THE
REAL ESTATE
LAW REVIEW

FOURTH EDITION
EDITOR
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LAW BUSINESS RESEARCH
The Real Estate Law Review

Fourth Edition

Editor
David Waterfield

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THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

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THE REAL ESTATE LAW REVIEW

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THE ASSET MANAGEMENT REVIEW
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EDITOR’S PREFACE

The fourth edition of *The Real Estate Law Review* is testament to the book’s success and the significance of real estate as a global asset class. A great deal has happened since the first edition appeared in 2012, and this fourth edition coincides with renewed confidence in the real estate market. The real estate market is often described as cyclical, and there is no doubt that we are now seeing positive investor sentiment in a market enjoying upward momentum.

The fourth edition of *The Real Estate Law Review* features 35 jurisdictions, and we are delighted to welcome a number of new notable practitioners who have helped bolster the strength and depth of this invaluable publication. Each chapter of *The Real Estate Law Review* has been updated to focus on key developments in that jurisdiction and their impact on the relevant domestic and wider global real estate market. *The Real Estate Law Review* offers real estate practitioners and their clients an immediate and accessible summary of the position in the many countries covered, as well as the global real estate market as a whole. The globalisation of the real estate market continues apace, and it is fundamentally important to develop an understanding of the legal and commercial opportunities and challenges pertinent to each country, and how each local market forms an integral part of the global picture.

This fourth edition seeks to provide an overview of the state of the global real estate investment market. Although there is without question significantly more good news around, the financial and economic turmoil of recent years serves as a reminder of how fragile markets can be, and a number of obstacles remain on what may prove to be a bumpy road to global recovery. Sustainable growth across the eurozone remains illusory, Japan continues to flirt with recession, the fear of a hard landing in China and other developing economies remains, there is continuing instability in Ukraine and the Middle East, and the Ebola outbreak in West Africa is a global concern.
Once again, I wish to express my deep and sincere thanks to all my distinguished colleagues who have contributed to this edition and the success of *The Real Estate Law Review*. I would also like to thank Gideon Roberton and his publishing team for their tireless work in coordinating the contributions and compiling this fourth edition.

**David Waterfield**  
Slaughter and May  
London  
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I INTRODUCTION TO THE LEGAL FRAMEWORK

i Ownership of real estate

The two main types of ownership of real estate in England and Wales are freehold and leasehold. Freehold is in effect absolute ownership for an indeterminate period, whereas leasehold is a right to possession and use of land for a limited period; the lessor retains its interest and grants the leasehold interest to the lessee for the term of the lease. Ownership of land also includes ownership of any buildings or other structures attached to the land and, as a general rule, includes the subsoil beneath and the airspace above the land.

Generally speaking, freehold interests are more attractive to investors because they are not subject to termination and there are fewer restrictions on the owner, whereas a lessee is constrained by the terms of a lease. That said, leasehold interests are often held for investment purposes. In central London in particular, properties may be owned by the Crown Estate, trusts, charities or other entities that may choose not to dispose of their freehold interests as a matter of policy, and will instead grant long leases. It is also common for leaseholds to be used when structuring joint ventures, and other arrangements and structures where owners wish to retain an element of control by imposing positive covenants.

A leasehold property held on an investment basis should be distinguished from an occupational lease, which is typically granted for between five and 20 years subject to a market rent, and therefore has a negligible capital value. An investment leasehold interest will most likely be granted for a term of between 99 and 150 years, at a premium. There are generally fewer onerous obligations on the lessee of a leasehold property held on an investment basis. The income generated from most investment properties is in the form of rent paid under occupational leases.

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1 David Waterfield is a partner at Slaughter and May.
A relatively new form of land ownership called commonhold was introduced in England and Wales by the Commonhold and Leasehold Reform Act 2002. Commonhold comprises a freehold unit within a larger development and membership of the company that manages the common parts. As such, commonhold is suitable for residential flats as well as commercial developments such as shopping centres; however, its use has not been adopted by the property industry and it remains a rarity.

ii System of registration
Most freehold and long leasehold titles are registered at the Land Registry; however, a number of unregistered titles remain, and these will generally only become registered once there has been a dealing with the land that triggers a requirement for ‘first registration’. Trigger events include sales, mortgages and leases granted for more than seven years. Until a trigger event occurs, titles will usually remain unregistered. Registration fees are payable, calculated by reference to the type of transaction and the price paid.

Registration at the Land Registry provides a state guarantee of title. Compensation is payable if loss is suffered as a result of a mistake on the register. Therefore, there is no separate US-style title insurance regime. The registered title has a unique title number and identifies the extent of the land on a plan. The register also provides details of the property, including any rights that benefit it, and identifies the owner and any rights or matters adversely affecting the property, including financial charges. If the property is leasehold, brief details of the lease are included. Various short leases and rights of occupation are not, however, required to be registered in their own right. These and some other non-registrable interests will bind a purchaser, and should be uncovered by the purchaser’s due diligence process. Accordingly, the information on the register cannot be treated as being totally comprehensive. Documents and other information held by the Land Registry are widely available to the public, although it may be possible to protect certain commercially confidential provisions for a limited period.

iii Choice of law
Dealings with real estate in England and Wales will be covered by the law of England and Wales. Although a contract may include an express choice of governing law, which in general the courts will uphold, English law will still apply in relation to the transactional formalities that involve English and Welsh real estate.

Real estate law in England and Wales is different from real estate law in Scotland, Northern Ireland, the Channel Islands and the Isle of Man, and thus specialist advice will be required where these jurisdictions are involved.

II OVERVIEW OF REAL ESTATE ACTIVITY
There has been a notable increase in confidence in the UK real estate market and, for the first time since the credit crunch, the good news is not confined to prime central London properties in the City, West End and Docklands. The main story for 2014 has been the extent of the recovery outside these prime London markets. The regions have enjoyed a marked increase in investment volumes as investors have found it increasingly difficult to find value in central London. Although trophy London properties remain attractive,
particularly to overseas investors, there are signs that demand for primary assets in central London is beginning to cool, and some commentators have already called the top of the market. There is no doubt that London has retained its enviable position as a leading global city and remains a hugely important part of the UK and global real estate markets, and it is encouraging to see that investment has returned to the regions and London fringe markets.

In the central London office market, strong occupier demand has caused upward pressure on rental levels, and increases to the market rent at rent review are becoming a reality. In addition, lease terms are starting to increase, and the average length is now 6.8 years. Much of this demand has been driven by the technology, media and telecoms sector where there has been significant occupier activity. There has also been a marked increase in the space offered by serviced office providers to meet the needs of start-up companies and SMEs generally. The need for flexible high-tech space continues to drive the market, and developers must adapt to meet the rapidly evolving requirements of occupiers and modern working environments. Demand for substantial, well-connected industrial space remains strong, while retail warehouses and supermarkets have not fared so well. Better trading conditions have meant that the retail sector has been less vulnerable to insolvencies, despite high-profile casualties including Phones4U and La Senza. High-profile destination retail schemes remain popular, but vacancy rates at secondary high street locations remain high.

The private rented sector, including serviced apartments and student accommodation, has attracted substantial amounts of institutional capital as residential property has become an established asset class. Foreign investment in high-profile residential schemes has continued, and China and India are notable new entrants in this sector. There has been a significant jump in the number of active lenders, and increased competition has led to a contraction in margins. Despite pressure on the banks to ramp up their loan books, there has not been a return to the riskier lending practices prevalent before the credit crunch, and loan-to-value ratios remain relatively low. Significantly better market conditions have reduced the banks’ exposure to underperforming real estate-backed loan portfolios as ‘bad banks’ have started to come good.

III FOREIGN INVESTMENT

Overseas investors are able to own, sell and lease real estate in England and Wales without any legal restrictions. A legal opinion may be required to confirm that an overseas investor has legal power to enter into a transaction involving property in England and Wales, to deal with the property and to execute the relevant documents.

IV STRUCTURING THE INVESTMENT

A number of alternative structures are available for direct or indirect investment in real estate in England and Wales. The decision how best to structure an investment is likely to be dictated by tax considerations, and it is important to ensure that appropriate tax advice is sought, taking into account both UK tax legislation and that of the investor’s
own jurisdiction. There are, however, a number of advantages and disadvantages to each structure, which may also prove critical depending on the investor’s particular objectives.

i Corporate entity
A company can hold assets in its own name and create floating charges. There is potential for flexibility in terms of share structure, and there can be the advantage of limited liability. More generally, corporate entities are widely recognised, and can promote a strong and legitimate identity. Nonetheless, there is a lack of confidentiality in comparison with other investment structures and the added administrative burden of complying with the relevant regulatory framework. There is also a lack of tax transparency, and it may be expedient to base the company offshore.

ii General partnership
Whereas property co-ownership is not in itself sufficient, the active, joint management of property may constitute a partnership; it is a matter of substance rather than form. The main advantage is tax transparency, while the main disadvantage is the unlimited liability of the partners.

iii Limited partnership
In a limited partnership, investors will be limited partners who are only liable to the extent of their investment. This limited liability is particularly advantageous when coupled with the tax transparency that, to an extent, is offered by a limited partnership. However, a limited partnership must comply with the Limited Partnerships Act 1907, and a limited partner should not become involved in the management of the partnership. This may prove to be unduly restrictive for investors looking to actively manage their real estate investments.

iv Limited liability partnership (LLP)
LLPs are governed by the Limited Liability Partnerships Act 2000 and combine limited liability for members with the tax transparency of a partnership. LLPs are not subject to the same restrictions as limited partnerships, and partners are able to actively manage the business of the LLP. Furthermore, an LLP is a body corporate (having a legal entity separate from that of its members), so there are no issues as to the legitimacy of floating charges. If the LLP is a collective investment scheme, it must be operated by an authorised person in accordance with the Financial Services and Markets Act 2000 (FSMA).

v Property unit trust
A property unit trust is an open-ended fund that allows pooled investment and is tax-efficient. A unit trust is governed by a trust deed, and as such may be an unfamiliar structure to certain overseas investors. One drawback may be the need for authorisation under the FSMA. Offshore unit trusts are popular, and can provide further tax advantages as a result of their offshore status; Jersey property unit trusts in particular have been used extensively in recent years. However, there may still be local regulatory supervision, and
the fact that the trust must be managed outside the UK may be undesirable for certain investors.

vi  Property authorised investment fund (PAIF)
PAIFs are open-ended investment schemes that invest in property and are authorised under the FSMA. The PAIF regime allows gross dividends to be paid, and was introduced to make property attractive to tax-exempt investors. A number of conditions apply for entry into the PAIF regime, including the need to carry on a property investment business and the genuine diversity of ownership condition.

vii  Offshore vehicle
Offshore vehicles can take advantage of lighter regulatory and tax regimes. As well as Jersey, popular offshore locations include Luxembourg, Guernsey, the Isle of Man, the British Virgin Islands and the Cayman Islands.

viii  Listed property company
Investing in a listed property company offers a popular means of investing in UK real estate. Listed property companies can benefit from a high profile and augmented credibility as well as greater liquidity. The drawbacks include stringent regulatory and filing obligations, and a general lack of confidentiality. In addition, listing may be costly and places extra pressure on the company management to perform. The investor also has limited control over the underlying real estate assets.

ix  Real estate investment trust (REIT)
The REIT is a relatively new form of property-specific investment vehicle in the UK based on an investment structure first developed in the United States. REITs are tax-efficient, as they are exempt from tax on income and capital gains; distributions of profits are treated as property income in the hands of the shareholders. To gain REIT status, a company must comply with a number of conditions, including a requirement to be listed on the official list of the London Stock Exchange or traded on a recognised stock exchange, and proof of property rental business characteristics. Recent improvements to the REIT regime aimed at reducing barriers to entry and investment, and lowering the costs of compliance, have resulted in a significant number of new REITs, and the inclusion of REITs as institutional investors should also boost the sector.

x  Property joint venture
Joint ventures allow parties to share risk, and therefore provide a particularly attractive investment structure while the availability of debt remains constricted and investors are keen to mitigate risk exposure. A property joint venture can be structured in whatever form the parties choose, and in many cases may involve more than two parties. Of course, as well as sharing risk, parties share gains and management, so joint venture provisions need to be considered carefully.
V  REAL ESTATE OWNERSHIP

i  Planning
The planning administration in England and Wales primarily consists of local planning authorities (LPAs) and the Secretary of State for Communities and Local Government. The Mayor of London is also able to exercise specific planning powers at a regional level. Planning administration is governed by various statutes, including the Town and Country Planning Act 1990. In general, planning permission is required for development, including material changes of use, although certain restricted types of development do not require planning permission under the Town and Country Planning (General Permitted Development) Order 1995. There are particular planning requirements for conservation areas and listed buildings, as determined by the Planning (Listed Buildings and Conservation Areas) Act 1990. Third parties have a right to make representations about any planning application, which in turn must be considered by the relevant LPA. Applicants are able to appeal any refusal of planning permission or any conditions attached to a grant of permission. In addition, LPAs have enforcement powers to deal with any development carried out without planning permission. A fundamental reform of the planning system is provided for by the Localism Act 2011. Its provisions enhance the powers of LPAs, give local communities more say over housing and planning decisions and introduce a package of measures to make the current system clearer, more democratic and more effective.

ii  Environment
The environmental issue of particular significance to investors is the contaminated land regime, which is set out in Part IIA of the Environmental Protection Act 1990, as amended by the Environment Act 1995. Contaminated land is land that is causing, or may cause, significant harm to the environment or human health, and the regime also applies to water pollution. There is an obligation on local authorities to inspect their land to identify areas of contamination. Where land is deemed to be contaminated and is not being remediated voluntarily, the local authority or the Environment Agency is obliged to serve a remediation notice on the relevant persons requiring the clean-up, investigation and monitoring of the contamination. It is a criminal offence to fail to comply with a remediation notice. In general, those who cause or knowingly permit land to become contaminated are responsible in the first instance; however, if no such person can be found, the current owners and occupiers of the site may be liable for remediation costs. While the regulators in the UK do not take enforcement action as readily as in other jurisdictions, remediation costs can be substantial, and it is often necessary to obtain specialist advice when dealing with land that is or may be contaminated.

iii  Tax
**VAT**
The starting point is that a supply of land will be exempt from VAT. However, the seller or lessor can exercise the option to tax, which will make any sale or letting of the property a supply subject to VAT. The standard rate of VAT is currently 20 per cent. The lessor or seller can then recover the VAT charged on supplies of goods and services made to
him or her in connection with the property concerned. In addition, supplies of land are generally subject to VAT if the sale involves a new commercial building completed within the past three years, or an incomplete industrial or commercial building.

**Stamp duty land tax (SDLT)**
SDLT is a transactional tax payable by the buyer on the acquisition of a chargeable interest, and applies to any chargeable consideration payable by the buyer on a relevant transaction. The rate depends on the value of the transaction, and the highest rate for non-residential transactions is currently 4 per cent where consideration exceeds £500,000. The Autumn Statement introduced a new ‘progressive’ system for residential properties, with rates of up to 12 per cent for higher value properties. SDLT is also payable by the lessee on the rental element of a lease on grant, and is charged at 1 per cent of the net present value of the rent payable for the term of the lease. Limited types of transactions are normally exempt from SDLT, including mortgages and personal licences to use or occupy land. There are also a number of reliefs that may apply, including group relief, sale and leaseback relief, acquisition relief, reconstruction relief and charity relief. It is important to consider how best to structure a transaction for SDLT purposes, although the introduction of various anti-avoidance provisions has made it increasingly difficult to implement tax-saving schemes.

**Rates**
The occupier of a business property is responsible for the payment of business rates, which fund local government expenditure and are calculated by reference to the rateable value of the property. Rateable values are assessed every five years, although the next revaluation has been postponed from 2015 to 2017. Following a significant reduction in the relief available, business rates are generally payable on empty properties, and this has become a significant issue for owners in sectors with high vacancy rates. A structural review of business rates was announced in the Autumn Statement.

iv Finance and security
Lenders will generally require security over real estate, the best form of which is a charge by way of legal mortgage. It is necessary to register a mortgage over land at the Land Registry and, if the company giving the security is registered at Companies House, the security must also be registered at Companies House within 21 days of creation. A new regime for the registration of charges created by companies came into force in 2013. The mortgage will typically impose restrictions on the ability of the borrower to deal with the property and obligations on the borrower to preserve the value of the security. Security is also commonly taken over the rental income derived from occupational leases.

VI LEASES OF BUSINESS PREMISES
In general, the lessor and lessee are free to agree the terms of a commercial lease. The law does not prescribe a particular form or contents of a lease and, subject to the lessee’s security of tenure referred to below, there are relatively few statutory provisions affecting the lessor and lessee relationship under a commercial lease. The Code for Leasing of
Business Premises seeks to encourage fairer and more flexible terms for lessees but, despite industry endorsement, remains voluntary. Traditionally, the industry has not enjoyed a reputation for being customer-driven, and leases have tended to be lengthy and complex. That is, however, changing as owners seek to meet the needs of their occupiers. The position for commercial leases should be contrasted with that for residential leases, where statute plays a significant role.

i Term
Leases can be granted for a wide range of terms. Leasehold interests held for investment purposes are normally held on long leases for a term of between 99 and 150 years. Historically, occupational leases were granted for a term of 20 or 25 years; however, shorter terms of 15 years, 10 years or less have become more common recently. A lessee of an occupational lease may also require a right to determine the lease before the end of the term. For example, the lessee of a 10-year lease may have a contractual right to determine or break the lease at the end of the fifth year of the term.

ii Rent increases
The property industry has traditionally required five-yearly upwards only rent reviews to the open market rental value of the property. This guarantees a minimum return of no less than the original rent for the remainder of the term of the lease, even if market rents have fallen. Although there has been some pressure on the property industry to offer leases on more flexible terms, it is still very rare to see rent review provisions that allow for the rent to go up or down in line with the market. An alternative form of rent review is indexation, for example in line with the retail price index or the consumer price index, but this, too, is often on an upwards only basis. Fixed uplifts in the rent are another possibility, and changes to the rent can also be restricted by agreed caps and collars. An element of the rent, particularly in large retail developments, may also be calculated by reference to turnover. VAT may be charged on the rent.

iii Lessee’s right to sell and change of control
There are likely to be restrictions on the lessee’s ability to sell, charge, underlet or share occupation of the property without the lessor’s consent. In a typical occupational lease, consent must not be unreasonably withheld. In considering applications for consent, the lessor will be keen to ensure that a lessee of good covenant strength is responsible for paying the rent. Provisions restricting a change of control of the lessee itself are, however, rare.

iv Lessee liability and security for payment of rent and performance of covenants
The Landlord and Tenant (Covenants) Act 1995 (LT(C)A) introduced a regime whereby lessees of new leases (granted on or after 1 January 1996) are released from liability on an assignment of the lease. The lessee’s guarantor is also released at this point. This is in contrast to the previous regime, whereby the lessee and its guarantor remained liable for the duration of the term of the lease under the doctrine of privity of contract, even after an assignment of the lease. The doctrine continues to apply to old leases (granted before 1 January 1996). The LT(C)A also introduced authorised guarantee agreements (AGAs),
which provide the lessor with a guarantee from the outgoing lessee for the assignee’s obligations under a new lease. The AGA is for the duration of the assignee’s term only, so that when the lease is assigned again, the original lessee is released from all liability. The decision in *K/S Victoria Street v. House of Fraser (Stores Management) Ltd and others* confirmed that, although a lessee’s guarantor cannot be required to guarantee the liability of an assignee, it can guarantee the lessee’s obligations under an AGA given by the lessee in respect of the assignee. A lessor will also consider other security, including a rent deposit or bank guarantee.

v  **Repair and insurance**

A lessee of business premises will usually be expected to be responsible for all liabilities in respect of the property, including maintenance and repair costs. Where a property is multi-let, those costs are recovered through a service charge. The lessor generally insures the property but recovers the cost of the premiums from the lessee. As a result, leases of business premises are often known as full repairing and insuring (FRI) leases. An FRI lease is important for the UK real estate investment market, as it allows the lessor to receive a clear income stream.

vi  **Collateral warranties**

For investors in a property that has been recently constructed, collateral warranties provide investors, funders and other third parties with a contractual link that can be used to enforce the performance of the duties of the professional and construction teams. Third parties can also be given equivalent rights under the Contracts (Rights of Third Parties) Act 1999.

vii  **Termination**

If the lessee fails to pay the rent or is in breach of any of its other obligations, generally the lessor is entitled to bring the lease to an end by forfeiture; however, the lessee is given the opportunity to remedy the breach and can apply to the court for relief. The lessor’s right to forfeit also normally applies if the lessee of an occupational lease becomes insolvent.

viii  **Security of tenure**

The Landlord and Tenant Act 1954 (LTA) provides security of tenure to lessees of commercial properties in England and Wales. If the property is occupied for business purposes, the lessee has the right to remain in occupation at the end of the term of the lease and is entitled to apply for the grant of a new lease on substantially the same terms; however, the lessor may be able to resist the grant of a new lease based on one of the grounds prescribed by the LTA. The most common ground relied on in practice is that the lessor plans to redevelop the property. This ground is not always easy to establish and, if the lessor is successful, the lessee may be entitled to compensation. Security of tenure
can be a valuable statutory right for lessees, and can have a significant impact on a lessor’s plans for dealing with its property, including future development plans. It is possible for the lessor and lessee to agree to contract out of the security of tenure provisions of the LTA. To contract out, a notice must be served on the lessee explaining that security of tenure is to be excluded, and the lessee must make a declaration acknowledging this before the lease can be entered into. Contracting out tends to be more common in relation to short-term leases.

 ix Mixed-use developments

Mixed-use developments are generally permitted in England and Wales, and have become a facet of urban renewal. There are specific issues relating to mixed-use developments, including increased levels of statutory protection for residential lessees. Residential lessees’ rights include collective enfranchisement and individual lease extension rights, as well as the right of first refusal and protection in relation to service charges and the management of the property.

VII DEVELOPMENTS IN PRACTICE

i Tenants and insolvency

The Court of Appeal has decided in favour of a group of lessors of retail stores previously held by the Game group of companies. Game went into administration on 26 March 2012, the day after the March quarter day, and no rent in respect of that quarter was paid. The earlier High Court decisions in Leisure Norwich (II) Ltd and others v. Luminar Lava Ignite Ltd (in administration) and others and Goldacre (Offices) Limited v. Nortel Networks UK Limited (in administration) had confirmed that rent payable in advance that fell due before the commencement of the administration could not be recovered as an expense of the administration.

In Pillar Denton Limited and others v. Jervis and others, the Court of Appeal applied the salvage principle and overruled the earlier decisions. Rent was payable as an expense of the administration for the period during which the premises were used for the purposes of the administration. In respect of those stores where Game ceased to use or occupy the premises before the next quarter day, the rent would be apportioned. Accordingly, the lessors were able to recover around £3 million in rent in respect of the March 2012 quarter. The Court of Appeal’s decision is good news for lessors, and will prevent administrators from timing their appointment to avoid rent payment dates. However, administrators will be keen to vacate premises that do not form part of their future plans, and lessors may be left with vacant properties a little earlier than was previously the case. The Supreme Court has refused permission for Game Retail to appeal this decision.

3 [2012] EWHC 951 (Ch).
4 [2009] EWHC 3389 (Ch).
ii Nuisance and remedies

The Supreme Court has considered some interesting issues in relation to nuisance caused by the occupier of a property and, more generally, the remedies available to a claimant in respect of an unlawful infringement of a property right. In *Coventry and others v. Lawrence and another*, the owner of a residential property had complained about noise caused by motorsport events. The Supreme Court decided that the activities did constitute a nuisance, and proceeded to consider the courts’ discretion to award damages in lieu of an injunction. Lord Neuberger was of the view that the courts should adopt a more flexible approach in deciding whether damages were an appropriate remedy. In particular, the public interest was to be taken into account to a greater degree, and the existence of planning permission authorising the relevant activity could be a factor in favour of an award of damages. This suggests that, although a claimant is *prima facie* entitled to injunctive relief where there has been an unlawful interference with his or her property right, it may have become a little easier for a defendant to persuade the court that damages are an adequate remedy.

In a subsequent hearing, the Supreme Court ruled that the lessors of the premises were not liable for the noise nuisance caused by their lessees. To be liable, a lessor had either to participate directly in the commission of the nuisance or the nuisance had to be an almost inevitable consequence of letting the property.

iii Competition law and real estate

With effect from 6 April 2011, land agreements became subject to Chapter 1 of the Competition Act 1998 (CA) in relation to the prevention, restriction or distortion of competition. A recent case considered whether a user clause in a lease was anti-competitive and in breach of the CA. In *Martin Retail Group Ltd v. Crawley Borough Council*, the claimant was the lessee of a unit in a parade of shops. As part of a renewal process under the LTA, the lessee sought to widen the user clause in the lease to permit use as a general convenience store. The lessor accepted that the existing clause was restrictive of competition, but argued that it was exempt under the CA because it was beneficial to the other lessees and local residents by promoting a diversity of trades. The court decided that the user clause restricted competition in the sale of convenience goods in the relevant market and was void. The lessor had failed to establish that the provision was of any wider benefit.

This case is interesting as it is the first to consider the application of competition law to real estate transactions following the repeal of the land agreements exclusion order. However, it should be noted that the relevant market in this case was very limited, because local residents would only be prepared to walk a short distance to purchase convenience goods.

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7 [2014] UKSC 46.
8 [2013] EW Misc 32 (CC).
iv Break clauses

In *Marks and Spencer PLC v. BNP Paribas Securities Services Trust Company (Jersey) Limited and another*, the Court of Appeal allowed the lessor’s appeal from the first instance decision that the lessee was entitled to be reimbursed rent paid by it in respect of any period after the break date by reason of an implied term. The full quarter’s rent had to be paid, because the break was conditional on there being no arrears as at the break date, as well as the payment of a penalty or break fee. The Court of Appeal felt unable to imply a term requiring the reimbursement of any such rents. The parties were aware that the break date fell in the middle of a rent payment period and they could have expressly provided for a proportionate rental payment if the break clause was operated. The parties had proceeded on the basis that any loss should lie where it fell and that there was no entitlement to reimbursement. The lessee has been given permission to appeal to the Supreme Court.

In another break clause case, the Court of Appeal confirmed that strict compliance with any conditions to or terms of a break clause is required. In *Friends Life Limited v. Siemens Hearing Instruments Limited*, the lessee’s failure to refer expressly to a specific statutory provision in its break notice was fatal and it made no difference that the reference was no longer relevant. Lessees must ensure that they comply strictly with all the conditions attached to the exercise of a break right.

v Guarantors and intra-group assignments

The ability of a lessor to look to lessees and guarantors to pay the rent and discharge other liabilities under the lease is fundamentally important to the investment value of a property. In *K/S Victoria Street*, the Court of Appeal confirmed that an existing guarantor cannot guarantee the liability of an immediate assignee in any circumstances.

The Court of Appeal recently considered the effect of a clause requiring a repeat guarantee on an assignment to an associated company. In *Tindall Cobham 1 Limited and others v. Adda Hotels (an unlimited company) and others*, the relevant clause provided that the lessor’s consent would be given, provided that any existing guarantor became the guarantor of the assignee and notice of the assignment was given. The Court of Appeal adopted a practical commercial approach and felt able to sever the unlawful condition requiring the repeat guarantee from the remainder of the clause. This left a simple qualified covenant preventing assignment to an associated company without consent, such consent not to be unreasonably withheld. Although the lessor was not automatically entitled to a replacement guarantee, it could reasonably require a new guarantor or other security if the proposed assignee was of poor covenant strength. The judgment offers a useful indication of the approach the courts will take when interpreting alienation provisions that fall foul of *K/S Victoria Street*.
vi Model Commercial Lease (MCL)

The MCL was launched on 8 July 2014 and offers a new suite of commercial leases and related documents. The MCL is the result of a project by a working group of property lawyers and landlord representatives set up by the British Property Federation to review the commercial leasing process. The aim of the project was to create a set of lease documentation that offers a fair and reasonable starting point for both parties, and the working group hopes that, in due course, the MCL will be adopted by the property industry for the majority of commercial leasing transactions in England and Wales.

VIII OUTLOOK AND CONCLUSIONS

The ‘No’ vote at the Scottish Independence Referendum brought welcome certainty to the domestic markets, particularly in Scotland, as the migration plans of banks and other businesses were shelved. Increased devolution north of the border includes a new land and buildings transaction tax to replace SDLT and a new Scottish landfill tax. The UK general election in May 2015 will give rise to a further period of political and economic uncertainty. The outcome of the vote and the new government’s policies will undoubtedly have an impact on the real estate markets, and a period of lower transaction volumes is likely. Conversely, ongoing international economic and political instability will continue to have a positive impact on central London’s appeal as a safe haven for overseas investors looking for a secure home for their cash. Continuing interest rate speculation will also have a bearing on commercial and residential markets as the economy anticipates the first upward movement from a historic low.

The UK government must address concerns about the UK’s housing crisis and maintain the pipeline of vital infrastructure projects. The Airports Commission’s final report on the options for additional runway capacity at Gatwick and Heathrow is expected in the summer of 2015. The proposed HS2 rail network will link major cities of the Midlands and the North to London and the European-wide high-speed rail network, and Crossrail 2 is a proposal for the future.

The outlook for 2015 is positive. A rising population, rapid employment growth and increased confidence in the wider economy point to continued demand across most commercial and residential asset classes. The UK continues to be an important part of the global investment market. Trophy assets remain attractive to overseas investors, particularly from Asia and the Middle East, and the increase in investment from North America seems likely to continue. Although much of the global focus will remain on London, interest in the wider UK market from both domestic and overseas investors is a welcome development.
Appendix 1

ABOUT THE AUTHORS

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David Waterfield is head of the real estate practice at Slaughter and May. He has broad real estate experience incorporating property development, the acquisition and disposal of investment property portfolios, the negotiation of commercial leases for both landlords and tenants, sale and leaseback transactions and structured financing.

Mr Waterfield has also been involved in numerous flotations, public offerings and securitisations, together with the real estate aspects of a number of high-profile international corporate mergers and acquisitions.

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