



K&L GATES

OVERRIDING INTEREST SUMMER 2023

Highlighting developments and issues in the real estate industry

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NEW JOINERS



Jennifer McCosker

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Jennifer McCosker is a partner in the Real Estate group in Sydney. She has advised a number of Australia's leading commercial property investors, financiers, and developers on a wide range of transactions, including large-scale property and development finance matters and the sale and acquisition of commercial, retail, industrial, and mixed-use properties. She has also acted for clients on complex property development and construction projects, as well as commercial and retail leasing matters.

Larry Woodard

Partner
Chicago

Larry Woodard is a partner in the firm's Chicago office. He is a member of the Real Estate and Construction groups. Larry has experience in virtually every facet of real estate law, representing diverse clients such as Fortune 500 companies, public and private real estate investment trusts, family offices, private equity funds, pension funds, developers, regional and national banks, institutional investors, special servicers, institutions of higher education, units of local government, contractors, subcontractors, material suppliers, landlords, tenants, condominium associations, property managers, receivers, and real estate brokers across the United States.



Hourie Khdlarian

Lawyer
Sydney

Hourie Khdlarian is a lawyer on the Sydney Real Estate team. She has a commercial background and has acted for national, international, and multi-national property investment funds and developers. She has experience in a broad range of property matters including commercial, retail, industrial leasing, property acquisitions and divestments and property development work.



Rory Lynch

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Rory Lynch is a lawyer in the Real Estate group in the Brisbane office.



Christina Tohme

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Sydney

Christina Tohme is a lawyer in the Real Estate group in Sydney and has experience with a variety of property related matters. She has acted for some of Australia's leading landlords and tenants, real estate investment trusts, large property development companies, and government entities.



Timothy Jaeger

Special Counsel
Sydney

Timothy Jaeger is special counsel in the Real Estate group in the Sydney office.

Danielle Sibenaler

Special Counsel
Brisbane

Danielle Sibenaler is special counsel on the Real Estate team, focusing on planning and environment in Brisbane.



David Boyer

Of Counsel
Portland

David Boyer is of counsel in the Real Estate Group in the Portland office. David works on a range of transactional matters, including purchase and sale agreements, joint venture arrangements, and leasing. David's experience working with lenders, servicers, and credit institutions provides him with the ability to assist both borrowers and lenders through commercial debt financing in a variety of areas of real estate finance.



Lysondra Ludwig

Counsel
Seattle

Lysondra Ludwig is counsel in the Real Estate group in the Seattle office.



Brooke Benjamin

Associate
Washington

Brooke Benjamin is an associate in the Real Estate group in the Washington office. Brooke has assisted in the representation of real estate clients in an array of transactions, including acquisitions, dispositions, financings, leases, new market tax credits, and obtaining economic incentives. Brooke has also advised clients on a wide range of operational and organizational matters, including corporate governance and taxation.

NEW JOINERS



Johnathan Billings

Associate
Nashville

Johnathan Billings is an associate in the Real Estate group in the Nashville office. Johnathan specializes in matters involving the acquisition and disposition of real property, leasing, land use agreements, and zoning.



Courtney Engel

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Courtney Engel is an associate in the Real Estate group in the Portland office.



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Nadine Hitschke is an associate in the Real Estate group in the Berlin office.



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Conor Mannix is an associate in the Real Estate group in the Seattle office.



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Brandon McFarlane is an associate in the firm's Pittsburgh office. He is a member of the Real Estate, Construction, and Policy practice groups.



Johannes Michel

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Munich

Johannes Michel is an associate in the Real Estate group in the Munich office.



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Seattle

Garrett Peery is an associate in the Real Estate group in the Seattle office.



Caroline Vermillion

Associate
New York

Caroline Vermillion is an associate in the New York office. She is a member of the IP Litigation practice group.



Jacopo Rugginenti

Associate
Milan

Jacopo Rugginenti is an administrative lawyer in the Milan office. His professional activity is focused on urban development, town planning, building, energy and environmental law, land expropriation, local authorities' legal system, and public procurement.



ARTICLES OF INTEREST AND FIRM NEWS



RENTERS' REFORM BILL - EXAMINING GOVERNMENT PLANS TO TRANSFORM THE PRIVATE RENTED SECTOR

By: Steven D. Cox, Joseph K. Skilton, Sophie F. Levitt

On 17 May 2023, the Renters' Reform Bill (the Bill) was introduced to Parliament. The Bill will fundamentally overhaul the landlord and tenant relationship for private housing.

This article will explain key reforms proposed by the Bill and analyse the effect these reforms could have on the private rented sector. The Bill enjoys wide parliamentary support and the support of campaign groups.

KEY REFORMS PROPOSED BY THE BILL

A New Tenancy Picture without S. 21 Evictions or Fixed Term Tenancies

The Bill plans to abolish landlords' section 21 eviction power and scrap all fixed term tenancies.

S. 21 evictions

The government views s. 21 evictions as inhibiting tenant stability. When a landlord wants to end a periodic tenancy, but the tenant is resistant, they can issue a s. 21 eviction notice. The s. 21 notice allows landlords to end periodic tenancies with two months' notice and without the need to provide a reason. As a result, a family of long-term tenants may be forced to move out of their home for no stated reason with two months to find alternative accommodation.

Fixed term tenancies

The government views fixed term tenancies as not providing sufficient flexibility to tenants. Tenants may need to move out quickly to buy a property or take a job opportunity—fixed terms inhibit this.

A new tenancy picture

The Bill will create the following tenancy framework:

- All tenancies will be periodic—rolling on a weekly or monthly basis.
- Tenants will have to provide two months' notice if they wish to end their tenancy.
- Landlords will no longer have the s. 21 power to evict tenants on periodic tenancies without reason. Instead, Landlords will be given new and expanded grounds to end tenancies where they wish to sell or move family members into their property.
- Landlords will only be able to exercise these new grounds after the first six months of a tenancy.

The Bill's new tenancy picture will be implemented in two stages. After stage one, all new tenancies must be periodic. At stage two, all existing tenancies will be transitioned to periodic. The government will give at least six months' notice of the stage one date, and there will be at least 12 months between the two stages.

New Duty to Satisfy the Decent Homes Standard

The Bill will introduce a legislative duty on private landlords to meet the Decent Homes Standard. The Decent Homes Standard already applies to social housing and encapsulates basic standards of safety, repair, thermal comfort, and facilities for a dwelling. The government estimates 21% of private rented properties do not meet the standard and will require investment from landlords.

Blanket Bans Will Be Illegal

The Bill will make it illegal for landlords or agents to have blanket bans on renting to families with children or those who receive benefits.

Abolishing Rent Review Clauses

The government believes that unscrupulous landlords force tenants into agreements with unfair rent review clauses. The Bill will ban the inclusion of rent review clauses in leases and not permit the increase of rent during a tenancy more than once per year.

A New Ombudsmen

The Bill will introduce a single government-approved ombudsman to cover all private landlords in England. Membership of the ombudsman will be mandatory for landlords. The ombudsman will have the remedial power to compel landlords to apologise, provide information, take specified action, and pay compensation up to £25,000.

Permitting Pets

The Bill will make it illegal for landlords to unreasonably withhold their consent to a tenant's request to have a pet in the property. Landlords will be able to oblige such tenants to acquire insurance against damage their pets may cause to the property.

The Bill does not explain when it would be reasonable for a landlord to withhold their consent to a pet request.

A New Property Portal

The government will introduce a new property portal that will hold information on every property in the private rental sector. This will support local authority enforcement, help landlords to better understand their responsibilities, and better inform tenants about prospective landlords and properties.

EFFECT OF THE BILL'S REFORMS ON THE PRIVATE RENTED SECTOR

Effect on Landlords

The Bill's proposals—especially scrapping s. 21 evictions and fixed term tenancies—restrict the flexibility of landlords to manage their property. This could lead to more landlords wishing to sell.

This impact may satisfy government aims to increase the stock of homes for purchase, but the Bill may have unintended consequences. For example, appetite for build-to-let projects may suffer, more landlords could turn to licences in order to avoid tenancies and the supply of rental property could be further squeezed.

Most worrying for landlords will be the removal of s. 21 evictions. The s. 21 power is widely used by landlords. The latest government statistics indicate 67% of landlords who evicted tenants in the last year gave their tenants a s. 21 notice. While s. 21 does not require a stated reason for eviction, landlords often find the power useful to remove troublesome tenants.

On the other hand, impetus to support landlords in the Bill is clear. More efficient and effective mechanisms for obtaining vacant possession will be welcome.

The repeal of s. 21 will leave landlords reliant on s. 8 of the 1988 Housing Act, which requires a court hearing, and the grounds for possession set out in Schedule 2.

The government plans to amend the s. 8 regime to compensate for the loss of s. 21 in several ways:

1. To introduce new grounds for possession for landlords who want to sell their property or move themselves or close family members into it, although it says it will not allow use of these grounds in the first six months of a tenancy and will prevent landlords from marketing or re-letting for three months following the use of either ground;
2. To introduce a mandatory ground where a tenant has been in at least two months' rent arrears three times in the previous three years, regardless of their arrears on the day of the hearing; and
3. To make it easier for landlords to evict tenants responsible for antisocial behaviour using existing grounds for possession.

Effect on Tenants

Most worrying for tenants will be the end of fixed term tenancies. These tenancies provide a simple framework for their exclusive possession of the landlord's property. Periodic tenancies by their nature will feel more precarious.

However, proposals to tackle rogue landlords including adopting the Decent Homes Standard, removing blanket bans, and implementing a sector wide ombudsmen will be welcome.

Effect on the General Student Private Rental Sector Market

The abolition of fixed-term tenancies, combined with the repeal of s. 21, would give tenants greater security of tenure, which is a positive proposal. However, the general student private rental

market is one exception, where abolishing fixed-term contracts could make letting to students considerably less attractive to private landlords. This is because the student rental market reflects the academic year, which benefits from 12-month fixed tenancies. If the student private rental sector was not made exempt from the abolition of fixed-term tenancies, this could push up rents or reduce the availability of student rentals at a time when the market in many university towns is already very tight. It is therefore advisable that the government retains fixed-term contracts in the student private rental sector.

CONCLUSION

The Bill will rebalance the private rented sector in favour of tenants. The Bill's headline reform will remove a significant tool landlords have to obtain vacant possession from tenants. Further reforms modernise the sector and aim to increase baseline housing standards while rooting out rogue landlords.

The Secretary of State for Housing Michael Gove has indicated the Bill is likely to become law before the next general election.

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GLOBAL OFFICE ASSET TRENDS: A LOOK AT 2023 AND BEYOND

By: Anna Amprimo, Tobias Gries, LL.M., Heather Adivari Horowitz, Christian Major, Jennifer McCosker

Post-pandemic, with some level of remote work here to stay, the global real estate industry is tracking an unprecedented reassessment of the office asset class. To paraphrase Mark Twain, have the rumours of the “death of the office” been greatly exaggerated? Or, are office assets hanging on, with a new focus lead by a “flight to quality” by end users? A rising rate environment makes navigating this new “normal” even more challenging. What trends are being seen in the global marketplace for office assets in response to these conditions for 2023 and beyond?

Globally there is a slow road to recovery in the office market lead by shifting needs from end users, with owners, investors, and lenders re-evaluating strategies taking into account interest rate and valuation concerns. European city centres are holding valuations and rents, US and Australian markets are seeing a flight to quality and a glut of B- and C-quality office assets, which may be ripe for better uses. Disruption is in effect within the office asset class on a global scale, though this may ultimately provide opportunities for willing investors. Below we highlight trends and anecdotes across the United States, Australia, and several European markets in greater detail to shed further light on how developers and investors are coping with the stresses in diverse urban office markets.

OFFICE ASSET TRENDS IN THE UNITED STATES

Vornado Realty Trust’s Chief Executive Officer, Steven Roth, declared recently in Crain’s Business Daily, “you can assume that Friday is dead forever” and “Monday is touch and go.” While this may be an overly pessimistic viewpoint, major urban centres such as New York and Chicago are seeing some form of remote or hybrid working and shorter

in-office weeks as a sticking trend. For major cities like New York and Chicago, large outlying suburban areas with high and costly commute times coupled with higher in-city living costs and larger numbers of jobs that may be performed remotely are disrupting urban office demand. In addition to shifting needs for in-office workspace, office tenants also are looking for newer, higher quality, amenity-laden spaces. Tenant and employee expectations have been disrupted by a “We-Workification” of office arguably just as much as in-office time expectations have been disrupted by the pandemic. Significant office space footprints are a waning trend for many major companies such as Google, Apple, and Facebook. Law firms, financial services firms, banks, tech companies, and the like are, globally, re-evaluating their need for office space and reconsidering how their employees use the space they have. Owners and lenders are seeing, in the United States, losses in valuation on prime office properties in gateway cities as tenants roll over and downsize and as existing office stock ages.

- Trepp, the mortgage loan data-analytics provider, is currently tracking a “wall of maturities” in the commercial mortgage-backed securities market with a value of

US\$12.7 billion expected to come due between 2023 and 2024 in Manhattan alone. Out of the US\$12.7 billion, US\$7 billion of this debt is comprised of 10 office buildings, with four alone located on Park Avenue. Given the current rate environment and the valuation impacts, this will make refinancing difficult for equity owners.

- According to a recent Colliers market report, owners and investors will both need to navigate the changing sources of market demand, demographic trends, and lower occupancy rates, while also facing hesitation in the capital markets. Refinancing and modification requests should be treated with care, taking special consideration for potential equity needs in regards to dollars allocated both for asset refurbishment and capital improvements, as well as re-leasing costs.
- Colliers also expects over one billion square feet of office space to rollover before 2026. If, on average, tenants are seeking reductions of between 20% and 30% of their existing space, projections suggest upwards of 300 million or more square feet could be unoccupied as a result. Vacancy rates, together with other market conditions, are drivers in valuation reductions for office product across the board.

Upside to the downturn? Significant valuation drops may result in interest from foreign and domestic equity buyers looking for fire-sale prices, depending upon their long-term hold strategies and appetite for repositioning.

Another trend to watch is a renewed interest in office-to-residential conversion. With today's increasing focus on environmental, social, and governance (ESG) and sustainability, more owners and developers are considering whether obsolete office assets are ripe for repurposing into different higher and best uses, specifically residential and multifamily housing. Recently, New York-based



Silverstein Properties announced a capital raise for a projected US\$1.5 billion fund to focus on acquiring underutilized office buildings for residential conversion.

While conversion efforts can be extremely costly, with the right tax incentives and municipal or other local support, residential conversion may be attractive for B and C class buildings where existing design and construction attributes may lend themselves to alternative uses. Between 1995 and 2006, New York City's Financial District saw conversion of office to residential in approximately 13% of its previously existing office space through utilization by developers of New York's Rule 421-g, providing favourable tax incentives. Currently underway are plans by GFP Real Estate and Metro Loft to create New York City's largest ever office-to-residential conversion at 25 Water Street, the former Daily News and JP Morgan Chase offices, which contemplates the creation of as many as 1,300 new apartment units.

In order to further promote conversions in New York City, Mayor Eric Adams recently unveiled the New York City Office Adaptive Reuse Study, focusing on recommendations to facilitate "adaptive reuse" of underutilized office stock. The report includes proposals to ease regulations regarding conversion measures and proposes tax incentives to support affordable housing conversions. Notwithstanding renewed interest in adaptive reuse, some market watchers think the trend may ultimately be fringe at best. In an April 2022 Moody's Analytics report case study of New York conversions, the takeaway suggests that unless there is serious, permanent post-pandemic office valuation disruption, finding the right project for conversion may be a needle in an economic haystack.

Are offices shopping malls 2.0? Time will tell in the US market, but what is certain is that owners, investors, and lenders are re-evaluating their approach to the office asset class across the board.

OFFICE ASSET TRENDS IN EUROPE

The United Kingdom

Post-Pandemic Office Life

Similar to the trends noted above for the United States, shorter workweeks still have a foothold in the United Kingdom. City of London workforce numbers on Mondays and Fridays pale in comparison to midweek where greater numbers of workers make their way in office. While Tuesday through Thursday numbers may not yet be at pre-pandemic occupancy levels, they are getting there. Weekly average office occupancy before the pandemic was 63%. The weekly average is now half of that at 31% but creeping upwards—on Tuesdays, Wednesdays, and Thursdays, the daily figure is now at 44% (two-thirds of pre-pandemic occupancy). There is a sense, however, that the in-office trend will continue slowly upwards as companies seek to capitalize on the value and necessity of in-person collaboration and training.

Leasing Trends

In focusing on "working smarter," businesses want less space, better-quality space, and more-flexible space. Further, ESG concerns are also at top of mind. Evidencing these trends, we can look to simple numbers. So far this year, 92% of take-up by tenants in London is now of prime, or class A, assets; 62% of take-up is of space that has an excellent or outstanding rating for sustainability; and 16% of take-up is by serviced office operators. Unlike in the United States and Australia, in London there is no glut of supply. Inflation in the construction industry, both with respect to materials and labor, has led to a delay in new projects coming online. While it is projected that 16 million square feet of office space is expected to come to market over the next five years, average annual take-up (i.e., lease-up) is five million square feet, creating a shortfall. Further, while existing tenants may be re-evaluating space needs, there remains demand with US tech and financial-services companies to

expand to London. Rents are therefore stable, with an increasing gap between prime rents (edging up) and secondary assets (edging down). Luxury class A space is in the region of £105 per square foot, prime £85 per square foot, and secondary is languishing at £40 per square foot.

Investment Trends

On the equity side, we are seeing a massive price correction in London. Capital values are 21% off of their June 2022 peak—the fastest drop the market has seen since 2008. In the span of nine months, approximately £210 billion of value was wiped off the books for UK assets.

Where is the Floor?

Where the valuation decline will stop is dependent on the stabilization of interest rates and reduction in inflation, both factors have great uncertainty in the short term. For purposes of defining metrics, keeping a close eye on 10-year bond yields is a useful factor. The 10-year yields are levelling off at 3.75%. If prime real estate yields are on their way to 5.25%, that reflects a spread of 1.5%, which is not so far off the 30-year historic average of 2% (compared with a spread of 3% over the years of ultra-low interest rates). On this basis, UK real estate may be beginning to look like it is on track for fair value. The first quarter of 2023 has shown transaction volumes double those of the fourth quarter of 2022, with much of the uptick attributable to renewed interest in offices by Asian buyers in particular. In March 2023, UK real estate

showed the first positive returns since June 2022. London, which is facing its challenges, remains the second most popular market for Asian, American, and Middle Eastern investors targeting Europe, and the third for European investors. Core office assets remain high on investors' wish lists. On this basis, the UK office market could turn a corner over the summer, to the extent that pricing and valuation may yet see a 25–30% decrease.

Germany

In principle, Germany is seeing the same trends in the office leasing market as in the United States, Australia, United Kingdom, and across Europe. Furthermore, the transaction market has largely come to a hold. Expectations of vendors and investors continue to differ significantly and there is a general trend in the lending space to move towards conservative approaches and a general reluctance to finance new investments. In particular, developers in Germany have been reporting challenges in obtaining financing for new developments.

A number of current challenges to the office market have led to a significant downturn of turnover in rented spaces. According to a report by Jones Lang LaSalle Germany, the office market has suffered a 30% downturn in Berlin, Frankfurt, Munich, Hamburg, Cologne, Düsseldorf, and Stuttgart (the Big Seven) in the first quarter of 2023. However, individual results differ significantly as Colliers Germany has reported an increase of 7% for Berlin.



The uncertainty in the market has also influenced the size of leases. The majority of lettings took place in the region below 800 square meters. Large-scale lettings, such as above 5,000 square meters, are becoming rarer. Notwithstanding the leasing size metrics, class A rents remain stable and are even expected to increase given the scarcity of availability and increased desire for high-quality office products. This is shown by a vacancy rate of only approximately 4–5% for class A space in the Big Seven.

A lack of high-quality spaces in attractive locations is impacted by a number of factors including:

- Property acquisition costs, which remain high;
- General reluctance from financing sources to fund new developments, coupled with rising interest rates;
- Unavailability of financing for projects with Russian investors (even if they are minority holders); and
- Impact of price increases and supply chain issues within the construction industry.

Additionally, the German office market has seen a significant increase in the indexation of rents (i.e., consumer price index adjustments) of upwards of 10% in a relatively short time.

Further to the rent indexation issues, on the landlord side, pressure is being exerted as well in regards to the push for ESG. Germany in particular is seeking to formalize legal requirements wherein new buildings would need to include energy supply systems utilizing up to 65% renewable energy. As Germany further seeks to require replacement of existing building systems with environmentally friendly, carbon-saving initiatives in the near future, this is putting pressure on landlords to retrofit. Furthermore, the shift to remote work— together with a labor shortage causing employers to offer attractive working conditions in order

to secure talent—means tenants and landlords alike are re-evaluating their space needs and also reconsidering fit-out requirements. While demand for class A space may be positively impacting rental rates, some tenants and employers are being cautious in regards to their lease take-up, and may consider lessening their existing footprints or subletting reserve space.

Italy

Leasing

Despite the disrupting effects of the pandemic and recent increases in rental rates in Milan and Rome, both 2022 and the first quarter of 2023 have registered a positive trend for Italy's office market—arguably even above pre-pandemic levels seen in 2019, which was a record-setting year for office assets.

In terms of volume and numbers, 2022 saw a leasing uptake of about 520,000 square meters from occupiers, reflecting a year-over-year increase of approximately 35% against 2021. The most active business sectors in the office market have been finance, consulting, and fashion, which together absorbed more than half of the annual take-up in terms of square meters.

If it is true that the trend has been positive, it is also true that the typology of the investments in the office sector, especially for lease transactions, is changing.

Class A office rent levels, particularly in city centres, are at maximum prices. Milan prime rents stand at €650 up to €700 per square meter per year as a result of low vacancy levels and limited availability for desirable class A space.

Similarly to what has been described in the other jurisdictions, remote and flexible working is becoming a reality for many companies, with most workers out of the office a minimum of one to two days per week. This reduction of in-office time has

created a shifting need for prospective tenants. Occupiers active in certain sectors are seeking to relocate into smaller spaces nearer to the city centre while at the same time seeking high-quality building standards, especially Leadership in Energy and Environmental Design certification or buildings compliant with ESG policies.

This shift has created tight market demand for class A office products, which in Italy is not always easy to provide for. In city-centre locations, many ancient buildings (which may be further subject to restrictions and constraints by the relevant municipal authorities, such as cultural or historical limits), may require a significant effort in terms of costs and timing to be converted into class A products by owners and operators.

In the long term—in response to rent increases and today's inflation levels, many occupiers are showing particular attention at lease negotiations to attempt to keep low the rent indexation and the common charges linked to their consumptions. Furthermore, the risks of the moment in connection with the costs and timing of the fit-out make ready-to-use offices more attractive and competitive for occupiers.

Investment Outlook

Deal flow on the equity investment side in Italy is less robust than leasing uptake. In terms of deal numbers for 2022, 68 major transactions occurred, which is an increase from the prior year but is less vibrant than the leasing market. Given market uncertainty with respect to office assets, institutional investors are appearing more cautious in their deal making. Notwithstanding the foregoing, the Italian office sector nonetheless has been second, only behind logistics, in attracting investors totalling approximately €5 billion, with the greatest focus seen in Milan.

One of the main drivers of demand for quality office stock is the implementation of a new work philosophy focused on wellbeing and work-life balance. Occupiers are also now seeking offices with a new concept design, where common areas and co-living spaces are becoming essential to satisfy and accommodate the needs of the workers. Limited supply is keeping rental rates high, though overall investment demand is lower.

CONCLUSION

The office market across the globe is facing a slow road to recovery as owners, developers, tenants, and lenders all re-evaluate their strategies and approaches to the office asset class. Our Real Estate practice is uniquely positioned to assist clients as they approach the new normal in the office for 2023 and beyond.

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EVENTS



UPCOMING – 12 SEPTEMBER 2023– 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 – 14 JULY 2023

On 14 July, the London Real Estate team will be attending the Property Race Day at Ascot. 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 2023

On 4–6 October, members of the 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. A team of European lawyers from K&L Gates will attend.

For more information, please contact:

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Annual Real Estate Breakfast Seminar

Global Real Estate Trends and Opportunities for 2023/2024

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 2023 and looking forward to 2024.

Panelists:

- [Sabina Reeves](#), Chief Economist, CBRE Investment Management
- [Mike Phillips](#), UK Editor, Bisnow
- [Michael Anderson](#), Finance Partner, K&L Gates, London
- [Richard Hardwick](#), Finance Partner, K&L Gates, London

Please register your interest so that we can provide further detail on this September seminar and future seminars/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.

RSVP ONLINE

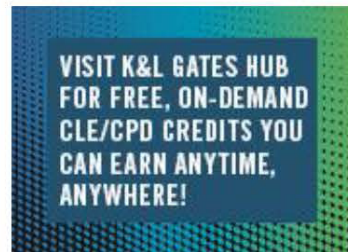


Tuesday, 12 September 2023

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



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PRO BONO UPDATE

OUR COMMITMENT TO THE COMMUNITY

Helping the community and doing what we can to help support people in need is something very important to us.

This commitment to pro bono work is ingrained in our culture, dating back to the legacy firms that gave root to what we are today.

Our lawyers actively engage in a variety of pro bono efforts and work on hundreds of pro bono matters each year.

Over the last year, our lawyers in London helped UK organizations with a variety of property-related issues. Some examples include:

We have been recognized with the Thomson Reuters Foundation's Trust Law Impact Award for its global pro bono work on a pre-trial detention survey with the Commonwealth Human Rights Initiative. The Impact Award recognizes outstanding legal research projects that have had demonstrable change and significant outcomes for the work done by the pro bono client, for example, within their community, for the beneficiaries they serve, within legal frameworks, or on the issues on which they work.



London associate Serena Totino assisted Sensory Trust, a UK charity that works to enhance health and well-being through sensory experiences and meaningful connections with nature, in negotiating and revising a license agreement with an Italian

company that distributes games for children with disabilities internationally. Providing Sensory Trust with legal advice meant that one of their games could be distributed internationally without needing to compromise on their intellectual property rights or future business plans. Serena also assisted Hope in Depression with drafting agreements that will enable their delivery partners to use their teaching material for courses addressed to people suffering from depression and will allow Hope in Depression to receive donations that will help them to grow their current activities.

Our lawyers in London helped organizations with a variety of property-related issues. For example, of counsel Steven Cox assisted Snowflake School, a school for children with autism, in acquiring new school premises. He negotiated a lease that included a purchase option and pre-emption agreement, as well as an agreement with the local planning authority to facilitate the change of use from office to school use. Special counsel Chiara Del Frate assisted the Darlaston Community Garden, which organizes workshops and events for schools and disadvantaged individuals with an illegitimate eviction. Chiara also helped a UK charity that manages a local community pool and associated facilities with issues related to their right of way and parking areas, and she helped Jigsaw Thornbury, a charity supporting families who have children with additional needs or disabilities, by assisting them with the letting of their new venue in Bristol.

As a result of this work and work across our global platform, our firm devoted more than 41,000 hours to pro bono cases in 2022.

CASE REPORTS

THE MINIMUM ENERGY EFFICIENCY STANDARDS REGIME – APRIL 2023 CHANGES

The Minimum Energy Efficiency Standards (MEES) regime was brought into effect by 2015 regulations. Until 31 March 2023, MEES rules required commercial landlords to produce an Energy Performance Certificate (EPC) with a rating of E or above for the property, unless they had registered an exemption. An EPC rating of F or G prevented landlords from granting a new lease of commercial properties.

With the newly implemented changes from 1 April 2023, it is unlawful for a landlord to continue to let a commercial property with an F or G rating, unless (a) they still receive a rating of F or G after carrying out all cost-effective energy efficiency improvements prescribed in the EPC, or (b) an exemption applies.

Exemptions

The exemptions and limits can provide landlords with some relief, particularly in relation to buildings where all possible improvements have been made, such as heritage properties. Exemptions also apply if a landlord is unable to get consent (e.g.,

from a local planning authority or from a tenant) or if the cost of improvements could reduce market value by 5% or more. Exemptions must be registered on a publicly available register and renewed after five years.

Landlords failing to comply with regulations are liable for fines, which increase in amount as a breach of regulations continues.

Looking to the future

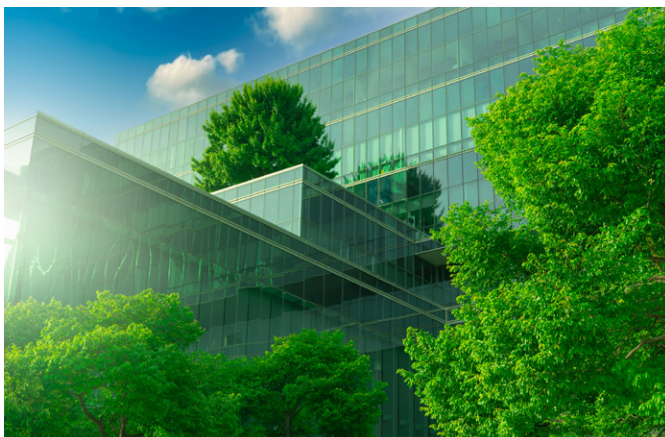
The UK government consulted in 2021, with the aim of achieving net zero emissions by 2050. New minimum rating requirements for the letting of commercial properties by landlords are anticipated. Unfortunately, there has not been any real clarity or announcements regarding the proposed shift to ratings of C by 2027 and B by 2030.

Two new consultations on proposed changes to holiday lets

With a housing shortage in the United Kingdom, the government now appears to be focussing on touristic short-term lets (such as Airbnb), providing local communities with greater control over the balance between lack of housing and community benefits of tourism. For property owners with holiday lets in England, the deadline to respond separately to each consultation was 7 June 2023. Changes are anticipated in 2024.

1. New registration regime

The first proposed change is a new registration scheme, helping to paint a picture of new short-term lets—including number and location of properties—to assess impact on local communities. Responses



are being sought regarding scheme framework; fee structure; property registration; property exemptions; registration renewal; information to be held on the register; and compliance.

2. New short-term lets planning consent where properties are not used as a sole or main home

Proposals include a new use class for short-term lets, the potential for permitted development to change a dwellinghouse to a short-term let (and vice versa), and potential flexibility for short-term lets by owners for a specific number of nights. Feedback has also been sought on the planning necessary if this number of letting nights is restricted and, if so, the number of nights available.

Government rationale for these proposed changes includes the ability of local communities to control the number of short-term lets in their area, support the retention of existing dwellinghouses to buy or to rent, and facilitate—where possible—the reestablishment of short-term lets as dwellinghouses. While particular areas may wish to use these planning tools to affect change, they will only be able to do so where it is justified locally. In areas with no local issue, the planning changes should not adversely impact existing flexibilities for use of a dwellinghouse.

BUCKNELL V ALCHEMY ESTATES (HOLYWELL) LTD [2023] EWHC 683 (CH)

Summary

The High Court held that a right-of-way could be used to construct and access new houses, if the use was not excessive and did not constitute a nuisance.

Facts

A dispute between neighbours was considered, relating to the use of a right-of-way over a driveway. The right was created by express grant when the dominant land and servient land were sold in 1972. It was a right-of-way at all times and for all purposes, with or without animals and vehicles, for the benefit of the dominant land (a yard).

The dominant owner constructed two houses on its land and argued that the driveway could be used by its construction vehicles and the house residents. The servient owner, who acquired the servient land in 2014, disputed the right, arguing that such use was excessive and a nuisance.

Decision

The High Court held that the servient owner was bound by the easement.

It considered the scope of the right, and it was held that:

- In relation to construction of a grant, a right-of-way under an express grant is not restricted to such uses as were reasonably required at the date of the grant. However, the right is limited to what the servient land can reasonably accommodate, as this is the extent to which the parties can have reasonably contemplated at the time of the grant.
- The court ruled that it was contemplated that the driveway could be used for residential purposes as well as agricultural. It took account that in 1972, the same grantor had granted a right-of-way on the same terms for the benefit of a third-party's residential property nearby.

CASE REPORTS

- A right-of-way must not be used excessively, and the question of excessive use is fact-specific and evaluative. Every case is dependent on its own facts.

The use of the driveway by construction vehicles, and subsequently by residents, did not amount to excessive use or nuisance. It was expected that buildings might need to be demolished and reconstructed occasionally, which would require access using the driveway.

The servient owner was not automatically entitled to maintenance of the rural peace and quiet originally enjoyed when acquiring the servient land.

Comment

The decision highlights that, when considering the scope of an easement and excessive use, every case is fact-sensitive.

FEARN AND OTHERS (APPELLANTS) V BOARD OF TRUSTEES OF THE TATE GALLERY (RESPONDENT) [2023] UKSC 4

Summary

The much-anticipated Supreme Court judgment was handed down on 1 February 2023. The Supreme Court found, overturning the Court of Appeal, that visual intrusion can give rise to liability in nuisance.

Facts

The case concerns the public viewing gallery on the top floor of the Blavatnik Building, which is part of the Tate Modern art museum (the Tate). From the gallery, visitors enjoy 360-degree panoramic views

of London. However, the public can also see directly into the living areas of a block of flats located about 34 metres from the Tate.

The claimants brought a claim in private nuisance, seeking an injunction requiring the Tate's board of trustees to prevent members of the public from viewing their flats from the relevant part of the viewing gallery—or alternatively, an award of damages.

Decision

The High Court dismissed the claims in 2019, although it required an undertaking from the Tate's board of trustees that it would display signage and restrict the hours in which the platform could be used. While the High Court found that there could be a cause of action in private nuisance for overlooking, it was not actionable in this case due to the distinctive nature of the apartments.

The Court of Appeal dismissed the appeal, taking a different view from the High Court and disagreeing that overlooking could amount to private nuisance at all. The Supreme Court overturned the Court of Appeal's decision, ruling that the Tate was liable in nuisance. The Supreme Court considered the Tate's land use for the purposes of the viewing platform as exceptional, rather than a necessary or ordinary incident of operating an art gallery.

Comment

Several key points can be noted from the decision:

1. Visual intrusion can give rise to liability in nuisance. Each case is dependent upon its own facts. However, there is now a precedent, and other claims will follow.

2. In matters of public policy, considerations of public interest should be taken into account—not in determining liability, but in considering the remedy to grant.
3. The sensitivity of the claimant’s property is not a defence against liability, nor is it a defence to state that the claimant could take reasonable steps to avoid the consequences of the nuisance. Nevertheless, it remains possible for the design or construction of a building to be so unusual and far from expectation that it might give rise to a defence.

HAMBLING AND ANOTHER V WAKERLY AND ANOTHER [2023] EWHC 343 (CH)

Summary

This case considers the extent and true construction of an easement, and whether it was capable of benefitting adjoining residential property.

Facts

The claimants owned two properties on either side of an access road. One plot was a field, and the other was a cottage occupied by the claimants. An easement was granted over the access road, benefitting only the field. The question was whether the access road could also be used to access the cottage. The wording of the easement specified that the road was “only being used for access to the field, not to Garden Cottage”.

Decision

The judge initially ruled that the natural and ordinary meaning of the wording determined that the access road could only be used for access to and egress from the field and not the cottage. However, the claimants argued that the access road was to be used to pass between the field and cottage, a legitimate ancillary use of the easement benefitting the field.

The High Court rejected the claimants’ appeal. It was apparent that the easement was not intended to benefit the cottage, and the dominant land was the field only. To pass over the access road from the cottage to the field was not permitted.

There was also a covenant to maintain a fence along the boundary between the cottage and the access road. This was the parties’ original intention: that the access road should not be used to access the cottage from the field. The easement expressly prohibited use of the access road as a means of access to or from the cottage, whether from the field or otherwise. Any such use was not considered ancillary to the purpose of the access road to and from the field.

Comment

This case shows the importance of the construction of an easement. The express terms of the easement’s grant prohibited the use of the track as a means of access between the cottage and the field, with the phrasing “prohibition” negating the possibility of an alternative interpretation.

