remained in the property after the break date. The High Court found that the landlord was not entitled to any compensation as no loss was suffered and the COVID-19 pandemic meant that the tenant had not derived any financial benefit from its continued occupation. However the court did imply a term into a break clause, even though that was not necessary to meet the business efficacy test.

Facts

There are various criteria which must be complied with in order for a term to be implied into a contract. These include factors such as the condition being reasonable and equitable, necessary to give business efficacy, and complying with officious bystander test—i.e. it is obvious. It cannot contradict an express contract term and it must be capable of clear expression.

In this case a stately home was owned by Wigan Borough Council (Council) who had allowed the property to be used as a hotel/wedding venue after granting planning permissions for change of use and development. The Council had granted a lease to Scullindale Global Ltd (Scullindale), at a premium of £400,000 plus VAT. A condition of the lease was that Scullindale started the redevelopment works within six months of the date of the lease and completed the development, in accordance with the planning permissions, before a date in May 2018. If Scullindale did not meet the milestones set out regarding the development works then the failure to do so constituted an "Event of Default" and the lease contained a break right for the Council, exercisable "at any time" on two months' notice.

On 16 September 2019, the Council purported to exercise the break right, giving notice to terminate the lease on 22 November 2019 (break date). A condition in the lease provided for the Council to pay compensation to Scullindale if the break right was exercised. Scullindale then stayed at the Property after the break date and so the Council brought a claim for trespass, claiming liability for damages or mesne profits. Scullindale's argument was that the lease remained in place, on the basis that the Council's break notice had not been served within a reasonable time, and that the development had been completed by the time the break notice was served.

Decision

The court found that the Council's break notice had been effective and they rejected the argument that the words "at any time" in the break right should be construed as requiring the notice to be served "at any reasonable time", "at any time whilst an Event of Default persists" or "at any time between 23 May 2018 and subsequent completion of the Development in accordance with the Planning Permissions." The court then considered whether such wording should be implied into the break right. The court found that it was necessary to imply a limitation on the break right on the ground that it was so obvious as to go without saying that both parties had proceeded on the basis that a break notice could only validly be served at any time whilst an Event of Default still persisted. The court was willing to imply a term into a break clause that was not necessary to meet the business efficacy test. However, the court did not allow a claim for damages and mesne profits. The Property had significantly reduced between the break date and the date of the judgment. The Council therefore had not suffered any financial loss and Sullindale had not benefitted financially, so the court did not award damages for trespass or mesne profits.

It has been a busy few weeks in the UK with judgments in important cases concerning COVID-19 rent arrears. COVID-19, continues to dominate the press and courts and the cases below are all related to impacts of the pandemic.

COMMERZ REAL INVESTMENTGESELLSCHAFT MBH V. TFS STORES LIMITED (TFS) [2021] EWHC 863 (CH) AND BANK OF NEW YORK MELLON (INTERNATIONAL) LIMITED V. CINE-UK LIMITED, MECCA BINGO LIMITED (AND OTHERS) [2021] EWHC 1013 (QB).

Summary

These are significant cases concerning COVID-19 rent arrears. Restrictions on forfeiture and other remedies (which we have reported on in our **alerts**) have meant that many landlords have resorted to court claims against tenants in an effort to recover arrears. Tenants have defended these claims and there have been a number of cases which look at the obligation to pay.

Decision

In each of the cases the court found in favour of the landlords and in both cases ordered that the tenants should pay the arrears. In the Commerz case, the High Court held that a shopping centre landlord was entitled to summary judgment against the retail tenant for non-payment of rent and service charge, where arrears were incurred since April 2020. The defendants were commercial tenants who had needed to close their

premises and had largely been unable to trade during the national lockdown.

Facts/Analysis

The court looked at facts/arguments around the implied terms, frustration arguments, and rent suspension. As a general comment, the court was not interested in either case in considering the effect of the pandemic on a tenant's business (i.e., whether or not the tenant could actually pay) instead, the court was principally concerned with whether the tenants had a realistic prospect of successfully defending the landlord's claims for rent and whether there was any compelling reason why the claim should go to trial. A number of important points were considered in the cases; the majority of which will be familiar to commercial landlords and tenants, being the main arguments raised by tenants in disputes relating to COVID-19 rent arrears.

The defences mounted by the tenants, across the two cases, included the landlord's conduct in the context of the Code of Practice for commercial property relationships during the COVID-19 pandemic (the Code of Practice) (**click here** to see our alert). The court in both cases dismissed this ground of defence by reference to the fact that the Code of Practice is voluntary in its nature and does not affect the legal relationship between the landlord and tenant.

The defence also centred around insurance, whether expressly or impliedly the fact that the landlords had insured against loss of rent. In both cases, the landlord's position was clear – it was not required by the terms of its leases to insure against a global pandemic, nor loss of rental income associated with it. In any case, unless the rent suspension clause in the lease was engaged, it had in fact suffered no loss and therefore there was no loss for which it could claim under its policy.

The tenants also asserted that the landlord was, by pursuing arrears through the courts, exploiting a "loophole" in light of the various protective measures that the government had legislated for in respect of forfeiture, CRAR and statutory demands/winding-up procedures. The court was ultimately clear that there was no restriction placed upon a landlord bringing a claim for rents and seeking judgment upon that claim.

There was also a review and argument based on the law of frustration and "temporary" frustration. The court dismissed the idea that there was any such thing as temporary frustration – as a matter of principle, a contract is either terminated or it is not and frustration does not merely "suspend" the operation of the contract.

Ultimately the defences were unsuccessful on the basis that the tenant had no real prospect of defending the claim at trial. The decisions are interesting for both landlords and tenants, seeking to navigate a way through pandemic and post pandemic market influences on trading, and particularly in light of the call for evidence.

ROYAL ASSENT OF THE FIRE SAFETY ACT 2021 (FSA)

On 29 April 2021, the FSA 2021 received Royal Assent.

Following Grenfell Tower in 2017 a series of changes to fire safety were planned by the government.

The FSA 2021 amends the Regulatory Reform (Fire Safety) Order 2005 (SI 2005/1541) (RRO 2005). The RRO 2005 applies to all non-domestic premises, including communal areas of residential buildings with multiple homes. Controversially, the FSA 2021, as enacted, does not contain the proposed amendment that would have prohibited passing fire risk remediation costs on to leaseholders and tenants. The FSA will run alongside the new Building Safety Act (BSA) when it comes into force, which is likely to be in 2023 as it has not yet been laid before Parliament. The new legislation will enhance the existing regulatory regime for building design and construction and will focus on high rise residential premises. A new Building Safety Regulator will oversee the design, construction, and occupation of high-risk buildings.

The FSA now requires all responsible persons (there may be more than one) to assess, manage and reduce the fire risks posed by the structure and external walls of the buildings for which they are responsible (including cladding, balconies and windows) and individual doors opening onto common parts of the building. It is no longer dependent on the height of a building and applies to all multi-occupied residential buildings, and allows the Fire and Rescue Service to enforce against non–compliance in relation to the external walls and the individual doors opening onto the common parts of the premises.

RESTRUCTURING PLAN IS CHALLENGED BY LANDLORDS IN SIGNIFICANT VIRGIN ACTIVE CASE

Background

Like many businesses, Virgin Active has been unopen to run/operate during the COVID-19 pandemic and its operation has been severely impacted. Virgin Active therefore sought to implement a restructuring of its financial debt including its lease liabilities.

The law was changed in June 2020 (as part of the new raft of COVID-19 legislation, and amendments made to Part 26 of the Companies Act) to allow for restructuring plans targeted at lease liabilities, and Virgin used those new laws to propose new funding from shareholders, writing off arrears of rent at the same time, and reducing rent on some of the sites in their portfolio which were less profitable.

The court has approved the plans in a significant ruling, approving the new restructuring tool. This case could set a precedent, as a number of landlords who opposed the plan lost their legal challenge when they voted against the restructuring. The restructuring plan used a procedure known as a cross-class cramdown, and was the first case to bind dissenting landlord classes to lease compromises.

Summary

The Virgin Active restructuring plan involved a number of secured and unsecured creditors, but of interest to the real estate sector is the fact that there were creditors of unsecured property liabilities and 46 landlords of 67 leasehold properties. The creditors were divided into seven basic classes, and landlord classes were rated A-E. At the meeting to discuss and approve the restructuring plans, these were approved by the secured creditors and the class A landlords (who generally owned the more valuable properties), but none of the others classes voted in favour of the plans. There is much more detail and consideration in the judgment. The judge concluded that creditors in a dissenting class would be no worse off than the relevant alternative of administration (i.e. class B-E) under the restructuring plan. The court said that even though all in the class had voted against the plan, it had a discretion to override the wishes of a class meeting.

The court needed to be satisfied that a number of questions were answered positively in order for cram down to be used. These conditions were: (1) If the plan were to be sanctioned, would none of the members of the dissenting class be any worse off than they would be in the event of the relevant alternative? (2) Has the plan been approved by the requisite 75 percent in value of a class of creditors present and voting who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative? (3) a general discretionary ground allowing court to properly exercise its discretion. The court was satisfied on all of these questions and the restructuring was allowed.

Comment

It is likely that the restructuring plan may emerge as the best solution for corporates, particularly as there are still uncertainties about CVAs. It is already emerging as the restructuring tool of choice for many corporate entities facing significant financial hardship due to the pandemic.

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