SLAUGHTER AND MAY/

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REAL ESTATE NEWSLETTER

NEWS

Little by little

Amendments to Renters' Rights Bill

Some important charges have been made as the Bill passes through the parliamentary process. There is a new proposal to ban any requirement for more than one month's rent to be paid in advance. This means a landlord can only require rent to be paid monthly. It is not uncommon for a landlord to require more than the first rent payment upfront. The advance payment may be up to the full amount of rent payable over the term. This is different from a rent deposit which is paid by way of security for the payment of rent and compliance with the other tenant covenants. An advance payment may be required where there are concerns about the tenant's ability to pay the rent or the landlord's ability to take enforcement action in respect of any non-payment. This proposal is clearly a concern for landlords, but it may also be an issue for tenants who may be happy to make an upfront payment to secure the letting and who might otherwise be unable to satisfy the landlord's letting criteria. A payment in advance may help reduce monthly payments to meet affordability concerns. A landlord's ability to require an advance payment is also determined by the market and tenant demand for a particular property.

The Bill provides for a new regime for residential tenancies and confirms the abolition of assured shorthold tenancies and fixed-term assured tenancies. All tenancies will operate on a periodic basis from month-to-month. The change will also apply to all existing assured and assured shorthold tenancies. However, it is worth remembering that not all residential tenancies are assured tenancies. Any such tenancies will remain outside the statutory regime and continue to exist as common law tenancies. Significant examples include company lets and high-value lettings. An assured tenancy can only arise where the tenant is an individual. Lettings of residential property to companies are common law tenancies. A letting where the rent is more than £100,000 per annum will also be a common law tenancy, as will the letting of a residential property with a rateable value of more than £1,500 in London, or more than £750 elsewhere. There is also an exclusion in respect of tenancies at a low rent: £1,000 or less per annum in London, or £250 or less elsewhere. Other excluded tenancies include those for a term of more than seven years, holiday lets, service tenancies, short-term accommodation such as that for the homeless, licenced premises, Crown tenancies and certain student accommodation. Social housing and agricultural tenancies will remain subject to separate regimes.

Common people

Commonhold to replace leasehold?

The government has announced plans to outlaw the sale of new leasehold flats and to require the use of a revitalised commonhold system. The "Commonhold White Paper" was published on 3 March and will be followed by a Leasehold and Commonhold Reform Bill later this year. Although the framework for a commonhold system was introduced in 2002, take up by the property industry has been extremely limited. The government needs to overcome this reticence if its plans are to succeed. Commonhold is a form of freehold ownership without a third-party landlord and with each owner of a unit dealing with management issues through a commonhold association. The main advantage of commonhold is that ownership lasts forever without the often complicated and costly need for a lease extension or enfranchisement. Of course, commonhold does not avoid the need for co-operation among owners as well as active participation in management issues, backed by an effective dispute resolution process and enforcement regime. The government plans to address concerns with the existing regime and to make

commonhold more flexible to accommodate the full range of buildings, as well as mixed-use developments. It is essential that the revised system works for developers and funders, as well as unit owners. The new regime is also expected to simplify the conversion of existing leasehold structures into commonhold while accommodating those tenants who do not wish to convert. There is a great deal of work to be done if the government is to secure the confidence of the property industry and introduce a workable new regime by the end of this parliament.

Safe from harm

Terrorism (Protection of Premises) Bill

The Terrorism (Protection of Premises) Bill is aimed at improving safety at certain events and premises. The new regime is also known as "Martyn's Law" after one of the victims of the Manchester Arena terror attack. The regime will apply to certain premises and to events which are open to the public and expected to attract 800 or more people. Those responsible for qualifying events or qualifying premises are responsible for putting in place public protection measures to reduce the risk of harm in the event of an act of terrorism. Government guidance sets out some examples of reasonable and appropriate steps and procedures which the responsible person should consider. Measures may include monitoring through surveillance, controlling the flow of people, the physical safety and security of the premises and the security of sensitive information, such as floor plans and security schedules. The responsible person will also need to maintain a statement of the safety procedures and put in place notification procedures. The new regime will apply to the owners, occupiers and managing agents of larger premises and those with responsibility for running larger events. There are estimated to be 154,600 premises in the UK that will be subject to the standard duty requirements and 24,300 in respect of the enhanced duty requirements.

The heat is on

EPC reform

The government has conducted a consultation on the reform of the EPC regime. The reform is part of its goal of achieving clean power by 2030 and net-zero emissions by 2050. EPCs are a key means of measuring the energy performance of most UK buildings. The government has proposed a reformed Energy Performance of Buildings (EPB) framework. The proposals also include new metrics for assessing the energy efficiency of buildings to ensure the process is up-to-date and to allow clear performance benchmarks to be determined. The intention is to provide a more comprehensive measure of a building's energy performance. The potential metrics include energy cost, carbon, energy use, fabric performance, heating systems and smart readiness. The government has proposed that fabric performance, smart readiness, heating systems and energy cost should apply to domestic premises while the carbon metric should be maintained as the single headline metric for non-domestic buildings. The distinction between domestic and non-domestic buildings reflects the differences in how energy is used in residential and commercial properties.

The consultation also considers how to reduce energy costs including the thermal qualities of the fabric of a building and its insulation. It is anticipated that any changes to the EPB regime will be introduced in 2026 and the transitional process the new regime will require careful consideration. At present, an EPC is normally valid for 10 years and the consultation questions whether this period should be reduced to ensure that the EPC remains valid and reflects the actual energy performance status of the building. The paper also raises the possibility of requiring an EPC on a renewal or extension of a lease to ensure that the EPC remains current throughout the period of occupation. It may also become necessary to have an EPC before a property is marketed. At present, an EPC can be provided after a building is put on the market, provided reasonable steps have been taken to obtain it. Display Energy Certificates are required for certain public buildings, and it is proposed that the period of validity for a DEC should also be reduced. Other proposed measures include a review of levels of compliance and the effectiveness of the current enforcement regime. The general concern is that compliance is low and EPCs and DECs are seen as a box-ticking exercise rather than a means of assessing and improving energy efficiency. The paper also considers air conditioning inspection reports, which are a mandatory requirement for all systems with an output of more than 12KW.

Should I stay or should I go

Landlord and Tenant Act 1954 reform

The Law Commission has also published a consultation paper on the much anticipated and long overdue reform of the security of tenure regime under Part II of the Landlord and Tenant Act 1954. Unless it is decided to abolish security

of tenure in its entirety, a second paper will look at changes to the Act in more detail. The consultation paper on the right to renew business tenancies considers the role of security of tenure in today's commercial property market and the impact any reform might have on businesses, landlords, funders and investors. The first question is whether business tenants should have security of tenure and, if the answer is yes, what form that security of tenure should take? The models of security of tenure put forward range from no security of tenure at all to making it a mandatory regime with no option to contract-out. The more likely outcome is for security of tenure to be maintained, with either a "contracting-in" or a "contracting-out" option.

The Commission also considers the scope of any future security of tenure regime and which categories of tenancy should enjoy protection. The types of tenancy excluded from the regime could be expanded to reflect the current letting market. At present, short-term tenancies for six months or less are generally excluded, as well as agricultural tenancies and there are specific provisions under the Telecoms Code in respect of leases granted to telecoms operators. Any reform would also offer the opportunity to iron out the many issues with the current regime, including the contracting-out process. How many statutory declarations do you really need for one lease?

CASES ROUND UP

You can go your own way

Application of the breach of contract principle

Weston Homes Plc v Henley Developments 211 Ltd: [2024] EWHC 3286 (Ch)

This case involved the interpretation of an agreement for the sale and purchase of a property for £14.5m. Weston paid a deposit of £870,000. The contract obliged Weston to "use all reasonable and commercially prudent endeavours" to obtain planning permission and to diligently pursue the planning application. Completion was conditional on planning and either party could determine the contract if permission was not obtained within six months of the planning application being made. The deposit was to be returned if the contract was terminated. Planning permission was not obtained, and Weston served notice terminating the contract and requiring repayment of its deposit. Henley claimed that Weston was in breach of its obligations relating to the obtaining of planning permission and contended that if Weston had complied with those obligations the permission would have been obtained within the six-month period. Henley relied on the breach of contract principle under which it is presumed that the parties did not intend that a party should benefit from its own breach of contract.

The court confirmed that the breach of contract principle is distinct from the prevention principle, where a party prevents another party from complying with its obligations by not complying with its own obligation to co-operate or assist. The breach of contract principle applied in this case and the court considered whether it had been displaced by the terms of the contract. In particular, the contract provided that either party could terminate if the planning condition was not satisfied. That right was not conditional and was without prejudice to any right or remedy in respect of any antecedent breach of the contract. The contract contained express limitations in respect of other rights to terminate. Accordingly, the court held that the parties did not intend the principle to apply. It was also not possible to include an implied term to that effect.

Fade to grey

Remediation contribution orders and the just and equitable test

Grey GR Limited Partnership Limited v Edgewater (Stevenage) Limited and others: CAM/26UH/HYI/2023/0003

This case relates to building safety defects at Vista Tower, a 16-storey residential building in Stevenage. Vista Tower was an office block that was converted into a block of 73 residential flats. The First-tier Tribunal hearing follows other proceedings in relation to the building and its defects. At an earlier hearing, a remediation order was granted against Grey GR, the owner of the freehold title. Grey GR made an application for a liability contribution order to be made against Edgewater, the landlord of the building, and also against various companies associated with Edgewater. In 2019/2020 it was discovered that there were a number of fire safety defects, including combustible glazing and a lack of cavity barriers. Grey GR had obtained funding from the Building Safety Fund and put in place construction contracts for the remediation works. The Secretary of State applied for a remediation order on behalf of the residents to speed up the remediation works and to ensure they were completed. The Tribunal granted a remediation order by way of a backstop to give reassurance to the residents that the works would be carried out. Following the grant of the remediation order against it, Grey GR was looking for contribution orders against the respondent companies. The

Tribunal had to consider whether it was just and equitable to make those orders.

The Tribunal confirmed that a contribution order should be made against Edgewater and 76 of the 96 named respondents. In considering the application, the Tribunal had to consider whether each respondent was an associated entity for the purposes of the Act and, if so, whether it was just and equitable to include it in the order. The remediation contribution order provides that all the named respondents are jointly and severally liable for the £13.26 million cost of the remediation works. The Tribunal found that the structure of the respondent companies was a "fluid, disorganised and blurred network". The "just and equitable test" allowed for the grant of such a wide order to ensure that the public money from the Fund used to carry out the remediation works could be recovered. Other factors included the fact that most of the respondent companies were involved in the property or building industries or were related to companies in such sectors. The sharing of the Edgewater name among the respondents suggested a group structure and the majority of the companies had links to two families who owned the landlord company. In addition, loans between the companies indicated that they were operated as a group. The Tribunal also gave "great weight" to the interests of third parties when considering whether it was just and equitable to include a particular company. For example, whether it would affect "properly declared independent investors". The extent and nature of the contribution order reflected the unusual company structure involved.

The butterfly collector

Preliminary enquiries, misrepresentation and rescission

Patarkatsishvili and another v Woodward-Fisher: [2025] EWCH 265 (Ch)

This is the moth infestation case which has attracted significant press attention; partly because the property in question cost £32.5 million and partly because clothes moths are a common issue in most homes. The defendant sold a house in Notting Hill to the claimants for £32.5 million. The defendant had carried out a significant refurbishment project at the property. The works included using insulation materials with a significant natural wool content. The defendant and his wife had become aware of an issue with clothes moths and had obtained quotes from two pest control companies. One quote suggested that the only way to deal with the problem was to remove all the wool-based insulation. The seller went with the other company and various treatments were carried out which did not get rid of the moths. The seller then marketed the property, and the buyers agreed to buy it. The seller provided replies to preliminary enquiries. The enquiries included a specific reference to "vermin infestation" as well as references to defects in the property. The seller's replies did not reveal the moth issue, the pest control reports, nor the treatment work undertaken. Following completion, the buyers noticed the moths and carried out various investigations, leading to the implementation of recommended treatment processes. A report revealed a "severe" infestation that had been a problem for a number of years. Although works costing £270,000 were carried out by the buyers, they were not satisfied and sought to claim against the seller for rescission of the contract, return of the purchase price and damages.

Fancourt J allowed the claim for rescission of the contract. He agreed that "vermin" was wide enough to include insects, and the insect infestation was a latent defect at the property. Although the buyers had not themselves read the replies, they had been read by the buyer's solicitors and also by the buyer's advisor who reported that there was no issue preventing the buyers from proceeding. The court ordered the return of the property to the seller subject to a lien or equitable charge in favour of the buyers. This meant that the seller could carry out the remediation works before selling the property and discharging his liability to repay the purchase price and pay damages. Fancourt J pointed out that this was an extreme case and that it would not create a general conveyancing problem. The seller knew about the infestation and the only honest answer to the enquiries was to disclose that defect. A seller does not have to provide answers to preliminary enquiries, but if a seller does provide replies they must be honest. Failure to disclose the moth infestation rendered the information provided to the buyers misleading and incomplete.

Our house

SDLT and substantial performance

Goldsmith Ltd and another v HMRC: [2024] UKFTT 927 (TC)

In this case, the First-tier Tribunal considered the meaning of "possession" and whether an agreement for the purchase of a house had been substantially performed for SDLT purposes. The taxpayer had entered into an agreement to acquire a residential property which it intended to convert into self-contained flats. It was agreed that the taxpayer could have early access between exchange and completion to carry out

works. However, the scope of the permitted access and the extent of the works that the taxpayer could carry out was limited. The taxpayer could not carry out structural works and the hours for carrying out the works were restricted. In addition, the taxpayer was required to return the keys at the end of each day and the seller remained responsible for insuring the property. The seller also continued to deal with security and utilities, subject to reimbursement by the taxpayer. A key issue was whether the taxpayer had taken possession prior to completion, thereby triggering an obligation to file a return and pay tax under the substantial performance rules.

The Tribunal considered the meaning of possession for SDLT purposes. Possession was wider for SDLT purposes than for property law purposes and not every licence to occupy would trigger substantial performance. The purchaser took possession if it went into occupation as though it had become the owner or had "taken the keys". The occupation also had to be lawful. Although substantial works had been undertaken, the taxpayer had not taken possession for SDLT purposes. The taxpayer did not have the freedom to occupy the property as the "owner" and it had not acquired responsibility for the property. The restrictions on what the taxpayer could do at the property were relevant as was the fact that the hours of access were limited. Although the carrying out of the works had not triggered a tax liability, the taxpayer had assigned the benefit of the contract to a company owned by him, and this constituted a notional transaction for SDLT purposes. It is important to consider the risk of a tenant or purchaser triggering substantial performance by obtaining access prior to completion. Whether this amounts to possession for SDLT purposes will depend on the facts of each case but a cautious approach is generally advisable to avoid the risk of inadvertently triggering a tax liability prior to completion.

Too much, too little, too late

Forfeiture and ability to pay debts

SBP 2 S.A.R.L. v Southbank Tenant Limited: [2025] EWHC 16 (Ch)

The court has considered the effect of a forfeiture ground drafted by reference to S123 of the Insolvency Act 1986. Section 123 includes a definition as to when a company is deemed to be unable to pay its debts. This includes where a creditor has served a written demand for a sum exceeding £750 on the company at its registered office and the amount has not been paid within three weeks, execution or other process issued by the court is returned unsatisfied or if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due or that value of its assets are less than the amount of its liabilities taking into account contingent and prospective liabilities. In this case, the defendant was an SPV company forming part of the WeWork group. A guarantee had been given by WeWork Companies LLC. The guarantor had adopted a plan of division under Delaware law which divided it into two companies, one of which had filed for Chapter 11 in the US Bankruptcy Court. A Chapter 11 filing by the guarantor was a forfeiture event in the lease. The landlord sought to forfeit the lease on the grounds of the Chapter 11 filing. Due to the complications arising from the plan of division creating two companies, only one of which had filed for Chapter 11, the landlord also sought to forfeit on the ground that the other company was unable or deemed unable to pay its debts "within the meaning of S122 or S123 of the 1986 Act". Section 123(1)(e) and S123(2) both require that the company's inability to pay its debts is proved "to the satisfaction of the court". The issue before the court was whether the inability to pay its debt ground for the purposes of S123 could only be met if there had been a prior judicial determination to that effect. If this was the case, the forfeiture process would be significantly longer and involve additional costs.

The court considered whether prior judicial determination was required or whether it was sufficient to show that the company was unable to pay its debts as they fell due, or the value of its assets was less than the amount of its liabilities. Obviously, even without the need for judicial determination, it may not always be straightforward to establish that an entity is unable to meet its debts. The judge acknowledged that this was a difficult issue and found in favour of the tenant. The landlord could only rely on the S123 ground if the guarantor's inability to pay its debts had been determined by the court. The tenant's argument that S123 only applied to companies registered in England and Wales was made too late and was not considered. Although the chances of a landlord only having the S123 ground to rely on are small, if there are concerns then the ground can be amended to make it clear that the reference to S123 specifically excludes the requirement for judicial determination or simply to provide for forfeiture if the tenant is unable to pay its debts.

A whole new world

Variation or replacement of contract

R (On the application Cobalt Data Centre 2 LLP and another) v HMRC: [2024] UKSC 40

The Supreme Court has considered whether the parties to a contract had intended to replace it or just vary it. The Capital Allowances Act 2002 provides that certain tax reliefs are available if expenditure is incurred under a contract made before a specific deadline. The applicants contended that the expenditure had been incurred under a contract made within the deadline and that the contract had been varied subsequently. HMRC argued that the purported variation after the deadline was a replacement of the existing contract. Accordingly, the replacement was made after the relevant deadline for claiming tax relief. The relevant contract was a JCT standard form building contract with Contractor's Design 1998 Edition entered into in 2006. The contract gave the developer the right to change the works. The taxpayer developer exercised the right to change the works after the expiry of the relevant deadline for tax relief. The changes resulted in the construction of three buildings which were significantly different from those provided for in the original 2006 contract.

The Supreme Court found in favour of HMRC. The time limits imposed were a central part of the relevant enterprise zone allowances regime. The Supreme Court considered the effect of the changes to the original contract; were they simply a variation of the original 2006 contract or did the changes constitute a new contract? The changes required by the developer went beyond that permitted by the original contract and resulted in different buildings being built. The parties to a contract would normally consider whether the changes amounted to variations to the original contract or a replacement of it. It was the intention of the parties that was key unless that would result in an absurd conclusion or bring the law into disrepute. The example given was a contract for a holiday being varied to become a contract to build a nuclear submarine. Even if described as a variation, this would be a replacement of the original holiday contract.

OUR RECENT TRANSACTIONS

We are advising Everton on the financing for its new stadium at Bramley-Moore Dock.

We are advising Simmons & Simmons on its new London office at 25 Finsbury Circus.

We are advising SEGRO on a joint venture with Pure DC for the development of a new data centre at Park Royal. We also advised SEGRO European Logistics on the acquisition of six European logistics assets from Tritax EuroBox.

We advised Derwent London on the pre-letting of the commercial space at 25 Baker Street W1, to tenants including Cushman & Wakefield and PIMCO.

AND FINALLY

TikTok tomatoes

A bridge in Dublin has been nicknamed Cherry Tomato Bridge after a TikTok user posted a photograph of cherry tomatoes left on the bridge.

On the buses

Brighton & Hove Buses and Metrobus have revealed some of the "quirkiest" examples of the 13,000 items left on their buses last year, including a canoe, a fridge and a wardrobe.

Air miles Mittens

A family's move from New Zealand to Australia went horribly wrong when they realised Mitten, their cat, had been left on the plane and had flown back home.

Jane Edwarde
T +44 (0)20 7090 5095
E jane.edwarde@slaughterandmay.com

John Nevin
T +44 (0)20 7090 5088
E john.nevin@slaughterandmay.com

Simon Bartle
T +44 (0)20 7090 3563
E simon.bartle@slaughterandmay.com

Mark Gulliford
T +44 (0)20 7090 4226
E mark.gulliford@slaughterandmay.com