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Boodle Hatfield Property Insights

June 2025

In this issue, we consider the latest developments shaping the property landscape. Highlights include recent rulings on the extent to which landlords' commission may be recovered as insurance rent, misrepresentation in property transactions and the interpretation of "open-air recreation". We also consider the increasing relevance of climate risk in real estate transactions, provide updates on the Building Safety Levy and delays to construction projects waiting for Gateway 2 approval and consider new Government initiatives aimed at accelerating homebuilding. Finally, we track the progress of key legislative reforms, including the Renters' Rights Bill, leasehold reform, and the introduction of commonhold ownership.

Insurance rent and landlord's commission

It is usual for a commercial lease to require the tenant to pay the whole or a proportion of the premium paid by the landlord in meeting its insurance covenants under the lease. Whilst this might on the face of it seem a straightforward sum to quantify and recover, a number of issues can arise, including the apportionment between units in the case of a lease of part, or as between buildings where the landlord has a block policy and, as in the case of *London Trocadero (2015) LLP v Picturehouse Cinemas Ltd and other companies [2025] EWHC 1247 (Ch)*, the extent to which the insurance rent covers commission paid to the landlord.

The tenant occupied a large cinema complex in the Trocadero Centre, London. The lease required the tenant to pay "insurance rent" calculated by reference to the premium payable by the landlord for "keeping the Centre insured". The landlord's agent placed the insurance for the centre as part of a block policy and in doing so negotiated a significant commission which it charged on to the tenant (proportionally) as part of the insurance rent dating back over a ten-year period, later replacing the landlord's commission with a 35% "insurance fee".

The tenant argued that the insurance rent should not include the landlord's commission or the insurance fee as such sums did not form part of the cost of "keeping the Centre insured" given that the commission was received by the landlord, neither sum was paid in return for any service and both sums were instead optional fees negotiated or charged to allow the landlord to benefit financially at the expense of the tenant.

The court agreed with the tenant and held that the express lease wording did not entitle the landlord to recover landlord's commission or the insurance fee as part of the insurance rent, contrasting such sums with the commission that for example a broker placing insurance would receive and retain in return for its services in sourcing and placing the insurance. Accordingly, the tenant's claim for restitution in respect of the overpaid landlord's commission in the region of £640,000 succeeded.

The case spanned a period when payment of landlord's commission of this type was common, albeit not necessarily in such large sums, allowing the prospect of a significant benefit to the landlord without any additional cost to the insurer with the tenant picking up the bill, and illustrates that, whilst each case will depend on the terms of the lease in question, in the absence of clear wording, the courts may be reluctant to allow recovery of payments of this nature as part of the insurance rent payable by a tenant.

Andrew Wilmot-Smith, Head of Property

Moths and mansions

In a landmark decision earlier this year, the High Court granted rescission and damages in favour of the buyers of a £32.5 million mansion in West London found to be infested with clothes moths. The case, *Patarkatsishvili & Anor v Woodward-Fisher*, highlights the need to proceed with care when replying to pre-contract enquiries.

The property in question had suffered from persistent moth infestation since at least 2018, affecting the natural wool insulation in the walls. Despite multiple treatments by pest control contractors, the issue remained unresolved at the time of sale in May 2019.

During the conveyancing process, the seller, an experienced property investor, provided replies to the buyer's standard pre-contract enquiries, to the effect that he was not aware of any "vermin infestation" at the property, that there were no reports relating to any such matters, and that he was not aware of any concealed defects in the property. The seller's replies were later held to amount to fraudulent misrepresentations in that they were knowingly false or were made recklessly, in the belief that disclosing such information would likely lead to further enquiries from the buyer.

- While clothes moths are, alas, frequently encountered in London properties and are perhaps not commonly considered to be "vermin" in the same way as say rats or cockroaches, the sheer number of moths in this case, and their presence in the fabric of the building, was such that the seller was aware that this may amount to an infestation.
- Similarly, while the seller argued that he had not received copies of any formal reports regarding the moths, whilst perhaps not labeled as such, there was clear evidence of emails, treatment plans, quotations and other documents sufficient to amount to "reports" and these should have been disclosed to the buyer.
- Finally, the statement that the seller was "not aware" of any defects that were not apparent from an inspection was untrue. The seller was aware of the serious nature of the moth infestation, as evidenced by the investigations and treatment undertaken prior to the sale, and as such this should have been disclosed.

This case does not mean that all sellers are now required to disclose the existence of every moth, beetle or mouse that may be encountered, and the established principle of caveat emptor ("buyer beware") remains. However, sellers should be reminded to give full consideration to all enquiries made and replies given. While it is open to a seller to decline to provide a reply to a particularly tricky enquiry, a buyer may view the seller's silence with suspicion. Where a reply is given, such a reply should accurately and truthfully reflect the seller's knowledge. Failure to do can unravel even high-value transactions, such as in this case, long after completion of the purchase.

Edward Allan, Partner, Residential Property

Renters' Rights Bill – anyone for ping pong?

The Renters' Rights Bill is reaching the final stages of its parliamentary journey. With the Committee Stage completed on 15th May, the Bill will move to the Report Stage in June, prompting speculation that, with a following wind, it could receive Royal Assent shortly.

The Bill contains sweeping reforms, including the abolition of fixed term assured and assured shorthold tenancies, the end of "no-fault" evictions under section 21 of the Housing Act 1988, and the introduction of a new periodic tenancy regime. Crucially, implementation will take place on a single commencement date after which all new and existing tenancies will convert to periodic assured tenancies, allowing tenants to terminate on two months' notice at any time.

Due to the wide-ranging nature of the reforms, there has been an unprecedented interest in the Bill's progress and the Bill will now enter the "ping pong" phase, the process by which it will bounce between the Commons and the Lords as each House considers the other's amendments. Notwithstanding widespread concern as to the court system's capacity to handle the anticipated

increase in possession proceedings, the Government has stated that it remains committed to ensuring the courts are adequately prepared, but that it does not intend to delay the reforms. Implementation will therefore take place on the commencement date, to be specified by the Government following Royal Assent.

Indications suggest that there will be a short transition period to allow the new regime to be implemented "smoothly" and in a "responsible manner". This will provide time for the Government to prepare and publish the substantial volume of regulations and statutory guidance required and for those in the residential lettings sector to digest and prepare for the changes. While a transition period of, say, 12 months would be welcomed, it seems more likely that the Government will press ahead with a commencement date of early 2026, in order to deliver on a key manifesto commitment.

Naomi Heathcote, Partner, Property

Climate risk

The Law Society has published a new practice note on climate risk and conveyancing. The practice note builds on the Law Society's climate change guidance for solicitors published in April 2023 and complements existing practice notes on flooding and contaminated land.

The practice note highlights the potential **physical risks** that climate change may present for both commercial and residential conveyancing transactions including ground stability and subsidence, coastal erosion, flooding, sea level rise, water stress and heat stress. Whilst as conveyancing solicitors we, and others in the profession, are not qualified to advise on such physical risks, we encourage our clients to ensure that they obtain specific advice and relevant surveys from suitably qualified surveyors.

The practice note also highlights the **transition risks** including statutory, regulatory and market changes that may arise in response to climate change including, but not limited to the anticipated rise in the threshold for EPC certificates required under MEES Regulations.

Kate Symons, Senior Associate, Property

Wild camping and open-air recreation

The recent Supreme Court decision in the case *Darwell and another v Dartmoor National Park Authority (DNPA) [2025] EWCA Civ 927* received front page treatment in many of the national newspapers earlier this year.

The case relates to part of an estate in Devon, including an area of open land on Dartmoor Common on which the landowners, Mr and Mrs Darwell, keep cattle and other livestock. The landowners brought proceedings against DNPA, seeking a declaration that the Dartmoor Commons Act (the 1985 the Act) which includes provision that "the public shall have a right of access to the commons on foot and on horseback for the purpose of open-air recreation" should not be interpreted to allow members of the public to "wild camp" on the Commons.

The High Court had initially ruled in favour of the landowners, having given weight to the fact that wild camping did not relate to "an activity undertaken on foot or on horseback". The Court of Appeal did not agree, and in a decision now upheld by the Supreme Court, found that the right granted by the Act was broad and not limited to the activities of walking or riding. Accordingly, wild camping by those arriving on foot or horseback and when undertaken in accordance with relevant byelaws, fell within the right granted in the same way as other activities such as birdwatching, rock climbing, sketching and bathing.

The decision is specific in its application to land within Dartmoor Common and does not confer any new right to wild camp on other common land. The decision has nonetheless been reported in many cases as a victory for those promoting the "right to roam" and has potential to be applied to other situations where there is uncertainty as to the interpretation of similar rights to open-air recreation.

Saskia Arthur, Partner, Residential Property

Building Safety Levy

On 24 March 2025, the UK Government published a technical response to the consultation for the Building Safety Levy (the Levy). The Levy is, in essence, a tax on housing developers intended to fund the remediation of buildings over 11 metres following the Grenfell tragedy.

The technical response contains our first sight of the rates for the Levy (which differ across local councils to reflect each area's housing prices) and confirms that the Levy will come into force in Autumn of 2026 (rather than Autumn of 2025 as originally intended). This gives local government, the Building Safety Regulator and building control approvers 18 months to prepare for the Levy as well as time for housing developers time to factor the cost of the Levy into their financial planning.

The timing of the Government's announcement is interestingly just two weeks after the Home Builders Federation (HBF) wrote an open letter to the Chancellor of the Exchequer pleading for the following, seemingly sensible, action to be taken before the introduction of the Levy:

- Complete the work promised by Government officials to be undertaken during 2025 to determine how much funding is actually required for building safety remediation works. The letter notes that of the Government's £5.1bn Building Safety Fund only £2.4bn had been allocated to remediation projects as of December 2024.
- Publish a robust Impact Assessment to explore how many fewer private and affordable homes will be built as a result of the Levy, noting that during a recent Public Accounts Committee hearing no impact assessment has yet been conducted for the Levy.
- Reconsider the collection and administration of the Levy. The HBF state that the timing and process for collecting the new tax is particularly punitive with payment of the full Levy due at the point of completion of the first home on the development.
- Be braver in tackling the product manufacturers who rebuffed attempts by the previous administration to obtain financial contributions for building safety remediation efforts.

Whilst it makes sense to (finally) publish the Levy rates and to allow time for housing developers to factor the costs into their planning, the Levy, introduced by the previous Government, provides another financial and administrative hurdle to the already strained housing market. Housing developers are already facing huge cost and delay issues caused by the new gateways processes and more stringent administrative burdens than ever before.

Sarah Rock, Partner, Construction

Gateway two delays - a gateway to disputes?

The delays to higher-risk building (HRB) projects which are being experienced by parties trying to navigate the Gateways processes are well known across the industry and continue to make headlines. However, what happens once those projects finally get off the ground has been little considered. The current average delay to a HRB project of 18-22 weeks at Gateway 2 alone is significant. The additional programme time and cost has to go somewhere, and one can't help but expect that it will ultimately end up going to court.

The Building Safety Act requires that HRBs, buildings of 18 metres or 7 storeys in height which contain at least 2 residential units must pass through the Gateways process. Gateway 1 before planning permission is granted, Gateway 2 before work can start on site and Gateway 3 at completion but before the building can be occupied. Each Gateway must be passed to the satisfaction of the Building Safety Regulator (BSR) or the project comes to a hard stop. Gateway 2 approval was originally expected to take up to 12 weeks (for a new build HRB) or up to 8 weeks (for works to an existing HRB). The reality is quite different with one developer reporting a delay of up 37 weeks for a recent HRB project. Add to this further delays at the Gateway 3 stage, and projects are being delivered late and at significant additional cost. Who is responsible?

Contractors, consultants and developers are blaming the BSR, stating that it is understaffed and unqualified to handle the quantity and type of work required. The BSR is blaming the contractors, consultants and developers stating that 75% of the applications to the BSR are rejected because of missing or flawed information. Whoever is right here the client is ultimately going to receive a very late complete, ready to use building which is going to cost more than first envisaged. In the highly unlikely event that no additional cost is incurred during the build, the cost to the client of lack of use of the asset for months on end will hit projections causing untold losses.

As with all construction projects, who could be found ultimately responsible for such delays and losses will depend on the contract and the agreed terms. This seems somewhat unfair given a lot of these contracts would have been agreed in good faith between the parties months or even years before the true delay issues came to light. The JCT standard form (unamended) allows for additional time and money to be awarded to a design and build contractor for delay in receipt of the necessary approval of any statutory body, or decisions of relevant authorities, which control the right to develop the site. However, delays caused by the BSR as opposed to local authorities granting planning permission of this magnitude cannot have been in the expectation of the parties at the time of entering into contract.

The contractors will not have prepared a Gateway 2 submission on their own, the professional team now have to be engaged and involved much earlier in the project with Gateway 2 approval requiring stage 4 equivalent design. As late delivery of a project has traditionally been seen to be out of the hands of much of the professional team there has always been push back from consultants when attempting to tie their scope of services strictly to the overall programme. It may be hard therefore for delay claims to be brought against the design team. If, however, submissions are vastly lacking material demonstrating how designs comply with building regulations there is scope for disputes here.

How delay issues affecting current projects will play out in the courts is yet to be seen. What can be learnt from this experience is how such concerns might be alleviated, navigated or even avoided altogether going forward. Perhaps a 'Covid' style approach to awarding time but not money to a contractor might seem a fair allocation of the risk. How best to allocate the delay risk across the design team is slightly harder given that they have no say in delays during the construction phase. Or is now the time to down tools on these projects whilst the backlog clears?

Sarah Rock, Partner, Construction

Speeding up build out

The Government has published a Planning Reform Working Paper: Speeding Up Build Out inviting views on further action that Government should take to encourage homes to be built out more quickly.

The proposals include new powers for councils to keep housebuilders on track to deliver homes within agreed timeframes to be set before the grant of planning permission and proposals for developers that repeatedly fail to build out, or use planning permissions to trade land speculatively, to face payment of a "delayed homes penalty". In addition, as a last resort, those that deliberately sit on vital land, without building out the promised homes, could see the sites acquired by the council.

Subject to the outcome of the consultation, the Government intends to introduce the necessary regulations as soon as practicable, with Housing Secretary Angela Rayer describing the proposals as "backing the builders not the blockers" comprising decisive changes to "support housebuilders to adapt to build more, and faster, by incentivising a model that works for developers and communities."

Rajeev Joshi, Partner, Commercial Real Estate

Leasehold Reform and Commonhold

Having been a key content item for previous client updates, there is currently very little to report on the subject of leasehold reform, aside from the changes to the private rented sector in the form of the Renters' Rights Bill outlined above.

We await more on the stated intention of the Government to introduce a new Leasehold and Commonhold Reform Bill "in the second half of 2025" setting out commonhold as a new form of tenure to replace new leaseholds. Similarly, there is no sign of an outcome following the consultation on the abolition of ground rents payable under existing residential leases. Finally, the provisions of the Leasehold and Freehold Reform Act 2024 aimed at strengthening leaseholders' rights making it cheaper and easier for leaseholders to extend their lease or buy their freehold (including the removal of the requirement to pay marriage value) are not yet in force.

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