SLAUGHTER AND MAY/

OCTOBER 2025

ISSUE 123

REAL ESTATE NEWSLETTER

NEWS

The only way is up

The end of upwards-only rent reviews?

Hidden in the English Devolution and Community Empowerment Bill is a surprise provision to ban upwards-only rent reviews in new commercial leases. It's stated objective is to "make commercial leasing fairer for tenants, ensure high street rents are set more efficiently, and stimulate economic growth". If passed, the new provision will be added to the Landlord and Tenant Act 1954. It is not retrospective and, subject to transitional provisions, will only affect leases entered into after the ban becomes law. It applies to all leases to which Part 2 of the Act applies, whether the lease is contracted-out or not. Accordingly, its application will depend on occupation for business purposes, a relatively fluid concept unlike the contractual provisions of a lease. It is not possible to contract-out of the ban and there are under anti-avoidance provisions including a right for the tenant to instigate and control the process to prevent the landlord from resting on a higher rent. The provisions apply to all rent review provisions drafted by reference to a variable, including the open market rent, inflation or the tenant's turnover. The rent determined at a review date by reference to any such variable should be able to go down as well as up.

Upwards-only rent reviews have long been a fundamental part of the commercial real estate market and have proved attractive to investors and funders. If the current residential leasehold judicial review proceedings are anything to go by, a blanket ban seems likely to be challenged by the key players in the industry. Freedom of contract is also a key part of the English legal system. Limited state intervention has proved to be attractive to investors, particularly from overseas. A lot has happened since a ban was first mooted by the Labour government in the 1990s and the commercial letting market has changed considerably. The financial crisis and Covid-19 have accelerated the move towards shorter more flexible leases, often without a rent review or with a tenant break right tied to the first review date. In sectors such as retail and leisure, the challenge is often finding tenants for vacant units as market conditions have largely put paid to escalating rents. A more targeted approach may be a better way for the government to promote economic growth and boost the health of the high street. In Ireland, where a ban on upwards-only rent reviews was introduced in 2009, various practices have evolved, including the use of reasonable caps and collars and provisions for allowing landlords to delay implementing the review. These schemes have not yet been tested by the Irish courts which suggests that the ban has had a limited effect on the Irish letting market. It also remains to be seen where the proposed ban ranks in the government's list of priorities. In the property sector, the reform of residential leases and tenancies and the revitalisation of commonhold are likely to be prioritised.

Same as it ever was

Law Commission's plans to reform security of tenure

The Law Commission has published an interim statement following its earlier consultation. It has decided that security of tenure should continue under a "contracting-out" regime. There will be a second consultation on updating the 1954 Act, including the current contracting-out procedure. The intention is to ensure that the 1954 Act meets the requirements of the current commercial leasehold market. The Law Commission has indicated that it will retain a list of excluded tenancies that do not enjoy security of tenure under the Act. At present, tenancies of up to six months do not enjoy security of tenure, although previous occupation for the purposes of the business is taken into account in determining

the existing six-month period. The Law Commission will consider extending this period to up to two years. The second consultation paper will set out the technical details of the options for potential reform.

Take me to church

The end of chancel repair liability?

Several years after the Land Registration Act 2002 sought to deal with the risk of liability, the chancel repairs saga continues to rumble on. The Act provides that a buyer of registered land will take free of any chancel repair liability unless that liability has been protected by registration on the title. However, the law in relation to chancel repair liability is complicated and the legal position remains uncertain. As a result, chancel repair liability searches continue to be undertaken and insurance policies taken out. The Law Commission has published a consultation paper on further reforms to ensure greater certainty about whether a buyer is or could be liable. The 185-page Law Commission paper is available on the Law Commission website for anyone interested. The consultation closes on 15 November. Ideally, any reform should make it clear that a buyer will not be bound unless the chancel liability is noted on the title.

CASES ROUND UP

There is a light that never goes out

Damages awarded for unlawful interference with right to light

Cooper v Ludgate House Ltd and **Powell and another v Ludgate House Ltd**: [2025] EWHC 1724 (Ch)

This right of light case considers, first, whether there had been unlawful interference with the claimants' rights of light and, secondly, if there had been an unlawful interference, what was the appropriate remedy. The claimants owned flats in Bankside Lofts on the South Bank. The defendant owned a development site known as Bankside Yards, to the west of Bankside Lofts. A number of new high-rise buildings were to be built by the defendant on the site. Construction of the first, an office block, began in 2019. It was accepted that, when finished the new development would interfere with the rights to light of neighbouring property owners, including tenants of Bankside Lofts. The defendant had been in negotiations with the affected owners regarding the payment of compensation for the loss of light to their premises. However, a number of owners including the claimants did not accept those offers. The defendant asked the local authority to put in place a protection order under S203 of the Housing and Planning Act 2016 to allow work to be carried out on the wider project. Southwark made the order in 2022, but it did not apply to the office block because construction was already substantially complete. The claimants applied for an injunction requiring the demolition of the office block, or in the alternative, damages.

The developer argued that although the claimants' right to light had been infringed by the office block, the court should take into account light enjoyed by Bankside Lofts over the remainder of Bankside Yards. The loss of these rights would be compensated for under S204 in respect of the remainder of the proposed development. The Judge decided that because the claimants could not defend the right to light over the remainder of the site, it should not be taken into account. The defendant also argued that the Waldram method for determining loss of light was outdated and should be replaced by a more up-to-date method. The Judge, while accepting that newer methods might have some use in marginal or unusual cases, confirmed that the Waldram method should be applied and that there had been an actionable interference with the claimants' rights. The Judge then considered whether to exercise the court's discretion to award an injunction requiring the demolition of the office block. The Judge took into account a wide range of factors including the public interest, harm to third parties and the fact that it would be open to the developer to apply for protection under S203 once the original building had been demolished in order to rebuild it. Damages were to be awarded in lieu of an injunction and the claimants should receive £350,000 and £500,000 respectively. The calculation was on the basis of negotiation damages - in other words what the parties would have agreed in a hypothetical negotiation to release the rights, and also by reference to the increase in development value attributable to the releases. The Judge decided that the developer would have paid 10-15% of the increase in development value. This was assessed to be in the range of £3m to £4.5m, which was to be apportioned between those owners whose rights had been lost. The figure received by each owner would be subject to adjustment to reflect property values.

I want you to back

Landlord required to refund insurance commission

London Trocadero (2015) LLP v Picturehouse Cinemas Limited: [2025] EWHC 1247 (Ch)

The Criterion Group is the landlord of the Trocadero Centre, part of which was let to

Picturehouse Cinemas. For a number of years, the landlord had been earning significant commission in respect of the block insurance policy for its buildings. The commission paid to the landlord resulted in a higher premium which was passed onto its tenants. Following a long-running dispute, Picturehouse challenged the commission paid to the landlord.

The court held that the lease did not entitle Criterion to charge the higher insurance rent and that Picturehouse was entitled to repayment by way of restitution. The landlord had made deals with the insurance company whereby the brokers were paid an inflated commission which was passed onto the landlord. As a result, the insurance company charged a higher premium which was passed onto the tenant. This meant that the tenant bore the cost of the landlord's commission. The landlord could only recover amounts payable by way of premium for insuring the building. It could not include rebates engineered by the landlord's agents. Even if the landlord's commission formed part of the premium it was rebated as part of arrangements made by the landlord through its agent. The landlord had sought to replace the commission with a 35% "placement, administration and work transfer fee". The court held that this was not a genuine insurance cost and was also not recoverable. The tenant had also argued that the insurance premiums had been increased by the landlord's breach of its fire safety obligations. The court held that it was entitled to recover any increase in insurance rent resulting from the landlord's breaches.

We gotta get out of this place

Telecoms agreements and contracting-out of security of tenure

EE Ltd and Hutchinson 3G UK Limited v AP Wireless II (UK) Ltd: [2025] 8WLUK 288

This First-tier Tribunal Property Chamber case considered whether telecommunications agreements were contracted-out of Part 2 of the Landlord and Tenant Act 1954. The Tribunal considered a range of points under the current contracting-out regime. The case related to various telecoms agreements and the issues included whether notices under the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 had been served in accordance with the statutory requirements. The Tribunal also considered the previous contracting-out regime, where the parties were required to apply for a court order, and the transitional provisions following the introduction of the new regime under the 2003 Order.

The Tribunal found that wording in a tenancy agreement which makes it clear that security of tenure under Part 2 is not to apply may be sufficient without an express agreement under S38A between the parties. The Tribunal also stated that an endorsement on the tenancy agreement that a warning notice had been served and that the appropriate declaration had been made by the tenant is likely to be sufficient evidence that the procedure has been complied with without the need to see the notice and declaration. In relation to the Telecoms Code, it was confirmed that Code notices which were valid when served remained valid and that serving Code notices without taking any further steps was not an abuse of process as the Code gave both parties the ability to progress matters. Although only a Tribunal decision, the case suggests that the courts may take a pragmatic approach when considering whether or not a tenancy has been contracted-out. This does not diminish the need to ensure that the process is carried out with precision, but it might help assess the risk as part of a due diligence exercise.

I'm free

Assignee's parent company guarantee and indemnity following assignment

Kiko UK Limited v Jamino Ltd (in liquidation) and Pianoforte Holdings SpA: [2025] EWHC 1510 (Comm)

This case considered the extent of the liability of a former tenant under an AGA and the liability of the assignee's parent company under a separate guarantee and indemnity entered into with the assignor. In 2016, Kiko had been granted a 10-year lease of commercial premises on Oxford Street. In 2019, Kiko assigned the lease to Jamino. Pianoforte entered into a parent company guarantee and indemnity agreement with Kiko, guaranteeing the payment of rent and performance of Jamino's obligations under the lease. Pianoforte agreed to indemnify Kiko in respect of any liabilities incurred by Kiko under the lease. On the assignment, Kiko entered into an AGA with the landlord guaranteeing Jamino's obligations as assignee. Jamino ran into financial difficulties and was in breach of the lease. The landlord looked to Kiko under the AGA and Kiko looked to Pianoforte under the parent company guarantee and indemnity. Kiko, Jamino and Pianoforte entered into a settlement agreement allowing Pianoforte to make payments in instalments in respect of the amounts due under the guarantee and indemnity. Jamino subsequently went into liquidation and the liquidator disclaimed the lease. Under the Insolvency Act 1986, the lease was deemed to continue to subsist between the landlord and

Kiko; only Jamino's liabilities had come to an end as a result of the disclaimer. However, the landlord required Kiko to take a new lease under the terms of the AGA. Kiko then claimed against Pianoforte under the original guarantee and indemnity in respect of its obligations under the new lease it had been required to take.

The court decided that the guarantee and indemnity in respect of Jamino's performance of the tenant covenants only related to the original lease and not the new lease granted under the landlord's put-option in the AGA. The obligation to take the new lease arose from the liquidator's disclaimer and not from Jamino's breach of covenant. Although the case turned on the particular facts and the drafting used, it is worth considering the wording of any guarantee and indemnity to ensure that it covers any liabilities arising under the AGA including under any new lease the assignor is required to enter into. Note that AGAs and guarantees are normally drafted from the landlord's perspective. In this case, it was the assignor relying on the wording and it did not include an obligation on Pianoforte to take an underlease in the event that the assignor was required to take a new lease. The court also considered the settlement agreement. Pianoforte had failed to make payments under the agreement in respect of its liabilities to Kiko under the original lease. The court held that the discount agreed in the agreement no longer applied because there had been no consideration under the settlement agreement. The settlement agreement should have been executed as a deed.

A house is not a home

Nature of residential property for SDLT purposes

Mudan v HMRC: [2025] EWCA Civ 799 (CA)

The Court of Appeal has considered the scope and breadth of the term "residential property" for SDLT purposes. The taxpayers had acquired a property in 2019 and the issue was whether it was a residential property at the effective date of the transaction. The previous use of the property had been as a dwelling. However, the taxpayers argued it was not suitable for use as a dwelling when they bought it because extensive works were required before it would be safe for them to live in. SDLT was paid on the basis that the property was not residential. This resulted in around £100,000 less tax than if residential rates had been applied. HMRC argued that SDLT should have been paid at residential rates. The taxpayers failed at both the First-tier Tribunal and the Upper Tribunal but appealed to the Court of Appeal.

The Court of Appeal considered the purpose of the SDLT legislation. It was important not just to look at the nature of the property at the effective date but to take into account past use as well as the intended future use. The taxpayers intended that the property was to be used for residential occupation. The fact that it was not suitable for immediate occupation and use did not determine whether it was a residential property. This was a question of fact and degree and the court also had to consider the character of the property based on the ordinary use of the language used in the legislation. Simply because the property could not be used as a dwelling as at the effective date did not cause it to lose its residential character. The legislation was concerned with the building rather than its interior fit-out and the building's state and condition did not mean that it had ceased to be residential.

A change is going to come

Change of circumstances and variation of residential service charge

Eastern Pyramid Group SA Corp v Spire House RTM Co Ltd: [2025] UKUT 292 (LC)

This case considers the ability of a RTM company to apply for a variation to residential leases under S35 of the Landlord and Tenant Act 1987. Under S35 an application can be made by the landlord, the tenant or an RTM company for a variation if the lease fails to "make satisfactory provision" in relation to specific matters, including the recovery of expenditure. The First-tier Tribunal cannot exercise its discretion to order a variation if the variation would "substantially prejudice" another person without adequate compensation. The leases of a block of flats limited the interim payments payable by the tenants on account of service charge costs to 50% of the previous year's expenditure and also capped reserve fund contributions at 30% of that expenditure. The RTM company had taken over the management of the building and needed funds for urgent repairs to the building. The landlord and two tenants opposed the RTM company's application for a variation to increase the contributions payable by the tenants. The FTT made an order for the variation and this was appealed by the landlord and the two tenants.

The Upper Tribunal considered whether the order had been properly made. It found that substantial prejudice had not been contended at the hearing. In deciding whether a lease was seriously defective in failing to make satisfactory provision this had to be considered in the context of the current circumstances. The identity and nature of the person responsible for repair and maintenance was a relevant factor in assessing

whether the lease failed to make satisfactory provision. The RTM company had limited resources and its financial circumstances were a relevant consideration. Accordingly, a change of circumstances, such as the appointment of an RTM company, may mean that the lease is found not to make satisfactory provision for the recovery of expenditure if the RTM company is unable to carry out its obligations under the terms of the lease.

Oh! sweet nuthin'

Unsafe cladding remediation not limited in time

Almacantar Centre Point Nominee No 1 Ltd and another v de Valk and others: [2025] UKUT 298(LC)

This case considered the liability of tenants of Centre Point House to contribute to the costs of the remediation of unsafe cladding. Under the Building Safety Act 2022, a qualifying leaseholder is not generally liable to contribute to the cost of remedying a relevant defect. The key issue was that the cladding was installed outside the extended 30-year limitation period introduced by the Act for relevant defects. The landlord argued that the unsafe cladding system was not a relevant defect under the Act and that the tenant protection did not apply.

The Upper Tribunal confirmed that the protection applied to the remediation of unsafe cladding irrespective of when it was installed. Paragraph 8 of Schedule 8 to the Act provides that a qualifying leaseholder is not liable for service charge costs in respect of the removal or replacement of any part of an unsafe cladding system. There is no requirement for the unsafe cladding to also be a relevant defect for the protection to apply. Therefore, the 30-year limitation period was not relevant. The Act is intended to protect tenants from paying remediation costs in respect of unsafe cladding and no time limit applies in respect of when the cladding was installed.

Up on the roof

Building safety remediation order and roof space

Monier Road Ltd v Nicholas Alexander Blomfield and others: [2025] UKUT 157 (LC)

This Upper Tribunal case, considered the extent of a remediation order and also whether a roof garden was a storey when determining whether the property was a higher-risk building for the purposes of the Building Safety Act 2022. The First-tier Tribunal had made a remediation order against the landlord of a residential building following an application made by 29 of the tenants. A risk assessment report concluded that there were fire safety defects at the property including combustible cladding. The First-tier Tribunal made an order against the landlord. The landlord challenged aspects of the order including the breadth of the defects covered. Under S123 of the Act, the First-tier Tribunal can make a remediation order requiring a relevant landlord to remedy specified defects and to carry out specified steps in relation to a specified defect. A higher-risk building is one at least 18m tall or at least seven storeys and containing two or more residential units. The Act provides that an accountable person has certain duties and responsibilities in respect of a higher-risk building. The First-tier Tribunal has jurisdiction to determine the accountable person but not to decide whether a building is a higher-risk building. Although funds had been ring-fenced to deal with the remediation works, the tenants wanted the landlord to get on with the works recommended in the report. The First-tier Tribunal concluded that the building was a higher-risk building and included additional building safety items in the remediation order.

The Upper Tribunal held that the First-tier Tribunal had exceeded its discretion by adding additional items to the remediation order. It had to follow a fair procedure and invite the parties to provide evidence and could not itself determine that an issue was a safety defect. It should also not have opined on whether the building was a higher-risk building. In relation to the rooftop gardens, the Upper Tribunal did not make a ruling. Existing government guidance indicates that a roof garden should not be considered to be an additional storey.

Lose control

Modification of restrictive covenants in long lease

Great Jackson ST Estates Ltd v Council of the City of Manchester: [2025] EWCA Civ 652

The Court of Appeal has dismissed the developer's appeal against a decision of the Upper Tribunal not to modify restrictive covenants in its lease under S84 of the Law of Property Act 1925. The developer owned the long leasehold title to a warehouse site and the landlord was the Council. The warehouses were redundant and the tenant wished to redevelop the site as a residential scheme. It obtained planning permission from the Council and was in negotiations with the Council as landlord for the grant of a new long lease to facilitate the development. However, the tenant was not happy with the proposed new lease and applied to the Tribunal to modify a number of covenants in its existing lease to allow it to carry

out the development without the Council's consent as landlord. The Tribunal refused the application on the basis that the covenants secured practical benefits for the Council.

The Court of Appeal agreed with the Tribunal that the Council had a legitimate interest in influencing the development of the site and the covenants conferred practical benefits which were of substantial advantage to the Council. The Council had legitimate concerns in relation to the viability, timing and completion of the proposed development. The Council was entitled to refuse its consent under the terms of the existing lease until those concerns were addressed.

OUR RECENT TRANSACTIONS

We advised Derwent London on the new headlease of its redevelopment site at 50 Baker Street.

We advised the Greater Manchester Pension Fund on its interests in the Mix Manchester joint venture for the development of a new science and innovation campus next to Manchester Airport.

We are advising Therme Group on its €1 billion joint venture with CVC and CVC's co-investment in Therme Manchester.

We advised Song Capital on a €702.5m financing secured over a portfolio of German medical facilities.

AND FINALLY

Racing corgis

International teams have competed in a corgi racing event in Vilnius, Lithuania.

Silly sausage

A highway in Pennsylvania was closed after a lorry carrying hot-dog sausages spilled its load.

Walkies

Injuries incurred by walking the dog are reported to be costing the NHS £23m a year. Hand and wrist injuries are the most common including broken fingers. Researchers suggest encouraging training to ensure "optimal dog walking practices".

The Birds

Scotland has held a seagull summit to tackle the growing problem of nuisance gulls. Aggressive gull behaviour has left Scots "scared, attacked and traumatised". Potential victims have been advised to stare at gulls as they do not like eye contact.

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