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Boodle Hatfield Property Insights

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Register of Overseas Entities: implications for property transactions

With effect from **1 February 2023**, all overseas entities that own or acquire registered land in the UK (save those registered as the owner before 1 January 1999) are required to be registered on the new Register of Overseas Entities maintained by Companies House. What does this mean in practice for those looking to buy, let or sell property?

An overseas entity that has not registered before the February deadline will be committing a criminal offence, and the entity and its officers, may face criminal sanctions in the form of fines or imprisonment. In addition, an overseas entity that has not registered will, in practice, be prevented from buying or selling a freehold or registerable leasehold interest in UK property.

An overseas entity that is disposing of UK property (including a lease of more than 7 years) will need to provide its buyer with evidence of its current Overseas Entity ID. The seller will need to provide this evidence at an early state of the transaction as the buyer will not be able to register the purchase of the property at the Land Registry without evidence of the seller's Overseas Entity ID.

An overseas entity that is buying a UK registered property (including a lease of more than 7 years) will need to provide the Land Registry with evidence of its own current Overseas Entity ID when applying to register a purchase. The buyer will need to have completed the registration at the time of the completion of the purchase. The Land Registry will not register the purchase of the property without evidence of the buyer's Overseas Entity ID.

"Overseas entities that have not already registered at Companies House should take immediate steps to identify any UK land held or UK land that it intends to acquire and, where appropriate, start the registration process. The level of complexity of the information required to complete the registration will vary from company to company and a detailed analysis may be required. We are happy to advise on the application of the relevant rules and the necessary steps to register."

Saskia Arthur, Head of Residential Property

MEES: April 1 2023 deadline for commercial properties

Landlords will be familiar with the current Minimum Energy Efficiency Standards (MEES) that require landlords granting a new lease of commercial premises to hold an Energy Performance Certificate (EPC) with a rating of E or above (or register a valid exemption). This requirement will be extended on **1 April 2023** to include all existing leases of commercial premises. By way of example, a landlord that currently lets commercial premises under a 10 year lease granted in 2016 with an EPC rating of G will need to carry out sufficient energy efficiency works to improve the EPC to E or above (or register a valid exemption) before 1 April 2023.

Landlords should be taking steps now, if not already in hand, to identify any properties that fall below the April 2023 standard and action appropriate works, where required, to improve energy efficiency (or register a valid exemption). Whilst non-compliance with MEES does not invalidate the subject lease, and tenants will be required to continue to pay rent, non-compliance may result in a fine for the landlord of up to **£150,000 per offence**.

"Whilst landlords will understandably want to focus on the April 2023 date, it pays to think ahead. Minimum standards will rise in the near future with current government proposals for all commercial properties to have an EPC rating of C or higher by April 2027 rising to B or higher by 2030."

Andrew Wilmot-Smith

Forthcoming King's Speech to introduce leasehold legislation

Leasehold reform has been mooted for a number of years now and, following the Law Commission's reports published in 2020, those advising clients on leasehold property have been waiting with baited breath to see if and when the proposed reforms may come to pass. In a series of recent announcements, Michael Gove, Secretary of State at the Department for Levelling Up Housing and Communities, has affirmed plans to scrap the 'feudal' leasehold system and it now appears that the new legislation will be introduced in the next King's Speech, currently set for Autumn of this year.

The first of the heralded changes saw the introduction of The Leasehold Reform (Ground Rent) Act 2022 in June 2022, which restricted ground rents reserved in any residential lease to a peppercorn. However, it is probably fair to say that this was not seen as the most seismic of the proposed reforms. So, what of the more significant changes, and could 2023 see their introduction? Described as "the biggest shake-up of the private rented sector in 30 years" the proposed reforms are significant and will have a huge impact on landlords of prime residential property. The reforms recommended by the Law Commission cross a range of changes, including reducing the cost to claimants, broadening the scope of the collective freehold acquisition of buildings, making it easier for lease extensions, reducing the cost of enfranchisement claims and providing leaseholders a greater ability to claim the right to manage. The Government has issued a number of briefings and announcements in which it states that it intends to adopt several of the Law Commission's recommendations. However, the timetable for the introduction of any of these measures remains unclear.

The reforms being discussed will bring about more rights and benefits to leaseholders, but with no guarantee as to what will be introduced, and, perhaps more significantly, no clear path as to when they might be introduced, those leaseholders minded to make an enfranchisement claim are left having to decide whether and when to make their claim. Similarly, the proposals present several challenges for landlords, but they are left unclear as to how they might prepare for the reforms, or whether there is anything they might do to mitigate against the potential impact on their residential property portfolios.

"In the absence of a crystal ball, it remains unclear as to when any of these reforms may come to pass. Changes to enfranchisement claims may seem low on the list of government priorities. However, it is clear that the desire for reform remains. A briefing issued in December 2022 quite clearly restates the government's aims to legislate in this field and refers to a Bill being included in the 2023/24 parliamentary session. This has been reinforced in an interview in January 2023 in which Michael Gove pledged to bring forward laws to scrap most "feudal" leaseholds in England "later this calendar year", albeit that he acknowledged that "it is not easy in legal terms, when you've got a tangle of property laws going back hundreds of years."

Simon Kerrigan, Property Partner

Tate Modern: Visual Nuisance

The residents of an exclusive glass clad residential building adjacent to Tate Modern have won their long-running legal dispute with the gallery with the Supreme Court finding that that a viewing platform that allows visitors to the gallery to enjoy the panoramic London skyline, whilst also looking directly into the residents' living space, constitutes a "visual nuisance".

The viewing platform, situated on the tenth floor of the gallery is said to have attracted in excess of 500,000 visitors each year with a significant number of those visitors displaying an interest in the interiors of the adjacent building, taking photographs, waving at residents and in some cases using binoculars for a better view before posting images on social media. The residents claimed that the use of the viewing platform constituted a nuisance, turning their homes into a "public exhibit" akin to being on display in a zoo.

The residents' claim of nuisance was rejected by both the High Court, which found that residents in an inner city location "can expect to live quite cheek by jowl with neighbours" and should perhaps address the issue with the use of net curtains, and the Court of Appeal which found that "mere overlooking" cannot give rise to liability for nuisance.

The Supreme Court however disagreed with the decisions in the lower courts finding that "inviting members of the public to look out from a viewing gallery is manifestly a very particular and exceptional use of land" and that the residents "cannot be obliged to live behind net curtains or with their blinds drawn all day every day to protect themselves from the consequences of intrusion caused by the abnormal use of the land". The Supreme Court also rejected the idea that the residents claim was based on mere overlooking - finding that the residents did not object to the fact that they were overlooked, but did object to the "visual intrusion" created by the gallery inviting the public to the viewing platform given the proximity of the claimants flats.

The saga may not end here. The Supreme Court was not able to decide an appropriate remedy, the residents having previously argued for an injunction to prevent the further use of the viewing platform or compensation in the form of damages with both parties encouraged to reach agreement, failing which the matter will return to the High Court.

"Whilst unarguably an interesting decision, the facts of the claim are relatively unique. It will not be easy for those finding themselves overlooked in more mundane circumstances to successfully apply this judgment to establish a successful claim for nuisance - save, perhaps, where there is a particular and exceptional use of land. Will future cases allow claims in less extreme situations, for example a busy restaurant terrace, or a 24hour gym overlooking residential premises at close proximity?"

Colin Young, Property Litigation Partner

Service Charge: Residential

Aviva Investors Ground Rent GP Ltd and another v Williams and others

Residential service charge has long been an area ripe for dispute and uncertainty. In the Aviva case the Supreme Court has provided a welcome judgment for residential landlords, holding that a commonly used lease provision that allowed the landlord to revise the tenants' shares of a residential service charge was not void under s27A(6) of the Landlord and Tenant Act 1985 (which renders void a clause in a lease that gives a landlord the right to determine issues relating to the service charge that ought to be determined by the First Tier Tribunal (FTT)).

The Supreme Court held that the purpose of s27A(6) was to prevent the parties agreeing a different mechanism to determine a point that could otherwise be determined by the FTT. The lease provision in this case did not purport to oust the jurisdiction of the FTT (as would have been the case if the lease had made the landlord's decision to revise the tenants' shares final and binding). In this case the FTT still had the jurisdiction to decide whether the tenants' shares specified by the landlord were reasonable - and accordingly the jurisdiction of the FTT had not been removed. To find otherwise could lead to a situation where potentially every discretionary management decision relating to service charge, including whether or not to undertake works, could be transferred to the FTT for decision and that to do so would "overburden" the FTT and would be "uncommercial".

"Described by the landlord's legal team as "huge for residential leaseholders" this case will be of comfort to landlords of residential leases containing similar provisions, and in particular those granted for a significant length of term where a degree of flexibility in such charges may be required over the course of time."

Colin Young, Property Litigation Partner

Service Charge: Commercial

Sara & Hossein Asset Holdings Ltd v Blacks Outdoors Retail Ltd

In a second case relating to service charge, this time in a commercial lease, the Supreme Court considered the correct interpretation of a commonly found clause where the parties have agreed that the landlord's certificate as to the service charge payable shall be "conclusive" (save in the absence of manifest mathematical error or fraud).

The landlord argued that the decision in the Court of Appeal was correct and that the certification of the sum due was conclusive, subject only to the permitted challenges of manifest error and that this was the natural and ordinary meaning of the certification provision,

allowing the landlord to recover all sums incurred without delay or dispute ("pay now argue never"). The tenant disagreed, arguing that the correct interpretation was that given in the lower court that the certificate was conclusive of the costs incurred but not as to the tenant's liability to pay it ("argue now, pay later").

Interestingly, the Supreme Court held, by a majority decision of 4:1 in favour of a third and iterative approach ("pay now, argue later") finding that the tenant was liable for the full service charge claimed, but that the tenant could subsequently dispute liability, a decision seen by the dissenting Lord Briggs as attempting to mend the parties' bargain.

"This is an interesting, and for some, potentially troubling, approach by the Court. The decision is arguably a sensible solution to the factual scenario in this case. However the traditional approach to contractual interpretation is that the plain and ordinary meaning of the clause should prevail, absent a necessary implication to the contrary. It remains to be seen if the Court will be prepared to take this interventionist approach elsewhere."

Kellie Jones, Property Litigation Partner

The Building Safety Act

The Building Safety Act continues to provide more column inches with regular consultations and updates. In December 2022 the UK Government announced its plans to mandate two staircases in all new residential buildings over 30m. The GLA took this one step further in February 2023 with London mayor Sadiq Khan stating that all planning applications for new buildings above 30m must now have second staircases before going to the Greater London Authority (GLA) for final sign off.

Cladding and fire safety remediation cases have taken one step forward and potentially two steps back. 49 developers pledged last year to commit to remediate life critical fire safety works in buildings over 11 metres in which they played a role in developing or refurbishing over the last 30 years in England. Last summer the Government produced a draft contract for the developers to sign committing themselves to the Government scheme. This contract has now been heavily negotiated and the developers are expected to sign in the coming weeks. The negotiations to the contract significantly lessen the obligations on the developers and do not guarantee that all works initially identified as required will be carried out voluntarily, swiftly or even at all. The freeholders and leaseholders affected have no right of recourse against the developers at present and remain stuck in potentially dangerous buildings with little chance of forcing the developers' hand or having any possibility of selling. The saga sadly rolls on.

The Government continues to consult the industry on various matters relating to fire safety. Recent consultations where we await the findings include the levy which will be paid by developers and charged on new residential buildings requiring building control approval in England. Once the findings are published we can expect further secondary legislation to enact the provisions. Watch this space....

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